



Summer 1992

Legal Regulation of Sustainable Development in Australia: Politics, Economics or Ethics

Helen Endre

Recommended Citation

Helen Endre, *Legal Regulation of Sustainable Development in Australia: Politics, Economics or Ethics*, 32 Nat. Resources J. 487 (1992).

Available at: <https://digitalrepository.unm.edu/nrj/vol32/iss3/4>

This Article is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact amywinter@unm.edu, lsloane@salud.unm.edu, sarahrk@unm.edu.

Helen Endre*

Legal Regulation of Sustainable Development in Australia: Politics, Economics or Ethics?

Government regulation of the environment is itself a growth industry of government institutions. The immediate concern of lawyers dealing with environmental laws and regulatory mechanisms is to analyze whether environmental rulemakers have the capacity to impose behavior-regulating requirements upon their clients. Beyond this immediate analytical concern, lawyers are increasingly confronting the question of *whether* governments should be involved in environmental regulation. Because this normative aspect of environmental regulation has become a preoccupation of citizens, it has also become a pre-occupation of politicians; not only at the local and national level, but also as part of the language of the global economy.¹

The United Nations has played an important role in placing environmental concerns on the international and national agenda. In 1983, the United Nations appointed the World Commission on Environment and Development (WCED) under the Chairmanship of the then Prime Minister of Norway, Gro Harlem Brundtland. The United Nations wanted the WCED to examine the nexus between environmental issues and economic development issues.² The United Nations was concerned that conservation and preservation of the environment were no longer matters that each country could effectively deal with on a parochial basis.³ Spill-over effects of environmental damage to neighboring nations caused by transbound-

* Helen Endre, Lecturer-in-Law, Queensland University of Technology, Brisbane, Australia; Barrister and Solicitor, South Australia; Solicitor, New South Wales; Barrister, Queensland; Barrister, England and Wales. I have profited greatly from the comments on draft material made by Professor Alan Fogg of the University of Queensland and the encouragement of my colleague, Dr. Razeen Sappideen.

1. In Australia, the most publicised judicial declaration that Australia could not remain isolated and parochial in relation to issues that touch upon human life and in particular, environmental concerns, was Justice Murphy of the High Court of Australia in *Tasmania v. The Commonwealth* vol 158 Commonwealth Law Reports, page 1 (1983). *Id.* at 733-34.

"The preservation of the world's heritage must not be looked at in isolation but as part of the co-operation between nations which is calculated to achieve intellectual and moral solidarity of mankind . . . protecting the world's cultural and natural heritage and thus fostering the intellectual and moral solidarity of mankind, in promoting the elimination of war, advances the foremost object of international relations."

2. World Commission on Environment and Development (WCED), *Our Common Future*, 6-8 (1987).

3. *Id.* at 2-8.

ary air and water pollution were seen by the global community and the United Nations as examples of issues that would require international cooperation. The WCED completed a report called "Our Common Future" in 1987. In its report, the WCED proposed governments should form policies to ensure sustainable development.⁴ The WCED explicitly linked economic and ecological considerations and added a moral dimension to its proposal by recommending that a right of individuals to sustainable development policies be enshrined within an international treaty as a fundamental human right.⁵

The WCED report has sparked increasing international interest in sustainable development in both populist and political discourse. The report has emphasized a growing belief in the idea that social, political and economic issues are inseparable from environmental issues by reinforcing the belief that all manner of human endeavor are connected regardless of political differences.⁶ The perception that ecological and social issues, together with the legal forces that influence and direct these issues, are inseparable internationally, lead to the WCED recommendation for an international convention that would place environmental concerns within the vocabulary of human rights. No such international treaty has been struck yet, although environmental problems that transcend purely local concern continue to be the focus of intense international publicity as newspaper reports continue to show the world the devastating human cost of environmental accidents. The Chernobyl nuclear reactor disaster in the Soviet Ukraine of 1986 affected the economic viability of large sections of the European and United Kingdom agricultural industries with more than 20 countries registering high radioactivity levels. Yet there was no treaty between these countries and the U.S.S.R. allowing tort liability claims.⁷ The Sandoz chemical spill into the Rhine River in 1989 with its consequent damage to fish population and drinking water for some of the most heavily populated areas of Europe provided further evidence of the need for international cooperation on environmental matters,⁸ as the

4. *Id.* at 8.

5. *Id.* at 334, 348. The 1992 United Nations Conference on Environment and Development in Brazil considered an action plan for sustainable development goals. T. Starrs, 16 *Ecology Law Quarterly* 604 (1989) (book review of *Our Common Future* by the United Nations World Commission on Environment and Development, Oxford, England: Oxford University Press, 1987).

6. *Id.* at 4. See also B. Commoner, *The Closing Circle: Nature, Man & Technology*, (1971).

7. Chernobyl: Law and Communication, (P. Sands ed., 1988). In the United Kingdom, two hundred farms remained closed during 1990 because of rainfall shortly after the incident affecting their produce. In Finland, 95 percent of Laplanders' reindeer were unfit for consumption after eating vegetation affected by nuclear radiation. S. Khan & L. S. Spedding, *Environmental Diplomacy*, 18 *International Business Lawyer* 473, 475 (1990).

8. *Id.* The effect of the chemicals in the River Rhine was to kill off or contaminate the entire fish population of the eight hundred kilometer waterway between Basel and Rosterdam.

Union Carbide gas leak in Bhopal also demonstrated.⁹ Regional disasters indicate that the ever-increasing internationalization of commercial transactions brings with it the question of how each country ought to ensure that different environmental standards benefit the economically weaker nations. Each nation must also address the equity issues of its own internal environmental practices with new insights that take on board the paucity of scientific, economic and ethical concerns.

In Australia, sustainable development has become a policy objective of the federal government at a time of economic recession and changing political patterns. The Australian federal government began to participate in the sustainable development debate in 1989 when the Prime Minister announced that all federal government decisions¹⁰ would be guided by three policy principles that aimed to ensure sustainable development.¹¹ In 1990, the Federal government released a discussion paper through the Department of Prime Minister and Cabinet called "Ecologically Sustainable Development."¹² This paper provided the launching ground for ongoing policy initiatives by the Australian government throughout 1991. The government is pursuing the policy of sustainable development within the economic vocabulary of "cost benefit analysis" and "best available technology."¹³ Concomitant with the government's utilitarian approach the government is also seeking to incorporate *prima facie* antithetical social objectives of equality and concern for future gener-

9. For a description of the Bhopal incident of 1984 and its implications for ethical decision-making within corporations see M. Velasquez, *Business Ethics*, 3-6 (1988).

10. Australia has nine separate legal jurisdictions; the Federal level, six States and two mainland territories, each with its own courts and parliament. The federal constitution, known as the Commonwealth Constitution, gives the federal parliament specific, enumerated powers under which it may exclusively or jointly with the States, pass legislation. All other (unenumerated) legislative powers reside in the state and territory legislatures. There is no specific commonwealth constitutional head of power giving capacity to the federal parliament to pass environmental legislation, but the federal parliament has effectively done so under other Commonwealth constitutional heads of power, namely: external affairs (s.51(xxix)), interstate and overseas trade and commerce (s.51(ii)), the defence power (s.57(v)), the corporations power (s.51(xx)), the taxation power (s.51(ii)), and the grants power (s.96). These Commonwealth Constitutional powers give the Australian Federal Parliament power to make laws with respect to . . ." the enumerated heads of power mentioned above. The federal government has been able to effect environmental regulation if that regulation is a necessary component of a "law with respect to . . ." one of the commonwealth's enumerated powers.

11. These were later reproduced with minor amendment in the appendix to the Resources Assessment Commission Act 1989 (Commonwealth), *supra* note 22, at Appendix. Commonwealth Discussion Paper, *Ecologically Sustainable Development*, (ESD), Department of Prime Minister and Cabinet, (Australian Government Printing Service, Canberra Australia, 1990).

12. Commonwealth Discussion Paper, *Ecologically Sustainable Development*, (ESD), Department of Prime Minister and Cabinet, (Australian Government Printing Service, Canberra Australia, 1990).

13. *Id.* at 15-19.

ations.¹⁴ To this mixture of utilitarian and equity perspectives, the government also seeks to incorporate a general deregulatory thrust into its proposals for an environment strategy. This approach seeks to placate the neoliberal and public choice theorists' suspicions of government regulation of individual behavior. The result is a definition of sustainable development that has the appearance of a cross-referencing of different philosophical and cultural values. Until now, these values have been portrayed as mutually opposing, because the practical outcomes have been antithetical to one another.

This article uses the Australian federal government's 1990 discussion paper on ecologically sustainable development to illustrate the effects of juxtaposing economic rationalism and environmental ethics upon government policy proposals for environmental regulation. Part I examines the normative positions of environmentalism and developmentalism in Australia and the economic and political positions from which they are derived. Part II considers the convergence of these two approaches in the Australian federal government's legislative and policy instruments which seek to ensure sustainable development. These opposing ideologies are placed within the contemporary Australian political and economic context which is strongly influenced by libertarian liberalism. Liberalism of the 1980s and 1990s seeks to deregulate values of liberty and choice of, and for, the individual citizen and apply the market economics approach to environmental regulation. Somewhat surprisingly, despite the government's laissez-faire approach, a dimension of equity or distribute justice has also been incorporated as part of the Government's policy objectives for sustainable development. Part III suggests that environmental regulation, by placing different and competing normative positions on equal footing, creates a mixture of values. These competing values fail to provide a functional environmental strategy. Part IV suggests that whether a national environmental strategy is coherent and functional depends ultimately upon which values are prioritized.¹⁵ In other words, governments must take the political risk to rank values.

14. Classical utilitarianism was formulated in the 1700s by Jeremy Bentham, who said that "nature has placed mankind under the governance of two sovereign masters, pain and pleasure The principle of utility recognises this subjection, and assumes so for the foundation of that system, the object of which is to near the fabric of felicity by the hands of reason and law", in *An Introduction to the Principles and Morals and Legislation*, (Burns & Hart eds. 1970). See also Bentham's *Theory of Legislation* 3-5, (C.M. Atkinson ed, 1914). Original Bentham utilitarianism has evolved since the 1970s into the law and economics, school of jurisprudence. Contemporary utilitarianism converts the happiness and pain principles into the economic equation of willingness to pay for a particular outcome. See R. Posner, *Economic Analysis of Law* (3rd ed. 1986).

15. W. Gormley, *Human Rights and Environment: The Need for International Co-operation* (1976) said: "The clash between the need to conserve resources and to preserve existing . . . life . . . must, regrettably, compete with the requirements of development. It is essential that this "head on clash" not be minimized because of the interest of the world community in both (environmental) "protection" and (economic) "development."

A ceaseless balancing act of values provides no real solution whilst the problem continues to be defined within political and economic terms, rather than the ecological imperatives being placed as the primary concern. The lack of consistent legal standards by which to measure the relative merits of competing interests means environmental issues are dealt with as ad-hoc political decisions that are guided by economics, not ecology. The balancing of economic against noneconomic interests, present day costs and benefits against consequences upon future generations, and individualism against collective interests must eventually evolve to a choice between values if sustainable development is to acquire a meaning beyond mere rhetoric. This choice must also be capable of actualization in a flexible way that is able to respond to the unending variety of environmental problem situations.

PART I DUALISM AND THE MORAL CONCERNS OF THE ENVIRONMENT DEBATE

For much of the last 20 years, debate over the environment in Australia has been portrayed within the vocabulary of dualism of environmentalism and developmentalism. Environmentalists advocated environmental controls and were considered by their opponents to be advocates of a steady state economy.¹⁶ However, environmentalists argued that the purpose of environmental regulation was to affirm the collective morality of a society which saw environmental degradation as evidence of society's failure to live up to its moral ideals.¹⁷

On the other side were the developmentalists. The developmentalists justified resource development as the means for national and local economic growth. Their assumption was that environmental problems arose out of inefficient use of resources. Thus, environmental problems could be addressed by industrial efficiency and prosperity.¹⁸ While both views have their own inherent moral, political and economic assumptions, these assumptions were rarely aired as part of the debate.¹⁹

Political responses to this history of dualism did little more than mirror it. Politicians were either for or against the environmentalists and therefore for or against the developmentalists. During the 1970s and early 1980s, which were relatively good economic times in Australia, environmentalists had little incontrovertible empirical evidence to support their

16. The seminal literature on "economics as if people mattered" is E. Schumacher, *Small is Beautiful* (1974).

17. R. Andrews, *Cost Benefit Analysis as Regulatory Reform in Cost Benefit Analysis and Environmental Regulations: Politics, Ethics, and Methods*, D. Schwartzman, R. Liroff and K. Croke, eds., Washington, The Conservation Foundation, 107, 112, (1982) cited in M. Sagoff, *Rationality in Environmental Law*, 14 *Ecology Law Quarterly* 265-26 (1987).

18. W. Baxter, *People or Penguins? The Case for Optimal Pollution* (1974).

19. The unspoken assumptions behind different positions in the environmental debate has been a phenomena observed also in the United Kingdom. See K. Milton, *Interpreting Environmental Policy: A Social Scientific Approach*, 18 *Journal of Law and Society* 4 (1991).

urgings. Consequently, environmentalists were classified by vocal developmentalists as a (mostly) urban interest group who had no real grasp of the resource and conservation problems in Australia.

Towards the end of the 1980s, however, it was clear that environmentalism of some form was here to stay as a political force in Australia. Environmental concerns moved from left-wing politics into the middle and right. This was due to a variety of causes of environmental degradation including soil degradation resulting from decades of pastoral mismanagement, salination of vast tracts of land along the Murray River which had hitherto been rich agricultural areas,²⁰ and air pollution and effluent problems in the major cities. The warmest decade on record convinced policy makers that Australia could not remain in comfortable isolation from environmental effects such as global warming.²¹ It was clear that certain types of environmental practices if continued could cause permanent economic disadvantages. The search for a middle ground was on to satisfy the political forces behind the developmentalists. Naturally, the middle ground needed to be within the economic model of Western capitalism. But, most importantly the middle ground needed to be committed to more appropriate behavior toward the environment and resources if the problems of environmental damage due to misuse of resources were to be taken seriously.

PART II AUSTRALIAN FEDERAL GOVERNMENT APPROACHES TO SUSTAINABLE DEVELOPMENT

In Australia, the contemporary search for *rapprochement* at the federal government level can be identified in both legislative and policy mechanisms. Both the legislative and policy initiatives of the federal government show that the government has recognized and incorporated concerns that had been labeled as environmental and developmental. In 1989, Parliament set up the Commonwealth Resource Assessment Commission to advise the commonwealth government on resource issues that the Prime Minister referred to the Commission.²² The Parliament incorporated the "Policy Principles for Resolving Competing Claims for the Use of Resources" that had been announced in 1989 in the enabling legislation for the Resource Assessment Commission. These principles dictate that:

20. The Murray River flows through three states of Australia and plays a critical role in allowing agricultural uses in otherwise arid and semi-arid regions as it is the only waterway in those regions.

21. See, for example, Schneider, *The Green House Effect: Science and Policy*, 243 Science 771 (1989).

22. Resource Assessment Commission Act, No. 94 (1989) (Commonwealth of Australia).

1. There should be an integrated approach to conservation (including all environmental and ecological considerations) and development by taking both conservation (including all environmental and ecological considerations) and development aspects into account at an early stage.
2. Resource use decisions should seek to optimize the net benefits to the community from the nation's resources, having regard to efficiency of resource use, environmental considerations, 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, recognizing that in some cases both conservation (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.²³

By balancing competing values, these policy principles suggest that the Australian federal government is incorporating economic and social considerations into its definition of sustainable development. However, the values identified have been categorized within the already-existing dualist vocabulary. Environmentalism includes "all environmental and ecological considerations." Developmentalism draws upon the economic theory of "optimis(ing) the net benefits" based on "efficiency" models of government regulation. After "nature" and "profit" have been addressed, the collective good is addressed by ensuring that resource use decisions result in what is vaguely described as an "equitable distribution of the return on resources."²⁴

In mid-1990, the federal government initiated a wider debate upon the meaning and effect of sustainable development by releasing a discussion paper titled "Ecologically Sustainable Development."²⁵ This document considered a variety of practical methods to assess environmental effects of resource use. More fundamentally, it has drawn up a variety of normative rationales used to justify the role of government in ordering the lives of individuals. In the discussion paper, the government

23. *Id.* at Schedule 1.

24. Thus far, the Resource Assessment Commission has released reports upon mining at Coronation Hill in the Kakadu National Park, Northern Territory (Report of the Resource Assessment Commission into the Kakadu Conservation Zone, Australian Government Printing Service, Canberra, Australia 1991) and Australia's Forest and Timber Resources (Report of the Resource Assessment Commission into Australia's Forest and Timber Industry, Australian Government Printing Service, Canberra, Australia, 1991).

25. ESD, *supra* note 12.

stated that the goal of government is to ensure the "improvement of the community standard of living . . . viewed in a broad sense of (not only) income levels or the consumption of goods and services (but also) the environment, social justice, and personal freedoms."²⁶ Environmental and economic goals are to be linked to "take count of the Government's social justice policies and Australia's place in the world."²⁷

Against this philosophy of promoting an aggregate good, termed within the paper as "equality of opportunity and social justice for all Australians",²⁸ it pitches the liberal model of individual freedom. The classical liberal model is based upon the normative philosophy that each individual must be free from government regulation so that she or he may make unfettered choices about her or his (economic) behavior. The discussion paper's authors say that "in a democratic society, there is the issue of how much (or how little) regulation of or intervention in peoples lives is appropriate."²⁹ The authors do not attempt to specifically address these philosophical apposites. They simply assert that the primary goal of government is to "set[ting] acceptable standards in consultation with other levels of government and other groups in the community", to ensure that the principles of ecologically sustainable development are applied to "all areas of economic and environmental decisionmaking, from those made by individuals to those made by governments."³⁰

Like the 1987 World Commission's Report on Environment and Development, the two federal government initiatives represent more than a statement upon ecology and resources and development. These initiatives represent normative positions that seek to bring economic and political perspectives within one broader rationale encompassed by the term "sustainable development."³¹ The distinct underlying philosophical positions of sustainable development are not clearly articulated, but remain as mostly unspoken presuppositions that represent arguments from both the environmentalists view and the developmentalists. The outcome of this conjunction of moral purposes will be examined later when canvassing the recommendation of the first report of the Resource Assessment Commission.³² To understand the extent of the philosophical debate, it is first necessary to understand the fundamental values that underscore these disparate philosophical positions.

26. *Id.* at 1.

27. *Id.* at 2.

28. *Id.* at 27.

29. *Id.* at 27.

30. *Id.* at 10-11.

31. For a history of the term "sustainable development", see E. Barbier, *The Concept of Sustainable Economic Development*, 14 *Environmental Conservation* 102 (1987).

32. See *infra* notes 83, 84 and 87 and accompanying text.

PART III THE PHILOSOPHICAL POSITIONS BEHIND THE PROPOSALS

Five options for government policy and legislative changes are identified in the federal government's discussion paper on ecologically sustainable development:

1. improvement in market operation;
2. direct environmental regulation;
3. better information and analysis;
4. research and development;
5. public education.³³

Of these, market-based measures were most emphasized. Using the market place as the engine room of change in environmental resources use, the authors suggested that price-based measures and rights-based measures would be the most effective means of implementing improvements in market operation: "[M]arket-based measures . . . change the relative returns on activities that are environmentally benign and those that are environmentally damaging. Or they may create efficient markets where none presently exists. Individuals and firms are then left to make their own decisions about what measures they will take to respond . . ." ³⁴ Both price-based and rights-based measures are mechanisms founded upon the basis of driving home the cost of environmental damage to the end-user on the principal of polluter pays. The polluter may be either the producer or the consumer. Price-based measures such as charges and subsidies have been suggested by environmental economists throughout the 1980s as incentives for long-term resource management. Environmental costs and benefits which consequently work to alter the ultimate price of the product are internalized.³⁵ Other incentives include royalties, taxes on resource use, charges on pollution, noncompliance fees, and compulsory insurance to compensate the victims of environmental damage. The discussion paper proposes a valuation of environmental assets that includes "ecological, aesthetic and ethical" components as well as economic components.³⁶ The paper suggests that "[r]esources that are free or underpriced tend to be abused" or overused.³⁷

Rights-based measures could create rights to use environmental resources or to pollute the environment up to a predetermined limit. These rights could be traded with others.³⁸ No differentiation was made in the discussion paper between private and communal property rights.

33. ESD, *supra* note 12.

34. *Id.* at 13-14.

35. *Id.* at 14.

36. *Id.* at 4.

37. *Id.*

38. *Id.* at 15.

Where it proved impossible to prescribe a monetary value to environmental damage, the discussion paper suggests direct governmental regulation may be required, although this is less preferred than market mechanisms.³⁹

The federal government's reliance upon market-based measures, such as taxes, market incentives, and assignment of property rights in natural resources, illustrates the extent to which the Australian government perceives that environmental change and economic dynamics are inextricably entwined. The use of economic terms has become a phenomenon of Australian government and politics to an extent that would have been unthinkable even 15 years ago. This use of the vocabulary of economics is a key feature in the policy approach to environmental regulation in pursuit of sustainable development.

The incorporation of indirect social costs, or externalities, in product-costs adopts the social accounting of contemporary utilitarian economics; the twentieth century response to Benthamite utilitarian philosophy.⁴⁰ In the twentieth century, original nineteenth century utilitarian terminology has been replaced by new economic terms, such as the cost-benefit analysis in commodity pricing.⁴¹ The weighing of costs against benefits has been used to ascertain the most economic, or efficient, way of mobilizing existing resources in a way that appears to exclude moral and philosophical considerations.

Australia is not alone in adopting this social accounting approach to policy objectives. The emergent democratic and egalitarian governments of this century have been attracted to the seemingly impartial rationality of the utilitarian model.⁴² These governments express concern for both individual and collective welfare. The utilitarian model requires recognition of social interests defined as collective interests, although it is an individualistic philosophy in that it counts the welfare of each individual in order to ascertain the collective welfare.

Contemporary government intervention and regulation seek to serve general welfare by operating efficiently and rationally.⁴³ Cost benefit analysis and the welfare economic theories of Marshall, Pareto and Pigou share the same roots.⁴⁴ Under the cost-benefit equation, harm to

39. *Id.* at 16.

40. J. Bentham, *The Principles and Morals of Legislation* (1788).

41. The most simplistic economic model for cost benefit analysis is called the Kaldor-Hicks criteria, which requires that the monetary benefits of a policy should not exceed its costs. See generally D.W. Pearce, *Environmental Economics* (1976).

42. Sagoff, *supra* note 17. Sagoff points out that the proponents of the market approach have not been able to show why efficiency is a social value in the first place. He questions whether preference satisfaction ascertained on the "willingness to pay" principle has a justified place in the formation of public policy. *Id.*

43. For an argument that legal rights under utilitarian theory are antithetical to moral rights, see David Lyons, *Utility and Rights*, in *Theories of Rights* (Jeremy Waldron ed., 1984).

44. A. Marshall, *Principles of Economics* (1890), C.A. Dyon, *Wealth & Welfare* (1912); Vilfredo M. Pareto, *Manual of Political Economy* (latest translation 1970).

society is measured by the costs of decline in overall economic welfare. Pigou's scheme internalizes external costs so as to restore social optimality. Environmental problems are defined as external diseconomies that drive a wedge between social costs and benefits and private costs and benefits. Theoretically, by putting a market price on resource use, the government should be able to directly change patterns of resource use.

"Rationality" is defined as a state in which each individual or group is activated only by self interest.⁴⁵ Marshall explained human behavior in terms of a perfectly competitive market. Such a market will gravitate towards "natural equilibrium" as each person values the utility of a commodity by the price they are prepared to pay for it.⁴⁶ The extension of the theories of Marshall, Pareto and Pigou to account for environmental problems has put environmental aspirations within the framework of rational economic man who seeks only to increase his own net happiness. Monetary measures thus form the world view of environmental policy makers within this model.

Price-based measures have been a standard form of environmental control by governments in Europe and the United States for at least a decade. As an accepted means of government control, price-based measures have as an established bureaucratic formulae for policymakers to implement.⁴⁷ Price-based measures follow the Pigouvian tradition, which suggests that a market failure represents the existence of an externality where the absence of a true market price has worked to block the attainment of Pareto optimality.⁴⁸ Where there is no naturally occurring market mechanism that automatically acts to place a price upon resource use or resource pollution, a government can fill this gap by imposing environmental taxes and other charges. The proponents of tax and charge-based mechanisms argue that the use of price-based measures will induce organizations and firms to innovate. Technical progress reduces the firm's costs and ultimately reduces the costs of environmental and resource use to society.⁴⁹ Thus, classical price theory in which diminishing supply leads to increased demand for alternative commodities in order to achieve market equilibrium appears to have been assumed by the authors of the government's discussion papers.

The assumptions about human behavior which underlie the economic model of environmental taxes and charges is that an individual's reactions and choices can be reliably predicted upon the basis of informa-

45. F. Edgworth, *Mathematical Psychics* (1881).

46. Marshall, *supra* note 44.

47. See generally V. Kerry, *Environmental Policy under Reagan's Executive Order* (1984) and *Environmental Policy in a Market Economy* (F. Dietz and W. Heijman eds., Pudoc Wageningen 1988).

48. In a state of Pareto optimality, the welfare of one individual cannot be improved without harming the welfare of at least one other individual. See Pareto, *supra* note 44.

49. F. Majone, *Standard Setting and the Theory of Institutional Choice: The Case of Pollution Control*, 4 *Policy and Politics* (1976).

tion that is available to that choice-maker. If people have information that an environmental tax will increase the costs of certain behavior, people will, it is assumed, reliably choose to adopt the least expensive option. To be fully effective under this model, the initial height of a charge or tax will depend upon the expected reactions of resource users and will need to be adjusted to react to real behavioral outcomes. To be fully effective, taxes and other monetary incentives and/or penalties that encourage avoidance of environmentally damaging activity need to be set at a rate higher than the costs of investing in other capital expenditure. If environmental penalties are set at a lower rate, a firm may prefer to pay taxes on pollution and resource consumption and use, rather than lose an opportunity to invest in other capital equipment that will increase the cost of production.

Coase suggested that the transaction costs incurred by government intervention in the market, whether directly or indirectly, may cause the costs of ensuring that an activity is not environmentally damaging to exceed the actual monetary cost of the damage caused.⁵⁰ Coase suggests that transaction costs, such as litigation, the costs of identifying and quantifying resource use, and the costs inevitably incurred in the framing of and ultimate enforcement of property rights, may impose a burden upon use of a resource so as to make the entire procedure inefficient, no matter who bears the legal right or obligation in each case. Under the Coaseian model, the most economically efficient outcome is that no legal rights should be assigned to resource use.⁵¹ That is, it may be preferable not to regulate resource use, as the costs of regulation to preserve or conserve resources may itself cost more than the worth of the resource. Putting the difficult aspect of valuing environmental resources in monetary terms to one side, Coase has firmly established the importance of law and economics as concomitant partners in this theory.⁵² The tremendous importance placed upon economic models by policymakers explains the almost exclusive use of economic vocabulary in contemporary responses by policymakers to environmental concerns.

As with a system of price-based mechanisms, a system of rights-based measures seeks to incorporate social costs within the market price of commodities that carry environmental consequences. At the same time, the rights-based system examines who owns resources and who is entitled to charge for their use. The discussion paper's suggestion goes no further than stating a belief that rights-based measures will inculcate a sense of responsibility in the proprietor of a particular resource. This sense of

50. R. Coase, *The Problem of Social Cost*, 3 *Journal of Law and Economics*, (1960).

51. A.M. Polinsky, *An Introduction to Law & Economics* 13 (1989); R. Malloy, *Law and Economics*, 334-37 (1990).

52. For a history of the effect of the Coase theorem upon law and economics, see D. Posin, *The Coase Theorem: If Pigs Could Fly*, 37 *Wayne Law Review*, 89 (1990). Posin also contends that the Coase theorem is "wrong as a matter of straight forward micro economic theory" *Id.* at 93.

responsibility is assumed to be an immutable quality that is uniform among property holders, universally consistent and susceptible to change only when there is a more economically efficient alternative to property ownership. While not specifically addressed, the paper is premised upon the assumption that a proprietary interest in property will automatically increase the efficiency of property or resource use by the resource holder to the level demanded by sustainable development. The Australian discussion paper relies upon ego-centered concerns as the goal of individuals, where the primary motive is personal monetary gain. The predictability of this behavioral response of individuals to produce results which are collectively beneficial is assumed and unchallenged by the paper's authors.⁵³

The orthodox economic argument for attaining efficiency through property rights has three necessary conditions: universal ownership of scarce resources, exclusive property rights in remaining resources and transferable property private rights.⁵⁴ Transferability is important because it allows the property holder to capitalize upon expenditures in her or his property sale or transfer of the right. The property rights literature regards well-defined private property rights as more efficient than communal property rights, as these rights provide the best incentives for individuals to make the best use of their resources.⁵⁵ Calabresi and Coase have placed emphasis upon the way in which economic agents can be influenced by market or economic incentives, and both emphasize the economic choice theory of rational economic man acting within an ideal market.⁵⁶ As in the case of price-based mechanisms, the premise of rights-based measures is that individuals are motivated most profoundly, if not exclusively, by self-interest and profit. Therefore, the best way of ensuring the continuing, efficient use of land is to give an interest in it which can be sold, traded or transferred. However, existence of free riders to resources that cannot be appropriated, such as air and water, provides another justification for state regulation of such goods.⁵⁷ Thus, even law and economics theorists must at least acquiesce to the environmentalist argument that market forces and public choice do not necessarily bring about sustainable development.⁵⁸

The extension of economic paradigms based on the rational choice theory to address environmental degradation has created a new

53. Milton, *supra* note 19.

54. F. Stephen, *The Economics of the Law* (1988).

55. G. Hardin, *The Tragedy of the Commons in Ethics and Population*, M.D. Bayles.

56. G. Calabresi & A. D. Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 *Harvard Law Review*, 1089 (1972); R. Coase, *The Problem of Social Cost*, 3 *Journal of Law and Economics*, (1) (1960).

57. Lyons *supra* note 43.

58. M. Redclift, *Economic Models and Environmental Values in Sustainable Environmental Management* 53 (Economic and Social Research Council ed, Pinter Publishers 1988).

field of economics. Bioeconomics is a growing sub-specialty of economics.⁵⁹ The belief in individual motivation is fundamental to the Australian federal government's preference for market-based measures in forming its sustainable development strategy: "... rights [ensure] that users have an incentive to consider the longer term and to manage those resources sustainably."⁶⁰

The same behavioral assumptions are made about the effect of price-based measures under a system of pollution rights, where a permissible level of pollution is assessed by government and rights to pollute up to this amount are sold on the market. Those needing to discharge pollutants seek to buy the rights. The cost of the right is determined by market forces, i.e., the individual institutional cost of pollution discharge and total market limits on, or capacity to sustain, pollution discharge. Presumably, those who have high costs of pollution abatement will more avidly seek pollution rights. Those who can economically process their pollution via their own technical initiatives would presumably choose to do so to avoid the costs of buying pollution rights.⁶¹

The alternative aspects that may influence resource use, such as tradition and custom, advertising and fashion, have little or no bearing upon the theory of economic charges for resources. The use of the perfect market, inhabited by perfectly rational economic man, means that interest, aspiration, altruism and desire are assigned a single monetary value. This economic theory does not examine the connection between the charge or tax and the belief system of the resource user. This theory fails to recognize that the motivation of people and firms may include other commitments, such as contract obligations to pay off recently purchased equipment or to promote union lead work practices and so on. Arguably, these seemingly noneconomic considerations may prevent a decision-maker from making a rational or efficient decision in order to either consume less of the resource that is being taxed or, alternatively, to innovate so as to increase resource productivity from the same level of resource consumption.

Recent empirical investigations into the results of environmental charges have shown that environmental charges do not necessarily prevent environmental misuse.⁶² This result is unsurprising given that the success of market-based approach depends on only one form of behavior—the single-minded pursuit of profit. Furthermore, while market measures may encourage resource use that is more sustainable than previ-

59. D. Pearce, Inaugural Lecture, University College, London, 1985, D. Pearce, A. Markandya & E. Barbier, *Blueprint for a Green Economy* (Earth Scan Publications, 1989); D. Pearce & R. Turner, *Economics of Natural Resources and the Environment* (Harvester Wheatsheaf, 1990).

60. ESD, *supra* note 12 at 15.

61. For a fully argued case of a system of pollution rights see J. Dales, *Pollution, Property and Prices* (1968).

62. *Incentives for Environmental Protection* T. Schelling.

ously, there is no guarantee that resource use will become *sufficiently* sustainable. It begs the question of a definition of sustainable development that ensures ecologically sustainable development to seek a precondition of economically sustainable development. The mathematical approach to individual motivations in the economizing of environmental regulation confirms the "... frequently caricatured picture of homo economicus as an omniscient, infinitely calculating, egotistical maximizer."⁶³

The heavy dependence upon the vocabulary of economics in the context of environment regulation reflects concern about the economic times during which sustainable development is being debated. This debate carries within it several opposing dimensions. The fashion in Australia in the late 1980s and early 1990s has been to describe all manner of political concerns in the economist's jargon of efficiency and market failure. The impetus for econo-speak has come from the economic rationalists who point to the (undefined) utopian days of deregulation. The economic rationalists have captured the political ground not only of the Right, but also the Left, as the boom-bust nature of the Australian economy over the last 15 years has given way to long-term economic downturn.

Traditional Keynesian orthodoxies that provided a normative rationale for direct government intervention and regulation in the past are now under close scrutiny and question. The present drive for deregulation is deeply influenced by factors that have been at the heart of the public's perception of the role of government since the beginning of the recession in Australia from the late 1980s. The combination of monetarism and supply-side incentive effects in industry that are part of economic rationalism's armory have played a large role in recent policy implementation. Classical liberal philosophy which defines freedom within the relationship of the individual and government, assumes that the market is a central force in the lives of individuals. Classical liberal philosophy therefore assumes that the market forms the normative conditions for legitimate government intervention.

More recently, policy has been guided by neoliberal liberals who see an active market as the only means of guaranteeing traditional negative political liberties.⁶⁴ The ideal market supposedly allows for efficient resource exchange within a system that protects the paramount freedoms of freedom of choice and private property rights. Even so, the libertarian branch of liberalism sees cost-benefit analysis as a stalking horse for unwarranted government intervention.⁶⁵ Notwithstanding that self-equilibrating markets remains a theoretical rather than practical reality,

63. A. Hamlin, *Ethics, Economics & the State* (Wheat Sheaf Books, 1986).

64. For a full discussion of this aspect of the U.K. and U.S. political values of the 1980s, see G. Thompson, *The Political Economy of the New Right* (Pinter Publishers, London, 1990). The neo-liberal position of the New Right has its Australian equivalent in the Liberal/Coalition "think tank", the Institute for Public Policy.

65. T. Machan, *Pollution and Political Theory* in T. Regan, *Earthbound: New Introductory Essays in Environmental Ethics* 98 (1979).

the mixed economy of Britain during the 1980s and "Reaganomics" during the same period in the United States saw market solutions as an ideal, to be supplemented by social welfare solutions only in cases of overwhelming market failure. The weighing of costs against benefits was used to ascertain the most efficient and most economical way of mobilizing existing resources. The need for market correction by government in particular instances reinforced the paradigm of the market as a self-regulating entity rather than as the explanation of exchange in capitalist systems that it is.

The interest by Western governments in the 1980s to incorporate the language of economics into the language of politics has supported the use of cost-benefit analysis in solving environmental issues. Environmental concerns have been pitched into the resurgent faith in laissez-faire market values. Because the calculus is economic, *prima facie* moral and philosophical considerations are excluded. The so-called neutrality of economic equations is far from impartial, though. The calculus is a value-laden process. It assumes that individuals wish to make their environmental choices through the market process, rather than the political process. It assumes that individuals consent to any of the outcomes that result from either the actual free market economy, or the pseudo-free market (government-created) economy.⁶⁶ Thus, government is defining "sustainable development" more in terms of present political and economic conditions in which it exists, rather than in terms of the ecological circumstances which acted as its catalyst.

The Australian government's discussion paper on ecologically sustainable development suggests that economic growth and environmental objectives are mutually reinforcing. The government sees pre-existing market mechanisms, together with government designated property rights and government-set environmental standards through the use of monetary incentives, as the solution to environmental problems that are themselves the product of inefficiently operating markets. In other words, the papers authors take the view that if the ephemeral perfect market were facilitated by a government that saw its proper place as the umpire, rather than a participant, in the market, environmental problems would cease to be problematic.⁶⁷ Self-interested individuals, the authors assume, would prefer to act in ways that are universally and collectively beneficial, provided that they have appropriate economic rules to guide them. The umpire's role, it is suggested, is merely to identify the necessary boundaries for fair use of resources by setting standards for resource use. The

66. See Coleman, *Ethics and the Law: a Critical Review of the Formulations of the Economic Approach to Law* 94 *Ethics* 649, 671-77 (1984) cited in Sagoff, *supra* note 17 at 277.

67. For a persuasive argument upon the "market" as a theoretical fabrication, see J. Goldring, *The Common Law and the Free Market: Some Reflections on the Use of Theoretical Models and the Place of Externalities*, 12 *Bulletin of the Australian Society of Legal Philosophy* 147 (1988).

Australian federal government thus defines its role as one of setting the standards for appropriate use of the environment. This use of market measures is inextricably linked with a government approach of managed capitalism that (paradoxically) seeks also to pursue a deregulated export and import market.⁶⁸ The object of deregulating the import-export market is held up by government as a means of ensuring competition parity with other international markets and, the discussion paper suggests, provides the link with ecological sustainability.⁶⁹ The extended cost-benefit analysis scheme of accounting for social and aesthetic environmental factors, together with property rights of purchased environmental use, presuppose the market place as the *locus* of environmental solutions.⁷⁰

The adoption of a definition of sustainable development based on market theory by an Australian Labour federal government whose political agenda favors equity is at first sight puzzling. But this tension is a measure of the robustness with which political forces have been influenced to set the policy agenda to include the virtues of competition. Policy-makers perceive that preference for procedural change, rather than direct substantive regulation, to protect the environment is a compromise between the opposing forces of environmentalism and developmentalism.

The Australian government is attempting to formulate a policy on sustainable development that will satisfy its general policy objective of deregulation but by means that necessarily involve substantial market intervention. Environmental conservation and preservation in the form suggested must ultimately be enforced by central control mechanisms, albeit under the guise of indirect regulation that is comfortingly phrased in market-place vocabulary. While economic instruments of market-based measures designed to ensure positive environmental outcomes may themselves require legislative backing,⁷¹ the government unquestionably preferred indirect environmental regulation over direct regulatory mechanisms. The government's preference arises from its perception that market-based measures provide a "continuing incentive" to resource-users to identify and adopt more efficient ways of obtaining a given environmental standard or in spurring efforts to achieve "progressively better standards."⁷² Of course, direct legislative regulation, backed with the usual

68. ESD, *supra* note 12.

69. *Id.*

70. Cost-benefit analysis and the market model have been attacked on grounds other than its lack of evidence of support by citizens as a justification for government regulation. It has been suggested that the "preparedness to pay" principle is too ambiguous as there is an unpredictable disparity between people's preparedness to pay on the one hand and their willingness to sell on the other. This disparity points up the value-laden nature of cost benefit analysis. See D. Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 *Stanford Law Review* 387 (1981).

71. ESD, *supra* note 12.

72. *Id.* at 14.

coercive mechanisms of legal sanctions such as penalties, may be just as "continuing" an incentive as indirect measures. The unspoken, but nevertheless clear, direction of the authors of the discussion paper was to pursue the political policy approach of deregulation that has been a feature of United Kingdom⁷³ and American Governments⁷⁴ approach during the 1980s. De-regulation is increasingly a feature of Australian federal politics.

Quite apart from the issue of whether government intervention in environmental regulation when dressed in market-place vocabulary is in fact any less an attack on individual liberty and choice than direct legislative regulation, the tension remains between the Australian government's drive for deregulation and market mechanisms in its environmental strategy and its emphasis in the discussion paper of the fundamental place of social equality as its political goal. This tension can to some extent be resolved by understanding that social equity within the welfare economics paradigm also incorporates the belief in markets as a naturally occurring self-regulating entity.⁷⁵

The nexus between neoclassical welfare economics and the market lies in the way in which maximizing aggregate happiness justifies government intervention. Government intervention in the market is legitimized if it seeks to improve the ability of individuals to make their own choices. By defining efficiency within the rational choice model, economists assume that a free market will ensure the collective ideal of social equity. Because the aggregate good equals the social good, society favors individual behavior that seeks to improve individual happiness because that behavior incidentally increases the aggregate good. Policy makers and society can justify government intervention to correct market failure because efficient allocation of resources achieved by government still preserves the desirable qualities of the free market.

PART IV CAN COHERENCE ARISE FROM CONTINUAL BALANCING, OR MUST A CHOICE BE MADE?

Whether environmental regulation takes the form of direct controls or indirect controls in the form of incentives to resource users, the fact remains that those controls are set by government. Market mechanisms must be regulated to the extent required to ensure that broader social costs are included in commodity prices. The so-called natural equilibrium of the market has not managed to achieve this goal as part of its natural force yet. As demonstrated earlier, sustainable development requires assistance and intervention from an external force to avoid the free rider problems. The

73. G. Thompson, *The Political Economy of the New Right* (Pinter Publishers, 1990).

74. Kerry *supra* note 47.

75. Goldring *supra* note 67.

paradox of such a situation is that imposition of external, institutionalized market operations cannot, by definition, be a deregulated resources market.⁷⁶ To place the values of collective welfare in monetarist vocabulary pre-supposes the "valuation" of environmental "assets" by government and policymakers. Government-led and enforced alteration of environmental practices that ostensibly has its genesis in collectivist notions of aggregate good cannot be effectively contained within the *laissez faire* terminology of "the market" cannot alter the interventionist nature of subsequent government action. It has been said of that the classical liberal celebration of the market and its roots in freedom of the individual and *laissez faire*:

"[t]he most profound delusion gripping contemporary liberals and rationalists is the idea that firm opposition to a politics of the common good can be sustained without inviting the regimentation and repression to which they are militantly opposed."⁷⁷

Implicated in the preference for the market and private property rights is the normative view that the proper role of government is to merely set rules. Financial incentives are assumed to motivate individuals and it is also assumed that individual wealth-maximization is the single most compelling activator of people's actions. The values of prosperity and economic growth for both individuals and governments are paramount, however. Thus the Australian federal government's use of the term ecologically sustainable development maintains the fiction of the market as a self-equilibrating entity. The term also maintains conceptually the link between private property, market capitalism and economic growth that has dominated modern economic theory.

The justification discussed above for using market-oriented policy tools and property rights solutions to address environmental problems places protagonists of these market-based approaches in opposition to policies of direct regulatory mechanisms. These protagonists are joined by those who prefer a de-regulated economy, but on different grounds—namely, individual liberty, rather than market efficiency. The underlying value systems of these who base their views on liberty interests need to be identified to assess the value of such "freedom."

In its most extreme form, the economic approach to environmental regulation is a component of a libertarian style of government. The proponents of either the "efficiency" or "liberty" models of government regulation describe a society in which the individual's self-interest can be predicted and is quantifiable. Some have said that ". . . labor market

76. Contrast L. Chipman, *Liberty, Justice and the Market* (Centre for Independent Studies, Occasional Papers (6) 1987).

77. W. Connolly, *Appearance and Reality in Politics* (1981).

reform, tax reform, monetary discipline and a smaller role for government in enterprises and regulation are the real key to future prosperity",⁷⁸ for governments that apply a "command and control" approach of government ownership of property and provision of services are incapable of anything other than incompetent, overly bureaucratic and inefficient services.⁷⁹ The view that institutions are inherently unable to pursue the espoused goal of the institution incorporates the public choice theory of Tulloch and Buchanan.⁸⁰ In other words, because individuals are motivated primarily by self-interest, their primary interest as workers in an institution is to re-enforce the role of the institution and thus ensure each individual's own continued existence within it.⁸¹ The public choice approach to government intervention has added to the neo-liberals' suspicion of government to the point that neo-liberals consider a results-oriented approach unjustified except in those cases where the argument for government intervention is overwhelming.

The arguments of the neo-liberal and public choice theorists' against government ownership and control of environmental resources rests upon perceptions of institutionalized objectives that reflect political and institutional goals. Similarly, economic rationalists seek to justify their view by espousing the objective and empirically provable existence of "the market." Common to all views is the belief that social order obtains better when government is small. Environmental standards that achieve true efficiency and provide individuals with the opportunity to freely exercise the full range of economic choices will present themselves, they would argue, when government does not intervene in their lives. These views are fueled by the dread of governmental coercion and the ghost of popularized views of anti-democratic societies. These anxieties are no doubt further kindled by the political manifestos of some of the European environmental political parties which emphasize the equitable distribution of the benefits of economic growth. Nothing could lie in greater contraposition to the neo-liberal view than the political ideology of the German *die Grünen* party. The argument for a market driven approach to environmental regulation is described with ominous emotion by pointing to the extreme environmental damage that has occurred in Communist countries.⁸² But pointing to environmental damage in countries which place collective social and economic concerns ahead of individual wealth is an incomplete argument. It must be remembered that Marxist ideology

78. *Markets, Resources & the Environment* (A. Moran, A. Chisholm & M. Porter eds., 1991).

79. *Id.* at Chap. 2.

80. J. Buchanan & G. Tullock, *The Calculus of Consent* (1965).

81. Contrast Hamlin and the games theory (the "Prisoners' Dilemma") he demonstrates in Hamlin, *supra* note 62.

82. A. Moran, *supra* note 78 at 29.

is driven just as much by economic imperatives as Western liberal ideology. In Western countries, private ownership of resources has been the operative system while significant and not infrequently irreversible environmental damage has occurred to farming lands, riverways, seabeds, atmospheric conditions and mining sites. While it may well be true that government and bureaucracy-run services within the Marxist political model do not overtly benefit the environment, that is not in itself an argument for the beneficial effects of private ownership. Instead, it is a persuasive argument to develop a *new*, co-operative model of environmental concern. Under a new determinative model, power would be taken out of the hands of both governments *and* propertied individuals and placed in the care of the community.

In Australia, the Resource Assessment Commission legislation is paradigmatic of the seemingly unavoidable incongruity of the aspirational goals of legislation and the practical means of implementing those goals, when the goals and means are placed side-by-side as equal considerations. Instead, the exercise becomes one of attempting to balance "equity" with "efficiency." Despite the deployment of the cost-benefit analysis approach of utilitarianism, the Resource Assessment Commission is required to also identify aesthetic values that the legislation itself recognizes as unquantifiable.⁸³ The practical difficulty in equitably reconciling different goals is clearly demonstrated in the Resource Assessment Commission's 1991 Report into the Kakadu Conservation Zone.⁸⁴ In this report, the Commission considered the proposal to mine minerals at Coronation Hill in the Northern Territory of Australia. The Kakadu Conservation Zone is surrounded by, but not part of, Kakadu National Park, some 200 kilometers east of Darwin in the Northern Territory of Australia. The Conservation Zone is 47.5 square kilometers of Commonwealth Crown land proclaimed as a Conservation Zone under federal legislation.⁸⁵ The area is the home to a group of Australian Aboriginals, the Jawoyn, who regard the area as a sacred site. The Resource Assessment Commission was charged with inquiring into the use of resources in the Conservation Zone and considering the area's environmental and cultural values, the impact of potential mining operations on those values, the national economic significance of mining and how mining would affect the interests of the Aboriginal people.

In its Report, the Commission recognized the spiritual and cultural significance of the area to the Jawoyn people and made reference to the aesthetic values which the Commission is bound to consider within

83. Resource Assessment Commission Act 1989 (Cth) ss.88(c)(i) and (ii) and (d)(i) and (ii).

84. Kakadu Conservation Zone Inquiry Final Report (Australian Government Printing Service 1991).

85. National Parks and Wildlife Conservation Act, No. 12 (1975) (Commonwealth of Australia).

the policy principles annexed to the federal legislation that created the Resource Assessment Commission in 1989.⁸⁶ Balancing the economic benefit of mining and tourism against the less easily quantifiable benefits to Australians of leaving the area unmined was difficult enough. However, the Commission's greatest difficulty lay in how it ought to balance the wholly economically quantifiable benefits to the local Aboriginal population to leave intact an area that has for them important spiritual values. The Resource Assessment Commission was unable to do more than infer that the balancing of economic with non-economic values made for a difficult political decision.⁸⁷ The Commission emphasized the black humor of the Report of the WCED when the WCED had said in 1987 "[that] sustainable development must rest upon political will."⁸⁸

When projected to the international situation the issues remain the same. The ultimate meaning given to an environmental right to sustainable development within the human rights vocabulary suggested by the WCED will unavoidably be effected by the economic circumstances into which it is introduced. However, to consider only economic considerations would be to overlook the moral content of the use of the term "environmental right" in the Brundtland Report. An international treaty framing an environmental right as a fundamental human right seeks to do more than ensure national and international efficiency of resource-use, both human and biological. Unless the term "fundamental human right" is to be overlooked as being merely exhortative, it must be seen to represent not merely the economic concerns of the international community, but also the moral concerns of the international community.⁸⁹

The international human rights movement is essentially a post-World War II phenomenon that owes much to Marxist-influenced socialism. Paradoxically, at a time when Marxist-led political ideologies have been crumbling in Europe, the role of the United Nations as a representative of international moral feeling has gained enormous momentum in the face of international conflicts and their aftermath.⁹⁰ A more subtle distinc-

86. See *infra* note 21.

87. Draft Report of the Inquiry into the Kakadu Conservation Zone, (Australian Government Printing Service and Final Report, 1991). The Final Report, released in April 1991, abandoned the contingent valuation survey conducted to assess the monetary value that people place on the preservation of an area for their intrinsic satisfaction that the area remain undespoiled by human activities. The Resource Assessment Commission received wide-ranging criticism about their use of the contingent valuation method, ranging from, *inter alia*, concerns that survey respondents were exhibiting a "moral free lunch" to concerns that the survey methodology was flawed. Kakadu Conservation Zone Inquiry Final Report, pp.148-152 and Appendix Q.

88. See *infra* notes 2, 9.

89. Sagoff *supra* note 17. The general thrust of Sagoff's argument is further developed in M. Sagoff, *The Economy of the Earth* (1988).

90. N. Bustelo & P. Alston, *Whose New World Order: What Role for the United Nations?* (Sydney, The Federation Press, 1991).

tion between the approach to resource use within the Western capitalist model and within the Marxist model is apparent when one looks at the underlying values of the model. Neo-classical economics has attempted to incorporate environmental values by use of externalities. The Marxist approach to the environment is affected by the fundamental issue that is at the heart of Marxist thought, i.e., the distribution of resources and the consequences of that distribution on economic growth.⁹¹ The problem for the environment within classical Marxist ideology is that resource scarcity will only cease when it is no longer necessary to make commodities to produce profit. Thus, it can be seen that both classical Western economic theory and classical Marxist theory in undiluted form necessarily envisage continued use of resources.⁹² Neither model is equipped to provide a justification for the cessation of resource use if that is what an ecologically sympathetic application of sustainable development calls for.

International treaties for civil, social and economic rights attempt to set standards for laws of social policy that have their genesis in moral value. United Nations Charters written in human rights vocabulary stress the normative, rather than analytic, nature of laws. International human rights vocabulary is driven by morals, not markets. Human rights vocabulary describes the moral values which a moral society seeks to apply for the benefit not only of individuals in that community but also for the sake of the community as an integrated whole.⁹³

While this author concedes that this approach carries a certain moral and cultural arrogance, it is nevertheless an entirely different approach to the purely economic justification for laws of social policy. The economic approach sees people as bundles of preferences which market regulation can satisfy. The goals of efficiency on the one hand and the moral objectives of policy and regulations on the other hand are clearly different. This difference is not to deny the validity of either, but to underscore their different places in the regulatory process. An international human right to sustainable development has its basis not only in concerns of gross domestic product, material standards of living and appropriate prices for rainforest timber. It arises more fundamentally out of international moral aspirations that seek to emphasize the inter-dependency of each national community upon the other.

91. M. Redclift, *Economic Models and Environmental Values: A Discourse on Theory in Sustainable Environmental Management* (1988).

92. *Id.* at 61. Redclift also argues that Marxist method, with some revision of its nineteenth century contextual assumptions, has a relevant place in formulating an environmental ideology. *Id.*

93. I leave aside the argument of the relative strengths and weaknesses of an environmental right directed at the individual, but which the World Commission Report envisages to be a duty of the State to provide. See International Colloquium, *An Individual Right or an Obligation of the State?* International Colloquium on the Right to a Human Environment (E. Schmidt, Berlin, 1976).

Given the socialist-driven genesis of post-1945 United Nations international Covenants, it is surprising that the WCED's Report emphasizes economic growth to such an extent. It is unclear if this emphasis necessarily entails economic growth within the capitalist model of transferring nature and adding value to natural resources within a market system.⁹⁴ Indeed, the WCED's Report's stress upon reducing poverty in developing countries seems to suggest a return to the values of non-capitalistic societies. These societies incorporated environmental values into their cultural theology. These values were more predisposed to sustainable development than those of post-industrialism efficiency.⁹⁵

There is no doubt of the practical difficulties that lie between the moral aspirations expressed in the WCED Report and actualization of the goals of a clean, healthy environment that ensures sustainable development for this and future generations. On the face of it, internationally recognized human rights seem to call for ideal, distributive justice.⁹⁶ The fundamental human right framed by the WCED suggests the right of every person to a clean and healthy environment and the substance of the Brundtland Report demonstrates that sustainable development is an integral feature of this right. *Prima facie*, this would require a powerful centralized government that would be able either to ensure distribution of resources or the capacity to direct and control the economic system and thus become the provider of the right for everyone if this right were to be operationalized within existing political paradigms. Indeed, if the WCED's ultimate goal of "ensuring equitable opportunities for everyone" were to be extended to its fullest operational point, a lowering of the standard of living in the more affluent nations would be required.⁹⁷

There can be no doubt that an international analysis of environmental effects points to an imbalance of economic growth in developing countries relative to developed countries in relation to resource use. The Second Draft of "Caring for the World", a joint publication of the World Conservation Union, the United Nations Environment Programme and the World Wildlife Fund for Nature released in June 1990 cited "inequitable distribution of power and of access to information and resources, within and among nations" as one of the three main obstacles to be overcome to achieve sustainability.⁹⁸ That Draft Report considered that sus-

94. WCED, *supra* note 2 at 9.

95. Redclift *supra*, note 91 at 64.

96. H. Uibopuu, *The Internationally Guaranteed Right of an Individual to a Clean Environment in Human Rights in the World Community*, 151, 155 (Richard P. Claude & Burns H. Weston eds., 1989); A. Eide, *supra* note 102, at 43 pointing out that "Approaches to human rights are profoundly influenced by ideological controversies, not the least concerning the role to be played by the state."

97. Eide *supra* note 102 at 15.

98. World Conservation Union, *United Nations Environment Programme and the World Wildlife Fund for Nature, Caring for the World: A Strategy for Sustainability (Second Draft, June 1990)*.

tainable development was dependent upon a principle, inter alia, of "aim[ing] for an equitable distribution of the benefits and the costs of resource use among . . . countries."⁹⁹ The difficulties and dangers to other individual and collective freedoms considered integral to Western capitalist nations, which place such a high premium upon individual right to accumulate capital, are obvious.¹⁰⁰ Furthermore, there can be no doubt that a strong central government brings its own moral and practical problems that are addressed only in part by the suspicions of the public choice theorists. How then should Australia respond to an obligation to undertake institutional and legal changes to promote an environmental right if it were to become a party to the proposed international treaty for a human right to a clean, healthy environment and/or a right to sustainable development?

The difficulty faced in translating any international treaty obligation into national obligations is the wide and necessarily abstract terms of legal rights under international law. Their imperfection lies in a language that endeavors to encompass the whole range of international behavior that could be relevant to a legal right under international law. The WCED's recommendations are expressed in the broadest of terms. An environmental right framed as a fundamental human right would demonstrate the same phenomenon of broad expression obvious in the Universal Declaration on Human Rights and the European Covenant on Economic, Social and Cultural Rights.¹⁰¹

The call to each country that became party to such a treaty to enact implementing laws actualizing an environmental right stops far short of providing a program of implementation. Simple prohibitions on environmentally-damaging behavior do not constitute a full program of implementation. Doubtless, the wide ambit of the proposed environmental right is a necessary recognition of the many and varied conditions that apply in different countries. Climatic and geographic differences as well as political and economic differences among different countries must have a role to play in dictating the final form of local environmental regulation. Each country and each culture has its own subjective standard that it will apply to words such as "clean" and "healthy" and "sustainable." The WCED clearly envisages sustainable development as a flexible concept that will be defined differently within each nation state according to the

99. *Id.* at 4. The Report went on to note that: "The most obvious disparity is between high income communities, whose members use large amounts of energy and raw materials, and low income communities, whose per capita resource consumption is modest. Because of wasteful and excessive consumption, high income communities often degrade the environments of other communities as well as their own." *Id.* at 8.

100. *Eide supra* note 102.

101. *Id.*

physical, economic and political circumstances into which it is introduced.¹⁰²

Given the difficulties of an international standard that specifically requires governments to ensure sustainable development, it would be easy to relegate an "environmental right" to the status of a purely exhortative preference for an ideal which is, practically-speaking, unachievable. The WCED's policy prescriptions in "Our Common Future" are vague. Faced with the uncertainty of moral goals, it may seem safer to revert to the cost-benefit analysis approach for justifying environmental regulation upon purely economic considerations. The language of politics is increasingly spoken of as economic obligation rather than moral aspiration. "Hard" scientific data and money-in/money-out graphs are reassuring when compared to the struggle inherent in assessing the parameters of a better environment within a framework of social justice.

To dismiss the moral claims of an environmental right (and, by analogy, any argument for environmental protection that is not based upon economic formulae) would amount to a dismissal of the concerns that have been at the very heart of the environmental movement. These concerns derive from the inherent lack of moral sensibility in the uses of resources that result in a departure from what some environmentalists have described as the naturally-occurring order of "Nature."¹⁰³ The environmental movement has at the center of its theoretical constructs an assumption that there is a system in nature, which when left to cycle within the web of life, will achieve a balance and that this balance will allow continued viability of nature. The "invisible hand of the market" is replaced by the "invisible hand of nature." The curious aspect about this value system—and it is a value system—is that it is also based upon the empiricism and scientism that is fundamental to the economic value systems.

The economic approach uses the guideline of "efficiency" to arbitrate the distinction between unregulated individual activity and permissible state intervention. Perfectly rational neo-classical man is motivated by maximizing egoism and the economic approach suggests that this motivation can be described in monetary terms. The environmental approach uses the guideline of ecological efficiency to arbitrate the distinction between acceptable and unacceptable levels of human interven-

102. A solution to the dilemma of translating theory into practical in relation to international treaty obligations of social and economic rights is to apply the "Minimum Threshold Approach." See A. Eide, *Realization of Social and Economic Rights and the Minimum Threshold Approach*, 10 *Human Rights Law Journal* 35, (1989).

103. This position is taken by the "deep ecologists" who adopt a biocentric view of human activity with other living beings and processes. See A. Naess, *The Shallow and the Deep, Long-Range Ecology Movement*, 16 *Inquiry* (1973); *Deep Ecology* (M. Tobias ed., 1984).

tion. While these approaches appear on the surface to be different, both the economic approach and the equity approach are based upon an acceptance that humans and nature need to live in a better state of symbiosis. Both approaches assume a naturally occurring "state of grace",¹⁰⁴ whether it be the market or the forces of Nature. Both require the filtering of empirical data, nested within the procedural proscriptions of scientific rationalism.

Where does this leave an environmental right and the sustainable development that the WCED suggests, ought to be established if more than one generation is to have the advantage of the right? If a principled moral aspiration is the catalyst for environmental regulation, it is logical that economic and other constraints (technological, climatic, et cetera) should dictate the approach to achieving the goal of regulation. The WCED clearly considered that the goals of economic growth and environmental quality could be joined through the co-operative efforts of governments and industry.

Moral values guide us in determining whether an environmental objective ought to be implemented and the economic values help to assess the extent to which those objectives can be implemented. The sequential ordering of the two dimensions is critical, for it is only in this way that the broad moral concern is enjoined to take into account the practical capacity of government, individuals and groups to fulfill environmental objectives. To make the maximum practical level of implementation act as the yardstick against which the reality is measured does not deny the place of morality in the equation. The economic dimension plays its part in assessing and gauging the extent and timeframe within which environmental objectives can practically be reached. While not denying economic criteria, it is important to recognize its sequential place after the moral values that have acted as the impetus for environmental regulation.

CONCLUSION

The Australian federal government's discussion paper on economically sustainable development is a syncretic response to the WCED's suggestions and proposals. Despite the government's attempt to combine different values and principles, the practicalities of sustainable development still lack a coherent basis. The government explicitly rejects direct regulation as a means for influencing environmentally appropriate behav-

104. I have adopted here a term used by Posin. *Supra* note 52. Note also that view of nature as naturally symbiotic if left undisturbed has been like all scientific and quasi-scientific paradigms, displaced by a view based on the chaos theory, i.e., nature is constantly recovering from distabilizing forces.

ior except in circumstances where it is impossible to fit a given resource into a price or property model. In so doing, the government has overlooked the indispensable role that direct regulation has had in both utilitarianism *and* liberalism. The neo-liberal fear of government is setting the environmental agenda in a profoundly influential way. The definition of sustainable development is rendered further elusive and obtruse by the WCED's use of distributive justice. Both the Australian Resource Assessment Commission and the Australian federal government's discussion paper on ecologically sustainable development attempt to incorporate the concept of distributive justice into policy by requiring government to use broader subjective criteria than the immediately and empirically ascertainable.¹⁰⁵

Government (through both policy and legislation) is searching for philosophical values that go beyond the cost-benefit utilitarian approach of the economic model and the deregulatory neo-liberal model. This political and legal system has fallen shy of tackling that task. Distributive justice plays only a small part in the approach of the government, but distributive justice is integral to the human rights vocabulary of the environmental right to sustainable development suggested by the WCED's Report. Policymakers must go beyond bioeconomics when framing legal mechanisms of environmental regulation. Australian policy makers must look at the underlying value systems that were the catalyst of political interest and subsequent government regulation. Most importantly, policymakers must come to grips with the synergy of the vocabulary of law, policy and social concern. Australian policymakers must take the economic vocabulary they have used to describe sustainable development and develop the terms of the national government's sustainable developments objectives through the multiple lenses of social equity.

105. The Commonwealths 1990 Discussion Paper stated "most people also have aesthetic and ethical reasons for wanting to see plants and animals survive." ESD, *supra* note 12 at 3.