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CLEAN AIR SOCIETY OF AUSTRALIA & NEW ZEALAND

QUEENSLAND BRANCH

INTERNATIONAL CLEAN AIR CONFERENCE

BRISBANE, 17 MAY 1978, 7.30 P.M.

LAW REFORM AND THE ENVIRONMENT

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

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WHY A LAW REFORM COMMISSION?

A visiting American futurologist identified last month the three most frequently told lies of the twentieth century. The first was "my cheque is in the mail". The second, he said, was "I'll love you as much tomorrow morning as I do tonight". The third, he said, was this : "I'm from the Government. I am here to help you".

Well, the Australian Law Reform Commission is a new organ of the government of Australia. It is here to help the Australian legal system to cope with the challenges and opportunities of today's society. I set myself the task of establishing that the Law Reform Commission, at least, is entitled to be judged exempt from the "lie" of the third kind. I propose to tell you something about the Commission and then to explore with you the relevance of some of the projects before it for the reform of the law affecting the environment.

The Law Reform Commission was established by the Federal Parliament in 1973. Its charter is to "review, modernise and simplify" the laws of the Commonwealth of Australia.[1] It works on references it receives from the Commonwealth Attorney-General, Senator Durack. Under the Constitution, the Commonwealth has limited and largely unexplored powers to enact laws affecting the whole environment throughout Australia. Such laws, in our country, are generally regarded as the responsibility of State and local governments. Nevertheless, some of the tasks before us affect, or have the potential to affect, the protection of the environment. Future references to the Commission may involve more directly the consideration of what Australia, as a nation, ought to be doing to tackle some at least of its environmental problems on a national scale. All of the work being done in the Law Reform Commission affects Australians as citizens. We are likely to be seeing more of each other. The Commission is not a scholarly debating society. It is, as I have said, part of the regular machinery of government in this country. Because its recommendations can affect you directly, it is useful to review who we are, how we operate and what we are doing.

The Commission is a national body. It is made up of ten Commissioners : three of them full-time. The part-time Commissioners are resident in the various States and travel to Sydney, where the Commission is set up, for regular meetings with the full-time Commissioners and staff. "Part-time-ism", as all of you would know, has its problems. But Australia is a continent and a federation with divided responsibilities for legal reform and renewal. It is vital to keep a link with the communities in the different States. It is also desirable in suggesting reform of the law to be able to acquire the help of the best legal minds in the country : many of whom would simply not be available on a full-time basis.

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1. *Law Reform Commission Act*, 1973 (Cth), s.6(1)(a).

All of the Commissioners but one are lawyers. The full-time Commissioners number a judge, a solicitor and a legal academic. One position for a full-time Commissioner is currently vacant and was, until recently, filled by a Sydney Queen's Counsel. The same pattern is found amongst the part-time Commissioners who include a Melbourne Q.C., an Adelaide Professor of Law, a Sydney solicitor, a member of a Commonwealth Tribunal stationed in Canberra and so on.

To make the most of our part-time members, the Commission is organised, under its Act[2] in Divisions. Each time we receive a new reference from the Attorney-General, a division of the Commission is created, comprising full-time and some part-time members assisted by research and other staff. For the purposes of the Act, this division is the Commission. In this way we have been able to make real use of the particular specialties and reasonably available time of our Commissioners.

I have said that the Commission is not simply a debating society. In saying this I merely reflect what successive Attorneys-General have asserted. Late last year, the present Attorney-General, Senator Durack, put it this way :

> "... [M]y government is a government of law reform. It has gone about this task purposefully and quietly. It has not shirked from tackling difficult projects and it has sought to involve as many as possible in bringing these reforms about. The government proposes to continue to tackle these difficult problems and to tackle them as fast as we can. There is no sense in having law reform commissions unless the government takes active and prompt steps to consider the reports and to implement the reports so far as they are consistent with the government's philosophies and

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2. *Ibid*, s.27

> the practical exigencies that may apply. Obviously the government cannot be expected to implement reports carte blanche. We haven't done so. But it is the obligation of governments to consider the reports promptly and to take some positive steps to implement them. That will be the policy, the government of which I am a Member, will pursue".[3]

The Commission has already delivered five substantive reports to the government, four of them prepared to meet deadlines fixed for report. Two of them were delivered late last year and are still under study. One of these, a report on *Human Tissue Transplants*, is understood to be the subject of legislation presently being prepared. Another report, delivered in 1976, has now passed into law. Both of the other two reports were accepted by government and a Bill introduced which, substantially, sought to implement the Commission's proposals. One of these Bills, the Criminal Investigation Bill 1977, was described by Attorney-General Ellicott, quite rightly I think, as "a major measure of reform".[4] It lapsed with the recent dissolution of the Commonwealth Parliament. But there have been firm commitments by the Prime Minister,[5] Mr. Ellicott[6] and Senator Durack[7] to the principles of this important measure. Equally I believe the Opposition has indicated general support.[8] It is, as Senator Durack has acknowledged, a highly controversial measure but one which seeks to modernise the law and to render it available to Australians, substituting an available Australian statute for obscure and often unavailable English sources.

The point I want to make is that unlike some Commissioners, Committees of Inquiry, Royal Commissions of the past, the national Law Reform Commission in Australia has secured

3. Address to the North Queensland Legal Convention, Townsville, 8 October 1977 (No. 66a/77) *mimeo*, 14-15.
4. *Commonwealth Parliamentary Debates* (H of R) 24 March 1977, 47
5. Speech to Legal Convention (1977) 51 *A.L.J.* 343 at 344 and Ct Parl. Debates, (H of R), 6 Sep. 1977, 727.
6. See n.4.
7. See n.3.
8. *Cwth. Parl. Deb.* (H of R), 3 May 1977, 1486.

bipartisan support from successive governments and five successive Attorneys-General. It was created by our Federal Parliament to assist the legislators and the Executive in the more complex and controversial matters that might otherwise be put into the "too hard" basket.

METHODOLOGY OF REFORM

I now want to say something about the methods that have been adopted by the Law Reform Commission in answering the various references it has received from government. The methods have been unusual. They deserve the attention of a few minutes. One of the endemic complaints about the processes of legislative preparation in Australia has been about the secretiveness that is almost universally the watchword. One frustrated editor put it this way :

> "In Australia the tendency has been for there to be little (although growing) consultations between government and the community on where and how law reform should take place. That does not mean that there isn't some consulting between governments and experts in various fields. This does not mean that there is not some exchange of views between governments and various industries when major changes are proposed in important areas of business legislation. But it is clear that there continues to be less confidence in the business community in Australia in the way in which the law is reformed than there is in the United States. And this is equally true for Canada.
>
> The reason for this great respect [in North America] is the manner in which the reform process occurs ... The usual process is for model legislation to be drawn up by a specialist committee ... This report is examined at length by a committee which is appointed from all levels of the business and legal communities. ... This is no "lunchtime" committee, no "seven-to-nine" committee. This is no meeting of persons who have had a busy day at the office, or who know that tomorrow's going to be another hectic day in negotiating a new contract. These men and women are given the opportunity to look at problems with a realistic but

> nevertheless tight schedule, with a realistic but nevertheless tight budget for research, with a realistic but nevertheless responsible programme of seminars and conferences with experts from various parts of the country. ... Compare this to the way in which the *Trade Practices Act* was introduced in Australia. ... Compare this to the way in which legislation dealing with Privacy has been introduced in various States in Australia. Compare this with the way in which legislation dealing with Gift Duty has been introduced in the various States of Australia. All of these are examples of the rather inadequate nature of law reform as it occurs in Australia".[9]

This somewhat polemical but obviously heartfelt protest was written late in 1975. The protest is basically against the fairly well established procedures which we inherited in this country from Whitehall and which characterise the preparation of most Australian legislation. There are two causes for this procedure. The first is no longer really relevant. It is the conviction that a highly trained and elite group has a privilege and duty to prepare laws according to what it thinks is right and just, without the harassing pressures of public and intereste opinion. Universal education, the information explosion and modern notions of democracy and participation in society make this thesis unacceptable today.

There is, however, another consideration. In the United States, where there is greater public participation in lawmaking, the Executive Government is, impeachments apart, guaranteed four years in office. That is not so under our system. Control of the Treasury Benches may be much more ephemeral. It is therefore understandable that governments and the public service working to them should seek, so far as is possible, to protect government from needless controversy. One means of doing so is

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9. Editorial (1975) 3 *Australian Business Law Review* 239, 240-24

by keeping a firm control on the preparation of legislation and this is one of the advantages of office. Advantages so hard won are not lightly surrendered. The rather secretive preparation of legislation, without the North American debates, can therefore be seen, in part at least, as one of the consequences of our particular system of Ministerial responsibility and Cabinet government.

But times are changing. Social problems are becoming more complex. The Executive and Parliament itself increasingly need assistance of an expert kind. As laws become more numerous and more complex, the need for and advantage of widespread consultation in their preparation becomes increasingly manifest.

There are some who protest at the flood of legislation. They ask whether it is not possible for the judges simply to develop reasonable principles of common law to cope with new social situations. But the answer to this contention was given by the first Chairman of the English Law Commission, Sir Leslie Scarman, now Lord Scarman. When he abandoned his work as a law reformer and returned to the Bench he took an early opportunity to point out that the courtroom is not really a very suitable place for major tasks of law reform :

> "Consistency is necessary to certainty - one of the great objectives of the law. ... The Court of Appeal - at the very centre of our legal system - is responsible for its stability, its consistency and its predictability ... The task of law reform, which calls for wide-ranging techniques of consultation and discussion, that cannot be compressed into the forensic medium, is for others".[10]

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10. Scarman L.J. (as he then was) in *Farrell v. Alexander* [1976] 1 *Q.B.* 345 at 371. See also 92 *L.Q.R.* 321.

Governments are not blind to these truths. Nor are the public servants who work in this system. The role of courts in reforming the law, renewing it, simplifying it and modernising it, has declined in direct proportion to the activism of the representative Parliament. The capacity of Parliament itself to do the hard work of reform by the processes of consultation and discussion is also obviously limited. That is why governments are now experimenting with new techniques. Bills, such as the Criminal Investigation Bill, are being laid on the table of Parliament to permit discussion, public debate and criticism. The government has also done this with the Human Rights Commissio Bill and other measures where it is considered that open discussi in the community will refine and improve the initial proposals. State Governments, including the Government of New South Wales, have begun to take the same course.[11] I welcome this innovation. But it has its price.

The Criminal Investigation Bill contains many innovative reforms. Inevitably the details attract comment and it would be a naive reformer who expected every interest group to embrace all proposals. The very purpose of public consultation is to secure criticism. We must not be too distressed when the invited criticism actually comes. But the shock to the Australia system of actually being asked to comment on legislation has proved too much for some. The invitation for specific comment and ideas of improvement has produced, from one lobby group, emotional posters which insult the community and play on fears. I hope we do better in the future because, if we do not, the retreat to secret legislation will inevitably follow.

The other ways government can consult the community, after the North American mode, is through the vehicle of inquirie They may be Royal Commissions, committees such as the Trade

11. N.S.W. Real Property (Amendment) Bill 1977, *N.S.W. Parliamen Debates (Leg. Assem)*, 14 Sep. 1976, 800, 805.

Practices Act Review Committee or bodies such as the Law Reform Commission. I now want to say something about the procedures we have followed. They have been novel.

Fundamental to the procedures is the endeavour to consult with interested parties and the community generally befor a report is delivered containing recommendations for reform. The means of consultation vary. The purpose remains the same. In advance of any of the reports so far produced, consultative documents such as *working papers, discussion papers, issues paper* and so on have been produced. In the course of their production, the Commission has engaged the assistance of persons appointed with the approval of the Attorney-General as Consultants. They come to our meetings and, often over several days, help us to foc on the practical, social as well as legal problems to which reforming laws should be addressed. In addition to all this, we have not been limited to the written word as a medium of communication. Radio and television have been used to bring the debates about the reform of the law "into the living rooms of the nations".[12] Our tentative ideas on defamation reform and on the law which should govern the transplantation of human tissues and our approach to privacy protection have been debated before national television audiences numbering millions. Talk-back programmes have enabled Commissioners to engage in widespread public discussion that would simply not have been possible in times gone by. Opening the Australian Legal Convention, the Prim Minister, Mr. Fraser, explained the reason for this "participator law reform.

> "We have taken quite a new direction in law reform in Australia, a direction entirely in keeping with our traditions. We have deliberately set about promoting what I might term "participatory law reform". If the law is to be updated, if the advances of science and technology are to be acknowledged and

12. R.J. Ellicott, Address to the Second Symposium on Law and Justice, Canberra, 26 March 1977, *mimeo*, 1.

> accommodated, and if our traditional liberties are to be protected, it is vital that the community governed by the law should take part in helping to frame reforms in that law. I for one reject the notion that important reforms should just be left to the "experts".[13]

To supplement media discussions of proposals, public sittings have been held in all of our references, generally in every State capital in the country and in Darwin and Canberra. Notification is given to groups and persons affected by the reference and to the public. These sittings are conducted informally. Information is secured by the inquisitorial rather than the adversary system. Differing points of view and lobby attitudes are "flushed out" in the course of the preparation of the law. Let nobody say that the ordinary citizen cannot make a useful contribution in this process. Our experience has been that he can and, given an opportunity, will.

In addition to public consultation of this kind, a series of seminars is frequently arranged at which those specially affected by proposals can come along to debate the wisdom of or follow up proposals put forward by the Commission.

Such consultation is obviously time-consuming, not inexpensive and exhausting for those who engage in it. The aim of the exercise is the achievement of "law reform that can last".[14] The lesson of experience is that consultation will not result in the satisfaction of all interest groups. It will, however, ensure that all points of view are considered before the draft of legislation reaches the Parliamentary table.

REFERENCES TO THE COMMISSION

A number of the tasks upon which the Law Reform Commission

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13. J.M. Fraser, Address to the Legal Convention (1977) 51 *A.L.J.* 343; Also (1977) 2 *Cwth. Record* 863.
14. (1975) 3 *Australian Business Law Review*, 239, 241.

is presently engaged relate directly or indirectly to the protection of the environment. We have, for example, a general remit to inquire into protection of privacy in Australia. Obviously, environmental privacy is an important attribute of this value in our society and a number of aspects of it are being closely studied. We have a project on Aboriginal Customary Laws which requires us to examine, in particular, the values of traditional Aboriginal society and the legal protections if any, that should be accorded to persons living in such traditional society.

Two tasks, however, have a direct bearing and can be usefully analysed. The first is a reference we have received relating to the "standing" to sue which should be required of litigants in federal jurisdiction in this country. The second is a major project for the reform of the Lands Acquisition Act of the Commonwealth.

STANDING TO SUE AND CLASS ACTIONS

The least known of all of our projects is that which relates to standing to sue and class actions. We have not had it for long. It directly impinges upon environment protection and the answerability of those in breach of environmental protection laws in the courts of the land. I hope I can enliven your interest in it, for though it is technical, it is important for the effectiveness of the law. It will be necessary to procure participation in our work upon the reference.

The Anglo-Australian legal tradition imposes so-called "standing" rules on parties who come to court seeking to invoke the assistance of the law. Only those parties who have the requisite "standing" or "interest" in the subject matter of the dispute are able to obtain relief from the court.

> "Before you can come to a court of law ... you must have suffered a legal wrong as well an actual loss of money or amenity or anything else".[15]

15. *Gregory v. Camden L.B.C.* [1966] 1 *W.L.R.* 899, 909.

The reason for this attitude is complicated. The precise "interest" which is required varies in different compartments of the law's concern. What the law is trying to do by imposing a threshold obligation to demonstrate an "interest" in the subject matter of the dispute is to

> "face the problem of adjusting conflicts between two aspects of the public interest - the desirability of encouraging individual citizens to participate actively in the enforcement of the law, and the undesirability of encouraging the professional litigant and the meddlesome interloper to invoke the jurisdiction of the courts in matters that do not concern him ..."[16]

In the 18th and 19th centuries, when modern rules governing "standing" were largely developed, the philosophy then prevalent, if I can dignify it by that description, was that rights preceded the existence of the State. The State was not needed to protect rights. This function could be left to the aggrieved parties, to assert their legal rights before the independent umpire : the courts. The law tended to concern itself principally with property rights and interests. This concern accorded with the economic attitudes of the time. Majestically, the law assumed that all had property. Those seeking to work the legal machinery available, generally did have a property interest in the subject matter at stake.

Notions such as this cannot survive in tact after the spread of popular democracy and the growth of governmental activity in this century. Widespread literacy, popular education, improved communications and universal suffrage have promoted the interests of ordinary citizens in having some part in the running of their society and some control over the decisions of government and of the public service. Furthermore, these very

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16. de Smith, *Judicial Review of Administrative Action*, 3rd Ed., 1973, 362.

forces operated in crowded cities and more affluent times have developed ideological causes : racial tolerance, so-called "civil rights", consumer protection and above all environmental protection. Of course these interests may on occasions involve the property concerns of citizens. However, they are chiefly expressions of social values which individuals want the society they live in to respect.

> "Today it is unreal to suggest that a person looks to the law solely to protect his interests in a narrow sense. It is necessary to do no more than read the newspapers to see the breadth of the interests that today's citizen expects the law to protect - and he expects the court, where necessary, to provide that protection. He is interested in results, not procedural niceties".[17]

The first outcome of these changing attitudes, in the context of the law, has been the move to provide legal aid to permit people, whatever their financial position, to enforce at least some of their private legal rights. In the nature of things, these are principally their property interests. The second "wave" involves "reforms aimed at providing legal protection for "diffuse interests" especially in the areas of consumer and environmental protection".[18] Although the first wave of legal aid has come to Australia, the second has not yet arrived. In Australia, unlike many overseas countries, nothing has been done to liberalis the old rule that, in order to invoke the assistance of a court, a person must have a direct personal and usually financial or property interest in the litigation.

That rule serves fairly well to defend the interests of a person knocked down by a motor car or one whose home is the subject of a trespass by an unwanted intruder or whose identity has been used, without permission, to promote the business interests of another. It is, however, less apt to serve the

17. Black, The Right to be Heard [1977] *N.Z.L.J.* 66.
18. Cappelletti, *Rabels Z.*, 1976, 682.

interest of a person whose basis for seeking interference by a court is more nebulous. For example, in Australia, it is not at present sufficient to invoke the consideration by the High Court of an assertion that the Constitution has been breached, that the plaintiff should be a taxpayer.[19] In Canada, that used to be the rule. However, two recent decisions of the Supreme Court of Canada have liberalised the previous approach to standing.[20] In respect of the rights of the taxpayer or citizen to invoke a decision by the country's highest court on compliance of a statute with the Constitution, the position in Canada is now more generous than either that of the High Court of Australia or the Supreme Court of the United States. Can we and should we adopt a similar principle in Australia? The predicted floodgates of busy-body litigation of which the Supreme Court was warned in Canada, have simply not appeared.[21] Since the initial decision in 1975, only one other Constitutional challenge has come up for consideration. On a more mundane level, the question is raised as to whether a citizen's general concern that the environment is being damaged should be enough (if he is willing and able to pay the costs) to invoke a decision of the court. Those who say that it should not be, talk in terms of "floodgates", "academic questions" and "nuisance litigants But those who say it should cite Lord Denning's ringing words :

> "I regard it as a matter of high Constitutional principle that if there is a good ground for supposing that a government department or public authority is transgressing the law or is about to transgress it in a way which offends or injures thousands of Her Majesty's subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced and the courts in their discretion can grant whatever remedy is appropriate".[22]

No man has been more vigorous in asserting the rights of the court

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19. *Anderson v. The Commonwealth* (1932) 47 *C.L.R.* 50.
20. *Thorson v. Attorney-General of Canada* (1974) 43 *D.L.R.* (3d) 1
21. Chief Justice Laskin, Comparative Constitutional Law - (1977) 51 *A.L.J.* 450.
22. *R v. Greater London Council; ex P. Blackburn* [1976] 3 All E.R 184, 192.

to ensure compliance with the law than Lord Denning.[23]

But if we are prepared to concede that procedural impedimenta against invoking a court's jurisdiction should be removed, where does this stop? How far should it be left to the individual citizen (as distinct from the governmental agency) to work the legal machinery of the community in matters such as environment protection?

One has only to compare the newspapers of today with those of the sixties to realise how rapid and widespread has been the acceptance of the need for protection of the environment, ultimately supported by legal regulation. Membership of conservation societies was estimated in 1974 to exceed 100,000. Although legal regulation has advanced apace, the extent to which that regulation can be worked by ordinary citizens remains limited. The Committee of Inquiry into the National Estate put it this way, pointing to what was perceived as a significant legal vacuum :

> "There is as yet little legal or governmental machinery which can be used by citizens to challenge governmental or private actions which are felt to be against the interest of the public.[24]

Many writers, examining the impact, in practice, of the plethora of environmental legislation of the seventies, see the question of standing to sue as central to the development of "a legal structure responsive to the environmental needs of society".[25] On this view environmental responsibility is not only required of government and industry but should be enforceable by members of the public.

> "Courts act to resolve conflicts, yet the foremost combatants, the organised environmentally-aware public are generally cut off from legal means of

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23. *Cf. Bernard v. National Dock Labour Bd.* [1953] 2 *Q.B.* 18, 41.
24. National Estate Report, 1974, 28.
25. C.R. Loorham "The Impact of Environmental Legislation in the Seventies" (1975) 49 *A.L.J.* 407.

> holding any authority, industry or private developer whose activities are likely to have an adverse environmental impact to account for those activities".[26]

Under present law in this country, before a plaintiff will be even heard in a court, upon a complaint about pollution of or interference with the environment, he must show either :

* that the legislation permits members of a group to bring action to enforce its machinery, and that he is a member of that group;[27] or
* that the act of the defendant has affected him in some particular way distinguishable from its effect on the general public[28] or in excess of its effect on the general public;[29] or
* that he has secured a *fiat* to bring the proceedings in the name of the Attorney-General.

As a result of these impediments, the issue of "standing" generally comes down to whether the plaintiff has suffered a pecuniary loss. Unless such a specific direct personal and pecuniary interest is established, a community group can be as "concerned" and "motivated" as you like. The conduct of the polluter can be clearly unlawful or even illegal. Yet unless the complainant has "standing" of the kind I have mentioned, the court will normally decline to pass upon the matter. It is to review this technicality that the Commonwealth Attorney-General has asked the Law Reform Commission to consider the principle of "standing" and at the same time to review the questio of whether class actions should be introduced into federal jurisdiction in Australia. Our review will not, directly, affect the States or the great bulk of State legislation which has been passed to protect the environment. If, however, revised principles of "standing" were introduced in federal law and practice, there is at least the possibility that similar results will follow in State jurisdictions or in some of them.

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26. *Ibid*, 407.
27. *Boyce v. Paddington Borough Council* [1903] 1 *Ch.* 109; *Ex parte Northern Rutile Mining Co. Pty. Ltd.; Re Claye* [1968] 3 *N.S.W.R.* 294.
28. *Smith v. Warringah Shire Council* [1962] *N.S.W.R.* 944.
29. *Phillips v. N.S.W. Fish Authority* [1969] 72 *S.R. (N.S.W.)* 297

The Law Reform Commission has now published a discussion paper which seeks to weigh the argument in favour of, and against, the widening of standing rights.[30] The issue is by no means clearcut. Opponents of a wider standing right point with apprehension to the inconvenience and delay that can be caused to projects, important to individuals and the community generally, by well-meaning but, in their view obsessive, environmental groups. They also doubt the utility of courts as a means of resolving this kind of social conflict and prefer decisions on such public interest matters to be made, after weighing the factors involved, by the responsible authority concerned. Supporters, on the other hand, point to the need to supplement bureaucratic controls and policing by involvement of the community affected. They also refer to the inadequate staffing and funding available to pollution authorities, the fear that such authorities may sometimes get too close to the people they should regulate. They also point out that environment litigation has hardly reached "floodgate" proportions where it is more generally available. Furthermore, on any view, it is only to uphold a legal right (and not merely a moral duty) that the courts can intervene. At the moment, it is said, in default of standing or class action rights, the law is simply "winked at". Unlawful activity is performed with impunity because access to the mechanisms of control is limited.

I fully realise the limitations of present Commonwealth legislation on the environment and the fact that, as presently drawn, it does not generally lend itself to court enforcement, at the behest of an individual citizen or concerned group.[31] In part this form of legislation arises out of the fears mentioned above and the doubts that courtrooms are always the best places to resolve environmental battles. However, there is abroad a growing conviction that "consumers are generally among the best

30. The Law Reform Commission, D.P.4., *Access to the Courts I Standing : Public Interest Suits*, 1977.
31. G. Kelly; Commonwealth Legislation Relating to Environmental Impact Statements (1976) 50 *A.L.J.* 498.

vindicators of the public interest".[32] It is this conviction that leads to the calls for a legal structure to permit the concerned citizen to be heard. This is a question of general significance for the enforcement of pollution legislation and environmental legislation generally. It is one upon which the Law Reform Commission of Australia is working and will need the closest assistance and support from members of this Society.

REVIEW OF LANDS ACQUISITION LAW

A second task upon which the Law Reform Commission is currently working requires it to look at Commonwealth laws for the protection of the environment. This is our exercise reviewing the *Lands Acquisition Act* of the Commonwealth. That Act spells out the constitutional obligation, one of the few guaranteed rights in our Constitution, which requires the Commonwealth, upon compulsorily acquiring property for public purposes, to pay the owner "just terms". Once it was thought that "just terms" meant merely an amount of money. Nowadays, community standards require re-examination of this concept. May not just terms require today that where a person's home is taken, another home is substituted in its place? May not the obligation to provide "just terms" mean, in practice, the obligation thoroughly to explain the reasons for compulsory acquisition of property. It is always necessary, in law reform, to brush up and brighten old ways of doing things.

Amongst the proposals put forward by the Commission in its discussion paper on this subject[33] one is of specific interest to environmentalists. It is that each time government decides to acquire property, it should be obliged to give notice of its proposed scheme and, upon receipt of an objection, to summon a commission of inquiry to hear and report upon the objection within a fixed time limit.[34] It is suggested that such an inquiry might follow the lines of the informal commissions

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32. Chief Justice of the United States, W. Burger quoted in J.L. Sax, *Defending the Environment*, 1970, ix.
33. Australian Law Reform Commission, D.P.5, *Lands Acquisition Law : Reform Proposals*, 1978, 4.
34. *Ibid*, 9

that are possible, in the Commonwealth's sphere, under the *Environmental Protection (Impact of Proposals) Act* 1974. That Act also provides for inquiries that leaves it to the Minister to decide whether or not an inquiry into the environmental impact of proposals should be held. One question that faces us is whether because of their special disadvantage, owners only should be guaranteed an inquiry into the need for a project. We have been told in some of our public sittings that the owners, more often than not, will strike a bargain with government and leave the neighbourhood. It is suggested that the real people who ought to have an option to hold an inquiry are those who are left, bearing the burden of governmental development. Once an inquiry is started, it should doubtless hear all who have objections, including general environmental groups. That has been the course followed to date in impact inquiries, including the Ranger Inquiry. On the other hand, who should be able to initiate such inquiries? The same issue of "standing" is again before us. Should we restrict the privilege to those who have a pecuniary interest? Should it be available to all concerned citizens or only to the neighbours immediately affected? In today's world, who is one's "neighbour", in the environmental sense?

CONCLUSIONS

It can be seen from all this that the Law Reform Commission is a body with a specific potential to assist in the reform of the law of this country, including the law relevant to those who want to see our environment preserved, defended and protected. Views will differ about the ways of best achieving clean air, clean rivers, the preservation of historical buildings and the general protection of the environment. The responsibility for defending the environment has rested, so far, upon State legislators and authorities. In his review of the decision on Lake Pedder, Sir Garfield Barwick, as Vice President of the Australian Conservation Foundation, lamented the fact that

> "Those who will lose something as a result of the destruction of Lake Pedder are not only Tasmanians

> but Australians in general. The case of Lake Pedder emphasises the lack of any national power to protect what are in truth national assets".[35]

The Commonwealth clearly has limited powers. For that reason Commonwealth legislation on the environment is patchy. The opportunities for the Commonwealth's Law Reform Commission to do useful work in improving our laws are therefore limited. Nonetheless, some work has already begun. Other tasks may follow. Of one thing you can be sure, in all of the tasks that are before the Law Reform Commission the groups and individuals in our community who are sensitive to the needs to protect the environment and critical of the machinery so far afforded for that purpose, will be heard before we report to the Attorney-General and the Parliament. It is my hope that the matters I have mentioned tonight will spark an interest that will encouage environmentalists in Australia to take an interest in the Law Reform Commission as a practical instrument of government, useful in improving our laws to make them more modern and responsive to the needs of today's Australian society. The values of our country are changing. Concern with the environment is but one instance of this. The laws that reflect society's values and, ultimately, enforce them, must be renewed to keep pace with changing attitudes. The Law Reform Commission provides one means of assisting in this renewal.

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35. G.E. Barwick, Conclusion, *Pedder Papers*, Australian Conservation Foundation, 1972, 63.