June 1994

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SUSTAINING ESD IN AUSTRALIA

HELEN ENDRE-STACY*

INTRODUCTION

The still slippery concept of sustainable development continues as the contemporary resource use paradigm. Non-equilibrium ecology will be an important component of sustainable development discourse because it recognizes, for better or worse, the role of humans in the evolution of dynamic ecosystems. However, the experience in Australia with the use of sustainable development supported by ecology suggests that these ideas are limited by their emphasis on the fixed discourse(s) of expertise and exclude valuable sources of information. Sustainable development discourse oscillates between economics and ethics as competing, rather than complementary, principles. Both concepts rest on Enlightenment values of rationality and predictability. Efforts to move beyond this dualism remain within that linguistic code and thus the concept remains trapped by its own (self-imposed) boundaries. To enliven itself, sustainable development must incorporate revitalised ideas of community and precaution. Redrawn, these may be viewed as parallel concepts. Much valuable information about environmental consequences lies outside the discourses of scientific, economic, and legal expertise and can be found with community stakeholder activities. Decision-making needs to include the local systems and it needs to look to precaution as a way of avoiding the closure of local systems of information. For development to be sustainable, it needs to work from a legal system that is nested in flexibility rather than constancy. Natural and social systems are not static, and the law needs to recognize more fully the contingency of all knowledge and information and it needs to take on ecology’s comfort with heterogeneity.

The concept of ecologically sustainable development (“ESD”) became part of the vocabulary of international environmental aspirations in the International Union for Conservation of Nature and Natu-
The blueprint for a global strategy of survival contained in the United Nation's publication of the report of the World Commission on Environment and Development, Our Common Future ("Brundtland Report"), of 1987 set out an agenda for common international action premised upon the idea of sustainable development. It went much further than the 1972 Stockholm Conference of the United Nations in its aspirational declaration of equity of economic development between rich and poor nations through international cooperation. It stated that the future is imperiled without combined international effort and shared principles to guide national action. The Brundtland Report is one of many accounts that clearly showed that negative environmental impacts are being experienced globally—in market and planned economies, in industrialised and developing countries, and in urban and rural settings. The Brundtland Report's focus upon ecologically sustainable development put ESD on the policy table in a big way. ESD rests upon balancing environmental and ecological requirements and economic development; it is premised upon international and national institutional cooperation to ensure that the economic needs of the present are met without sacrificing or compromising the economic needs of future generations.

Whilst scientific evidence on the consequences of environmental degradation seems, if anything, to become increasingly inconclusive, it is also becoming clearer that "zero-infinity dilemmas," whereby some threshold of ecological tolerance level is reached and the environmental outcome is negative and irreversible, will continue to place legal environmental approaches on contemporary political and legal agendas. The Brundtland Report proposed that economic development in the near term must not threaten ecological well-being in the long term. ESD has sought to seal the intellectual chasm between the developmentalist and the environmentalist. Each country is left, probably quite properly in relation to issues that are more local than

1. INTERNATIONAL UNION FOR CONSERVATION OF NATURE & NATURAL RESOURCES ET AL., WORLD CONSERVATION STRATEGY: LIVING RESOURCE CONSERVATION FOR SUSTAINABLE DEVELOPMENT (1980).
3. Id.
4. The Brundtland Report defined ESD as a process of change in which "the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations." Id. at 46.
global, to construct an appropriate policy and legislative response to the Brundtland Report's call for ESD.

New perspectives on ecology are offering different perspectives on interactions in the natural world. The same phenomena are viewed, but suggest a different observation—from predation to cooperation, from parasitism to mutualism, and from competition to reciprocity. This understates the adversariness of nature (Charles Darwin) and economics (Adam Smith) that influence our political and legal institutions and suggests a move to a new paradigm that actively searches to include cooperation. “Prudent predation” may offer itself as a metaphor for sustainable multiple use of resources. Attention to multiple meanings helps to prevent ESD from becoming a fixed and authoritarian ideal. On the other hand, without ideals that become standards, law is flabby and cannot assist in approaches to resource use that are more sustainable. ESD was defined in the Brundtland Report as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.” This definition was rephrased in the IUCN’s 1990 paper, Caring for the World, as “improving the capacity to convert a constant level of physical resource use to the increased satisfaction of human needs.” In 1988, the Australian federal government adopted ESD in three environmental principles that are to guide its policy and legislation:

- there should be an integrated approach to conservation and development by taking both conservation and developments into account at an early stage;

5. The Prisoners' Dilemma game illustrates that cooperation increases with increasing chances of re-meeting opponents. This can be juxtaposed to an existential Sarte-like “no exit” situation where the choices are survival or extinction. If extinction represents a type of “losing,” then the only point in the evolution game is existence.

6. One of the elements of dialogic reciprocity suggested by Handler in his self-regulatory model is repeated contact amongst individuals. See Joel F. Handler, Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community, 35 UCLA L. Rev. 999 (1988).

7. The links between Adam Smith's “invisible hand of the market” and Charles Darwin's “survival of the fittest” are not surprising. Both views were framed within the same teleological view of linear logic and atomistic individualism.

8. Odum suggests that:

The widespread acceptance of Darwin's 'survival of the fittest' as an important means of bringing about natural selection has directed attention to the competitive aspects of nature. As a result, the importance of cooperation between species in nature has been underestimated. Until recently, positive interactions have not been subjected to as much quantitative study as have negative interactions. EUGENE P. ODUM, BASIC ECOLOGY 393 (1983).


resource use decisions should seek to optimise the net benefits to the community from the nation's resources having regard to the efficiency of the resource use, environmental considerations and an equitable distribution on the return of the resources; and

- Commonwealth decisions, policies and management regimes may provide for additional uses that are compatible with the primary purpose values of the area, recognising that in some cases both conservation and development interests can be accommodated concurrently or sequentially, and, in other cases, choices must be made between alternative uses or combinations of uses.\(^{11}\)

ESD has been pursued by Australia's federal government in three primary areas: (i) through the Resource Assessment Commission ("Commission"); (ii) through the federal ESD process; and (iii) through the Landcare Program. The first two are discussed here in more detail.\(^{12}\) Each of them has the potential to incorporate ecology's new insights. At the practical level, this suggests a broader examination of ecological processes. At the theoretical level, it suggests that the critique of policy and legal approaches to ESD must continue.

**I. Australia's Commission 1989-1993**

The Australian federal government's environment principles were included in slightly modified form in the legislation that established the Commission in 1989 as a cross-disciplinary body to advise the federal government on specific resource issues.\(^{13}\) The Commission

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11. **The Honorable R.J.L. Hawke, A.C. Prime Minister of Australia, Our Country Our Future: Statement on the Environment 5** (1989). In setting out broad environmental principles. Australia lagged well behind European responses to dwindling resources. For instance, the Federal Republic of Germany formulated its first environmental principles in 1971. The Environmental Program of the 1971 federal executive laid down three environmental principles that were to guide future policy and legislative instruments. These are: (i) the principle of precaution that not only requires environmental regulations to deal with present environmental problems, but they must also take into account the extent of environmental risk posed by an action (in assessing the risk, the principle has been used to require screening of new products prior to sale and consideration of environmental concerns in planning); (ii) the polluter-pays principle that seeks to pass on the costs of pollution to those who use the product that caused the pollution via market mechanisms and cost internalisation; and (iii) the cooperation principle, premised on the assumption that environmental problems are best resolved by agreement and broad commitment to environmental usage that is collectively advantageous, rather than by coercion and confrontation. These principles have been incorporated in the Treaty Establishing a Monetary, Economic and Social Union, May 18, 1990, F.R.G.-G.D.R., 29 I.L.M. 1120.

12. For a description of the National Landcare Program, see Andrew Campbell, Taking the Long View in Tough Times: Landcare in Australia (1992). There are now approximately 1,400 landcare groups around (mostly rural) Australia. The program depends on community participation for its success.

issued three reports before being dismantled in 1993.\textsuperscript{14} Surprisingly, the 1993 federal government budget announced that the Commission would close down at the end of that year. It was a budget of fiscal restraint and the Commission’s dissolution was included in a new round of federal government stringencies. Whilst the Commission’s dissolution does not mean that resource development will no longer be scrutinised, it does mean that the federal Environment Protection (Impact of Proposals) Act of 1974 will again become the primary method of scrutiny of resource proposals.\textsuperscript{15}

The processes of the Commission aptly demonstrate an institutional struggle with individualism and collective concern and efficiency. The second Reference to the Commission\textsuperscript{16} was an inquiry into the merits of mineral ore mining at Coronation Hill in the Kakadu National Park in the Northern Territory (“Kakadu In-

1. There should be an integrated approach to conservation (\textit{including all environmental and ecological considerations}) and development by taking both conservation (\textit{including all environmental and ecological considerations}) and development aspects into account at an early stage.

2. Resource use decisions should seek to optimise the net benefits to the community from the nation’s resources, having regard to efficiency of resource use, environmental considerations, \textit{ecological integrity and sustainability, ecosystem integrity and sustainability, the sustainability of any development} and an equitable distribution of the return on resources.

3. Commonwealth decisions, policies and management regimes may provide for additional uses that are compatible with the primary purpose values for the area, recognising that in some cases both conservation (\textit{including all environmental and ecological considerations}) and development interests can be accommodated concurrently or sequentially, and, in other cases choices must be made between alternative uses or combinations of uses.

Resource Assessment Commission Act, Sched. 1, § 7 (emphasis added).


16. A Reference is the ambit of inquiry that is placed before a Commission of Inquiry. References are made to the Commission from the Australian Prime Minister under the Resource Assessment Commission Act § 16.
The Commission's report was released by its Chairman, Mr. Justice Stewart, in February 1991 for public comment and the final report was tabled in the Federal Parliament on April 26, 1991. This report was the Commission's first published views on the meaning of "sustainable development." The report also made recommendations concerning the use of land within the Kakadu Conservation Zone ("Conservation Zone"), an area adjoining the Kakadu National Park within the Alligator Rivers Region of the Northern Territory.

The Conservation Zone is Federal Crown Land and contains mineral deposits on at least two sites that are held under mineral exploration leases at Coronation Hill and El Sherana. The earlier proclamation of the adjacent area as a National Park had brought it within federal ambit through the National Parks and Wildlife Conservation Act of 1975. The effect of the National Parks and Wildlife Conservation Act was to prohibit exploration and mining within the National Park. All mining activity within the Conservation Zone became subject to prior federal government approval.

The Commission was instructed under its Terms of Reference to assess the environmental and cultural values of the Conservation Zone and the effect that mining would have upon those values. It was instructed to consider the national economic significance of mining within the Conservation Zone and the way in which mining may affect the local Aboriginal population. Balancing losses and benefits of both quantifiable and unquantifiable interests in resource matters had been recognised in the Commonwealth Discussion Paper on Ecologically Sustainable Development of 1990 as an assessment of subjective elements that would be difficult to translate into monetary values. The Commission echoed the difficulty of measuring competing views of the collective good in their inquiry into mining in the Conservation Zone:

17. The parameters of the Commission's Inquiry are set by the Terms of Reference of the Inquiry. Under the Commission's legislation, these are established by the Prime Minister. The Prime Minister issued the Terms of Reference for the Kakadu Inquiry on April 26, 1990. 1 KAKADU INQUIRY, supra note 14, at 1. The first Reference to the Commission was made on November 26, 1989, into Australia's forest and timber resources. That report was tabled in early 1992.

18. The Conservation Zone of the Kakadu National Park comprises approximately 47.5 square kilometres and acts as a buffer to the National Park. 1 KAKADU INQUIRY, supra note 14, at 2.


20. 1 RESOURCE ASSESSMENT COMM'N, KAKADU CONSERVATION ZONE 2 (Draft Report 1991) [hereinafter 1 CONSERVATION ZONE, Draft].

One of the [Kakadu] Inquiry's most complex tasks is to ensure that account is taken of the divergent views that members of society hold about the values of resources. It is the opinion of the [Kakadu] Inquiry that all systems of belief, including the wide spectrum of personal and group values held in relation to the resources of the Conservation Zone are worthy of respect. An assessment of the value of resources to the community must be informed by an understanding of the range of beliefs and ethical frameworks of community members. Accordingly, the [Kakadu] Inquiry has endeavored to take all points of view into account in preparing its draft report.22

The Commission was asked to specify the values associated with archaeological, physical, biological, water, recreational and tourism resources that it identified. Both the Conservation Zone and sites adjacent to it contain Aboriginal archaeological sites that the Report described as "rich" and "significant."23 The ecological diversity of the Conservation Zone was a largely descriptive account as little research had been done on the ecological dynamics of the area.24 Mineral resources were described as "geologically diverse and . . . [with] high mineral prospectivity."25 The landscape was said to "represent[ ] the [Conservation] Zone's greatest recreational resource."26 Wildlife and Aboriginal artifacts also represented attractions for potential tourism.

Assessments of the value of these assets differed for each asset. The Commission considered the archaeological resources to be of both national and international importance when compared with sites of the same class in Australia and the number of other sites in the same class. The amount of cultural information that could come from further investigation of the sites, the tourist potential of the sites, and the subjective importance of the sites to the indigenous Jawoyn people were all taken into account in the Commission's high valuation of archaeological resources in the area.27

The value of the physical and biological resources were assessed by considering if the Conservation Zone contained endangered, threatened, vulnerable, or rare species. The Commission also considered if the features of the Conservation Zone distinguished it from its surroundings through its diversity, species, and richness of ecological function. Although noting that some features of the Conservation Zone fulfilled these criteria, the Commission did not seek to ascribe

22. 1 Conservation Zone, Draft, supra note 20, at 9-10.
23. Id. at 18-19.
24. Id. at xviii.
25. Id.
26. Id. at 32.
27. Id. at 37-39.
all encompassing objective values to the area. Instead, it noted the area's national and international significance through placement on national and international environmental protection registers.\(^{28}\) The Commission found existing water to be essential to continued ecological survival of the Conservation Zone. For all proposed activities, including mining, water was considered to hold intrinsic value, though this value was not quantified in monetary terms by the Commission.

With respect to the values attached to recreational and tourism potential within the area, the Commission concluded that the complex geology of the Conservation Zone, its varied and scenic topography, and the availability of good vantage points gave the area considerable potential for recreation and tourism.\(^ {29}\) Values included wilderness that was not pristine, but which provided for edge use of wilderness outside the Conservation Zone. Recreational opportunities were assessed on the basis of preferences expressed by visitors to Kakadu National Park, ascertained through questionnaires.\(^ {30}\)

Having identified the environmental and cultural values contained within the Conservation Zone, the Commission considered the impact the proposed mining would have upon those values. It concluded that there was some potential for the National Estate values of the Conservation Zone to be affected adversely by mining, but that it was unlikely that Australia's obligations under international conservation conventions and agreements, including the World Heritage Convention, would be affected by mining the area.\(^ {31}\) The Commission estimated that the national economic significance of potential mining development in the Conservation Zone represented a net value of eighty-two million dollars in 1991 (Australian) dollar values. The cost benefit analysis methodology used to arrive at this figure did not take into account any broader social costs and benefits—the externalities—that could flow from the mining project. The social costs not assessed in monetary terms included environmental impacts, training programs, spinoffs from mining infrastructure and technology, educa-

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28. The Conservation Zone is included on the Register of the National Estate because of its "special value for future generations." 2 Kakadu Inquiry, supra note 14, app. J at 85. Kakadu National Parks Stages 1 and 2 were already on the World Heritage List, with Stage 3 subsequently nominated for the World Heritage List in 1991. Stage 3 is now listed on the World Heritage List.

29. 1 Conservation Zone, Draft, supra note 20, at 39.

30. 2 Resource Assessment Comm'n, 1 Kakadu Conservation Zone 276 (Draft Report 1991). The Commission attached economic values to tourism potential by using a model of the Northern Territory economy and placing the value of tourism within the model. See id.

31. 1 Conservation Zone, Draft, supra note 20, at 75.
tional, scientific or cultural services, and government infrastructure support.

Assessing the objective aesthetic values of the Conservation Zone was understandably problematic. The Commission commented that: "The broad scope and changing perceptions of aesthetics make the task of assessing such values difficult. Aesthetic values are inherently subjective . . . ."32 A contingent valuation survey was undertaken to place monetary valuations on the preservation value of the Conservation Zone.33 To assess the simple existence value of the Conservation Zone, a survey was conducted of people likely to be affected by a change in the use of the Zone. They were asked how much they would be prepared to pay to prevent possible environmental damage from mining the Conservation Zone. The results of the survey showed that Australians in 1991 were willing to pay $123.80 per person for ten years to avoid any environmental damage from mining.34 The Draft Report regarded this amount to be a demonstration of a willingness by Australians to pay a "considerable amount[ ]" to preserve the National Park.35 Interestingly, Northern Territory residents were prepared to pay considerably less than this amount to ensure preservation of the area.36 The study surveyors could not explain this, but suggested that possibly the "respondents in the Northern Territory sample were taking account of possible financial or other personal gains from mining and netting these out of the costs to the environment."37

The Commission's Draft Report drew the tentative conclusion from this cost-benefit analysis of intangible values that Australians were willing to pay much more money to prevent mining than the new economic benefits of eighty-two million dollars that would potentially be gained from mining.38 However, the extended cost-benefit analysis methodology of the contingent valuation survey drew so much criticism that it was not included in the Commission's Final Report that was ultimately tabled in the Federal Parliament. The criticism was directed primarily at the method of gathering information for the survey.

32. Id. at 48.
34. 1 Conservation Zone, Draft, supra note 20, at 210.
35. Id.
36. Id.
37. Imber, supra note 33, at viii.
38. 1 Conservation Zone, Draft, supra note 20, at 95-96.
and, secondarily, towards the gesture of placing aesthetic desire as an item quantified in dollar terms.

The Commission considered the negative response of local Aboriginal people to mining in the area to be the central issue of the Kakadu Inquiry. Ecological concerns ranked as a secondary consideration to this primary concern. The Aboriginal community that appeared before the Commission opposed mining in the area because it would cause disturbance to traditional sites of cultural and spiritual significance. Two sites partly within the Conservation Zone are registered under the Northern Territory Sacred Sites Act of 1988. One of the registered sacred sites covers a substantial part of the land that would be required for the Coronation Hill mine.

The Commission identified some potential for limited positive economic results for the Aboriginal population through employment and royalties if mining were to take place. Mining would bring little economic gain from tourism and recreation proposals and it could potentially have negative social impacts. On the basis of evidence taken from the Jayowyn people, the Commission identified a belief amongst Aboriginals that tourism and recreation, rather than mining, was the preferred long-term use for the area.

The Kakadu Inquiry identified two main options for the future use of the resources of the Conservation Zone. Under the first option, mining would proceed and either: (i) the remainder of the Conservation Zone would become part of Kakadu National Park (which would have the effect under the National Parks and Wildlife Act of 1975 of prohibiting further mining in that area); or (ii) the remainder of the Conservation Zone would remain a Conservation Zone with no further mineral exploration until the Coronation Hill experience had been assessed; or (iii) exploration would be permitted in the Conservation Zone, with mining proposals to be assessed in light of the Coronation Hill experience.

42. It has been a matter of continuing debate amongst Aboriginal groups and mining developers whether this view is an accurate representation of broad consensus of the Aboriginal community in that area.
Under the second option, mining would not proceed at Coronation Hill, and either: (i) the whole of the Conservation Zone would become part of Kakadu National Park; or (ii) further exploration would be permitted in the Conservation Zone, with mining proposals to be assessed in the light of the Coronation Hill experience.

To reach a decision, the Commission said there needed to be "comparisons between the net benefits from development, which are usually quantifiable in monetary terms, and the potential effects on the cultural and natural environment, which are difficult to express in monetary terms."\(^43\)

Furthermore, a timely and firm decision was required from the federal government on Coronation Hill or uncertainty would effect future mining investments in Australia. The Commission noted: "If firm policies and procedures are not established, the economic consequences of not permitting mining at Coronation Hill could be much greater than those indicated by the cost benefit analysis . . . ."\(^44\) The Commission concluded that balancing competing interests in the future use of the Conservation Zone lay primarily between two factors: (i) the interests of the Aboriginal people who had strong views that the mining should not take place, and the relatively small economic advantage that would arise from the mining project; (ii) the monetary net benefits to the entire Australian economy of mining the Conservation Zone.

There was no consistent approach or common principles and mechanisms for resolving and reconciling different values amongst parties who had made representations before the Inquiry. The Draft Report commented that "[d]espite widespread agreement about the general principles of environmental protection and sustainable development, no agreed environmental or resource management ethic was evident among [Kakadu] Inquiry participants."\(^45\) In an attempt to formulate a reconciliatory mechanism, the Commission had to resort to the four factors contained within Principle Two of the policy principles in the Resources Assessment Commission Act of 1989: (i) efficiency; (ii) ecosystem and ecological integrity; (iii) sustainability; and (iv) equity.\(^46\)

The Commission did not attempt to define "efficiency" so it is not possible to judge if it was being used in the economic sense of Pareto

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\(^43\). 1 Conservation Zone, Draft, supra note 20, at 133.
\(^44\). Id.
\(^45\). Id. at 138.
\(^46\). Id.
distribution of resources. Instead, it was defined (by an unexplained logic) with reference to "development" within section three of the Resource Assessment Commission Act of 1989. This section defines development as "the modification of the biosphere to satisfy human needs and improve the quality of life."\textsuperscript{47} Reference was made to a broader concept of "real" development that included "meeting . . . emotional and spiritual needs and desires, advance in skills, knowledge and capability and the ability to choose between various courses of action,"\textsuperscript{48} rather than a definition of development based purely upon economic growth. Efficiency at the national level on a long term basis therefore needed to look to economic, social, environmental, and intergenerational issues. The Commission considered that the broader efficiencies were not immutable, but evolutionary: "It would be desirable to take account of socioeconomic, ecological, cultural and other objectives in considering issues of resource allocation . . . but it must be recognised that society's preferences may also change."\textsuperscript{49}

The Commission considered the definition of "ecological and ecosystem integrity," which is suggested by environmental economists\textsuperscript{50} to be too narrow because it failed to make allowance for the dynamics of ecosystems and interactions between species.\textsuperscript{51} Despite adopting a broader definition of efficiency that took those dynamics into account, the Commission found that the proposed mine at Coronation Hill did not present unacceptable risks to the integrity of the ecology of the Conservation Zone of Kakadu National Park. The Commission pointed out that there was no international or national agreement on the definition of environmental sustainability. The Commission considered that it should be a broad definition that ought be placed in "an economy-wide and world-wide context."\textsuperscript{52} The critical issue was not the effect upon resource prices that could follow from tighter controls, but how society responded to those controls by developing substitutes and other technological advances. The Commission appeared, therefore, to accept classical economic price theory. "Sustainability" thus defined would be counted upon to precipitate business incentives to innovate in resource use, or to encourage resource substitution through economic necessity. Valuing environmen-

\textsuperscript{47} Resource Assessment Commission Act, pt. 1, No. 3.
\textsuperscript{48} 1 Conservation Zone, Draft, supra note 20, at 139.
\textsuperscript{49} Id.
\textsuperscript{50} See David Pearce et al., Blueprint for a Green Economy (1989).
\textsuperscript{51} See id.
\textsuperscript{52} 1 Conservation Zone, Draft, supra note 20, at 143.
tal resources in an economy-wide and world-wide context would affect the costs of resource use and thus alter business practices in the marketplace.

The Commission considered that there were many issues of equity that came within the scope of its Kakadu Inquiry. For example, the Commission considered that it was an equity issue that Australia may gain an elitist and preservationist profile overseas if it banned mining.\(^5\) It was also an equity issue that the major portion of the economic benefits of mining in the Conservation Zone would be going to those who already possessed wealth and power.\(^5\) "Equity" was defined as "fair, impartial and just. It implies a concern for improving the welfare of the disadvantaged on a national and global scale and for protecting the vulnerable, including those yet to be born. It also implies equal rights of access to decision makers."\(^5\)

The main equity issue identified by the Commission related to the concerns of the Aboriginal people. It considered that the lack of equity that the federal government would exemplify should it disregard their views would be significant. This needed to be balanced with the lack of equity that would come from denying the Jawoyn people the minimal economic advantages they might reap were mining to proceed. The Commission therefore identified a number of views of collective good that incorporated both happiness and wealth maximisation.\(^5\)

The conclusion of both the Draft Report and the Final Report tabled in the Federal Parliament made it clear that, whilst the Commission could outline the issues to be considered, ultimately the extent of environmental regulation depended entirely upon the objectives of government.

[T]he dilemma facing the Australian Government is clear: should it set aside the strong views held by the Aboriginal people . . . in favour of securing increases in national income of the order that seems likely from this project? To do so would be contrary to the wish of the main political parties to build better relations with the Aboriginal community and could also bring about international crit-

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53. 1 Kakadu Inquiry, supra note 14, at 33.
54. Id.
55. 1 Conservation Zone, Draft, supra note 20, at 144.
56. The Australian federal government's moves to hear and act upon the views of Australia's indigenous peoples have been boosted by the Mabo decision of the High Court, which overturned the application of the doctrine of terra nullius to the Murri Islander people (an island community off the Queensland coast). See Mabo v. Queensland [No. 2], 175 C.L.R. 1 (1992) (Austl.). Subsequently, the federal government has passed the Native Title Act of 1993 and a social and economic "package" of compensation is to be announced this year.
icisms that Australia continues, as in the past, to treat its Aboriginal community less than fairly.\textsuperscript{57}

The Commission's last report inquired ("Coastal Inquiry") into the management and the use of the resources of Australia's Coastal Zone ("Coastal Zone").\textsuperscript{58} The Commission identified pollution of rivers, lakes, seas and urban sprawl as the factors placing the most strain on the Coastal Zone. The Coastal Zone was identified as a diminishing national asset (especially with Australia's increasing tourist industry) that was irreplaceable. Damage had been caused because the serious consequences of human activity had either not been identifiable at the time, or had been ignored well past the point where damage could be properly rectified. The Commission arrived at three main conclusions about sustainable development of the Coastal Zone: (i) conservation issues need to play a much larger part in Coastal Zone management; (ii) there needs to be a greater vision than in the past, because "[t]he luck ran out a long time ago,"\textsuperscript{59} and (iii) there needs to be a national approach to the management of the Coastal Zone because the lack of coordination amongst the many governments (federal, state, and local) that have jurisdiction in the coastal zone is leading to negative environmental, social and economic problems.

This last conclusion is the most sweeping. The Commission was at pains to emphasise that, although the national approach would be signified by federal legislation, this would not be something that the federal government would control. "A national approach is a cooperative partnership, where the roles and responsibilities of each of the partners are agreed, defined and respected in the interests of the nation as a whole."\textsuperscript{60} The aim would be to steer all levels of governments to the common goal of achieving ESD. To do this successfully, "adaptability must be of the essence. There is no place for inflexible master-plans driven from the centre."\textsuperscript{61}

The recommendations of the Coastal Inquiry were intended to ensure that future decisions that could effect the Coastal Zone would incorporate methods and processes whereby:

\textsuperscript{57} \textit{1 Conservation Zone, Draft, supra} note 20, at 134.
\textsuperscript{58} \textit{Coastal Inquiry, supra} note 14. The \textit{Coastal Inquiry (Final Report)} was delivered to the Australian Prime Minister on November 24, 1993 and tabled in the Senate at the Australian Federal Parliament on December 8, 1993. \textit{Id.}
\textsuperscript{60} \textit{Id.} at 3.
\textsuperscript{61} \textit{Id.}
the long view prevails over the short, the prudent over the expedient, and the considered over the hastily-conceived
• broad considerations predominate over narrow
• the techniques of modern management, and the tools of modern economics be brought into operation
• people being affected by the decisions (including indigenous people) are adequately consulted before decisions are made.\(^6^2\)

In seeking these results, the Coastal Inquiry adopted an approach that does not cast Canberra (Australia's capital city and seat of the federal parliament) in the principal role. It focused not just on the symptoms of problems in the Coastal Zone, but on the management systems that allow them to occur. It made practicality a most basic consideration. The Coastal Inquiry recommended a program of action comprising four elements: (i) a set of nationally agreed Coastal Zone management arrangements; (ii) arrangements for managing the program; (iii) greater community and industry involvement; and (iv) the use of innovative management mechanisms.\(^6^3\)

The Commission proposed that all spheres of government (federal, state, and local) agree on national objectives and national principles for achieving them.\(^6^4\) They could then adapt them to their own needs and circumstances. Individual state governments should formulate their own objectives and principles and local councils should also formulate objectives and principles that reflect local needs and concerns. All of the objectives and principles at the state and local government levels must be consistent with those agreed upon nationally.\(^6^5\)

Hitherto, different spheres of government in Australia usually engage in joint action through specific agreements. They do not normally have the agreement underpinned by legislation. The Commission's Coastal Inquiry, however, agreed with the views of some community groups, and it noted that existing agreements had lacked the impact initially promised due to the absence of underlying federal legislation. Accordingly, the Commission proposed the enactment of a Commonwealth Coastal Resource Management Act.\(^6^6\)

This Act would incorporate the objectives and principles for coastal management agreed upon by the federal, state and local gov-

\(^{62}\) Id.
\(^{63}\) For the suggested nationally coordinated approach, see COASTAL INQUIRY, supra note 14, at ch. 5.
\(^{64}\) Id. at 33.
\(^{65}\) Id. at 34.
\(^{66}\) Id. at 35.
ernments. The Commission recommended that the proposed Act link federal funding of activities in the Coastal Zone to activities consistent with nationally agreed objectives and principles. Coastal Zone activities inconsistent with the objectives and principles agreed upon by all governments nationally would be ineligible for federal money. By the very fact of its enactment, the Coastal Resource Management Act would underline the importance of the Coastal Zone in national affairs. The Commission’s Chairman suggested:

If a spirit of cooperation continues to prevail—as it has throughout our inquiry during which all of the states participated willingly in our deliberations, along with the Commonwealth, local government, industry and community groups, including indigenous interests, all of whom supported the concept of a national approach—there is no reason why Australia in the management of its coastal zone resources cannot be an example to the world. If, on the other hand, we continue in the way that we have, then we are in for a bleak future. It will not be easy: we are not proposing a quick fix. Governments alone cannot do it. People can. This report tells how.

II. Federal ESD Policy, 1989-

In June 1990, the Australian federal government’s Discussion Paper on Ecologically Sustainable Development began a process of consultation and collaboration between actors in nine industry and economic sectors (identified by the federal government) and peak national organisations in industry, environment, unions, welfare and consumer groups, and also government officials. The nine key industrial sectors identified were: agriculture, energy use, energy production, fisheries, forestry, manufacturing, mining, tourism, and transport. Their final reports were released in November 1991 after extensive round-table consultations, and placed in the hands of fed-

67. Id. at 365. Under Australia’s federal Constitution, allocation of monies from the federal to state government can be made conditional upon terms set by the federal government. Austl. Const. ch. II, § 96. The Coastal Inquiry’s (Final Report) recommended that the Commonwealth should:

[En]act a Coastal Resource Management Act, which, among other things, would provide that Commonwealth funding of resource management activities—whether in the form of direct expenditure by Commonwealth agencies on coastal zone management or as grants to State and local governments for specific elements of coastal zone management—be confined to activities consistent with the objectives and principles of the National Coastal Action Program.

Coastal Inquiry, supra note 14, at 365.
68. Coastal Inquiry, supra note 14, at 36.
69. BULLETIN, supra note 59, at 4.
70. DEPARTMENT OF PRIME MINISTER & CABINET, supra note 21.
71. Id. at 28-40.
eral government departments. Also in November 1991, the Heads of Government (comprising representatives of state, federal, and local governments) agreed on a co-operative intergovernmental process for examining the recommendations of the ESD reports, and established the intergovernmental ESD Steering Committee to coordinate assessment of recommendations in the Working Group reports. In 1992, the federal government released a draft of the resulting Ecologically Sustainable Development Strategy in 1992 for public comment. The final report of the National Strategy for Ecologically Sustainable Development ("ESD Strategy"), which was released in December 1992, incorporated aspects of the comments received on the Draft.

The ESD Strategy sets out a goal, core objectives and guiding principles, which, as a result of being adopted by the Heads of Government in 1992, must be implemented in all government activity. The goal of the ESD Strategy is development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends. Its core objectives are: (i) to enhance individual and community well-being and welfare by following a path of economic development that safeguards the welfare of future generations; (ii) to provide for equity within and between generations; and (iii) to protect biological diversity and maintain essential ecological processes and life-support systems.


73. Of the two hundred or so submissions, most "advocated acceptance of, and mechanisms for implementation of the final recommendations from the ESD Working Groups and Chairs; the clearer identification of priorities and of agencies responsible for implementation; and clarification of the linkages between this Strategy and other government policies and initiatives." National Strategy for Ecologically Sustainable Development 13 (Dec. 1992) [hereinafter ESD Strategy]. These recommendations are set out in tabular form in Compendium of Ecologically Sustainable Development Recommendations: An Accompanying Document to the National Strategy for Ecologically Sustainable Development and the Greenhouse Strategy (Dec. 1992). Additionally, the National Environmental Protection Council Bill 1994 (Commonwealth) was presented to federal parliament in August 1994, acting upon the ratification by the Australian council of governments of the ESD Strategy in February 1994 (with the exception of western Australia). The only state government to enact mirror legislation pursuant to the federal Bill so far is Queensland, which presented the Environmental Protection Bill to the Queensland legislative assembly in September 1994.
The following are the guiding principles to be implemented: (i) decision-making processes should effectively integrate both long and short-term economic, environmental, social and equity considerations; (ii) where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation; (iii) the global dimension of environmental impacts of actions and policies should be recognised and considered; (iv) the need to develop a strong, growing and diversified economy which can enhance the capacity for environmental protection should be recognised; (v) the need to maintain and enhance international competitiveness in an environmentally sound manner should be recognised; (vi) cost effective and flexible policy instruments should be adopted, such as improved valuation, pricing and incentive mechanisms; and (vii) decisions and actions should provide for broad community involvement on issues which affect them.

These guiding principles and core objectives need to be considered as a package. No objective or principle should predominate over the others. A balanced approach is required that takes into account all these objectives and principles to pursue the goal of ESD. Community participation and the precautionary principle are both cited as “Guiding Principles” of the ESD Strategy.

The effect of the ESD Strategy becoming one more government policy, combined with the news in August 1993 that the Commission was to close down at the end of that year, has created a sense that ESD may be something of a damp squid. A superficial assessment of this result might call on standard institutional theory. A shrug of the shoulders would imply that, of course, once policymakers got their hands on it, that is the death of its real dynamism. Add to that the internecine leadership politics in Australia’s federal parliament and hard economic times, and we apparently need look no further. That explanation would leave the consultative processes of ESD with its integrity intact but its effectiveness in serious doubt. After all, representatives of each side of the debate (economic and environmental) in

74. ESD STRATEGY, supra note 73, at 8-9.
75. “All in all, it’s just another brick in the wall...” PINK FLOYD, Another Brick in the Wall Part 2, on THE WALL (Columbia 1979).
76. When Australia’s present Prime Minister, Paul Keating, wrested leadership of the Australian federal Labor Party from Prime Minister Robert Hawke in 1992, the environmental lobby lost a powerful ally. Since then, a touch-and-go federal election in March 1993, wherein the Labor Party retained the power it took from the Liberal Coalition federal government in 1992, and a gruesomely slow economic recovery in Australia have deflected attention from ESD.
the ESD process and in the Commission had spoken to one another and produced joint documents. Perhaps that ought to be sufficient.

Arguably, however, the outcomes of the Commission and ESD processes are unsatisfying to all parties—government (because it has not been delivered one "right" answer), industry, and conservationists. For instance, the Commission’s statutory requirement to consider environmental losses of an unquantifiable nature, such as aesthetic or spiritual considerations, was considered a major legislative step in resource management in Australia, as was the Commission’s ability to consider a broad range of information from sources that would not have had standing were the matter before a court. It has been suggested that:

The range of matters to be taken into account by the Commission could well serve as a model for similar legislation . . . . [I]ndustrial and conservation concerns are given equal importance by the provisions of the Resource Assessment Commission Act. There is also some guarantee of an integration of ecological and development concerns through the processes of the Commission.

Resource issues are likely to remain contested, but closure of the Commission has now removed this unique forum. It seems an appropriate time to ask: Were we asking the right questions? Experts for and against a resource proposal can sound unnervingly alike (using the same methodology and vocabulary, but with different results), whether they appear before an “independent” (that is, apparently objective) forum like the Commission, or before a local, state or federal government. After all, the processes are based upon the same model:

The liberal forum language is evident in the conception of the process as beginning with ideas from experts, moving to debates about trade-offs amongst alternatives defined by these elites, deriving legitimacy from discussions with interest groups and individuals, and ultimately seeking consensus based on economic realities and political practicalities. In other words, throughout the process the interests of the Nation-State are first and foremost in that they limit the terms of the debate.

77. Resource Assessment Commission Act §8(d). See also, Kakadu Inquiry, supra note 14, at 34.
In other words, the disciplinary formalism of the debate remains conservative, because "the simple practice of language ceaselessly restates the new terrain on the oldest ground."  

The institutional and popular forces compelling Australia's ESD Strategy lie neatly within this description:

This Strategy has evolved over several years and through extensive consultation with all levels of government, business, industry, academia, voluntary conservation organisations, community-based groups and individuals. The Strategy's origins stem back to release of the World Conservation Strategy in 1980, the National Conservation Strategy for Australia in 1983, and perhaps more importantly, the 1987 report of the World Commission on Environment and Development Our Common Future (the Brundtland Report). The Brundtland Report recognised that sustainable development means adopting lifestyles within the planet's ecological means. The Report also made it clear that the world's current pattern of economic growth is not sustainable on ecological grounds and that a new type of development is required to meet foreseeable human needs.

The influence of the Brundtland Report can be clearly observed in (iii)-(vi) of the Guiding Principles of the ESD Strategy. A significant feature for critique of the Brundtland Report is the vocabulary in which it is couched. The document was written in the orthodox economic style of the 1980s, when the conventional language of economic man (homo economus) was influencing government policy worldwide. The Brundtland Report remained largely in the code of orthodox discourse. Its most radical suggestion lay in its argument for equity between developed and developing nations.

Ecologists, on the other hand, are now looking anew at the discipline of ecology and viewing it as a nonequilibrium paradigm. Change is possibly the only constant, rather than change heralding a new, but static, situation. In ecology, this had led to a greater emphasis on understanding ecological processes, rather than preserving an end-product of the system. This is a different view of natural phenomena and natural systems. It means that, within any spatial and temporal zone, it can only be assumed that what is observed is what inheres in the present. This approach observes that natural systems, even if undisturbed by human activity, may look very different when viewed a

81. ESD STRATEGY, supra note 73, at 12.
82. ESD STRATEGY, supra note 73, at 8.
83. Brundtland Report, supra note 2. Its approach, reflected in its vocabulary, was legal liberalism with a strong dose of welfarism. Its welfarism was influenced by both western utilitarian philosophy and Marxist welfarist redistribution. Id.
year, a decade, or a century later. It may, however, be possible to predict to some extent what changes will occur in that natural system by understanding what processes occur in that zone. Each zone will be affected by its own regional reference systems. These will inform the idea of “zone,” “pattern,” and “system.”

A similar reappraisal of social interaction and social systems has been taking place in some western (and therefore, affluent) nations. What the Brundtland Report did not include was recognition of the postmaterial values that had become a significant social and political force of affluence, especially western European nations, from the late 1970s and throughout the last decade. At the time that the Brundtland Report was released, the postmaterial social movement was a significant feature in Western Europe, committed to overturning society’s economic mentality and materialist obsession. The thrust of the postmaterialist view is that the rationale and the practical means of overcoming ecological crises lies in fundamentally restructuring our way of thinking about nature and our relationship with others in society. Postmaterialists seek an integrated approach between people and nature as the guiding principle for government, administrators, and citizens. Economy, they argue, is a too bounded rationality. It overlooks vital social elements in peoples’ interaction with their environment. Science, economics, and law, they argue, all overlook extradisciplinary (and, thereby, dissident) views and ideas. The

84. Of course, information collection will always be bounded by the temporal slice in which it is gathered. Is it likely that natural processes are so bounded by strictly determined life cycles that data collection during a particular period can be said to represent the systems in that region? Can it ever be certain that all relevant linkages between systems have been appropriately considered?

85. RONALD INGLEHART, CULTURE SHIFT IN ADVANCED INDUSTRIAL SOCIETY (1990).

86. The postmaterialist values of the new social movements in Western Europe of the last twenty years, most significantly represented by the political success of die Grünen in pre-unified West Germany, combined the Marxist critique of capitalism (both traditional liberalism and its statistical rejoinder, utilitarianism), with goals of an equitable, democratic and more cooperative society. However, the real politik of the Marxist-Leninist countries prior to the disintegration of the Union of Soviet Socialist Republics led to a critique of capitalism beyond Marxism. Liberal, utilitarian and Marxist theory each grew out of the Enlightenment view of progressive technology and an optimistic ethos that human structuring of the social environment would not be limited by reduced stocks of environmental resources. Marxism and postmaterialism both offer a critique of social and legal relations in which a pattern of dominance exists. As critiques of capitalism, they are still vitally important, notwithstanding the apparent victory of capitalism over communism. It seems much more likely that each may need the other to achieve their objectives. The theoretical aim of both theories (socialism, which became Marxist-Leninism, and liberalism) is to facilitate democratic participation and equality. Both have floundered on this point.

postmaterialists want to validate language that does not sit within the
cognitive and rhetorical boundaries of the disciplines.88 This calls for
removing the ranking of the disciplines as intellectually and psycho-
logically superior to nondisciplinary views.89

There is a common impulse between the new, nonequilibrium
view of ecology and the new social movements90 in that they both
seek dislodgment of the old view in a Kuhnian paradigm shift. Neither the new ecology nonequilibrium paradigm nor the postmater-
ial paradigm is particularly radical. Both, I suggest, have insights to
offer ESD. But in order to carry the postmaterial view forward, it is
necessary to first read it against itself. By this, I mean that it needs to
have its own (conservative) reformatory impulse applied to its essen-
tialism about “nature,” both as a view of nature itself and as a view of
nature as a model for social relations. The remainder of this essay
looks to the postmaterialist vision, with its ecological sensibilities and
its emphasis upon horizontal social relations, and considers how this
rather fuzzy vision may be developed from within so as to reread and
revitalise ESD in Australia. Like Western Europe of the 1980s, Aus-
tralia is affluent. Unlike contemporary Western Europe, Australia
cannot plead political instability as an impediment to the reformatory
impulse behind ESD.91

III. SUSTENANCE FOR ESD

Postmaterialism advocates abolition of social hierarchies outside
the discourse of expertise to encourage a plurality of forms and activi-
ties. However, neither the simple or naive communitarian values of
face-to-face democracy and decentralisation, nor the use of diverse
and efficient technologies necessarily lead to the pursuit of sounder

88. For a description of the self-discipline of the disciplines of expertise, see Pierre Schlag,
89. Though it does not necessarily call for wholesale removal of the discipline themselves.
On this view, “disciplines” becomes a site of information, rather than necessarily a voice of
authority.
90. The new social movements incorporate the ecology, peace and women’s movements.
91. According to research conducted during the 1990 Australian federal election, in Austra-
lia, there is now a similarly high percentage of people expressing these postmaterialist values as
there was in Europe in the early 1980s, although the values are not only the preserve of the
younger generations. This led to a record number of candidates contesting the 1990 federal
election. Whilst it is not necessarily the case that these postmaterialist values are yet influenc-
ing the voting patterns of people in direct contrast to the influences of economic issues, it is clear
that public values are changing to place a greater emphasis on noneconomic issues. For an anal-
ysis of the motivation of the generally educated, middleclass people who have formed environ-
mental coalition lobby groups, see The Greening of Australian Politics: The 1990
ecological principles, unless the legal and political order also reflects these values. These ideas seek alternatives to present systems, but they tend to ignore the implications of economic development through their overly abstract and essentialist view of nature. An indeterminate position on socioeconomic interests in favour of focussing on preservation of the environment leaves postmaterialism open to charges of an unrealistically nostalgic view of national and international economic relations at the close of the twentieth century. It gives little indication of how to guide the social process of industrial society as an ecologically sustainable alternative to orthodox paradigms. Postmaterialism offers a deconstruction of industrialised society, but as yet offers no reconstructed vision within ecological limits that adequately answers charges of utopianism and vagueness.\(^9\)

The postmaterialist vision would have us turn from *homo economus* to *homo ecologicus*. The similarity between these two otherwise antithetical visions lies in their each having an idealised picture of the good society. The objectives of each are also the same: To seek equity and freedom within ecological constraints. The Brundtland Report, and now Australia's ESD Strategy, would have us do it via economic means, in a mixture of *homo economus* philosophical values shared by liberalism, utilitarianism and a dash of socialist (re)distribution. The postmaterialists would have a good society based upon a nostalgic premodern, pre-urban vision which, supposedly, was more faithful to preindustrial *homo ecologicus*. Both visions, although claiming to be emancipatory, rest intrinsically upon the capacity to locate a fundamental homogeneity in society. What is important for the praxis of both visions is that citizens share that vision. The postmaterialists (or simple communications) present a vision that rests upon consensus—something that becomes ever more

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92. The West German Green Party presented the most effective political example during the 1980s of a philosophy of ecological harmony as the rationale that ought to underlie environmental regulation by the state. Its vision of an ecologically based, nonhierarchical society can counter the economic jurisprudence of liberalism, utilitarianism, and Marxism. It challenged liberalism's (mythical) appeal to individual freedom which never-the-less leaves the corporatist power structure intact. It challenged utilitarianism's attempts to place environmental values within a monetary calculation as a pathetic attempt of eco-reformism within a capitalist and industrialist rationalisation. It also challenged Marxism's commitment to technological progress as the means of social transformation. Its philosophical roots lie equally in Heidigger and his belief that the moral conception of nature is not a mass of inert matter but has a vital relationship to the human mode of being (Heidigger would say that *homo* is rooted in *humus* and that the moral phenomenology of nature is part of the phenomenology of the *Lebenswelt* (life-world)) and in the critique of science offered by Horkheimer and Adorno. See Martin Heidegger, *Being and Time* (J. Macquarie & E. Robertson eds., 1962); Max Horkheimer & Theodor W. Adorno, *Dialectic of Enlightenment* (John Cumming trans., Seabury Press 1972) (1944).
elusive in an increasingly pluralistic world. It seems romantic because of its lack of strategic and institutional specificity. Neither legal liberalism nor postmaterialism goes far enough, even when they engage in vigorous eco-reformism. They fail to recognise that society is increasingly signified by differentiation of peoples. What is called for in the praxis of ESD is an orchestration of the differentiated many, not a unitariness of the undifferentiated.

To present a persuasively viable alternative, law and ecology are turning their attention to processes that more adequately incorporate ecological sensibilities. They are looking to the methods, not only the outcomes, of modern institutions. The lack of strategic or institutional specificity in the eclectic postmaterialist view means that thought needs to be given to the legal forces that might facilitate its actualisation. This requires legal policies and methods that further horizontal relationships. In searching for an approach that better incorporates environmental consciousness, it must be observed that any approach must expose itself to heterogeneous outcomes. One can draw upon the nonequilibrium ecology paradigm to suggest that a unitary theory of social reality is not possible. Human thought and experience is so fractured and bounded by social positioning that it defies homogeneous description. Environmental issues share the heterogeneity and specificity that exists in all contested issues and problems. In Australia, law and ecology's failure to furnish a theoretical basis for radical change has led to its uneasy coexistence with the dominant system, rather than being able to overturn the privileged interests it opposes. On the other hand, to completely jettison the contributions of the dominant forms would be to "throw out the baby with the bathwater."

My point about ESD in Australia is that it has lost some of its potency as inspiration and aspiration because it remains a very conservative approach to legal reform. The role of law in achieving environmental objectives can go no further than the rationale of the state

93. The critique of normative jurisprudence under the now almost meaningless label of postmodernism has thus far concentrated on theoretical implications upon race, gender, ethnicity, and cultural subordination. It has recognised in relation to these areas of struggle that ignoring the integrated nature of individuals and society leaves these groups vulnerable to subordination and destruction. Feminist theory in particular has shown that recognising heterogeneity and specificity of different female experiences is an integral part of any process that seeks to remove gender-specific domination. Poststructuralism within postmodern critique also offers a way of reconceptualising law that suggests a potential to be better cognizant of environmental sensibilities. The terms "postmodernism" and "poststructuralism" have taken on any number of definitions. They are used here in the sense of disallowing any fixed claim to truth, though the possibility of that itself becoming a metanarrative of opposition cannot be overlooked. For a range of descriptions, see Alan Hunt, The Big Fear: Law Confronts Postmodernism, 35 McGill L.J. 508 (1990).
within which it operates. Our legal, political, and administrative institutions are presently part of an overall social schemata that is hierarchically structured and divided into interests that are opposing. They are situationally influenced to emphasize their irreconcilability. This irreconcilability is embedded by the discourse of expertise that effectively ranks science, law and economics above other voices. Instead of heralding a brave step beyond orthodox legal forms, ESD is a gentle sort of eco-reformism, tinkering quietly at the edges of economic structures that otherwise have unsustainable ecological damage as an intrinsic result.  

The ESD process in Australia was careful to canvas everybody’s concerns—as long as those concerns had a voice that governments could “hear”; peak bodies, such as industry, wilderness and conservation groups—with the aim of “balancing” ecology and economy. In short, no single group’s sensibilities should be too bruised. “We” (collectively) must all bear some of the strictures that sensible environmental approaches bring, but no single interest group should have to “hurt” (that is, need to make more change) significantly more than another. The ESD process was premised upon information sharing and negotiation between groups, but in remaining so reliant upon group interest and group representation, it was effectively embedding structured lines of communication, even if the lines were now talking directly to each other rather than shouting at one another in the press and on radio.

Contemporary critical approaches articulate a scepticism with modernism’s tools of rationality, scientism, and empiricism. It suggests that, just as poverty is the ineluctable consequence of simple capitalism, the crisis of legitimacy of the modern state and its institutions is a consequence of the rationality applied within it.  

94. Richard Delgado goes even further and suggests that environmental law reform is invariably doomed: “We resist precisely the medicine that could save us. We turn to strong solutions only when it is either too late, or when our thinking has advanced so far that the solutions seem commonplace and tame.” Richard Delgado, *Our Better Natures: A Revisionist View of Joseph Sax’s Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform.*, 44 VAND. L. REV. 1209, 1212 (1991).

95. At a more fundamental level, the ESD process was activated by, and acting out, our Cartesian anxiety. The tyranny of dualism meant that the only two available alternatives were well-mannered discussions, or someone or some interest group being “forced to take the medicine.” The conciliatory impulse of ESD removed the latter, but the well-mannered discussions risk freezing the institutional machinery.

96. The reference to “critical approaches” seeks to encompass the critique of Theodor Adorno and Jacques Derrida who are frequently associated with a cluster of others that are labelled poststructuralists. One aspect of my own project is to undermine the coherence of the very idea of poststructuralism, whilst accepting its targets of critique. See *Theodor W.
mental degradation has become symbolic of not only the limits of the modern western state, but also its capacity to turn upon itself in its ever extended efforts at social engineering. Law’s instrumentalism has participated in alienating *individuals* and community groups from the decision-making apparatus of the modern state.\(^9\) The self-perpetuating inclination of the powerful (those within the legal regimes of “truth”)\(^9\) is to portray the legal truth as a universal, as the *totality* of thought. Law becomes equated with established norms and opinions.

The critique of the normative impulse in law demonstrates that, instead of the legal order representing the normative status quo, it represents merely *one* of the alternatives that have been selected, and consequently elevated, within the dichotomy of truths/untruths. The critique of scientific rationality, deductive reasoning, and the construct of dichotomies—right/wrong, nature/culture, subject/object and mind/body—applies to the orthodox legal method of seeking the one “right” solution to a problem or conflict. Whilst there may be differing views within society about whether laws created by the “truthmakers” are good laws and represent justice, these “opinions”\(^9\) have no formal place in the truth system. “Truth” is in the hands of specialists—legal, economic, and scientific—and is not easily contestable by those outside the rings of expertise.


When turned upon law, this critique exposes the essentialism within law. It seeks to shed light on the totalising effect of any social, political or legal narrative that arises from a foundationalist stance. Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291 (1985). Cornell argues against the neo-Aristotelian impulse of legal communitarians who nostalgically seek to locate a vision of the good life and its virtues from a concept of “man” as having an essential nature. *Id.*

97. Rapid industrialisation and technocratization of modern life has enhanced this sense of alienation and has formed the backdrop for the critique of modernism. *LEGITIMACY AND THE STATE* (William Connolly ed., 1984).


99. We are always bounded by linguistic meaning. “Opinion” is placed in dualistic opposition to “fact,” and unless “proved” by the accepted rational method, remains ranked below “fact.” To view linguistic meaning as the intent of the speaking subject, no more, no less, is outside the dominant significance of language.
Both orthodox and western Marxist legal, political, and social critique, whilst seeking to resist capitalism's worst effects, have failed to offer a critique that is free of a normative view of human nature. Ecology suggests a model of law in which environmental sensibilities are incorporated within law's institutional behaviour, rather than imposed upon it. Such a legal model would require a revised perspective of the state and the individual. This revision might carry the communitarian perspective that individuals are socially constituted beings; that self-identity is a product of history, race, culture, gender, and class as much as it is a product of atomistic choice. It might suggest that the ethics of law incorporate contemporary social critique so that it may recognise differences of social categories. The methods of law might turn to assisting the process of recognising this differentiation through recognition of, and hence legitimization of, many different ideologies and values. This suggests that law breaks with ideology to the extent that it grounds itself in one ideology. This would mean that law would move against the idea of law as hegemony. Eco-reformism within orthodox jurisprudence demonstrates how tortuous and ineffective it can be to remain faithful to a fixed legal ideology and yet stretch to accommodate circumstances not foreseen when that ideology was formed.

Bolder institutional changes will be required in law if ecological sensitivities are to be better actualised. The suggested reform is premised upon the idea that unity as a conceptual tool does not exist in any real sense. Autonomy and consensus are two of the possible outcomes, although not necessarily mutually opposing. Actually

100. Typified in political praxis by the European New Left.
101. Ecology as a discipline is already a move away from traditional methods. In describing the approach adopted by Henry Regier, the editor of Common Property Resources suggests that, in contrast to western reductionist science, "[e]cology qualifies as... [a radical] component... because, as a science concerned with the whole (rather than with its parts), it stands at the fringes of the reductionist tradition of Western science." Common Property Resources: Ecology and Community-Based Sustainable Development 89 (Fikret Berkes ed., 1989).
102. An intricate theory of the state and the economy that might effect more radical transformation would understand that corporatist and institutional power relations will not be undone by the mere existence of social tension. The power of ideological control is that it is reproduced by the everyday existence of the dominant interests.
103. Construction in philosophy is necessarily deconstruction, that is to say, a deconstructing of traditional concepts carried out in a historical recursion of the tradition. It is not a negation of the tradition or a condemnation of it as worthless; quite the reverse, it signifies precisely a positive appropriation of tradition.
104. It is possible to combine autonomy and consensus, so that individuals retain an identity that permits individual choice to become part of, or, as feminist legal theory emphasises, to move away from, the social grouping (signifying "consensus") in which they may originally find themselves.
achieving autonomy or consensus becomes less important when the focus shifts to the reach for ethical reciprocity amongst people and between people and their environment. Finally, it may take from the postmaterialist vision the move beyond consumerism, but stripped of the essentialism inhering in its appeal to the "feminine" in our approach to each other and to nature.105

It is not the purpose of this essay to produce something that would become part of a definitive ethic of sustainable development in law. That project would have to appeal to some guarantee of its truth that could somehow be placed outside history and change. It is an attempt to ask appropriate questions about ways in which environmental regulation and policy could be framed. It is a petition for critical self-reflection—an attempt to sustain the quest of continually questioning. The purpose of this quest is two-fold: (i) the dynamic nature of human interaction with the environment means that the questions must not only continually be asked, but the questions and answers must themselves also be continually questioned; and (ii) law's role in assisting an ongoing process of dialogue is a rejection of dogma that rides so comfortably on the idea of equilibrium. It is a suggestion that law act as a catalyst of dialogue, rather than impose "rightness" that becomes fixity.

The idea is that legal action towards the environment could help to halt the replication of the economy/ecology dualism through disrupting the idea of essentialism in either. This suggests "that reality can never be completely enframed."106 At the theoretical level, it necessitates a decisive step away from universalistic theories. At the practical level, it presses for environmental solutions that are responsive and immediate, but without recourse to methodologies of hierarchy in either ideological or procedural approaches. Transposed into the social world, this emphasises horizontal rather than hierarchical relationships where empowerment is not the goal in all relations. In that way, perhaps the myriad of possibilities may be revealed. Environmental regulation can accept the need for solutions to be drawn at the point of what is possible, accepting that this is a response that is

105. The postmaterial vision represents in many ways the "ethic of care" which Carol Gilligan would describe as feminine values, in opposition to the masculine "ethic of justice." See CAROL GILLIGAN, IN A DIFFERENT VOICE (1982). Deep ecologists would apply this valorisation of the feminine by describing the genesis of things as gynesis. See Hwa Yol Jung, Marxism and Deep Ecology in Postmodernity, in 28 THESIS ELEVIN 86, 91 (1991) (citing ALICE A. JARDINE, GYNESIS (1985)).
106. DRUCILLA CORNELL, BEYOND ACCOMMODATION 140 (1991). Cornell emphasises that "reality is not as unshakeable as is might 'look.'" Id. at 131.
not a response of principle, but of strategy. Law becomes an instrument in the project of ensuring that the many alternative solutions to environmental problems are canvassed in a way that does not privilege any one of them in a foundationalist sense. It need not involve the rejection of economic solutions, but of those solutions needing to grow from an over-arching economic theory. Law can recognise that polarised, centralised and sectoral approaches are frequently costly, both economically and ecologically. It can also recognise that decentralised and integrated approaches towards environmental policy may take longer, and may offer a multiplicity that discomforts our search for coherence, fixity, and predictability. Away from the dualistic constraints of economy or ecology, it may listen to community values of interdependence and self-regulation, though not ignore the information that comes from economy and science. It can allow for local solutions to be found whilst still searching for broader solutions between communities, including the global community.

The symposium at which the draft of this paper was presented showed me the limitations of our linguistic and cultural forms. I came to the symposium using “community” as a petition for stepping beyond formal legal and scientific rationality, to leave the dualism behind as normatively suspect and practically unrewarding. “Community,” I felt, stood as a metaphor for reflexive law, situated amongst autopoietic groups. If there was an ethic I assumed in “community,” it was one of each group’s desire to remain open to others, and the ability of individuals to move freely amongst groups. “Interest” did not carry any intrinsic connection to “partisanship,” and “desire” inhered potentially as much in another group’s stated needs as it did in one’s own. The consequence for my use of “community” in the context of ESD was to open up the ESD debate beyond sterile, media-specific claims, to much broader concerns. “Community” for me carried impulses of hope and trust in ourselves and in others about the potential for diversity and heterogeneity. It held values of interconnectedness and horizontal relationships without erasure of the individual flowing as a consequence of seeing connections between individuals. This came from a deeper assumption that the old dualisms of body/nature, mind/body, and rational/irrational had by now, loosened their grip on legal consciousness.

At the October symposium, I quickly learned that the linguistic turn of "community" meant something quite different to my Chicago audience, than to my own textual baggage. Instead, "community" carried impulses of cynicism and distrust. The consequences of community involvement in environmental issues meant identification of interest groups through rigid demarcation, and adversarially placed against one another. In short, "community" was a metaphor for "closure of groups." Environmental disputes remained within the orthodox legal code of bringing disputes before it, though "community" had extended the number of litigants and given them a louder and better organised voice. If anything, it seemed that "community" worked to make vested interests more territorial and aggressive, whether they were the hard-won gains of environmentalists, or economic interests. Not only was the ethics versus economics dichotomy still in use, it appeared to have deepened.

Most interesting of all, I perceived that the environmentalists' list of human predators had extended beyond the obvious demons, industry and government, to include local citizen groups. "They," the locals, could not be trusted to do the right thing. It seemed, shocking and inappropriate as it may be, that the people upon whose behalf all the political and scholarly energy was being expended, could not see beyond their own noses. "They" wanted to protect their own environmentally damaging job, or keep that polluting factory in their neighbourhood. There was no choice but for environmental lobbyists to close in and hold on fast to the slippery tail of legal reform. I detected a siege mentality. Environmental, political, and legal strategies needed not so much to be ambitious, as didactic.108

The paradox to this, lay in the acceptance with which the new ecological insights were received. Ecologists and scientists are seeking to broaden the ambit of the "ecosystem" because it is acknowledged that the extent of the ripple effects of environmental disturbance or damage may be far greater than previously thought. "Ecosystem" is coming to be a term for sorting information, rather than delineating where environmental consequences begin and end. It is a word becoming more closely associated with elasticity, if not downright uncertainty, rather than connoting closure.

108. The idea that "'we' must do something now" because human suffering is so apparent implies that consideration and reconsideration of non-novel ideas such as horizontal social relationships is wasteful and indulgent "theorising" whilst "practical" issues press in. Part of my own project is to dislodge the idea of "theory" as categorically opposed or, in some fundamental way, as different to "practice."
It is not an overstatement to say that this new ecological approach is a sweeping change to orthodox ecological approaches. But possibly not as challenging to its practitioners as environmental lawyers find proposed change. Ecologists, after all, view their activities as the process of finding out the yet-undisclosed mysteries of the natural world. Some scientists may even view that process as finite, as simply getting enough money for new technology and enough research assistants to operate the new machines. Lawyers do not generally view themselves as being on a quest of discovery. They usually seek to apply institutional givens to new sociological phenomenon, such as an awareness that our environmental resources are too stretched, so that legal processes remain relatively static and legal change is comfortably conservative.

In many ways, placing “legal regulation” and “community” together may seem a clash of antithetical notions. Law is, in the main, a force of domination. Any area of social life that law seeks to regulate invites the risk of ultimately becoming monopolised by that legal regulation, simply through becoming the subject of legal rules and administrative processes. The spontaneity of local decision-making is frequently lost in the time consuming hierarchy of the legal drama. Indeed, the reformatory potential of community action towards the environment seems to be at its height when it is extra-legal, that is, when it remains outside the realms of orthodox discourse as a voice of dissent. Legal recognition of grass-roots environmental concern more often than not sounds the death knell of that initial community involvement. In traversing the divide between disputed discourse to orthodox discourse, local environmentalism has lost some of its punch. The trajectory of environmental concerns into the orthodox political and then legal agenda sees the application of legal norms, bounded as they are by thought processes of legal rationality. Environmental issues become (another) subject of institutional control—community involvement tends to become marginal, rather than central, to goals of environmental conservation and protection.

Perhaps this is an overly gloomy picture—that of local environmental concerns becoming a secondary function when law sweeps the environmental problem up as a legitimate subject for the apparatus of


110. The ESD process in Australia is a good example. When consultation between the parties was taking place, ESD had a momentum that seems to have dissipated, to a large extent, now that the process is “formal.”
governmental and legal institutions. It is not so much a charge that law gobbles its subjects; rather, it is a recognition that the autonomy and self-expression of community environmental groups is at danger when the environment is brought wholesale within formal administrative and legal control. Bureaucratic and technocratic involvement in environmental issues that were initially popularised by community concern is, on the one hand, a signifier of the success of that local concern. But now that the environment is, more or less, part of the orthodox political and legal machinery, the question is whether that machinery is itself intrinsically suited to serving the community involvement that first placed it there. Does the community concern that placed the environment into the orthodox arena, whether that be through local government, national or international regulation, or institutional arrangements, then place it beyond the communities' reach? Does all that community concern, the energy and the interest, put the subject of its concern into a place where it must be, can only be, institutionalised, because that is the very nature of the legal and political place?

It is not in doubt that environmental concerns have been successful in mobilising legal recognition—they so clearly have. The question that remains is why local environmental concerns have not gone further in promoting an ethic of dialogue about ESD. Community concern and mobilisation about environmental issues remains one of the most potent expressions of grass-roots political interest since the social turmoil of the 1960s. Together with sexual and racial equity, environmental concern has travelled the road from marginalised dissent to mainstream orthodoxy, at least in theory if not in practice. But unlike those other issues of social justice, community concern about environmental degradation has a unique temporal imperative. It is no longer considered alarmist to set time-lines for environmental improvement and reconstruction. It not only makes good economic sense, but also the tragic consequences to peoples' lives, unless land, water, and air degradation is minimalised, is now beyond contest.

So far, so good. Community concern has brought us to this point. But what about the legal system into which this now legitimated subject of regulation is delivered? Is law institutionally constructed so as to endorse and enhance the human inspiration of community based activism? Legal regulation of the environment seems to lead to institutionalised environmentalism—that is, environment decision-making

and solutions tend to become increasingly alienated from community participation.

If community participation is to remain an ongoing and growing feature of environmental solutions, the legal institutions which shape the regulatory process will need a different consciousness of the law's role. Allowing community participation to be central to environmental solutions offers an enormous challenge to law or to any group that "knows what's best (for us all)." In many ways, "community" in environmental concerns stands for legal reform that is based upon values that largely lie outside the rationale of the modern state. The language of the modern economic and administrative system is primarily channelled through competition in the market place and the translation of service and time into money units. "Community" values—as I read "community"—searches for alternative, noncoercive forms of existence. It assumes that self-help organisations at the local level are not intrinsically at odds with the search for environmental goals at the national and international level.

Where then, does law fit into this aspiration? Clearly, orthodox legal solutions based upon adversarial, winner-take-all processes have less of a role. Deductive legal reasoning, the use of scientific and economic data and reliance upon legal precedents are of assistance only, rather than determinative, when dealing with environmental conflict in which the intergenerational risk is speculative at best, and environmental stake-holders are concerned, for instance, about the aesthetic or religious and spiritual aspects of land-use.\textsuperscript{112} To apply the critical impulse to law is a mechanism of legitimating what is presently outside legal struggle, whether this be viewed from individuals or groups. It thereby gives a voice to, and legitimates, the nonlegal. Enlarging provisions of \textit{locus standi} is an understandable, but essentially conservative, legal response to environmental conflict. A paradigm hiccup, rather than a paradigm shift.

A revised description of law as representative of \textit{many} truths brings with it the concomitant suggestion that law may have \textit{many} solutions, each resonating to a particular value or group of values. These values are not fixed in time because they lay no claim to a universal essence. The perception of a problem is then free to alter with time, as it need not continually measure itself against a fixed idea of essential principles. A nonequilibrium paradigm for law offers more

\textsuperscript{112} Helen Endre, \textit{Legal Regulation of Sustainable Development in Australia: Politics, Economics or Ethics?}, 32 \textit{Nat. Resources J.} 486 (1992).
latitude for legal solutions to alter over time and in response to new values or new empirical data.\textsuperscript{113} Enhanced community involvement in environmental approaches has two potential advantages. First, it dislodges the transformative process of an ecological and social problem via the funnel of expertise, either through legal definition or an administrative function, where it tends to take on a character increasingly removed from its ecological and social context. Second, it opens up space for development of environmental solutions by the stakeholders and those who are most directly affected by an environmental problem.

The idea of problem solving by those who are most directly affected by environmental problems has not lost its power, even if it may have lost its cachet. Calling in the scientific, social, political and economic expertise of each environmental subsystem, and setting up mechanisms that allow for social planning by those who are within the subsystem, resolves to some extent the legitimacy crisis that occurs when uniform norms are enforced through adjudication under the classical model of legal institutions.\textsuperscript{114} Arguably, it prevents the transformation of an ecological problem into a legal and administrative problem. The key questions remaining are the interface of different rationalities occurring across different ecological subsystems, and the time required to reach a solution when the ecological imperative is particularly pressing. The measures of success would lie not only in the reduction of environmental damage, but also in the fluidity along the continuum of react-and-cure strategies and preventative strategies. This progression could be signified by anticipatory policies that are not restricted to media-specific regulation (including water and air pollution) but which are broader in scope.\textsuperscript{115} This carries a deeper significance, because it would transcend traditional administrative and

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\textsuperscript{113} Law's instrumentality in advancing economic interests is without question. Little wonder that ecological concerns lie in uneasy coexistence within present legal structures. It would, however, be repeating the same tyranny of interests if law were to turn its protection from its present economic perspective to a purely ecological perspective. An overnight transformation of \textit{homo economus} to \textit{homo ecologicus} would simply reverse legal bias and silence a different group of voices. For law to consistently prefer one vision of the good life over another vision of the good life is based on an assumption of the existence of fundamental homogeneity in society. In an increasingly pluralistic society, any assumption about a shared community vision of the good life, whether it be economically based, ecologically based, or any place in between, has the potential to become oppressive. The limitations of environmentalism to become its own oppressive ideology must not be ignored. It still does not free itself from a central vision of the good life and therefore does not offer an emancipatory critique. It is at risk of becoming its own totality.


\textsuperscript{115} Anticipatory or preventive environmental policy has been described by the Wissenschaftszentrum Berlin Fur Sozialforschung [the Science Centre of Berlin] as:
expert systems that are organised around practical environmental media. In other words, it would deinstitutionalise the administrative and scientific technocracies.

Change towards a participatory policy style and towards cooperation between central and the local levels moves away from stasis as an ontological preference. It requires recognition that "polarized, centralized and sectoral approaches are [frequently] costly, economically and ecologically speaking, and that holistic, decentralized and integrated approaches towards environmental policy are intellectually more demanding . . . [but are] at the same time more rewarding." The precautionary principle accepts that environmental regulation may be justified in the face of extremely limited scientific evidence and/or lack of unanimous scientific agreement on the level of environmental risk a society should tolerate.

- Prevention of the spread of all harmful emissions and waste products that exceed the assimilative capacity of the ecosystems through more and improved recycling, introduction of low emission technologies, and pre-emptive substitution of environmentally harmful products and production processes.
- Conservation of non-renewable resources, encouragement of the use of highly efficient renewable resources, and drastic reduction or redesign of all combustion processes.
- Active management of the natural environment allowing for greater participation of hitherto underrepresented public interests in all relevant planning procedures (industry, infrastructure, technology, energy, agriculture, etc.), and aiming for a strong institutionalisation of the prevention principle throughout society.


 116. Id. at 25.

 117. Stated at its very plainest, the precautionary principle is the requirement of preventative action, before scientific proof has been submitted, through recognition that environmental regulation must proceed in the face of inevitable scientific uncertainty. It aims to encourage, and even to oblige, decision makers to consider the possible damaging effects upon the environment of their activities prior to undertaking the activity. A more detailed analysis of the elements of the precautionary principle, and the different understanding it requires in order to implement it, indicates: (i) prevention of environmental damage is to be preferred to relying upon ex post facto remedying of environmental degradation because remedying degradation is more expensive than preventing it from occurring, and as toxic pollution has starkly demonstrated, there may be no effective means of remedying environmental damage; (ii) the burden of proof should shift to the potential contaminator of the environment satisfying doubt about environmental consequences prior to undertaking their activity, rather than the burden of proof lying upon those who, after the activity has been undertaken, having to demonstrate a nexus between the activity and their environmental damage; and (iii) the quantum of the burden of proof upon the potential contaminator of the environment needs to shift from the nexus between the activity and negative environmental consequences being beyond reasonable doubt, to simply a nexus between the activity and a potential (but not necessarily scientifically demonstrable) threat to the environment.

For example, the Bergen Ministerial Declaration on Sustainable Development in the EEC region stated: "Where there are threats of serious or irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation." Bergen Ministerial Declaration on Sustainable Development in the EEC Region, May 16, 1990, para. 7, reprinted in I.B.1 INTERNATIONAL PROTECTION OF THE ENVIRONMENT 2d Series 171 (Bernd Ruster et al., 1991) [hereinafter Bergen Declaration].
Precaution involves the broadest possible conception of potential environmental risks. It suggests that there ought to be regulation where there is no proof of a causal link between toxic emissions, for example, and harm. The precautionary principle is a move away from scientific bases for regulation, recognising instead that environmental problems are cited equally in political and social realms.

The impulse behind precaution and community is to transform the legal environmental order from one of coexistence to one of cooperation. The best legal certainty that is possible at any time can be obtained through procedures that stipulate cooperative assessment of potential environmental impacts and information sharing in specific post project analyses. Cooperation mandates public participation on equal terms with other legal personalities besides direct economic actors, in either the public or private sector. Combining principles of precaution and community contributes towards safeguarding common interests because it fosters (though, of course, cannot ensure) neighbourly environmental protection. It provides opportunities for intense regional and national cooperation and involvement of individuals and community groups as legal subjects. Participatory mechanisms are in this sense the practical outcome of institutionalising precaution. Openness and public participation allow input from nongovernmental, consumer, or other public groups or individuals, and provide opportunity for challenges to both government and private sector activities affecting the environment.

Establishing evaluative standards for precaution and assessment of environmental risk rests, for its effectiveness, upon sharing information and unceasing dialogue. Information needs to be as complete and full as is possible at any point, always recognising that there may be new information that will call for altered environmental approaches and standards. For example, the 1987 European Economic Community (EEC) Treaty that brought environmental protection within the EEC’s jurisdiction enables non-governmental organisations to initiate proceedings against the community before the European Court of Justice. The Bergen Declaration emphasised: “[T]he importance of participation by a well-informed and a well-educated society so as to allow the public to mobilise itself... and to encourage open debate on the environmental implications of national policies.” Bergen Declaration, supra note 117, at paras. 16, 16(e).

118. An example at the international level of such a legal instrument is the Convention on Environmental Impact Assessments in a Trans-Boundary Context, Feb. 25, 1991, XXVII.4 Environmental Impact Assessment in a Transboundary Context. This lists the activities to be included within the convention, acquires cooperative assessment of the possible or likely extraterritorial impact and mandates post project analysis; public participation at all of these stages is legally ensured, and on an equal footing with the nations state. Id.

119. The Bergen Declaration emphasised: “[T]he importance of participation by a well-informed and a well-educated society so as to allow the public to mobilise itself... and to encourage open debate on the environmental implications of national policies.” Bergen Declaration, supra note 117, at paras. 16, 16(e).
Nongovernment organizations may inform the EEC Commission of breaches by individual member states of community environmental laws and have standing to intervene before the European Court in environmental issues. Indeed, it was after the active lobbying by Friends of the Earth, that the Commission of the European Communities initiated an investigation into the proposed privatization of the water industry in Britain. The result of this investigation was a warning to Britain by the EEC Environment Commissioner that Britain must meet the minimum EEC standards or face legal action. Greenpeace Luxembourg helped a French group to apply to the European Court of Justice for an order to shut down a French nuclear power plant because of the plant's failure to comply with an EEC procedural requirement.

Environmental issues do not fit easily into a geographic framework of region and nation state. Environmental problems have no respect for regional boundaries or traditional notions of sovereignty, territory and state. Environmental risk procedures must be dynamic if they are to quickly adapt to changed circumstances, such as new scientific evidence and public perceptions of risk. This reinforces the ideal of community as a horizontal and cooperative sharing of information.

The challenge for law is to provide a procedural framework within which environmental cooperation can take place. It is fundamental to this cooperative approach that law continues to expand its definition of legal persons. Procedural obligations underlying practical applications of precaution and community will require agreements (even if it is temporary agreement) concerning specific sectoral approaches, specific substances, information exchange, and some kind of compliance control by means of a reporting data network. Information exchange must include transfers of technology. Because evaluative standards must, to a large extent, depend upon scientific evidence and public opinion, those standards must be able to adapt themselves quickly to scientific and technological evolution and therefore be much more flexible than traditional legal mechanisms. The interdependence of local, regional, and national groups emphasises the need

120. The Single European Act, Feb. 16, 1986, European Economic Community, pt. 3, tit. VII, art. 130R, 298 U.N.T.S. 3 [hereinafter EEC Treaty]. Article 130 of the amended EEC Treaty now provides that the EEC has the following environmental objectives: "preserve, protect and improve the quality of the environment; to contribute towards protecting human health; [and] to ensure a prudent and rational utilization of natural resources." Id. at 2680.
to attain the broadest possible membership in the agreement-making, standard setting and information exchange.\textsuperscript{121}

Institutionalising precaution canvasses the limits of undertaking environmentally harmful activities and cooperation between neighbouring groups in situations of environmental risk and also instances of environmental damage. The need for communication on sustainable use of resources between neighbouring groups becomes evermore evident when the transboundary environmental effects of resource use are fully appreciated.\textsuperscript{122} Because the possibility of environmental damage exists at all times, it is not only important to set a low threshold of sustainability of environmental interference and simple procedures to determine causation and responsibility of and for environmental damage, but it is also essential to continually reenforce the idea of reciprocity. That is, neighbouring groups need to communicate about environmental interferences. They may mandate that a group or nation-state refrain from a particular activity if environmental injury is certain or imminent, or if there is no known method of subsumption of the hazard known. It is precisely when a situation of environmental hazard is evident—be it of low probability, but of potentially high risk of environmental damage through its unknown extent of consequences—that the communicative impulse to neighbours must be ensured.

Environmental precaution where consequential damage is not yet fully known or quantifiable must remain a vague notion. Therefore, not only must the legal articulation of precaution set out the principle, but it must also set out evaluative standards that are subject to frequent review. Underlying these communicative procedures about risk and the potential for accident lies a cooperative understanding of standards.\textsuperscript{123} General rules to reduce and minimise environmental interference are only likely to be actualised if they are considered \textit{practically} feasible. For example, where transboundary effects constitute a mere possibility, this needs to invoke a legal obligation of information

\textsuperscript{121} Innovative approaches in international convention procedures seek to give a voice to those groups who have not been heard with the same force as other, more powerful voices and provide a model for regional mechanisms. These approaches have included weighted voting of groups (which have altered the entry into force of environmental standards for particular groups and adjustments peculiar to their regional circumstances), nonequality of parties, so as to provide a special regime for developing countries, and compliance sanctions, such as trade restrictions, affecting noncomplying parties.

\textsuperscript{122} For example, upstream use of water resources effects on downstream users and air pollution that has immediate trans-boundary effects.

\textsuperscript{123} For an analysis of different critical perspectives on standards and judgement, see Peter D. Swan, \textit{Critical Legal Theory and the Politics of Pragmatism}, 12 \textit{Dalhousie L. J.} 349 (1989).
to, and consultation with, transboundary neighbours. The legal role is to underscore this communicative cooperation with a de facto compulsion of the duty to inform, consult, and coordinate. Effective intercommunity and interstate communication on precaution and risk requires a reliable procedural framework. Processes may stipulate a description of the factual situation surrounding the environmental risk, the perception of competence of the risk generator to deal with that risk, and an assessment of the known and acknowledgment of unknown environmental effects. Procedures need to cover situations of intended as well as unintended environmental consequences and accidents.

Conclusion

As the temporal imperatives of environmental degradation become starker, it is likely that international, national, and regional environmental policy will increasingly internalise the message of the Brundtland Report. Recognition of environmental and ecological interdependence emphasises the idea of collective interests, but need not blur real differences in the capacity of regions to respond to ecological problems. Conservation biology is recognising ongoing change as the likeliest constant in the natural world. The very idea of "equilibrium" is being reviewed. Indeed, it seems more likely that our yearning for stasis in the social world has been projected onto the natural world. The insights of newer ecological theories can be turned back onto the social world. This shows us that our yearning for fixity is possibility more than a desire than a reality. Intense regulation of the environment may be emotionally satisfying and of intellectual comfort, but it is unlikely to be relevant to the natural circumstances that continually alter.\textsuperscript{124}

The potential for reform of political, legal, and social institutions through ecological values remains. The danger in becoming part of orthodox discourse is that environmentalism may thereby become institutionalised and frozen in that process. That is why there needs to be a greater focus upon how the processes of institutions need to be altered. There is a saying that "the revolution eats its children." Ecology must be as conscious of the voices that oppose it, or it will replace one form of intellectual arrogance for another. The next phase needs to address how society is to make the transition to ecologically sensi-

\textsuperscript{124} Brundtland Report, \textit{supra} note 2, at 7.
tive decision making, and consider the role of institutions within that transition.

Law has been part of the search for new theoretical insights to its normative structure. In this way, it has belatedly reflected the self-examination that took place earlier in the social sciences, economics and ecology as part of a wider questioning of scientific formalism.125 In questioning the contingency of all legal action, critique in law has caused a backlash of claims to objectivity and rational standards that are present, though not necessarily obvious.126 The application of contemporary forms of critique to law has led to accusations that throwing out the idea of fixed ideals and standards, measurable against an Archimedian point, can lead us to no good. Such fundamental questioning leaves us with nothing against which to judge our actions and aspirations, it is said, so the very idea of ethics and morality loses its potency.127

Environmentalism within the dominant ideologies that guide legal action makes much mileage from the imperative of “coherence” in policy. “Coherence,” after all, is “rational.” Despite its anchoring to ideological rationality, law is increasingly drifting from its “fixed” moorings in response to ecological imperatives. Although governments are guided by the meta-narratives to be platonic and to apply policy solutions arrived at deductively, both international and Australian environmental policy has already become ideologically “impure.” Institutions struggle with ecological problems that defy easy bracketing into sub-groups of anatomical likeness. The struggle to categorise frequently overtakes the environmental dimension.

Environmentalism as an ethical gesture cannot escape the attack against foundational concepts and the constituting character of human-centred legal language. The postmaterialism and environmentalism of the 1970s and 1980s sought to resist the dominant discourses, but did so within the same paradigm of power and authority as the meta-narratives. The pre-ideological essences of “natural” and “wild(erness)” replaced those of “atomistic individual” and “rationality.” Environmental concern was often accompanied by a view of nature as a benign, closed system. Social life seeks to replicate this vision of nature. Nature's natural harmony was to provide a guide to

125. Swan, supra note 123.
126. Ronald Dworkin, for instance, has placed “good” judging within the unspoken but present practices of society. RONALD DWORPIN, LAW'S EMPIRE (1986).
127. For a discussion of the disruption to traditional legal approaches that is perceived by those who are suspicious of contemporary legal critique, see Hunt, supra note 93.
social life. "Nature," "balance," and "healthy" become metaphors for one another. Living according to ecological principles was seen as the cure to the exploitation of nature that had been perpetuated through the principles of economy.

Environmental sensibilities within this form of naive communitarianism would have nature's foundations replace economy's foundations on the assumption that nature represents a mystical, non-violent innocence. Nature's natural harmony became the new authentic model for organising human relations. This approach has merely adopted and reversed the old patterns of domination. It has posited another "natural" in relation to a false reality by creating a new universal truth. This truth then guides the (platonic) constraints of human action. It remains fixed with the idea of a supreme value. Events are measured by reference to this stable ideal. Something that fails to reflect the absolute is not the absolute. It remains foundationalist, it holds up a new essence to replace the old. My point is that it is just as unlikely to hold the whole solution as what it seeks to replace, because the "whole" has never been glimpsed.

An alternative understanding that there is no one "knowledge" need not become another totalising theory or stable body of thought, but clears the space for any thoughts that may be considered once "knowledge" is no longer the standard of a "thought." To surrender to a new space of community as an ethic of dialogue is an act of hope. For some environmentalists, it may mean opening up space for those who have previously behaved downright destructively towards the environment. No doubt, it would feel as though the political and

128. Poststructuralism employs deconstruction as a corrosive method to undo binary oppositions and clear the ground for that which is unthought as yet—that which has not yet been considered an idea. Deconstruction of ideological premises points out the "Truths" that have been forced upon society, and suggests that it is only the authority of power that has given any sense of that structure appearing "natural" to the rest of society. Deconstruction shows up the particular segment of society that the "Truth" served, and points out that its selection as a "Truth" is an arbitrary selection. "Truth" retrospectively authorises the structure and hierarchy of society in privileged group(s), see Jacques Derrida, Structure, Sign and Play in the Discourse of the Human Sciences, in THE LANGUAGE OF CRITICISM AND THE SCIENCES OF MAN 247 (Richard Macksey & Eugenio Donato eds., 1970). Deconstruction has no inherent political agenda, but clears the space for multiple possibilities of political action. See DOMINICK LA CAPRA, SOUNDINGS IN CRITICAL THEORY (1989). The method of deconstruction intersects with politics, because it challenges the hierarchical command structure of society, which in turn has legitimated a point of authority (monarch, religious figure or parliament), police forces to enforce the command structure and cultural and sexual oppression. The philosophy becomes the tool of politics through its capacity to bias organisation and impose domination. "Deconstruction posits that the pressing for certainty and power is the history of Western metaphysics. ... Abdicating a belief in progress towards truth, deconstruction finds knowledge to be a thinly veiled will towards mastery." Peter Quigley, Rethinking Resistance: Environmentalism, Literature, and Poststructural Theory, 14 ENVTL. ETHICS 291, 295 (1992).
legal struggle of the last twenty-five years was at risk, with only the hope to sustain them that opening up the site of social struggle will bring its own reward. For the incrementalists (and this would include most lawyers), this may mean placing less reliance upon carefully measured and intensive environmental policy and regulatory responses, such as the creeping application of the public trust doctrine. For everyone, it means formulating “community” not on the basis of what it all too frequently is, but on what it could be.