

Robert J. Fowler*

LEGISLATIVE FRAMEWORKS FOR THE IMPLEMENTATION OF ENVIRONMENTAL STUDIES: SOME RECENT DEVELOPMENTS**

“Studies themselves do give forth directions too much at large...”
(Francis Bacon: *Of Studies*)

It is recorded that Francis Bacon, apart from being a lawyer, statesman and philosopher, was a “scientist” of moderate standing. This unique combination of skills might have stood him in good stead to meet the interdisciplinary demands of environmental studies today, particularly since his sixteenth century view of the nature of studies remains relevant in the context of modern investigations.

The “directions too much at large” which are usually generated by environmental studies need to be translated into policies, plans or controls in order to have any effect. By themselves, such studies constitute simply an information base, even though they are accompanied frequently by recommendations for future action. Such action must still be generated by other means, and at present a great deal of uncertainty exists as to what techniques can be employed to implement technical environmental studies.

Whilst administrative and political channels of an ill-defined nature may be available to give effect to environmental studies, it will often be necessary ultimately to introduce regulatory support through legislation. In some cases, legislation may endeavour to establish a complete framework for the undertaking of studies and their subsequent implementation through plans, policies and regulatory controls. The aim of this paper is to examine Australian statutes concerned with environmental quality and land-use which endeavour to provide what will be termed a “formal”, legislative framework for the implementation of environmental studies. Attention is directed in particular at a number of pertinent developments which have occurred in this context in three states (Victoria, New South Wales and South Australia), and occasional reference is made also to legislation at the Commonwealth level.

In addition, the second part of this paper considers the value of such formal frameworks and draws attention to some of the problems that may arise where legislation is employed to provide avenues for the implementation of environmental studies. In particular, it questions whether plans or policies produced pursuant to legislation for the purpose of giving effect to particular studies should prescribe direct restrictions or standards in order to regulate certain activities. It will be suggested that there is a trend evident in several areas of environmental quality and land-use regulation in Australia toward direct control through planning and policy instruments, and that this trend threatens to blur even further the difficult juristic distinction between policy and law.

PART I: IDENTIFICATION OF LEGISLATIVE FRAMEWORKS FOR THE IMPLEMENTATION OF ENVIRONMENTAL STUDIES

It is not intended to attempt to frame a suitable definition of what constitutes an “environmental study” since the forms of study which might be

* LL.B. (Hons.) (Adel.), Lecturer in Law, University of Adelaide.

** This is the revised text of a paper presented to the Environmental Studies Section, A.N.Z.A.A.S. Jubilee Congress, Adelaide, May 1980.

embraced within such a definition are too many and too diverse to enable the task to be undertaken with any confidence.¹ In broad terms, studies may be concerned with the collection of data concerning a particular region or resource; or specific types of problem such as pollution (in its several forms), soil erosion, salinity or extinction of species of flora or fauna; or particular proposals for development, such as a mining venture, a petrochemical plant or a new transportation route. Studies may also be undertaken by a broad range of groups within the community, including parliamentary committees, government departments or authorities, and consulting groups within private enterprise or tertiary institutions.

The approach adopted for the purposes of this paper is to examine legislation concerned with land-use and environmental quality under four broad headings: land-use, pollution, nature conservation and environmental impact assessment. In relation to each category of legislation, consideration will be given to the identification of examples of the so-called formal framework, or in other words, to instances where provision has been made for the linking of policy formulation and decision-making functions with prior technical or scientific studies concerning an aspect of the environment. In this manner, the relevant studies will be identified by tracing back through the legislation, rather than pursuing the much more difficult task of studying how environmental studies in general are given effect in the fuller range of situations in which they may arise.

1.0 Land-use planning

The majority of environmental controversies involves a conflict over land-use, and it has been argued strongly that "effective environmental management can only be achieved as an integral component of the broader task of effective land-use planning and management."² This argument is based on the view that it is essential to develop both national and regional land-use policies together with appropriate procedures and administrative organisations to co-ordinate land-use planning, natural resource management and environmental protection functions and to implement the appropriate policies. However, such a grand-scale approach remains largely hypothetical in Australia.

For many years, Australian land-use planning has centred around the segregation of land-uses through the zoning technique. The precursor to zoning regulations has been the "planning scheme", a relatively superficial, physical description of the appropriate planning area which provides a geographical basis for the subsequent zoning process. In this scenario, the notion of environmental studies has been relatively foreign, and Australian land-use planning systems have been criticized for their failure to account for environmental factors.³

However, in recent years there has been a growing acceptance of the need to incorporate environmental investigations into land-use planning techniques.

1. A useful account of the various forms of environmental study being undertaken presently in Australia is provided in Ministry for Conservation (Victoria), *Australian Environmental Studies — Order From Disorder*, Proceedings of First Australian Workshop on Environmental Studies, Cowes, October, 1977, (ed. Holmes and Clark, 1979).
2. Burton, "Environmental Management — An Aspect of Land Use Planning", in *The Status of the National Environment*, Proceedings of the Institution of Engineers, Environmental Engineering Conference, 1979.
3. See, e.g., the review of the former land-use planning system in New South Wales: N.S.W. Planning and Environment Commission, *Report to the Minister for Planning and Environment* (the "White Book"), November, 1975. This system has been replaced by a new "environmental planning" system: see the Environmental Planning and Assessment Act, 1979, discussed *infra*, section 1.2.

The planning scheme, which was adopted widely throughout Australia shortly after World War II as the basic investigative planning technique, is being superseded by new "environmental planning" techniques which are intended to form the basis for decision-making on land-use proposals. More complex and scientifically-based studies are being incorporated into land-use planning and would seem to qualify as a branch of "environmental studies" proper.⁴

The formal framework with which this paper is concerned is much more clearly evident in the new or recently revised planning systems in Australia. This framework arguably owes its origins to British land-use planning techniques, particularly the concept of the "development plan" which emerged from the major amendments in 1947 to the Town and Country Planning Act, 1932 (U.K.). The legislative and administrative approach to land-use planning in Britain has been deliberately structured in a vertical or linear manner on the assumption that one may proceed logically from the investigation of an area to the production of policies and plans for that area, and ultimately of detailed implementation of those policies and plans through specific controls. Some recent developments in Australian land-use planning, and in areas of environmental protection, such as pollution control and national parks management, reflect either a deliberate adoption of the British land-use planning model or at least a reliance upon the same assumptions concerning the viability of such a vertical legislative and administrative structure.

1.1 *South Australia: the Planning and Development Act, 1966-1980*

In turning to examine the framework for the implementation of environmental studies through land-use planning systems, an appropriate starting point is the South Australian legislation: the Planning and Development Act, 1966-1980. This Act was adopted after an extensive survey of overseas land-use planning techniques, and seeks to embrace the British concept of the "development plan" as the fundamental planning policy instrument.⁵ The vertical structure referred to previously is very evident in the overall scheme established by this Act.

Under the Act, the state has been divided into twelve "planning areas" on the recommendation of the State Planning Authority. The Authority is required to conduct an examination of each planning area and to make an assessment of its future development. The examination and assessment for each planning area is presented in a draft development plan, which must undergo a period of public exhibition and debate before it is finally authorised by the Minister. The authorised development plan may be revised and varied by the preparation and adoption of a supplementary development plan.⁶ By 1978, development plans had been approved for all but one of the twelve planning areas in South Australia, and work is proceeding on the final plan for the Far North Planning Area.

The Act seeks to establish a direct link between the development plan and a prior, relatively non-technical form of environmental study. The examination of the planning area which is required by s.29 of the Planning and Development Act is directed essentially at the evaluation of future development

4. For an account of these techniques, see Laut and Yardley, "An Emerging Spatial Basis For Environmental Policy-Making", in *Proceedings of Environmental Studies' Section, Jubilee A.N.Z.A.A.S. Congress*, Adelaide, May 1980.

5. For a discussion of the factors which influenced the form of this legislation, see Hart, *Report of an Inquiry into the Control of Private Development in South Australia* (1978).

6. The procedures for adoption of authorised and supplementary development plans are spelled out in ss.33-35 of the Planning and Development Act, 1966-1980.

demands within the area on a non-scientific basis. The Authority is required under s.29 of the Act to have regard to the need for further transport facilities, open spaces redevelopment within the planning area, the zoning of districts within the area, the need for land subdivision, and any matters which it considers are necessary to ensure the physical, social and economic development of the planning area. Since 1972, as a result of amendments to s.29, the Authority has been required also to examine pollution and conservation considerations.

Development plans produced by the State Planning Authority have constituted narrative, non-technical statements of a discursive nature concerning these various matters. The link between study and plan derives from the fact that the development plan constitutes the formal findings of the study. There is no separate report produced with respect to the examination and assessment of a planning area; rather, the draft development plan is the direct and immediate product of the prior study process, and is refined subsequently through a process of public scrutiny.

Whilst implementation of the study is achieved directly through the adoption of a development plan, the process is carried further through the provision by the Act of mechanisms for the implementation of the development plan itself. These are the development control procedures established by the Act. Part IV of the Act provides for the implementation of authorized development plans through the adoption of planning regulations, at the initiative of either the State Planning Authority or local councils in the planning area. Whilst the Act contemplates a very broad range of matters which may be dealt with by planning regulations, in practice their scope has been confined largely to zoning controls upon land-use. Uniformity has been sought with respect to planning regulations through the production of model planning regulations by the State Planning Authority (with separate models for metropolitan and country planning areas).

In reaching a decision upon an application for consent under zoning regulations, the planning authority is not required to have regard directly to the development plan, but rather to "the purpose for which the various zones have been created", as indicated in a schedule to the regulations. The planning authority must also have regard to general planning, amenity and environmental considerations as spelled out in the regulations; *e.g.*, "the orderly and proper planning of the zone" and "the preservation of the character and amenity of the locality". Hence, the link between the plan and subsequent controls arises principally from the influence of the plan on the zoning-pattern adopted through the regulations.

Each development plan normally includes a proviso concerning its suitability as a guide to future land-use decisions in the following terms:

"The development plan is primarily a statement of policy for the future development of the Planning Area. It does not purport to define with precision those areas allocated for different categories of land use or the alignment of proposed rail routes, but it does indicate generally the appropriate size and location of such areas and routes. The development plan provides a broad framework within which public authorities and private developers should be able to proceed confidently with their detailed plans."

Obviously, further detailed planning is necessary to implement the development plan through zoning regulations. Nevertheless it provides a broad and relatively immutable foundation for those subsequent deliberations, which in-

evitably involve a reconciliation of the various, vested land interests that may be affected by proposed zonings.

Where zoning is not considered appropriate in order to implement a development plan (*e.g.*, in many rural sections of outlying planning areas), the appropriate mechanism to regulate development under the Act is interim development control. This mechanism is also employed pending the approval of a development plan. Where interim development control exists, the policy pronouncements in the development plan acquire the utmost importance, since s.41 of the Act requires that any change in land-use must be consented to by either the State Planning Authority (or a local council exercising control powers delegated by the Authority) after having regard, *inter alia*, to the provisions of any authorized development plan. Although other factors are spelled out as relevant to decisions under interim development control, it has recently been indicated by the South Australian Full Supreme Court that the pronouncements in the development plan must be treated as the predominant consideration and that the other general factors spelled out in s.41(7) should be "relegated to an ancillary role".⁷ In an earlier decision, Wells, J. in the Supreme Court had insisted that whilst a development plan should not be treated as a "legislative document", it should nevertheless be observed strictly unless very special circumstances warranted a departure.⁸

These views demand a much stricter adherence to the statements in a development plan than has been assumed necessary previously. It has been indicated already that the State Planning Authority places emphasis in its plans upon the general nature of their pronouncements, and the Planning Appeal Board has previously adopted a similar view:

"The report [in a development plan] is a narrative essay. For the Board to seek for definitive meanings for each word and phrase of the report as if it were a statutory enactment is an inappropriate manner to give effect to it ..."⁹

The recent Supreme Court pronouncements are a clear rebuttal of these views, and accord a "quasi-legislative" status to the development plan by insisting that it is "no vague or amorphous effusion"¹⁰ but rather a "practical, definitive affirmation of plans and policies which has many of the characteristics of a general's operation order."¹¹ As a result, the central position of the development plan within the South Australian planning system has been quite firmly established through the legislation and its subsequent judicial interpretation, and a formal framework of studies, policies and consequent controls is particularly evident in this system.

The emergence of an entirely new land-use planning system in New South Wales provides an interesting comparison with the South Australian position. Whilst new investigative techniques underpin the New South Wales land-use planning process, it would appear that the same overall framework for studies, policies, plans and controls has been assumed as appropriate to the new system.

1.2. *New South Wales: the Environmental Planning and Assessment Act, 1979*

The passage of the Environmental Planning and Assessment Act, 1979 in

7. *Attorney-General v. Gurr* (1979) 21 S.A.S.R. 241, especially Wells J., 248-249.

8. *State Planning Authority v. Tanczos* (1979) 20 S.A.S.R. 210, 220-221.

9. *Romil v. Mt. Barker District Council and the Director of Planning*, unreported, P.A.B. decision, no. 363 of 1976.

10. *Gurr's case* (1979) 21 S.A.S.R. 241, 248 *per* Wells J.

11. *Tanczos' case* (1979) 20 S.A.S.R. 210, 215 *per* Wells J.

November, 1979 marked the culmination of some five years of investigation and debate in New South Wales concerning the inadequacies of the existing land-use planning system (which operated through Part XII of the Local Government Act, 1919).¹² Under the new system of "environmental planning", one of the fundamental goals is to integrate land-use planning and environmental management processes within the one framework. This is reflected in the incorporation of environmental impact statement requirements as an element of the development controls established by the new system.

The previous structure of planning schemes and interim development orders is to be replaced eventually by three types of "environmental planning instrument", although transitional provisions have been included to enable the existing techniques to continue in operation until the new instruments come into effect.

The new instruments reflect a distinction between broad planning policies and more specific land-use planning projections. State environmental planning policies are to be prepared with respect to matters considered by the Director of Environmental Planning to be of significance for the environmental planning of the state (Environmental Planning and Assessment Act, 1979, s.37(1)). These policies are intended to prescribe broad government objectives and to assist with the co-ordination of government authorities in accordance with such objectives. The Minister for Planning and Environment has the sole responsibility for determining whether or not to adopt a policy, and what publicity to accord to the policy (s.39).

More detailed investigation will precede the preparation of the other two types of environmental planning instruments, *viz.*, regional environmental plans and local environmental plans, and it is in the context of these instruments that the legislation provides for a direct link with prior environmental studies. Regional plans are to be prepared by the Director of Environmental Planning following the preparation of an environmental study of the land to which the plan is intended to apply (ss.40-52). Local environmental plans may be prepared by local councils, either individually or jointly, in order to translate state policies and regional plans into the local context. The council must prepare an "environmental study" of the land involved before proceeding to produce the local plan (ss.53-72).

Unlike the South Australian planning legislation, the New South Wales Environmental Planning and Assessment Act, 1979 contemplates that environmental studies undertaken at the regional or local council levels will be produced as a separate report and made available for public scrutiny and comment. In the preparation of a draft regional or local environmental plan, the relevant study will be considered with a view to determining whether it needs to be modified or supplemented (ss.44,61), the obvious implication being that in the absence of any apparent need for change, the plan will implement the findings of the study.

Regional plans are the key element in the new system, since it is contemplated that they will provide the principal guidance for local planning. The basic study technique to be employed in preparing an environmental study of a region is *land capability analysis*, which involves an assessment of the effect on all relevant resources (*i.e.*, air, land and water) of any given constrained use of land, with a view to producing quantitative land capability ratings for each land use in a particular location.¹³ These investigative techniques would seem

12. See the White Book, *op. cit.* (*supra*, n.3).

13. See Laut and Yardley, *loc. cit.* (*supra*, n.4) for a description of the land capability analysis technique.

to qualify much more readily as genuine environmental studies than do the traditional land-use planning techniques which have been employed in Australia to date, and mark the beginning of a most interesting new phase which could conceivably achieve a more satisfactory co-ordination of planning, natural resource management and environmental protection functions in New South Wales.

A link between environmental planning instruments and the reformed system of development controls established by the new Act is provided through s.90(1)(a) of the Act, which requires the "consent authority"¹⁴ to take into account the provisions of any such instrument, together with a wide range of other factors insofar as they are relevant to the application. Hence, state policies as well as regional or local plans may have to be considered by a consent authority in the course of deciding whether to consent to particular land-use proposals. One of the aims of the new system, however, is to reduce as far as possible the number of instances in which such discretionary judgments will have to be made, and in this respect the relevant instruments will often constitute a definitive statement with respect to future land-use options (either by prohibiting or allowing certain uses automatically). The environmental studies undertaken as a precursor to the preparation of regional and local environmental plans will therefore be implemented in a most direct fashion through the new environmental planning system in New South Wales.

1.3 *Victoria: dual land-use planning systems*

In Victoria, the general code for land-use planning is the Town and Country Planning Act, 1961-1979. In December, 1979, the Act was substantially revised to accommodate new approaches to planning procedures, resulting in a scheme which bears some superficial resemblances to the New South Wales framework.

The Town and Country Planning Board may issue statements of planning policy, which are required by the Act to be "directed primarily towards broad general planning to facilitate the co-ordination of planning throughout the State by all responsible authorities" (s.7A(2)). These strategic planning documents must be given "due regard" by planning authorities in the course of preparing or amending any planning scheme and, since the 1979 amendments, must be taken into account in any decision whether to grant a land-use permit.

Planning schemes may be prepared at either the regional or local level, but this system is much less co-ordinated than the reformed New South Wales system. Regional planning schemes have been adopted in only isolated instances in Victoria (e.g., the Mornington Peninsula Conservation Plan, adopted in September, 1978), and the normal approach to land-use control has been centred around the planning schemes or interim development orders of local councils.

The planning schemes themselves comprise an ordinance (which imposes specific restrictions on land-use) and a series of maps, and they are essentially a device for implementing zoning controls. The principal emphasis in such schemes is upon physical considerations such as traffic, provision of community facilities, and the partial segregation of areas for industrial, trading and residential use. The normal prior investigation for a planning scheme is an

14. The consent authority will be the appropriate local council, unless an environmental planning instrument has specified that the application should be determined at a higher level (e.g., by the Minister for Planning and Environment, or by a public authority): see s.4(1), Environmental Planning and Assessment Act, 1979.

"existing conditions" survey which results in the preparation of a map showing existing land-uses in the relevant area.

This method of approach is limited in its scope, even in comparison with the development plan technique operating in South Australia, and hardly qualifies as a form of environmental study. It is even further removed from the land capability analysis techniques proposed for land-use planning in New South Wales. Clearly, a link exists between the preliminary investigations leading to a planning scheme and the ultimate land-use control deriving therefrom, since the scheme will prohibit or allow certain types of uses in the light of existing land-use patterns. However, the formal framework of environmental studies, policies, plans and controls is much less evident in this overall scheme than it is in the South Australian and New South Wales systems.

It is perhaps not coincidental that there has developed in Victoria a quite unique, additional land-use planning system with respect to Crown lands. The Land Conservation Act, 1970 empowers the Land Conservation Council to "carry out investigations and make recommendations to the Minister [for Conservation] with respect to the use of public land, in order to provide for the balanced use of lands in Victoria" (s.5(1)(a)). Under s.2 of the Act, "public land" means any land which is not within a city, town or borough, and which is unalienated Crown land (including land permanently or temporarily reserved by the Crown, which is in any event exempt from the provisions of any planning scheme under the Town and Country Planning Act, 1961-1979 (s.34)).

The Land Conservation Council must "investigate" such districts and areas as have been approved by the Governor-in-Council before making its recommendations to the Minister for Conservation concerning future land-use (s.9). The Council in carrying out its investigations has made considerable use of base-line studies undertaken by the Soil Conservation Authority, a statutory body established in 1950 by the Soil Conservation and Land Utilisation Act, 1950. The Council itself assumed the functions of the Lands Utilisation Advisory Council, which had been established in 1950 by the same legislation, and which has been described as "a unique government organisation in Australia"¹⁵ in view of its investigative and advisory powers in the area of land-use management.

In the case of unalienated Crown Lands, the recommendations of the Council may be implemented by further reservations of land under the Crown Land (Reserves) Act, 1978, where some public use or function is proposed for the land in question. Where public lands are held by government departments or statutory authorities, these bodies are required to "use all diligence and despatch to give effect to [any] recommendation" of the Land Conservation Council (Land Conservation Act, 1970, s.10(3)). The Act thus establishes an additional form of planning process for public lands, quite distinct from that operating under the Town and Country Planning Act, 1961. In this instance, the "investigations" of the Council are explicitly linked with future land-use options concerning public lands, although no direct regulatory control is involved.

Even where a recommendation has been made by the Council to alienate Crown lands for *private* use, the Council is able to express a view concerning the desirable future use of the land, under s.5(3) of the Land Conservation Act, 1970:

15. Burton, *op. cit.* (*supra*, n.2), 36.

"Where the Council recommends the alienation of any land, the recommendation shall include the Council's opinion as to the best method of alienating the land to ensure the most satisfactory use and management of the land in the public interest."

The consequence of such recommendation is that the nature of the tenure and conditions attached to it will be tailored to give effect to the views of the Land Conservation Council. The activities of the Council are undertaken therefore very much within a framework which aims at the implementation of its investigative studies through subsequent decisions concerning land-use.

1.4. *Comments concerning land-use planning systems*

Whilst the normal approach to land-use planning in Australia has centred around the production of planning schemes for the purpose of segregating land-uses through zoning of areas, the development more recently of alternative or additional planning techniques has been accompanied by a more structured framework for the implementation of those techniques. In this respect, the South Australian system which employs the development plan provides an excellent example of the type of vertical administrative and legal framework which has been operating in England since the introduction of a similar concept in that country in 1947.

The reformed New South Wales planning system represents a further phase in the development of this formal structure, by emphasizing within a statutory framework the importance of strategic planning at State and regional levels, as well as providing for the detailed implementation of such plans at the local level. Underlying the New South Wales system is an entirely new concept of environmental studies specifically tailored to the land-use planning context, which is intended to integrate environmental management with effective land-use planning and management. The New South Wales experience with the implementation of its new environmental study techniques based on land capability analysis should attract considerable attention in the next few years.

2.0 Pollution Control

The emergence of the environmental movement produced a wide range of pollution control statutes at the state level in Australia in the early 1970's. The need for a comprehensive approach to pollution problems was widely accepted, particularly after the Senate Select Committee Reports on air and water pollution had been published. However, each state has tended to foster its own distinctive response to pollution control, with little effort being made to secure overall national uniformity with respect to methods of approach or standards. This situation has arisen despite the existence of co-ordinating mechanisms such as the Australian Environment Council.

The first and arguably the most comprehensive response was that of the Victorian Government, which enacted the Environment Protection Act, 1970 in December, 1970. In New South Wales, the State Pollution Control Commission Act, 1970 was enacted in the same month, but the statutory Commission established by this Act was not vested until 1974 with the comprehensive licensing and control powers enjoyed *ab initio* by the Environment Protection Authority of Victoria. Furthermore, the Victorian Act endeavoured to establish a complete framework of studies and policies to be linked with the pollution control functions vested in the Environment Protection Authority, thereby assuming the same sort of vertical links which have been identified previously in the context of land-use planning controls. It is proposed therefore to devote some closer attention to the manner in which the Victorian Act caters for the implementation of environmental studies.

2.1 *Victoria: The Environment Protection Act, 1970-1978*

The Act was proclaimed into operation in stages, and it was not until March, 1973 that its expansive licensing system for air emissions and discharges to water and land became fully effective. Section 20(1) provides that "no person shall begin discharging, emitting or depositing wastes into the environment without being licensed under this Act". The enormous and ill-defined scope of this and other provisions within the Act has attracted the occasional judicial criticism. In a High Court decision involving the Act's interpretation (*Phosphate Co-operative Co. (Aust.) Ltd. v. Environment Protection Authority*,¹⁶), Stephen, J. remarked that "the Act's provisions are often inept in drafting and contain many ambiguities and a considerable degree of incoherence of language."

Implementation of the licensing provisions proved to be an enormous task for the Authority, which in June, 1977 had a backlog of over 3,000 licence applications. However, by 1979 the situation had improved substantially, with a back-log of slightly more than 1,000 applications being recorded by the Authority in its Annual Report for 1978-1979.

The intention of the Act is that the licensing system should be backed-up by state environment protection policies, which are to be promulgated by Order of the Governor-in-Council on the recommendation of the Authority, and published in the Government Gazette (*Environment Protection Act, 1979, s.16(1)*). Under s.17(1), an Order may, in addition to declaring the relevant policy to be observed with respect to the environment generally or any portion, element or segment of the environment, "classify" any area, segment or element of the environment for the purpose of the Order, set aside areas or segments in which discharges of wastes are prohibited or restricted as specified in the Order and make rules for carrying such prohibition or restriction into effect. Under s.17(2) of the Act, contravention of the rules made by any Order is an offence involving a potential penalty of \$500.

These provisions indicate that state environment protection policies are not simply policy statements, but may also have direct, regulatory effect on waste discharge activities. In this respect, their status as legislative documents appears to have been contemplated explicitly by the Act, although it is not provided in the Act that there should be any opportunity for their parliamentary scrutiny (e.g., the tabling and disallowance procedures normally applied to regulations). There is however provision in s.19 of the Act for notice to be given to the public of an intention to declare a state environment protection policy, and in practice the Authority has issued draft policies and allowed reasonable time for public debate and submissions before recommending the final policy to the Governor-in-Council.

The Environment Protection Act, 1970 does not contemplate explicitly that policies will be produced on the basis of prior environmental studies, but it is evident from the provisions concerning the scope and contents of policies that considerable technical investigation will be required to precede the preparation of a draft policy. For example, s.18 of the Act requires that a policy "include in terms sufficiently clear to give an adequate basis for planning and licensing functions —

- (a) the boundaries of any area affected;
- (b) identification of the beneficial uses to be protected;
- (c) selection of the environmental indicators to be employed to measure and define the environmental quality;

- (d) a statement of the environmental quality objectives (where practicable); and
- (e) the programme (if any) by which the stated environmental quality objectives are to be attained and maintained."

In practice, environmental studies have been undertaken without exception before a draft policy has been produced by the Environment Protection Authority. In some instances, the Authority has made use of regional environmental studies undertaken by the Ministry of Conservation (*e.g.*, concerning the waters of Western Port and Port Phillip Bays), and on other occasions has conducted or arranged environmental studies at its own initiative (*e.g.*, concerning the air environment in Victoria). In this context therefore, the statutory obligation to produce state environment protection policies has generated numerous environmental studies and provided a convenient vehicle for the implementation of those studies.

The first environment protection policy declared under the Act related to the waters of Port Phillip Bay, and took effect in April, 1975. A review of the policy was begun in 1979, in order to take into account new water quality data which was not available in 1975 when the policy was declared. A second policy, for the waters of Western Port Bay and its catchment, was declared in February, 1979, and is based largely on data provided from the regional environmental study undertaken by the Ministry of Conservation. This policy in fact contains a number of direct restrictions upon activities. For example, it prohibits discharges to the surface waters of the Potable Water Supply Segments (as defined in the Order), other than urban run-off uncontaminated by domestic, industrial or construction wastes or agricultural stormwater run-off (cl. 22(a)). Hence, it clearly is purporting to have effect as a form of delegated legislation.

Overall, the process of preparing and promulgating policies has been very slow to develop in Victoria and has only recently begun to gain greater momentum. A draft policy for the control of noise from commercial, industrial and trade premises within the Melbourne metropolitan area was released for public review in March, 1979, and a draft policy proposing ambient air quality objectives for the major forms of air pollutant was released for public review in June, 1979. In January, 1980, draft policies were issued for public review for the waters of Lake Colac and its catchment, and for the waters of Lake Burrumbeet and its catchment. Previous draft policies issued by the Authority with respect to the Maribyrong River and tributaries (April, 1973), the surface waters of the Western Metropolitan region (October, 1975), the La Trobe Valley catchment and the Yarra River and tributaries have not proceeded to the final form, and in some instances are under further review by the Authority. Work is proceeding on the preparation of a draft policy for the waters of Far East Gippsland.

Although a network of policies concerned with water, air and noise pollution is being developed by the Authority, it appears to have been retarded considerably by delays in the production of draft policies, and more surprisingly, by the lack of follow-up action to convert draft policies into a final form for recommendation to the Governor-in-Council. These delays have undermined the assumption made at the time of the adoption of the Act that state environment protection policies would underpin the licensing process. The only specific guidance in the Act as to how licensing decisions should be arrived at by the Authority is in s.20(8), which directs itself exclusively to the relevance of state environment protection policies:

"In considering an application for the issue of a licence under the Act the Authority or protection agency shall have regard to the effect of the discharge emission or deposit of the waste concerned in relation to State environment protection policy and any classification made under this Act so that the licence and any conditions to which it is subject are consistent with such policy or classification."

In practice, the licensing process has had to proceed in the absence of most of the background policy and standards framework contemplated by the Act, and has therefore been required to operate on an *ad hoc* basis with respect to the consideration of each application. There are, in fact, very few refusals of licences. In 1978-1979, 1,101 licences were issued and only 10 were refused.¹⁷ The issue of licences has become a relatively routine matter therefore, with the principal source of control being the conditions which are attached to the licence.

Clearly, the theoretical framework of studies, policies and controls which seemingly has been borrowed or adapted from the land-use planning context has proved difficult to implement in practice. At the very least, it is evident that the establishment of such a framework will be attended by considerable delays pending the undertaking of appropriate base-line studies and that, during this period of delay, control will continue to be administered in an *ad hoc* fashion. It is still not possible to opine whether the Victorian pollution control system, having produced a number of draft environmental policies more recently, is finally taking effective shape and will be likely to work eventually in the manner initially contemplated.

It could be argued in defence of the Victorian approach that it represents a concerted attempt at a scientific or ecologically based system of pollution control and that, given the dearth of information and understanding concerning the nature and recovery capacity of various elements of the environment, it is inevitable that the development of this system will take considerable time. In this vein, it might also be argued that the Victorian legislation at least promotes an effort to ascertain the necessary base-line information through environmental studies and contemplates the ultimate implementation of those studies, whereas most other pollution control systems in Australia reconcile themselves to arbitrary and *ad hoc* methods of control. A brief review of other pollution control measures in Australia is sufficient to illustrate the relatively comprehensive nature of the Victorian legislation, and the lack of equivalent provision elsewhere for the implementation of environmental studies through policies and regulatory measures.

2.2. *General Environmental Codes*

In Tasmania and Western Australia, general codes for environmental protection have been enacted. It is interesting therefore to examine the extent to which these statutes contemplate that controls will be influenced by general policies or standards derived from environmental studies.

The Tasmanian Environment Protection Act, 1973 provides for the control of scheduled premises by licensing and the imposition of emission standards by regulations. The Director of Environment is empowered by s.5(4) to carry out "investigations into the problems of environmental protection", but no provision is made within the Act for linking investigations or studies with the controls which it establishes. In particular, there is no mechanism equivalent to the state environment protection policy technique employed in Victoria.

17. Environment Protection Authority of Victoria, *Annual Report for 1978-79*, Table 3, 18.

The Western Australian Environmental Protection Act, 1971 provides a slightly different picture. It establishes a three-man Environmental Protection Authority which may propose an environmental protection policy for approval by the Governor (ss. 38,39). Such a policy is to have "the force of law as though it had been enacted as a part of this [viz., the Environmental Protection] Act", once adopted by way of a declaration published in the Gazette (s.39(3)). The function of a policy is spelled out in s.40(1) of the Act:

"Where a declaration of the State environmental protection policy is made under section 39, the provisions of that declaration establish the basis upon which the Authority will act to preserve or enhance the environment to which that declaration relates."

This provision appears to assume a link between the policy device and regulatory action by the Environmental Protection Authority. Further support for this impression may be derived from s.40(2) of the Act, which provides that a declaration of policy may specify "detrimental uses or practices that the Authority is empowered to prohibit or control". However, such a link has not occurred in practice, for two fundamental reasons. First, the Authority is not vested elsewhere in the Act with comprehensive licensing or other regulatory powers; rather, it performs an advisory role which supplements the activities of existing decision-making authorities, and exercises only limited regulatory powers itself. Secondly, the Authority has not been anxious to produce declarations of state environmental protection policy, preferring in the words of one commentator "to avoid the use of statutory techniques and to rely upon persuasion, co-operation and agreement".¹⁸

Although the Act does not explicitly link policies with prior environmental studies, it does provide that the functions of the Environmental Protection Authority shall include the carrying out of "investigations into the problems of environmental protection" (s.29(b)), and its requirements with respect to the function and contents of a policy indicate (in a similar fashion to the Victorian legislation) that some form of studies would need to precede the formulation of a draft policy. Thus, although the Act has provided in detail for the adoption of state environmental protection policies, in practice there is no formal framework of studies, policies and controls which can be identified as having been created under the Act. Instead, the policy device stands as a rather isolated and curious mechanism within the overall legal structure for environmental protection in Western Australia, and it is not surprising to find that the technique has not been employed with any enthusiasm by the Environmental Protection Authority.

In the remaining state, Queensland, there is no general environmental code, nor has there been established any separate state level department or statutory authority to deal specifically with environmental matters. An advisory body entitled the Environmental Control Council was established in 1970 but was abolished in 1978 by amendments to the State Development and Public Works Organisation Act, 1971-1978. Regulatory powers with respect to land-use and environmental protection are exercised by several bodies whose activities are coordinated by the Coordinator-General as part of a deliberate government policy of decentralization of responsibility for decision-making on environmental matters.

There is an elementary link between environmental policies and controls contemplated by s.29(2) of the State Development and Public Works

18. Fisher, *Environmental Law in Australia* (1980), 142.

Organisation Act, 1971-1978, which requires government departments and authorities "to have due regard to such policies or administrative arrangements as may be approved from time to time by the Minister" when considering applications for approval of development or the undertaking of works themselves. There is no obvious link, however, between policies and environmental studies and, as will be discussed subsequently, the principal by-product of this provision has been a set of guidelines on E.I.A. procedures. There is no explicit framework within Queensland, therefore, for the development of environmental policies from environmental studies.

2.3 *Air and water pollution controls*

Apart from the general codes mentioned in the previous section, there are examples in virtually all states of legislation concerned specifically with particular types of pollution control. It is proposed to offer some brief observations concerning the role of environmental studies with respect to the operation of air and water pollution controls, without attempting the much larger task of reviewing in detail the provisions of the many enactments in each state.

The *Senate Select Committee Report on Air Pollution* (1970) commended as the ideal approach to air pollution control the development of primary ambient air standards based on current scientific knowledge of the effects of air pollution. However, the absence of the appropriate base-line information has prevented the adoption of such an approach in Australia, and it has not been possible to develop a structure whereby secondary standards are imposed at source on the basis of overall ambient standards. Further investigation and monitoring of air pollution levels has been undertaken in most states, but at present the principal administrative and legal controls over air pollution are centred upon basic standards at source and licensing or registration procedures, without any underlying policy or technical framework to guide either the development of standards or the application of licensing controls.

The major exception is in Victoria, where the draft "State environment protection policy for the air environment of Victoria," published in June, 1979, proposes ambient air quality objectives and broad strategies for achieving those objectives. The basic policy strategies are the existing licensing system and a set of maximum emission limits for stationary sources (which prescribes the *maximum* limits allowable in any licence); these strategies will be administered against the background of the ambient air quality objectives stated in the policy.

With respect to water pollution controls, state governments have been pursuing numerous environmental studies into water management problems, either on a regional basis or with respect to specific issues and activities. However, there is little evidence (the Victorian experience apart, once more) that such studies have any formal links of a legal or administrative nature with policy formulation or decision-making. In New South Wales, a complex series of field studies and related investigations is being undertaken by the State Pollution Control Commission with respect to Botany Bay. In addition, Salamander Bay (north of Newcastle), and the waterways of Narrabeen, Dee Why and Harbord Lagoons have been subjected to detailed environmental investigations by the Commission in recent years.¹⁹ It is not clear, however, in what manner the findings of these studies will be implemented by the Commission or the New South Wales Government.

The fundamental water-management technique employed by the State Pollution Control Commission under the Clean Waters Act, 1970 is the

19. State Pollution Control Commission, *Annual Report, 1977-78*, 112.

classification of waters on the basis of existing and likely future beneficial uses. The degree of protection to be afforded to a particular waterway is governed by its classification, and the Clean Waters Regulations, 1972 have established six classes of waters with specified emission standards for each class. One class (Class 5, specially protected waters) is a prohibitive classification, whilst the other five classes contemplate discharges of wastes under certain conditions and within prescribed limits.

The main purpose of the New South Wales system of classification of waters is to provide guidance to the Commission in its exercise of licensing powers with respect to discharges into waters. Under s.4(6) of the Clean Waters Act, 1970, the Commission may license discharges into water, and it is required by s.20(6) of the Act to have regard when issuing a licence to the classification of the relevant waters. Hence, a clear link between classifying of water and the licensing system is envisaged by the Act, but there is nothing to indicate that the process of classification itself proceeds from any prior environmental studies of waters on a regional basis. The task of classifying the state's waters has taken time to gain momentum, but by 1978 the Commission had achieved considerable progress.

The New South Wales water pollution legislation constitutes one of the few instances of such legislation outside Victoria in which some form of broad management policy is envisaged as a background support to licensing decisions. It nevertheless seems doubtful whether the New South Wales water classification technique can be considered as amounting to other than a system of emission standards, although it at least has the advantage of a greater flexibility in accounting for regional circumstances and characteristics than exists in the systems of water quality standards which operate elsewhere in Australia.

2.4 *Comments concerning pollution control systems*

Elsewhere in Australia, it is possible to identify statutory provisions which enable various types of environmental investigations, surveys or studies to be undertaken. In South Australia, the Environmental Protection Council is empowered to "investigate and report upon existing and potential problems of environmental deterioration and protection referred to it by the Minister" (Environmental Protection Council Act, 1972, s.14(2)(a)). The Council is however only an advisory body, and therefore is not in a position to implement its own findings.

In Queensland, the Environmental Control Council which was established also as an advisory body with investigative powers has since been abolished, and the responsibility for policy formulation would seem to rest with individual departments or authorities, supported in a broad manner by the functions of the Co-ordinator General's Department.

Finally, mention should be made of the rather curious power vested by the State Pollution Control Commission Act, 1970, s.12(a), in the New South Wales State Pollution Control Commission to "formulate and promote plans for the prevention, control, abatement or mitigation of the pollution of the environment, for the control or regulation of the disposal of waste and for the protection of the environment from defacement, defilement or deterioration." Whilst there is a delightful alliterative ring to the provision, there is an unfortunate absence in the Act of any further reference as to how this function is to be pursued by the Commission. The "plans" referred to in s.12(a) appear to be envisaged as a method of controlling or regulating pollution activities but, not surprisingly, in the absence of any further explanation in the Act as to how such plans should be prepared or implemented, none has materialized.

It remains true therefore that only the Victorian legislation has sought to provide in detail for a framework of environmental studies and policies which underpins and is in fact implemented through a comprehensive regulatory system. Aside from several other isolated and rather marginal exceptions, it would appear that environmental studies have not been linked formally with pollution policy and control functions in Australia.

3.0 Conservation legislation

Apart from the development of pollution control legislation, perhaps the other most outstanding advance with respect to environmental management and protection in the 1970's in Australia was the development of new, comprehensive codes for the conservation of flora and fauna. For example, in South Australia, the National Parks and Wildlife Act, 1972 repealed five earlier enactments and sought to establish a revitalised administrative and legal framework for the conservation of wildlife and the establishment and management of reserves for the public benefit. Similar approaches and objectives are evident in the corresponding New South Wales legislation (the National Parks and Wildlife Act, 1974), whilst the Commonwealth government also determined to commit itself to the conservation cause through its National Parks and Wildlife Conservation Act, 1975. All states now have national parks and wildlife legislation on their statute books.

There is an obvious land-use management function involved in the administration of these enactments. In setting up parks and reserves for conservation purposes, a decision is being made to commit the lands concerned to limited or rather specific forms of land-use, but the legislation providing for such action does not indicate the policy and planning framework (if any) which underlies each decision. Rather, the legislation seeks to provide for more detailed planning with respect to reserves or parks once they have acquired their special protected status. In this latter respect, the various Acts appear to have borrowed from or adopted similar approaches to the land-use planning context, by providing for the preparation of "management plans" which will provide detailed guidelines concerning future land-use activities within parks and reserves.

In some instances, it is contemplated that management plans may actually zone parks or reserves. For example, the Commonwealth National Parks and Wildlife Conservation Act, 1975, s.11(a), provides that:

"The plans of management may provide for the division of the park or reserve into zones and set out the conditions under which each zone shall be kept and maintained."

A similar provision is to be found in s.39 of the South Australian National Parks and Wildlife Act, 1972, which also provides for the declaration of prohibited areas within any reserve where "it is expedient for the purpose of protecting human life or conserving nature plants or animals" (s.42(1)). The Commonwealth legislation also contemplates that wilderness zones may be proclaimed within the whole or part of any park or reserve created under that Act (s.7(2)(b)).

The management plan is clearly intended to provide the basis for regulating all future development within a park or reserve. The New South Wales National Parks and Wildlife Act, 1974 provides, for example, in s.81(4) that:

"Notwithstanding anything in any other Act, where the Minister has adopted a plan of management for a national park, historic site, nature

reserve or Aboriginal area, no operations shall be undertaken on or in relation to the park, site, reserve or area unless the operations are in accordance with that plan of management."

Management plans would therefore appear to provide a suitable vehicle for the implementation of environmental studies concerning particular regions. However, once more, the relevant legislation does not spell out any deliberate or intended link between management plans and prior studies. Rather, the practice is to spell out "objectives" which must be borne in mind in preparing a plan, leading to the eventual production of a descriptive document which is to be given effect by the administering authority. That authority will normally have the power to allow certain uses by way of a grant of a lease or licence, by virtue of its overall title and domain over the lands concerned under the legislation.

In the context of parks and reserves therefore, there is at least the outline of an administrative and legal framework for the management of land-use within specific areas on the basis of policies or objectives spelled out in a form of "statutory" plans. However, the link between regional studies and such plans is not evident from the legislation and exists, if at all, along purely informal lines.

As in the case of both land-use development plans and environmental protection policies, there appears to be an inevitable and at times substantial time-lag between the identification of an area as a nature reserve and the preparation of the appropriate plan. A combination of methodological uncertainty, lack of base-line information, and financial and staff shortages may be contributing factors with respect to this problem.²⁰

4.0. Environmental impact assessment (E.I.A.) measures

The final category of legislation which may provide a mechanism for the implementation of environmental studies concerns the environmental impact assessment (E.I.A.) technique. Under such legislation, an environmental impact statement can be required from the developer or "proponent" of a project for consideration by the relevant decision-making authority or authorities before the project is allowed to proceed. The proponent may be either a public or private developer, and the E.I.S. which may be required of him constitutes a particular (and perhaps the most common) type of environmental study in Australia.

It should be emphasized at the outset of this discussion of E.I.A. measures that it is quite inappropriate to seek out the formal, conceptual framework discussed elsewhere in this paper within the E.I.A. process itself. The process simply constitutes an additional component of the overall administrative and legal systems for land-use planning, environmental protection and resource-management, and is not a discrete framework of studies, policies and controls in itself. It is misleading even to regard the E.I.A. process as a control mechanism with respect to development proposals. Although it has been argued that some proposals should be vetoed where the environmental hazards disclosed by an E.I.S. are sufficiently serious, nevertheless great pains have been taken by most governments in Australia in adopting E.I.A. procedures to emphasize that the process merely supplements existing decision-making

20. For an illuminating account of the administrative difficulties which may arise in this area, see Pettigrew, "The Development and Implementation of Nature Conservation Policy in New South Wales" in *Proceedings of Environmental Studies Section, Jubilee A.N.Z.A.A.S. Congress, op. cit. (supra, n.4)*.

procedures by providing information to the responsible authorities, and does not substitute for or add to the existing decision-making structure.

For the purposes of this paper, therefore, the central issue in considering E.I.A. measures is whether there is any provision in the relevant legislation for the implementation of the popular and specific type of environmental study known as the E.I.S. In other words, it is necessary to contemplate the manner and extent to which an E.I.S. is able to influence decision-making on the proposal to which it relates.

4.1 *The implementation of the E.I.S. in Australia: the "substantive mandate"*

The extent to which an E.I.S. which has been prepared in relation to a particular development proposal will influence the ultimate decision-making process for that proposal is governed in legal terms by the possibility that the legislation establishing the E.I.A. process has also created what the American courts have termed a "substantive mandate", *viz.*, a duty upon the appropriate authority to give due weight to the information provided in an E.I.S. which has been presented to it, in the course of balancing all the relevant factors involved in reaching its decision.²¹

It may not be necessary to spell out an express substantive mandate from the instrument which prescribes the ambit of an E.I.A. system, since it could be argued that the whole aim of the normally complex procedural scheme is to ensure a balanced consideration of environmental factors alongside all other relevant aspects, and that it is therefore unnecessary to make the obligation explicit. However, considerable doubt is often expressed concerning the extent to which administrators are required to take into account the material contained in an E.I.S., and it is suggested that it is preferable at the outset to spell out in any E.I.A. legislation that its ultimate objective is to secure the incorporation of environmental factors adequately into the decision-making processes of government authorities.

Even where the substantive mandate is explicit, doubts may exist concerning whether it has been observed in any particular instance. For example, the Commonwealth E.I.A. procedures which are established under the Environment Protection (Impact of Proposals) Act, 1974-1975 impose the following obligation on Commonwealth Ministers in s.8(b):

"Each Minister shall give all such directions and do all such things as, consistently with any relevant laws as affected by regulations under this Act, can be given or done by him...

(b) for ensuring that any final environmental impact statement formulated in accordance with those procedures, and any suggestions or recommendations made in accordance with those procedures, are taken into account, in matters to which they relate, in the Department administered by him and by any authority of Australia in respect of which he has ministerial responsibilities."

This mandate must be conceded to be extremely flexible and open-ended, and it is probably not surprising therefore that Commonwealth Ministers have been accused of taking decisions on occasions which were in disregard of their statutory obligations. The two most notable instances have been with respect

21. The term "substantive mandate" was coined in relation to the National Environmental Policy Act, 1969 in the United States, this being the legislation which first fostered the E.I.S. technique. In particular, the existence of a legal duty or "mandate" to have regard to environmental factors disclosed by an E.I.S. was strongly supported in the leading decision, *Calvert Cliffs Coordinating Committee v. Atomic Energy Commission* 449 F.2d 1109 (1972).

to the announcement of the decisions to allow Concorde to fly into Australia and to grant foreign exchange approval for the Iwasaki tourist complex at Yeppoon in Queensland. In each instance, the announcement appeared to precede the completion of the procedural requirements imposed under the administrative procedures promulgated pursuant to the Act, and gave rise to grave doubts as to whether the decision had involved any substantive attention to the E.I.S. concerned.

It will always be difficult to establish the extent to which E.I.A. procedures have ultimately influenced decisions. It may well be that some projects are not proceeded with at a relatively early design stage because of the obvious adverse environmental impacts which may be disclosed, yet it is often difficult to adduce evidence of such effects. In May, 1978, the House of Representatives Standing Committee on Environment and Conservation undertook a review of the effectiveness of the Commonwealth Act as part of its Report, *The Commonwealth Government and the Urban Environment*. After adverting to the difficulties in providing tangible evidence that the Act is assisting in the protection of the environment, the Committee reported thus:

"The Committee is not satisfied that the nature and character of the Act, and more particularly the responsibilities it places on decision-makers, has permeated all levels of policy making and implementation."²²

In its subsequent, more detailed investigation and report upon the Commonwealth Act (*Environmental Protection: Adequacy of Legislative and Administrative Arrangements*, October, 1979), the Committee reviewed criticisms of the Act by several Commonwealth departments concerning its substantive effect, and defended the aims of the legislation:

"The Act is designed to ensure that environmental factors are given a certain emphasis. The Committee does not believe that this has had a detrimental effect, nor has it served to establish environmental factors as the paramount consideration in the assessment of proposals. The legislation ensures that environmental factors are no longer submerged by other short-term considerations but are properly accounted for."²³

It is not clear from the *Report*, however, that the Committee considered the Act to be achieving its objects at a satisfactory level. It should also be borne in mind that the "substantive mandate" will only arise, if at all, where the procedures have been invoked in the first place, and there is considerable cause for concern at the present level of implementation by the Commonwealth government of the *procedural* requirements. Whilst the rate at which directions for an E.I.S. were being made showed a steady increase until mid-1978, since that time there has been a marked decline in the number of E.I.S. directions by the Commonwealth.

4.2 *Judicial enforcement of the "substantive mandate"*

If government administration of the procedures is not effective, then it can hardly be expected that substantive decision-making will be particularly influenced by the E.I.A. process. The only course in such circumstances may be to seek judicial enforcement of the procedural obligations and the substantive

22. House of Representatives Standing Committee on Environment and Conservation, *The Commonwealth Government and the Urban Environment* (1978), 57.

23. House of Representatives Standing Committee on Environment and Conservation, *Environmental Protection: Adequacy of Existing Legislative and Administrative Arrangements* (1979), 25.

mandate contained in the legislation prescribing the E.I.A. process. A major difficulty in this respect will be to find an appropriate party with sufficient interest in the observance of the procedures to establish *locus standi* for the purpose of instituting an action in the courts. In February, 1980, the High Court handed down judgment in *Australian Conservation Foundation v. The Commonwealth*,²⁴ in which it denied the Foundation *locus standi* to challenge alleged non-compliance by the Commonwealth with its E.I.A. procedures in relation to the decision to grant exchange approval for the Iwasaki tourist project.

Interestingly, the New South Wales Environmental Planning and Assessment Act, 1979 has taken quite the opposite course, by extending the opportunity in s.123 to "any person on his own behalf or on behalf of others having like or common interests" to institute an action in the Planning and Environment Court. The action can be for the purpose of obtaining an order to remedy or restrain a breach of the Act, irrespective of whether any right of that person has been infringed through the breach. This provision would enable enforcement, *inter alia*, of the E.I.A. procedures spelled out in the Act.

One of the major uncertainties apart from *locus standi* with respect to securing the implementation of E.I.A. procedures and the substantive mandate arising therefrom is that the obligations are often spelled out in instruments of doubtful legislative effect. As in the case of some of the policy or planning instruments which have been discussed earlier in this paper, it would appear that the documents prescribing E.I.A. procedures have a curious "quasi-legislative" status which raises doubts concerning their legal enforceability.

For example, the Commonwealth E.I.A. procedures are contained in an Order of the Governor-General made pursuant to s.6 of the Act. The Order was required to be tabled in Parliament for 21 days without being disallowed before becoming effective. In *Australian Conservation Foundation v. The Commonwealth*, only Stephen J. referred specifically to the status of the Procedures, or as he termed it, the "juristic nature of the rules of conduct prescribed in the Procedures":

"To ask whether they are delegated legislation or only mere rules of executive conduct perhaps does not much advance matters... The important question is whether breach of the rules which they prescribe results in a justiciable issue, in the sense of an issue which, given a plaintiff has *locus standi*, the Courts will entertain. If not, this would provide a short answer to the present appeal: I imagine that no Court would, even at the suit of the Attorney-General, entertain proceedings which complain of breach of, for example, some rule made by a departmental head concerning procedures to be followed within his department."²⁵

Stephen J. proceeded to express a tentative view that breach of the Procedures did raise a "justiciable issue", but clearly the matter has not been fully resolved. Lest it be thought that this is simply a technical, legal problem in the context of one specific piece of legislation, similar examples of "quasi-legislation" concerning E.I.A. procedures can be provided in a number of other Australian schemes.

In Victoria, the Environment Effects Act, 1978 prescribes the fundamental requirements for the E.I.A. system now operating in that state. However, s.10 of the Act provides for "guidelines", as follows:

24. (1980) 54 A.L.J.R. 176.

25. *Id.*, 187.

"The Minister [of Conservation] may from time to time lay down guidelines for or with respect to any matters he considers expedient to enable the carrying out of this Act, and without in any way affecting the generality of the foregoing, for or with respect to —

- (a) the main types of works or proposed works which could require the preparation of an Environmental Effects Statement;
- (b) procedures to be followed by proponents;
- (c) matters which should be contained in a Preliminary Environment Report or an Environment Effects Statement.;
- (d) any information or other matter he considers could be of assistance."

Unlike the Commonwealth Procedures, the guidelines which have been produced under s.10 were not required by the Act to be tabled in Parliament or to be subjected to the forms of scrutiny which might normally be expected to apply to delegated legislation, and it is much more doubtful whether those guidelines could be treated as having legal effect, or (to use the words of Stephen J.) that a breach of their terms would raise a "justiciable issue".

In Queensland, s.29(2) of the State Development and Public Works Organization Act, 1971-1978 imposes a duty on government departments and authorities, when considering applications for approval of development or the undertaking of works themselves, to take environmental effects into account, "and in doing so to have due regard to such policies or administrative arrangements as may be approved from time to time by the Minister to the extent that the same are compatible with legislation for the time being in force in the State." Pursuant to this provision, "policies and administrative arrangements" for E.I.A. in Queensland were declared by the Co-ordinator General's Department in a booklet published in March, 1979, under the title *Impact Assessment of Development Projects in Queensland*. Once again, it is suggested that the policies and administrative arrangements spelled out in the booklet, like the Victorian guidelines, have no legal status; that is to say, they could not be judicially enforced in the event of a breach.

In other states, detailed E.I.A. procedures have been spelled out in administrative guidelines which do not enjoy even the tenuous "quasi-legislative" status of the Victorian and Queensland measures. The Tasmanian Department of the Environment produced a manual in 1974 entitled *Guidelines and Procedures for Environmental Impact Studies*, whilst in Western Australia, the Department of Conservation and Environment released in September, 1978 a "bulletin" headed *Procedures for Environmental Assessment of Proposals in Western Australia*. Whilst both documents purport to have the statutory backing of the respective environmental codes in each state (discussed briefly, earlier in this paper²⁶), it is clear that they are not specifically authorized by those codes (unlike the Victorian and Queensland measures) and are simply informal, non-legal instruments. Nevertheless, they purport to prescribe detailed procedural requirements for E.I.A. and at least create the superficial impression that they must be observed.

Significantly, none of the instruments just mentioned, apart from the Commonwealth Procedures, purports to prescribe any form of substantive mandate on decision-makers to take into account environmental factors disclosed by an E.I.S. Such a mandate would change the nature of the existing legal

26. Section 2.2, (*supra*).

framework for decision-making and would obviously have to be spelled out in legislation. Delegated legislation can alter existing legal responsibilities only if a special clause (the so-called "Henry VIII clause") is incorporated in the parent legislation specifically empowering the regulations to override existing laws (as, for example, has been provided in s.9 of the Commonwealth Environment Protection (Impact of Proposals) Act, 1974-1975.)

The problems of enforceability arise therefore in the context of the procedural aspects of the E.I.A. process spelled out in such quasi-legal instruments. However, the obvious and disturbing consequence of the widespread employment of such informal techniques is that, in the absence of any statutory provision along the lines of s.8 of the Commonwealth Act, there can be no substantive obligation or mandate to have regard to an E.I.S. or the environmental factors disclosed by it.

It is difficult to avoid the feeling that there is a distinct jurisprudential untidiness about the present techniques for imposing E.I.A. procedures upon the Australian community. The almost certain lack of legislative or juristic status for some of the procedural schemes leaves a lingering suspicion that governments are reluctant to commit themselves fully and irrevocably to the implementation of the E.I.A. process. It is one thing to avoid the regular judicial interference with the operation of the process which is viewed as an adverse feature of the American experience with E.I.A.; but the use of extra-legal instruments and the absence in most schemes of a specific substantive mandate which would compel decision-makers to consider environmental factors suggests that this particular form of environmental study may not be influencing decision-making to the extent that the process itself contemplates, or that the community is entitled to expect it will. Clearly, more attention is required to be directed to the form and effectiveness of E.I.A. procedures as a method of environmental study in Australia.

4.3. *The future role of the E.I.A. process*

A final word will be offered concerning the general role of the E.I.A. process in Australia. It is suggested that the scope and detail of the investigations undertaken in preparing an E.I.S. for a major project clearly suffice to justify the classification of an E.I.S. as a legitimate form of environmental study, but there may be other possibly broader benefits to be gained from the operation of E.I.A. procedures than is generally acknowledged at present.

Arguably, E.I.A. has performed an important, if not the principal, role with respect to environmental investigation in Australia to date, in the absence in many instances of suitable base-line information and environmental studies upon which to draw in assessing the impacts of particular proposals. The store of important knowledge which is being accumulated through the operation of the E.I.A. process in Australia could be extremely valuable if some means could be found of pooling or compiling such knowledge to provide broader perspectives of particular regions, or types of environmental problems. Particularly if there are administrative authorities charged with a responsibility for undertaking environmental studies and policy formulation, albeit in the context of land-use planning, environmental protection or natural resource-management (or some suitable combination of these respective areas), then links with the E.I.A. process could be established in a two-way fashion. On the one hand, E.I.A. may help initially to develop the appropriate information systems for environmental studies and subsequent policy. But subsequently, those systems may alleviate the need for the types of extensive research currently required to be undertaken in the course of preparing a thorough E.I.S.,

by providing requisite base-line information for new proposals. It would seem desirable therefore that governments in Australia devote further attention to the "monitoring" of E.I.S. studies so as to determine whether broader use may be made of the information which is gathered through the E.I.A. process.

5.0. Conclusions

It is clear that the suggested formal framework has not been widely adopted in Australia, despite the several examples which have been identified in this paper. The clearest evidence of the existence of such a framework is in the recently revised land-use planning systems, where statutory plans (often at several levels of administrative responsibility, e.g., state, regional and local) have been proposed in place of the traditional planning scheme. In some instances, a distinction has been drawn between planning instruments in the nature of "policies" which are regarded invariably as "state-level" documents, and those in the nature of "plans". In addition, new study techniques based on a more technical and scientific approach to land-use planning appear to be gaining favour amongst the states. The experience with the land-capability analysis techniques underlying the new system of "environmental planning" in New South Wales holds particular interest in this respect.

There are relatively few examples of the conceptual framework, however, in the context of environmental protection legislation. The obvious and outstanding exception is the Victorian Environment Protection Act, 1970, which enables state environment protection policies to be formulated and then implemented through the comprehensive licensing scheme established by the Act. In some instances, the policies may themselves contain standards or prohibitions which, if disregarded, will result in an offence being committed. However, few other pollution statutes or general environmental protection codes (such as those enacted in Tasmania and Western Australia) contemplate a similar, comprehensive approach. The Western Australian Environmental Protection Act, 1971 provides for the declaration of state environmental protection policy, but has not established clear links between such policy and any regulatory functions related to environmental protection.

In the context of conservation laws, it is possible to identify a fragmented version of the conceptual framework in the procedures for the production of management plans for parks and reserves. There is, however, no indication that a link has been established between management plans and prior environmental studies, although one could easily arise in an informal manner as a result of the provision which has been made for the preparation and implementation of such plans.

Finally, in considering the E.I.A. procedures which have been adopted widely in Australia, it must be appreciated that although such procedures assume the existence of a regulatory or decision-making structure to which they will attach, they operate largely in an incremental fashion which prevents them from having any policy or planning function to perform in themselves. Clearly, E.I.A. procedures could benefit considerably from the existence of a framework of environmental studies and consequent plans or policies to assist their operation in particular instances, but such a situation has not developed yet in Australia. Rather, it has been suggested in Part I of this paper that E.I.A. procedures could assist the development of environmental policy by contributing a considerable amount of technical information which has emerged from their operation and which is not otherwise available at present in Australia.

Implementation of the E.I.A. process at the decision-making stage for projects to which it has been applied is of doubtful effectiveness for several reasons. Any substantive obligation to consider an E.I.S. which may be imposed is difficult to enforce in practice, both because of the inherently amorphous nature of such an obligation and the legal difficulties associated with securing judicial review. The legal difficulties relate in particular to the problem of *locus standi*, but it might be added that without legislation concerning freedom of information litigants may also encounter a problem in discharging the burden of proof requirements. An even more fundamental problem is that where the process has been spelled out in so-called "quasi-legal" orders, bulletins or guidelines, no substantive mandate can be imposed legally on decision-makers, and even the procedural obligations prescribed in such instruments are of extremely doubtful legal effect. Finally, where there is administrative reluctance to give full effect to the procedural obligations in the first place, this will circumscribe any potential substantive effect which the process might have on decision-makers. All of these matters provide cause for concern at the current level of effectiveness of E.I.S. studies in Australia.

The overriding impression arising from the review of the relevant legislation in Australia is that little provision has been made for the implementation of environmental studies, the few obvious exceptions apart. This conclusion would seem to confirm a similar view which emerged from the Cowes Workshop on Australian Environmental Studies in 1978:

"The notion that environmental studies may generate enlightened policies, which will serve as guidelines for specific management plans and ultimately be enforced by statutory controls, has a nice conceptual flow. It is also possibly a most desirable state to aspire to, in the interests of effective environmental management. Yet the practice in Australia has been largely different from this conceptual model. Policies affecting the environment — though not necessarily related directly to the environment — have often been formulated in response to political factors, and based on inadequate technical information. Overall, we still seem to lack cogent policies relating to resource-use and hence the management plans for particular areas of resources are often unco-ordinated and apparently aimless."²⁷

It seems logical to ask next, therefore, whether more effort should be made to provide for the adoption of formal rather than *ad hoc* environmental policies and plans, so as to provide some appropriate vehicle or mechanism to encourage a flow-on of the information generated by environmental studies. The existence of readily identifiable, formal mechanisms for the adoption of policies and plans may help the selection of subjects for inclusion in a research agenda for environmental studies.

It is proposed therefore to consider in Part II of this paper whether it is desirable to opt for wider adoption of the formal legal framework under discussion.

PART II: A DISCUSSION OF FORMAL LEGISLATIVE FRAMEWORKS FOR THE IMPLEMENTATION OF ENVIRONMENTAL STUDIES

The principal, potential contribution of the legal system to the implementation of environmental studies is the provision of an appropriate vehicle for that purpose, in the form of statutory policies or plans which in turn may be

27. Clark, "With Benefit of Hindsight" in *Australian Environmental Studies — Order From Disorder*, *op. cit.* (*supra*, n.1), 10.

enforced through specific controls. It is important to question however whether the advantages which may possibly arise from this approach are outweighed by certain other difficulties attendant upon such a formal structure.

It is proposed to focus attention upon a number of difficulties which it is felt ought to be taken into account in contemplating whether such an approach should be more widely adopted in Australia. Whether the balance of argument favours the increased employment of formal frameworks is a matter upon which this paper defers from offering a firm conclusion. The aim is simply to draw attention to the pro's and con's of such an approach.

6.0. The desirability of formal frameworks for policies and plans

Examples of discrete legal frameworks for the adoption of policies or plans as a consequence of environmental studies have been identified in the areas of land-use planning and environmental protection. The area of resource-management laws has been pursued less closely, although the Victorian scheme for approval of unalienated Crown land was noted. It seems reasonable to suggest that these are the broad areas in which formal policies and plans will be potentially most appropriate as a means of implementing environmental studies, but a number of further matters needs to be considered.

6.1. *Coordination of formal plans or policies*

There have been numerous calls for the development of Australian land-use policies of a nature which would embrace environmental and resource-management factors. Such a conceptual amalgam, however, could be impossible to achieve in practice for constitutional, political and technical reasons. Even if comprehensive land-use policies can be developed, there is a need for additional planning and management practices in relation to both environmental and resource allocation issues. Hence, it is suggested that the development of *separate* policies and plans for land-use, environmental protection and resource allocation is inevitable, irrespective of whether formal or informal devices are employed for such purposes.

If so, an obvious problem is the co-ordination of the disparate plans and policies so as to avoid unnecessary overlaps and outright inconsistencies. This difficulty has begun to present itself already in Victoria, where the production of separate statutory policies under both the Town and Country Planning Act, 1961 and the Environment Protection Act, 1970 has occurred on parallel lines, with little apparent communication or co-ordination between the respective authorities. In 1979, a report on the development control system in Victoria (the *B.A.D.A.C. Report*) expressed serious concern at the potential overlap between such policies:

"The Committee considers that an important matter for concern is the relationship between declarations of environment protection policy and statements of planning policy ... It appears to the Committee that it is only through some formal arrangement with the State Co-ordination Council which should be specified in the legislation that any rational approach to co-ordinating these two areas can be found. There is also need for some similar powers to be evolved to ensure that there is no conflict between State environment protection policies and planning schemes."²⁸

28. Building and Development Approvals Committee, *Report on the Building and Development Control System in Victoria: Part II - Planning Controls* (February, 1979), 72.

In New South Wales, the development of a new system of environmental planning appears to represent an effort to integrate land-use planning and environmental management functions within the one system. It seems possible, nevertheless, that the State Pollution Control Commission will maintain a policy formulation role connected possibly with the broad range of environmental studies which it is undertaking. Overlaps and inconsistencies will be less obvious however, since no formal, legal status is likely to be attached to any policies adopted by the Commission.

In defence of the adoption of formal policies, it might be argued that such an approach at least makes inconsistencies more apparent than would otherwise be the case. As a result, the development of arrangements for co-ordination, as proposed for example in Victoria by the B.A.D.A.C. Committee, may be more likely to occur than in circumstances where policies in the respective areas are of an informal nature.

6.2 *The reliability of formal plans and policies*

The development of a legal framework which caters for the adoption of statutory plans and policies assumes the validity for some reasonable period of time of the projections contained in any statutory instrument which is adopted. However, it may be questioned whether the framework is not posited on a far too static concept of the role of policy and is ineffective in practice.

In Britain, doubts concerning the accuracy of land-use development plans (which make projections on a 20 year scale) have prompted the suggestion that more importance should be attached to the *process* of framing policies rather than to the end-result instruments themselves. In *The Reform of Planning Law* (1976), Roberts argues that "the realities of the [planning] process lie in the procedures for drafting the plans or granting the permission, not in the plans themselves."²⁹ He warns strongly against presuming the efficacy of any planning system based on the type of conceptual framework under consideration in this paper:

"What is being suggested here is that the idea of planning the way communities are to grow and change is, by its nature, too complex for any single, rational, administrative system, reformed or unreformed, to deal with. The range of possible factors and the diffusion of conflicting values perhaps makes the idea of a viable, reformed planning process which can actually control future land-use an unattainable one."³⁰

However, it might be argued that some form of planning process is preferable to none, even given that its goals are not completely attainable. Formal policies and plans may be more acceptable if accompanied by increasingly dynamic and flexible techniques for their reappraisal and revision. Such techniques would be essential to ensure that the making of policy becomes a continuous process. The obvious alternative is to ensure flexibility by retaining a completely informal policy formulation process which can adapt more readily to social and political pressures, and also accommodate the findings of ongoing environmental studies with less difficulty than a formal planning process.

It is perhaps ironic that at a time when doubts are being expressed concerning the viability of the British land-use planning system, its techniques appear to be gaining wider acceptance in Australia. On this score it ought to be

29. Roberts, *The Reform of Planning Law* (1976), 10.

30. *Ibid.*

remembered that most of the original state land-use planning systems were modelled on the British planning scheme approach, which was rejected as an outmoded and inadequate technique in Great Britain at exactly the same time as it was being adopted in Australia. There would seem to be a possibility of history repeating itself, particularly when the recent developments in New South Wales are taken into account.

6.3. *The time factor for formal plans and policies*

One of the most important, practical considerations affecting the question of the desirability of formal plans and policies is the amount of time which may be required for their preparation and adoption. Considerable delays have been common with respect to the production of development plans in the land-use planning context, management plans for national parks, and state environmental policies under the Victorian legislation. It could be argued, therefore, that more informal techniques for policy formulation will produce speedier results, and hence are more effective and responsive than formal statutory instruments.

However, it is not simply the formal, *procedural* requirements for policy or plan-making that contribute to such delays. It is essential also that the appropriate manpower and financial resources be allocated to authorities to enable the requisite studies to be undertaken and the various procedural steps to be pursued expeditiously. On occasions, it seems that the political commitment to environmental planning and protection ends at the doors of Parliament, and that the legislative schemes adopted by governments are stifled or retarded by the lack of consequent financial commitment. The relevant administering authority may be left in the position of having to cajole and entreat discretely behind the scenes to secure the necessary resources to undertake its operations in an efficient and effective manner.

These considerations do not necessarily militate against the adoption of a formal framework of policies and plans, since the statutory requirements at least demand *some* financial and administrative commitment by the responsible government. Where there is no such framework, the lack of support for research activities and management programmes may be less evident and hence less susceptible to criticism. Nevertheless, the not uncommon time lag of five to ten years in the preparation and adoption of formal policies is likely to result in projections becoming obsolete virtually from the time of their first taking effect.

Thus, if formal plans or policies are to be favoured, it would seem necessary to any government adopting such an approach to undertake the necessary financial commitment to the carrying out of prior studies as well as the streamlining of the actual procedures for the subsequent formulation of such instruments.

6.4. *The nature of the link between studies and formal policies or plans*

It is only in the context of land-use planning that some effort has been made to prescribe the types of studies which should be undertaken prior to the development of statutory policies or plans. The range of environmental studies being undertaken in Australia is extremely wide, and it seems unlikely that all, or even a substantial proportion of them would necessarily link up directly with formal policies and plans.

It may be questionable, therefore, whether a link between studies and policies or plans should be defined formally, for example, by spelling out specific types of studies as suitable or necessary with respect to particular types

of policy or plan. In contemplating this question, it is important to appreciate that environmental studies are simply a means to an end, and that it may as a result be undesirable to "encase" particular types of study as a prerequisite for the adoption of plans or policies. It seems essential therefore, in order to be assured of reasonable flexibility in the overall process of policy formulation, to retain informal links with environmental studies. In this way, the *ad hoc* formulation of studies in relation to plans and policies should occur in order to meet the needs of the particular situation.

By appreciating that studies may be generated through providing for formal policies and plans to be adopted, unease about the links between studies and policy may be relieved. In such a framework, the informal links between studies and policy have the advantage of flexibility whilst an appropriate avenue for the implementation of any studies undertaken remains evident.

6.5. *The problem of the legal status of environmental instruments*

It remains to comment finally on the more general problem which it has been suggested is emerging in Australia, of instruments concerned with environmental protection and land-use planning which purport to impose constraints on particular activities although lacking legal or juristic status in themselves. In part, the problem arises where provision has been made for formal policies and plans, but it is also most evident in the context of E.I.A. requirements, where an astounding array of instruments such as orders, guidelines, agreements and arrangements have emerged as the vehicles for the operation of such requirements. Overall, the phenomenon of "quasi-legislation", bearing none of the familiar features of delegated legislation but which nevertheless purports to impose legal obligations upon the community, seems to be on a sharp increase in Australia, at least in the areas of environmental protection, land-use planning and natural-resource management.

With respect to policies and plans, this trend is reflected in the recent stronger emphasis upon legality and strict interpretation with respect to development plans in South Australia; in the provision in the Victorian Environment Protection Act, 1970 that state environment protection policies may incorporate legal constraints upon particular activities; in the unusual Western Australian provision that state environmental protection policies should have effect as law as if enacted within the Environmental Protection Act, 1971; and possibly, in the role of management plans for national parks as conclusive statements in some cases concerning future development activity in such regions.

It is submitted that attempts to regulate directly through policy or planning instruments are misplaced. Whilst it is possible to accord *legal* effect to such instruments by requiring that they must be given due weight in any subsequent regulatory processes, it is inappropriate in view of the broad scope of such instruments to regard the statements therein as absolutely definitive, or to impose directly within such instruments constraints of a *regulatory* nature.

In this sense, a distinction between legality and regulation should be appreciated. Policies and plans can have "legal status", in the sense of being recognized as formal instruments which must be taken into account by relevant authorities in appropriate circumstances, without becoming "quasi-legislation" by being treated as having direct regulatory effect. It would seem desirable for such a distinction to be kept more clearly in mind by legislators and judges alike in the future.

Clarification of the intended legal status of statutory policies and plans in particular would seem to be an important prerequisite to any future moves to

provide for the implementation of environmental studies through such instruments. By recognizing that these instruments are essentially designed to provide guidance for subsequent decision-making rather than to substitute decisions by themselves, they will be placed within a more appropriate perspective in any overall framework of studies, policies and controls.

In the context of E.I.A. requirements, it is submitted that the arrangements or guidelines which are intended to spell out procedural obligations should be accorded the status of laws proper, since they are clearly intended to *regulate* the activities of developers.

Furthermore, the prescription of the substantive mandate, which it has been suggested is an essential component of the E.I.A. process in order to cater for implementation of the E.I.S., must clearly be contained in legislation. This consideration adds further weight therefore to the arguments in favour of a legislative framework for the E.I.A. process.

7.0. Summary

No attempt will be made to weigh up the considerations which it has been suggested must be taken into account in determining whether a statutory framework for policies and plans is desirable in order to implement environmental studies. Before adopting such a framework, however, it is suggested that the following matters should be borne in mind:

- despite suggestions that land-use planning, environmental management and resource-allocation functions should be linked together, the development in Australia of separate legal and administrative frameworks in these areas, including for the preparation of policies and plans, seems inevitable;
- as a result, arrangements for the co-ordination of policies and plans in those respective areas are an important adjunct of any formal framework, so as to avoid overlaps and inconsistencies as far as possible;
- in view of the doubts which have been expressed (particularly in Great Britain) concerning the reliability of statutory plans and policies, any formal framework contemplated in Australia should seek to incorporate techniques for the revision of the statutory instruments, in order to achieve a more dynamic and continuous process of planning and policy formulation;
- the avoidance of unnecessary delays in the production of formal policies and plans requires an effective government commitment (following the adoption of legislation) to the provision of the necessary funding and manpower, as well as the establishment of streamlined procedural requirements;
- the establishment of formal links between studies and policies or plans by requiring specific types of studies may prove too inflexible an approach and deter the *ad hoc* stimulation of fresh types of environmental studies;
- the "quasi-legislative" status of many policies and plans is misleading and a source of potential uncertainty; more effort should be made where a legal framework for policies and plans is established to avoid the implication that such instruments are intended to have direct regulatory effect;

- the new "quasi-legislative" instruments concerned with the operation of E.I.A. procedures in Australia should be accorded the status of laws, so as to remove any doubts concerning their binding effect in both a procedural and substantive sense.