

THE DIVERSITY OF INTERESTS IN ENVIRONMENTAL GOVERNANCE: A CHALLENGE FOR THE RULE OF LAW.

Introduction

The function of environmental governance and the principle of the rule of law are both controversial and challenging. To apply the principle of the rule of law to the function of environmental governance is perhaps even more controversial and challenging. A system of environmental governance seeks to bring together the range of competitive and potentially conflicting interests in how the environment and its resources are managed. Increasingly it is the need for economic, social and ecological sustainability that brings these interests – both public and private – together. Then there is the relevance of the principle of the rule of law. Economic, social and ecological sustainability will be achieved – if at all – by a complex series of rules of law that are capable of enforcement so as to ensure compliance with them. To what extent do these rules of law reflect the principle of the rule of law? Is the principle of the rule of law the formally unstated value that is expected to underpin the legal system or is it the normative predicate that directs the legal system both vertically and horizontally? Is sustainability an aspirational value or a normative predicate according to which the environment and its resources are managed? Let us deal sequentially with these issues by reviewing a number of examples that demonstrate the relationship between environmental governance and the rule of law.

The rule of law as a principle

The nature and function of the rule of law have been a significant element in any jurisprudential discourse about law probably since time immemorial. The law not only confers power: it also controls its exercise. This has been expressed in these words:

Private power is constrained and limited by publicly enforced standards and public power is exercised in accordance with and subject to the discipline of public standards.¹

What are these standards and how are they enforced? The substance of these standards varies in accordance with the persons or institutions to whom or to which they apply. Clearly they apply to the members of the community to which the law applies. Equally they apply to the institutions of the community whose function it is to enact the law, to identify from relevant sources what is the law, to implement the law and to enforce the law. A community governed by the rule of law is thus distinguished from a community governed by an autocrat.

According to one view:

¹ Richard Ekins, "Rights, Interpretation and the Rule of Law" in Richard Ekins (ed) Modern Challenges to the Rule of Law (Lexis Nexis NZ Ltd., Wellington, 2011) at p166.

Government in all its actions is bound by rules fixed and announced beforehand - rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.²

This is an aspect of the formality of the principle of the rule of law. Equally important is the substance of these rules. Does the principle of the rule of law contain within it any recognition of fundamental values which no law may compromise: for example, individual liberty, private property, natural justice, democracy and perhaps even now sustainability. The extent to which the principle of the rule of law embraces matters of substance is much contested. Let it suffice to accept this conclusion:

There is an extensive literature that discusses the concept of the rule of law, ranging from approaches which give it a purely formal content to those which give it a significant substantive content, with intermediate positions along the spectrum.³

Without taking this issue any further, it seems reasonably clear that the principle of the rule of law embraces eight standards or criteria – whether they are described as formal or substantive. These have been summarised in this way. Laws should be:

- prospective
- capable of being obeyed
- promulgated
- clear
- coherent (not contradictory)
- stable (not changed arbitrarily)
- general (so that particular decisions are framed by general rules)
- in fact directive of official action.⁴

In the context of environmental governance the four most important are perhaps clarity, coherence, generality and direction.

The function of environmental governance

² F.A. Hayek, The Road to Serfdom (Routledge and Kegan Paul, London 1944) at p54

³ Philip Sales, "Three Challenges to the Rule of Law in the Modern English Legal System" in Richard Ekins (ed), Modern Challenges to the Rule of Law (Lexis Nexis NZ Ltd., Wellington, 2011) at p190

⁴ Richard Ekins, note 1, at p 166. See also J.D. Heydon, "What Do We Mean by the Rule of Law?" in Richard Ekins (ed) Modern Challenges to the Rule of Law (Lexis Nexis NZ Ltd., Wellington, 2011) at p18 to 21 and Ruth Higgins, "Contingency, Law and the Practice of Value" in JT Gleeson and RCA Higgins, Constituting Law: Legal Argument and Social Values (Federation Press, Sydney, 2011) at pp39 to 41

The function of environmental governance is no less contested. Importantly it comprises private power, public power, how the exercise of private power is controlled and how the exercise of public power is controlled. This is a reflection of the wide variety of interests – both private and public – that underlie the management of the environment and its resources.

A discussion about environmental governance frequently begins – but does not end – with land and landscape. The location of land is significant. It may be urban land, periurban land, or rural land. It may indeed be a mixture of these. The source of the interest may be, for example, freehold title, leasehold title, native title or something less than title in the form of a licence or a permit. Private power may be exercised in any of these ways and in any of these locations for a range of conflicting uses. These include residential, commercial, agricultural, horticultural or forestry purposes. The uses might include the provision of infrastructure or the supply of water. The uses may be industrial:

- the extraction of minerals
- the production of energy
- the transmission of energy
- the distribution of energy.

The land may be put to no use whatsoever by humans: it may be set aside for the protection and conservation of its natural values. Many of these conflicting uses take place side by side.

Then there is the public interest in how private power is exercised. What uses should be permitted or prohibited in the public interest? If a use is permitted, upon what conditions is it permitted? These issues arise in a number of contexts:

- Should access to land be permitted by way of a grant of freehold title, leasehold title, or some other interest in the land?
- Should access to the land be permitted to enable the construction and operation of oil or gas pipelines or electricity transmission lines?
- Should access be permitted and, if so, on what conditions to enable exploration for and subsequently mining of minerals?
- Should the construction and operation of a dam be permitted and, if so, on what conditions to enable the formation of a large reservoir of water to be used for public supply purposes?
- Should approval be granted for the construction of residential or commercial premises?

●Should the use of the land be restricted to agricultural or horticultural activities?

Issues such as these are resolved almost entirely within a framework of relevant legislation. The statutory regimes state the procedures according to which these issues are determined. Increasingly the legislation indicates the objectives to be achieved in the public interest in determining these issues and even in some cases the values and the principles associated with these processes. There is thus an ongoing relationship between private interests and public interests and they are as much conflictual as congruent. The values of society are changing. The policies and associated strategies of government are changing. The natural environment is constantly changing. All of this takes place within a framework of law which is itself changing. The principle of sustainability which is driving a number of these changes itself creates a number of significant economic, social, and ecological challenges. This in itself creates a number of challenges for the law.

It is of the essence of environmental governance that the system responds to change whether it would be brought about by human activity or natural events. One of the consequential challenges is whether environmental governance should be a responsibility of the executive branch of government. The second is the function of the legal system that sets the framework within which the executive branch of government operates. The third is the extent to which the judiciary is involved in interpreting and applying the arrangements created by the legislature and implemented by the executive branch of government. This goes to the heart of the constitutional relationship – always a dynamic one – between the legislative, the executive, and the judicial branches of government. In this way there arises for consideration the fundamental issue of the rule of law – whether formal or substantive or both.

Sustainability as a principle of the rule of law

(a) Introduction

Sustainability has itself emerged as a principle of environmental governance in international law as well in the national legal systems. Sustainability and its associated principles – for example the polluter pays principle, the principle of prevention, or the precautionary principle – are for the most part formalised as sustainable development or, in the case of Australia, as ecologically sustainable development. It is beginning to emerge as a standard for the exercise of private power and the exercise of public power in the senses already discussed. It does not assume the form of a traditional rule of law. But it is more than aspirational. It has become in a number of contexts part of the fabric of the statutory arrangements for environmental governance in Australia⁵ and its function has become increasingly

⁵ D.E. Fisher, Australian Environmental Law: Norms, Principles and Rules (Thomson Reuters, Sydney, 2010) at chaps 5 and 6

recognised and given effect by the judiciary. How it is incorporated within the legislation is important. How it is implemented by the executive government is equally important. But neither is likely to be particularly effective unless it is explained, analysed, and applied either directly or indirectly by the judiciary.

(b) A judicial analysis of the principle

Sustainability is controversial. It is not universally acknowledged as a helpful criterion for decision-making. But it is an element of the legal system in Australia. Significantly Chief Justice Preston of the Land and Environment Court of New South Wales has explained it in some detail.⁶ A number of points have emerged clearly from his analysis. His Honour acknowledged the importance of ecologically sustainable development as an objective supported by a number of principles and explained a number of these principles. Although it was commented that the principles of ecologically sustainable development “afford guidance in most situations”⁷, their function is more than to provide guidance.

The following points were specifically noted by the Chief Justice. This is the first:

The principles of ecologically sustainable development are to be applied when decisions are being made under any legislative enactment or instrument which adopts the principles.⁸

The critical word is “applied”. There are accordingly two questions to ask. Does the instrument adopt the principles? Does the instrument render them relevant? If either test is satisfied, then there is an obligation to “apply” these principles. The second point noted by the Chief Justice is this:

The [Environmental Planning and Assessment Act 1979 of New South Wales] is one such legislative enactment. It expressly states that one of the objects of the Act is to encourage ecologically sustainable development.⁹

Significantly the relevant object of the Act is neither to achieve ecologically sustainable development nor to apply its associated principles. It is simply to encourage ecologically sustainable development. However this on its face is sufficient to render ecologically sustainable development and consequently its principles relevant in the administration of the Act.

This is the third point noted by the Chief Justice:

Section 79C(1) of the Act, which sets out the relevant matters which a consent authority must take into consideration, does not expressly refer to

⁶ Telstra Corp Ltd v Hornsby Shire Council [2006] New South Wales Land and Environment Court 133

⁷ *Ibid* at para. 120

⁸ *Ibid* at para. 121

⁹ *Ibid* at para. 122

ecologically sustainable development. Nevertheless, it does require a consent authority to take into account the “public interest” in section 79C(1)(e). The consideration of the public interest is ample enough, having regard to the subject matter, scope and purpose of the Act, to embrace ecologically sustainable development.¹⁰

This line of judicial reasoning is critical. There is a duty to take into account relevant matters. Neither ecologically sustainable development nor its associated principles is stated to be a relevant matter. The public interest is a relevant matter to be taken into consideration. Since the encouragement of ecologically sustainable development is one of the objects of the Act, the public interest includes ecologically sustainable development and its associated principles simply because the legislature has declared it to be one of the objects of the Act. In this way ecologically sustainable development has become a matter that must be taken into consideration. The Chief Justice has expanded this by identifying the consequential duty to apply the principles of ecologically sustainable development once they have become relevant.

(c) Conclusion

It would seem, therefore, that the principle of sustainability in its various forms is capable of performing a significant function within a statutory framework that can justify its relevance. The nature and scope of environmental governance suggests that the principle is likely to be relevant in most if not all contexts of environmental governance. Let us now consider a number of examples of legislation in Queensland which provides access to a natural resource, which protects the environment and which conserves ecological values.

Sustainability as a principle incorporated in legislation

(a) Land

The Land Act 1994 of Queensland provides for the creation of interests in land through the grant, for example, of freehold and leasehold tenures. This is consistent of section 40 of the Constitution of Queensland which implies the retention by the Crown of the radical title to any unalienated land but confers upon the legislature the exclusive power to manage and control such lands and their associated natural resources. The Land Act 1994 contains no statement of its object. However section 4 requires land to which the Act applies to be managed for the benefit for the people of Queensland by having regard to a number of stated principles. One is sustainability:

¹⁰ Ibid at para. 123

Sustainable resource use and development to ensure existing needs are met and the State's resources are conserved for the benefit of future generations.

Then there is evaluation:

Land evaluation based on the appraisal of land capability and the consideration and balancing of the different economic, environmental, cultural, and social opportunities and values of the land.

The obligation is to have regard to these principles in the administration of the Act. This is an obligation imposed upon all persons involved in the administration of the Act.

The obligation in section 16 is more specific. Subsection (1) states:

Before land is allocated under this Act, the chief executive must evaluate the land to assess the most appropriate tenure and use for the land.

By implication the duty to evaluate the land carries with it the obligation to have regard to the principle of evaluation. This refers to the economic, environmental, cultural and social values of the land - clearly a reference to ecologically sustainable development. This is consistent with the stated principle of sustainability. The duty to evaluate is directed at a specific objective: mainly to assess the most appropriate tenure and use for the land. This implies an obligation to determine the most appropriate tenure and use for the land. Significantly it is both tenure and use simultaneously.

Subsection (2) states further:

The evaluation must take account of State, regional and local planning strategies and policies and the object of this Act.

It is a duty only to take account of these factors. Nevertheless this is designed, no doubt, to ensure a degree of consistency between the decision to grant access by granting tenure in the context of use and the priorities in relation to use that are a part of the planning strategies and policies at all levels. Then there is the obligation to take account the object of the Act. Although there is no stated object of the Act, the object of the Act can be determined by reference to the principles required to be taken into account by section 4. These include, as we have seen, sustainability and evaluation. Thus the principle of sustainability in its statutory form as reflected in section 4 performs an important function within the statutory framework.

(b) Geothermal energy

Access to geothermal energy is governed by the Geothermal Energy Act 2010 of Queensland. Section 3 distinguishes between the main purpose of the Act and other purposes of the Act. The main purpose stated in section 3(1) is to encourage and facilitate the safe production of geothermal energy for the benefit of all

Queenslanders. This is a statutory statement by the legislature of what it sees as the public interest in relation to geothermal energy. One of the “other” purposes stated in section 3(3)(b) is to encourage the use of renewable energy. Once again this is a statutory statement of what the legislature perceived to be in the public interest. On the other hand, the “other” purposes stated in section 3(3)(a) acknowledge the existence of other interests in the land and the potentiality for conflict between them and the public interest stated in the legislation. There are four:

- minimisation of conflict with other land uses
- constructive consultation with people affected by the activities
- appropriate compensation for owners or occupiers of land adversely affected by the activities
- responsible land and resource management.

The fourth probably brings together the public interest and the private interest in ensuring responsible management. The first three acknowledge the importance of a range of private interests in the land affected by the development of geothermal energy.

Access to geothermal energy is achieved by the grant by the Minister of a geothermal lease. The Minister may grant a geothermal lease only if satisfied that the requirements stated in section 81 have been complied with. The requirements include these two:

- the relevant environmental authority has been issued
- any relevant Water Act authorisation has been issued.

A relevant environmental authority is issued under the Environmental Protection Act 1994. The use of water to enable the extraction of geothermal energy suggests that in most cases authorisation under the Water Act 2000 will be required. In any event the criteria for the granting of an environmental authority and for the granting of water rights are stated in the relevant sectoral legislation and are by no means the same as the criteria for granting a geothermal lease.

The importance of environmental and water issues is reinforced by the requirements in relation to a mandatory development plan. According to section 90(1) the proposed development plan must include an assessment of:

- water needed for the proposed activities
- the potential for obtaining any relevant Water Act authorisation

- the potential structural and other impacts of the carrying out of the proposed activities on aquifers.

In addition subsection (2) requires the proposed plan to include a plan for the treatment and disposal of any water taken or that may be taken because of the carrying out of the proposed activities. Consequently the impact on water of proposed geothermal activities and the impact of these activities on aquifers are critical issues that must be addressed not only in the context of the decision to grant a geothermal lease but also in the context of the activities authorised by the geothermal lease and by its associated development plan. Finally, the relationship between the development plan that must address water issues and the environmental authority which must address environmental issues is governed by section 94(2). It states that “the proposed plan can not be inconsistent with any relevant environmental condition for the lease.”

The Geothermal Energy Act 2010 facilitates the development of geothermal energy as a matter of public interest and at the same time it recognises the need to address water and environmental issues associated with the development of geothermal energy by imposing a range of procedural and substantive obligations upon not only applicants for the geothermal lease but also the Minister in responding to the applications. While the Act recognizes that it is in the public interest to develop geothermal energy, it also recognizes that it is in the public interest to protect water, to protect aquifers and to protect the environment as matters of public concern and again at the same time to recognise the range of private interests that are associated with these wider matters.

(c)Environmental protection

The Environmental Protection Act 1994 of Queensland provides for the protection of the environment in general terms not only from environmental harm but also from the risk of environmental harm. However it is set within the context of ecologically sustainable development. Thus section 3 states:

The object of this Act is to protect Queensland’s environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends (ecologically sustainable development).

There are two elements of this statement of object. One is to protect the environment. The other is to allow for development of a limited kind. The relationship between the two elements is unclear. Is the achievement of one conditional upon the achievement of the other or are both to be achieved simultaneously? Whatever is the answer to these questions, for practical purposes the Act is about ecologically sustainable development.

This is reinforced by the interpretation given to the standard criteria that must be considered in making decisions under the Act. The interpretation of standard criteria includes:

- the principles of ecologically sustainable development
- the public interest.

For this purpose the principles of ecologically sustainable development are those set out in the relevant national strategy. Clearly there is an obligation for these to be considered. Equally clearly there is an obligation to consider the public interest. The public interest can be identified through the statement of object in the legislation – itself described as ecologically sustainable development.

Much more important in terms of legal doctrine is section 5. It states:

If, under this Act, a function or power is conferred on a person, the person must perform the function or exercise the power in the way that best achieves the object of this Act.

There is no doubt that this is a duty. It is a duty imposed on any person performing functions or exercising powers under the Act. The duty is to do so in “the” way that best achieves the object of the Act. Although this is not a unique formulation, it is one of the more specific formulations of a duty in relation to the object of the Act. Significantly the substance of the duty is precisely stated. It is “the way that best achieves” the object of the Act. The implication is that there may be a number of ways in which the object of the Act may be achieved. The obligation is to select the one that best achieves the object of the Act. There would accordingly be an implied obligation to justify how the decision best achieves the object of the Act by describing the facts and circumstances, by analysing the facts and circumstances against the criterion of ecologically sustainable development and by explaining precisely how the decision best achieves the object of the Act in these circumstances. This appears to be what section 5 means but it has never been judicially interpreted or applied.

(d)Wild rivers

The Wild Rivers Act 2005 of Queensland provides for the protection of particular values of the environment. Section 5(1) states that the purpose of the Act is to preserve the natural values of rivers that have all, or almost all, of their natural values intact. The principal instrument for achieving the object of the Act is the declaration of a wild river area. This is complemented by providing for the regulation of particular activities and of the taking of natural resources in the wild river and its catchment so as to preserve the natural values of the wild river. There is consequently a regulatory function as well as a strategic function incorporated in the legislation.

Section 12(1)(i) requires the declaration of a wild river area to include information about the carrying out of activities or the taking of natural resources proposed to be prohibited or regulated in the proposed wild river area. While the purpose of the Act talks about the preservation of the natural values of wild rivers, it is clearly contemplated that, while activities may be prohibited, activities may appropriately be permitted and regulated.

In the first instance, it is the declaration that contains the detailed arrangements according to which the wild rivers area is to be managed. The Act permits otherwise unlawful activities to take place in accordance with the provisions of section 31A and section 31E. A person who is the owner of land within a wild river area may put forward a plan to carry out activities on or take natural resources from the land if the activity of the taking is prohibited under a wild river declaration. The Minister may approve the plan only if the Minister is satisfied on a number of points. These include:

- the activities or the taking could not reasonably be carried out without amending the wild river declaration and would likely be completed within 10 years
- the carrying out of the activities or the taking would not have an overall adverse impact on the natural values of the wild river
- the environmental benefits of the plan would justify the approval of the plan.

Accordingly, unless each of these three conditions is satisfied, approval must not be given to the proposed activities or taking. It is a matter of fact and circumstance whether the proposed activities would have an overall adverse impact on the natural values of the wild river and this, together with a review of the environmental benefits, calls for a careful evaluation and judgement on the part of the Minister in accordance with the methodology for decision-making prescribed by the Act.

(e)Agricultural land

Values protected by the Strategic Cropping Land Act 2011 of Queensland are associated with agricultural productivity and consequently disclose economic as well as social and ecological perspectives. The purposes of the Act are threefold:

- to protect land that is highly suitable for cropping
- to manage the impacts of development on that land
- to preserve the productive capacity of that land for future generations.

Provision is made for the identification of land highly suitable for cropping. Once identified protection areas and management areas for strategic cropping land are

established. Development in these areas is regulated. Principles are established to protect strategic cropping land. Development on strategic cropping land that has a permanent impact on the land or a temporary impact on the land is prohibited without authorisation in one form or another.

The strategic land cropping principles stated in the Act are critical to the performance of the range of functions performed under the Act. The principles guide the performance of functions related to the protection of strategic cropping land or potential strategic cropping land and to the management of the impacts of development on strategic cropping land. There are five such principles:

- protection
- avoidance
- minimisation
- mitigation
- productivity.

The productivity principle is that strategic cropping land must be conserved for the future productivity of cropping in the state. The mitigation principles are about mitigating the impacts of development. The minimisation principles are about minimising the impacts of development. The avoidance principle is for development to avoid strategic cropping land if it is reasonably practicable to do so. The protection principle – quite simply – is to protect strategic cropping land. However, except in exceptional circumstances, the protection principle takes precedence over all development interests. This is one of the few examples of the creation of statutory priority. What it appears to mean is that protection of strategic cropping land in the public interest takes precedence over the interests of whoever wishes to develop the land whether the development interest is a private interest or a public interest. But again this is at this stage speculation.

(f) Aboriginal cultural heritage

The focus of the Aboriginal Cultural Heritage Act 2003 takes us from the natural heritage of the community – from either an anthropocentric or an ecocentric perspective – to the cultural heritage of the Aboriginal community. According to section 4 the main purpose of the Act is to provide effective recognition, protection and conservation of Aboriginal cultural heritage. The instruments for doing so include:

- a set of fundamental principles
- the involvement of the Aboriginal community

- a set of obligations not to harm Aboriginal cultural heritage.

One of the fundamental principles underlying the main purpose stated in section 5(e) and is this:

There is a need to establish timely and efficient processes for the management of activities that may harm Aboriginal cultural heritage.

There is accordingly no specific duty to establish timely and efficient processes but this is clearly stated to be one of the ways in which the objective of the legislation is to be achieved. Similarly section 6(g) states that the Act ultimately ensures that Aboriginal people are involved in the processes for managing the recognition, protection and conservation of Aboriginal cultural heritage. This is a descriptive statement rather than either a statement of principle or a statement of purpose.

Section 23(1) creates what is described as the cultural heritage duty of care. This duty is imposed upon everyone. Thus a person who carries out an activity must take all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage. This is complemented by the obligation in section 24(1) imposed upon everyone not to harm Aboriginal cultural heritage if the person knows or ought reasonably to know that it is Aboriginal cultural heritage. Neither duty is entirely objective in character. This is because each of the two duties contains to some extent a subjective element. While the purpose of the Act is to protect and conserve Aboriginal cultural heritage, neither the text nor the context of the Act supports an obligation either to achieve the protection and conservation of Aboriginal cultural heritage or to protect and conserve Aboriginal cultural heritage.

Conclusion

(a) Instruments for environmental governance

The propositions that are contained in the text of these statutory examples of techniques of environmental governance disclose rules that perform a range of different functions within the statutory regime in question.¹¹ There are, for example, propositions:

- stating objects to be achieved or to be considered
- stating strategies about how to achieve objects
- stating principles to guide the achievement of objects
- conferring powers upon a range of institutions and persons – rules of competence

¹¹ See D.E. Fisher, note 5 at pp9 to11

- imposing prohibitions, restrictions or conditions – rules of limitation
- prescribing the methodology of decision-making on the part of a range of institutions and persons
- creating enforcement mechanisms and imposing sanctions – rules of liability.

Ideally each of these is an element of an overall framework that is both consistent and coherent. A pattern of coherence is achieved if each of the elements is linked to the others in a logical and rational way. This ideal is rarely – if ever – achieved.

A system of environmental governance is increasingly directed towards the achievement of the objective of ecologically sustainable development. In the absence of the duty to achieve ecologically sustainable development, the effectiveness of the system is likely to depend upon the relationship between the several elements of it. For example;

- objects are to be considered
- strategies are to be implemented
- principles are to be applied
- principles are to guide.

These instruments are part of what may be described as the set of para-legal rules that are part of the overall system. Their inherent characteristic is flexibility and discretion. The range of instruments that includes rules of competence, of limitation and of liability assume the form of traditional legal rules. Their principal characteristic is relative clarity and precision. However, much depends upon the language of each of these sets of arrangements. If ecologically sustainable development is the ultimate objective to be achieved by the system, then it is the concept of sustainability that is likely to constitute the overarching concept that may produce coherence.

(b)Sustainable environmental governance and the rule of law

If this is a justifiable explanation of current arrangements for environmental governance, it raises issues for the principle of the rule of law. Such a system of environmental governance is a combination of legal rules and paralegal rules in the sense described. Their form, their substance and the language by which they are expressed are quite different from the form, the substance and the language by which traditional legal rules are expressed. This system of governance has been created effectively by the legislature. It is implemented by the executive branch of government in conjunction with the relevant members of the community affected by it. It is the traditional function of the judiciary to settle disputes and ensure compliance with the law.

The fundamental elements of the principle of the rule of law have been noted. They are moving from the perspective of form to one of substance. Ecologically sustainable development is essentially a matter of substance. But many of the instruments for its achievement are formal. There is therefore an emerging tension between the certainty of the legal rules component of the system and the flexibility of the para-legal rules component of the system. Should decisions about the environment and the use of its resources be the function of the executive branch of government and so responsible both to the legislature and to the law? Does the judiciary have a significant part to play in ensuring compliance with the rule of law or at least acknowledging its significance? This is ultimately an issue for those who are responsible politically for the characteristics of the system of government in any jurisdiction. On the assumption that the principle of the rule of law is one of the principles underpinning the society in question and its system of government, it is ultimately the responsibility of the judiciary to uphold the rule of law. But – certainly in the context of environmental governance – the judiciary itself is limited by the nature of the particular rules of law to which it is required to give effect.

In some instances, for example the Land and Environment Court of New South Wales, a court is invested with the jurisdiction to make decisions about the environment and its resources on their merits – an executive function. On the other hand a court – more traditionally – is invested with jurisdiction to ensure the legality of decisions made about the environment and its resources – an adjudicative function. In the context of environmental governance the two functions are perhaps becoming increasingly interrelated. Legislatures have increasingly imposed upon the executive branch of government complex methodologies for making decisions. It is the function of the judiciary to ensure the legality of these decision-making arrangements – certainly if the principle of the rule of law is to be upheld. If this is so, then a very heavy responsibility is cast upon the judiciary to uphold the rule of law in the context of environmental governance. This is probably no more than one consequence of the diversity of interests – both public and private – in how the environment and its resources are governed.