

BOOK REVIEW

ENVIRONMENTAL LAW IN AUSTRALIA 8TH EDITION

BY GERRY BATES

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But is that all there is? Can we really afford to be bystanders?¹

Gerry Bates's *Environmental Law in Australia*² is a welcome new edition of this established publication, updated and expanded to include developments in areas of waste management, biodiversity, and energy management, amongst others. Like previous editions it is thorough, well-structured and scholarly. At nearly 1000 pages it organises this vast and dynamic subject into comprehensible topics. This is an achievement in itself given that environmental law ('EL') tends to be a complicated mixture of established legal concepts, sui generis reforms, non-legal regulatory ideals, policy and legal norms absorbed from and applying across different jurisdictions. The book covers all traditional areas of, and treats key issues in, the broad range of legally protected interests that constitute the national environmental law

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¹ Email from Professor Fredrico Cheever (University of Denver Law School) to ENVLAWPROFESSORS listserv (6 December 2006) in Michael Robinson-Dorn, 'Teaching Environmental law in the Era of Climate Change: A Few Whats, Whys, and Hows' (2007) 82 *Washington Law Review* 619, 620.

² Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 8th ed, 2013).

regime. At the same time — alert to political, economic and social contexts — it avoids treating complex social and cultural phenomena such as the environment, and EL, as being amenable to doctrinaire applications of laws, or reductive principles.

Any book on national environmental laws must reckon with certain limitations — specifically, how to deal with the particularity of laws in their national context while at the same time doing justice to the globalisation of environmental harm. Texts treating a national regime must keep the essentially multi-jurisdictional framework of EL in view at all times for at least two reasons. First, because the transboundary nature of environmental problems requires both transboundary solutions and an awareness of the way in which the legal and regulatory initiatives in one jurisdiction interact with another. And, second, because the importance of comparative legal analysis should be appreciated, taught and practised in EL courses and advocacy, since legal concepts and regulatory approaches are transplanted between jurisdictions.³ In these respects Bates's book is admirable in its survey of international instruments, government reports and discussion papers, and a range of other material setting the national environment debates in context.

Comprehensive and self-assured with respect to the centrality of the discipline, Bates's work nevertheless alludes to certain of the anxieties with which EL is beset.⁴ While Bates correctly acknowledges the rapid development of EL over the last four decades, this is a short history by legal standards. References to earlier laws in which the protection of the land and water were at issue only seem to emphasise their isolation, and the relatively belated development of the law and justice of the environment. Indeed, rather than it being autochthonous, its historical foundations are located in other laws such as property and tort law.⁵

³ N de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (OUP, 2002); A Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* (Kluwer International, 2002).

⁴ See, eg, A Dan Tarlock, 'Is There a There in Environmental Law?' (2003) 19 *Journal of Land Use and Environmental Law* 213; Elizabeth Fisher, Bettina Lange, Eloise Scotford and Cinnamon Carlarne, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21 *Journal of Environmental Law* 2, 213–50; Owen McIntyre, 'The Proceduralisation and Growing Maturity of International Water Law Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay), International Court of Justice, 20 April 2010' (2010) 22 *Journal of Environmental Law* 3, 475–97; S Coyle and K Morrow, *The Philosophical Foundations of Environmental Law: Property, Rights and Nature* (Hart Publishing, 2004) 1.

⁵ R Cocks, 'Victorian Foundations' in J Lowry and R Edmunds (eds), *Environmental Protection and the Common Law* (Hart Publishing, 2000); Coyle and Morrow, above n 4, 1.

There is then little opportunity to develop a systematic view of the subject on the basis of a purposeful grand narrative.⁶ Nor perhaps would that be justified in a subject with unstable temporal and political boundaries, and a shifting scope due to its immediate contact with, and responsiveness to, a complex reality; and in a subject where political and economic expediency insist on ad hoc regulatory solutions, and view the development of better evidence-based regulatory models as an unpragmatic luxury.⁷

Nevertheless, EL has undergone substantive development, not the least because of the sheer volume and quality of scholarship which has been produced over the last forty years, and which marks it out as one of the most vigorous areas of legal scholarship. Both a cause and an effect of this eruption of environmentalist jurisprudence is the establishment of important centres for environmental law at leading tertiary institutions — evidence that EL is no longer an underrated or underrepresented discipline within university law schools, and is in fact at the vanguard of interdisciplinary teaching.

If there are persistent doubts, they centre on the paucity, if not the total absence, of discussion of an EL method. Even the earliest studies in environmental law acknowledged that EL might amount to little more than a set of complex associations developed across disparate concerns, and their problem-specific approaches. Stewart and Krier, for example, perceived the ‘great need’⁸ to establish a framework within which to assess environmental systems of governance, unify a landscape of ad hoc measures, and consider the interrelationship of separate environmental issues as a comprehensive system rather than a series of discrete regimes. Their text attempted to provide a unified conceptual framework to environmental law by viewing issues through the lens of institutional and economic policy analysis. Other attempts at field unification have followed,⁹ purchased usually at the price of high abstraction, and losing sight of the realism of case by case analysis.

If there has been some concern about the derivative way in which EL has developed, Bates is sensitive to its interaction with other disciplines, such as

⁶ Sadeleer, above n 3; E Freyfogle ‘Five Paths of Environmental Scholarship’ (2000) *University of Illinois Law Review* 115.

⁷ E Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart Publishing, 2007) 66–9.

⁸ Richard B Stewart and James E Krier, *Environmental Law and Policy: Readings, Materials and Notes* (Bobbs-Merrill, 2nd ed, 1978).

⁹ Robert Fischman, ‘The Divides of Environmental Law and the Problem of Harm in the Endangered Species Act’ (2008) 3 *Indiana Law Journal* 661; Albert C Lin, ‘The Unifying Role of Harm in Environmental Law’ (2006) *Wisconsin Law Review* 897; Daniel Bodansky, Jutta Brunnee and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP, 2007); Robert W Hahn, ‘The Political Economy of Environmental Regulation: Towards a Unifying Framework’ (1990) 65 *Public Choice* 21–47.

biological and environmental sciences, and is keen to demonstrate its newly adopted position as an influential field of law. Indisputably, as Bates says, without science ‘there would be no Convention on Climate Change or Kyoto Protocol’.¹⁰ Environmental law, from its earliest appearance on university curricula, has regularly engaged scientists, engineers and others, and appealed to students in those fields as well as in law, being an area in which lawyers and scientists will have reason to work closely together in solving environmental problems.¹¹ For example, science determines the triggers for the application of the precautionary principle — an anticipatory policy whereby decision makers in environmental matters, having inadequate information, are to advance cautiously¹² — and assesses what constitutes a threat to species, or biodiversity, to take but two vital examples. However, EL is not merely the handmaiden to a broader scientific or technical discipline. Environmental law scholars, like other legal scholars, do not merely consume or systematise expert knowledge, but produce, and contribute to, scientifically grounded regulatory regimes which incorporate legal reasoning, and legal skills into their administration¹³ — for example, emissions trading schemes¹⁴ and regulatory orders dependent on negotiated outcomes.¹⁵

Nor can EL be ignored by other forms of legal ordering such as corporate law, which cannot now be (safely) practised without a thorough knowledge of environmental regulation.

In Chapter 2, Bates sets environmental policy in the broader political and economic context of democratic and capitalist value systems. However, in an assessment of the development of the role of the law and lawyers in environmental decision making and the assessment of decision making, Bates acknowledges that the lawyers’ role will require them to expand their set of

¹⁰ Bates, above n 2, 32.

¹¹ See, eg, Cyril M Harris and Albert J Rosenthal, ‘The Interdisciplinary Course in the Legal Aspects of Noise Pollution at Columbia University’ (1981) 31 *Journal of Legal Education* 128.

¹² Bates, above n 2, 33.

¹³ C Joerges and R Dehousse (eds), *Good Governance in Europe’s Integrated Market* (OUP, 2002); G de Burca and J Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing, 2006).

¹⁴ Committee on the Human Dimensions of Climate Change — National Research Council (ed), *The Drama of the Commons* (National Academies Press, 2002).

¹⁵ J Freeman and L Langbein, ‘Regulatory Negotiation and the Legitimacy Benefit’ (2000) 9 *New York University of Environmental Law Journal* 60; J Scott and J Holder, ‘Law and New Environmental Governance in the EU’ in G de Burca and J Scott (eds), *Law and Governance in the EU and US* (Hart Publishing, 2006); J Steele, ‘Participation and Deliberation in Environmental Law: A Problem Solving Approach’ (2001) 21 *Oxford Journal of Legal Studies* 415.

ethical responsibilities beyond those they owe to their clients and the court. They need also to acknowledge responsibility for ‘sustainable development’,¹⁶ taking up the implicit challenge in Justice Kirby’s lament that lawyers’ devotion to winning has displaced their commitment to truth.¹⁷ At the same time, the pace at which economic opportunity is recognised, and capital mobilised to exploit it, is rarely matched by the development of statute. As a result, environmental law and practice must be a pluralist regime of legal and non-legal responses. The opposition to the coal seam gas industry by the Lock the Gate Alliance — an alliance of many dozens of member groups, including community law groups — to which Bates refers¹⁸ is a case in point.

If Bates identifies an overarching paradigm, it is that EL centres on the processes and structures of, and governs, decision making. In short, ‘[e]nvironmental law in Australia is all about making sure that impacts on the natural environment are identified and taken into account in decision making’.¹⁹ The processes and structures of decision making encompass the rights of citizens to participate in decisions and comment on projects’ environmental impacts,²⁰ the risk management strategies of corporations, and the legal responsibilities of governments. The focus on decision making also acknowledges the nuanced role of EL in ‘enabling and guiding decisions rather than commanding proscriptive outcomes’.²¹

The book does not take radical stances,²² but neither is it ever merely expository. It provides resources for considering fundamental issues radically — such as to what extent EL as it is currently practised is complicit with political and economic dominance. A persistent tension in EL exists between whether EL should prescribe action-oriented rules, or whether it should advance mere principles that give guidance to states. This tension may be assessed in relation to ‘sustainable development’,²³ ‘the central pivot around

¹⁶ Bates, above n 2, 18 citing Ben Boer, ‘Our Common Future; the Report of the World Commission on Environment and Development: Implications for Environmental Law’ (Paper delivered to the International Bar Association, Auckland, NZ, 1989) 15–16.

¹⁷ Bates, above n 2, 12.

¹⁸ *Ibid* 34.

¹⁹ *Ibid* 4.

²⁰ E Scotford, ‘Mapping the Article 174(2) EC Case Law: A First Step to Analysing Community Environmental Law Principles’ (2008) 8 *Yearbook of European Environmental Law* 1.

²¹ Bates, above n 2, 4.

²² Compare, eg, R White, *Crimes against Nature: Environmental Criminology and Ecological Justice* (Willan Publishing, 2008); Robert F Kennedy Jnr, *Crimes against Nature: How George W Bush and His Corporate Pals Are Plundering the Country and Hijacking Our Democracy* (Harper Collins, 2004); Robert F Kennedy Jnr, ‘Crimes against Nature’ (2005) 18 *St Thomas Law Review* 693.

²³ Bates, above n 2, ch 7.

which all governmental decision making is increasingly being required to revolve'.²⁴ Sustainable development seeks to trade off environmental protection against economic development. In the area of biodiversity, however, the environmental deficit has on any measure increased without a concomitant improvement in economic development and hence living standards. This is because impact-assessment principles of damage limitation are premised on the acceptance of the loss, to at least some extent, of sensitive and important ecosystems.²⁵ Decision making has been captured by interests that have steered it away from sustainability and towards development.²⁶ At the same time trade-offs favouring development over sustainability have failed to relieve the majority of the world's people from poverty.²⁷

Bates' critique of the judicial implementation of the principle of Ecologically Sustainable Development ('ESD') in the national context is trenchant:

If ESD is to be pursued seriously ... then surely this should be the paramount object of legislation. It should be the outcome that decision makers strive to achieve, not part of a process that simply requires ESD to be considered on the way through to making a decision, and decision makers should therefore be instructed to do more than simply 'have regard to' it.²⁸

EL is usually distinguished from other legal practices and disciplines by its sensitivity to crisis, and its appreciation of the urgency for intervention, and the need to sustain the capacity for intervention into the future by developing environmental lawyers with appropriate skills. Because of this, EL, more than any other legal discipline, accepts the challenge of Marx's *Eleventh Thesis on Feuerbach* — that '[t]he philosophers have only interpreted the world, in

²⁴ *Ibid* 219.

²⁵ On the continuing decline in biodiversity and ecosystems see Walter V Reid et al (eds), *Millennium Ecosystem Assessment Ecosystems and Human Well-Being — Synthesis* (World Resources Institute, 2005); the IUCN's Red Data listing process <<http://www.iucn.org>>; the World Wildlife Fund's bi-annual reports, eg, *Living Planet Report 2012: Biodiversity, Biocapacity and Better Choices* (WWF International, 2012); M L Parry et al (eds), *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2007) and various updates; the Secretariat for the Convention on Biological Diversity, *Global Biodiversity Outlook 3* (2010) <<http://www.cbd.int/doc/publications/gbo/gbo3-final-en.pdf>>; United Nations Environment Programme, *Global Environmental Outlook 5* (2012) <<http://www.unep.org/geo/geo5.asp>>; and J Rockström et al, 'A Safe Operating Space for Humanity' (2009) 461 *Nature* 472.

²⁶ Bates, above n 2, 236–7.

²⁷ See eg Kate Raworth, 'A Safe and Just Space for Humanity: Can We Live within the Doughnut?' (Oxfam Discussion Paper, February 2012).

²⁸ Bates, above n 2, 234.

various ways; the point, however, is to change it'.²⁹ The virtue of Bates's commitment to sensible exposition, and his willingness to engage forcefully in debate, is that — less dramatically than Marx but nevertheless on the basis of the same tension between interpretation and change that Marx perceived — he arrives at a conclusion. He adopts a method that makes the text suitable for future environmental lawyers in both introductory and advanced courses in environmental law.

²⁹ 'Die Philosophen haben die Welt nur verschieden interpretiert; es kommt aber darauf an, sie zu verändern; Karl Marx (edited by Friedrich Engels), *Thesen über Feuerbach* in *Marx-Engels Werke*, vol 3 (Dietz, 1888) 534.

