

**Australian Centre for Environmental Law**



**WORKING PAPER SERIES**

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**STATUTORY INTERPRETATION**

**&**

**ENVIRONMENTAL LAW IN AUSTRALIA**

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**BENJAMIN JAMES FULLER**

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## STATUTORY INTERPRETATION & ENVIRONMENTAL LAW IN AUSTRALIA

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*But with all the assistance which rules of construction and precedents (and the Interpretation Act) may offer, judges will still sometimes be faced with a choice of construction. One construction may favour the environment and one may not.*<sup>1</sup>

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### I. INTRODUCTION

Statutory interpretation is the most important single aspect of Australian environmental law practice.<sup>2</sup> This is most obviously because Australian environmental law is dominated by legislation.<sup>3</sup> Australia's State and Federal governments preside over extensive environmental statutory regimes designed to manage and control the omnipresent environmental impacts of increasing population, industry and resource exploitation.<sup>4</sup> Justice Bignold of the Land and Environment Court of NSW noted:

[T]here has been an explosion in the development of environmental laws as a recognised body of specialist law at international, national, state and local levels. These developments have undoubtedly resulted in both the comprehensiveness and complexity of environmental law – a trend that is likely to continue as new environmental challenges affecting the world and countries and local communities emerge and demand solutions.<sup>5</sup>

It follows from the proliferation of environmental legislation that courts are routinely required to interpret statutory provisions in the resolution of environmental disputes. This task is difficult for a number of reasons over and above those that trouble

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<sup>1</sup> Justice Paul L Stein, 'Use of Expert Assessors in the Hearing of Environmental Cases' (Paper presented at the Queensland Planning and Environment Court Annual Conference, Brisbane, 26<sup>th</sup> March 2002) 10 <[http://www.agd.nsw.gov.au/sc/sc.nsf/pages/stein\\_260302](http://www.agd.nsw.gov.au/sc/sc.nsf/pages/stein_260302)>.

<sup>2</sup> Cf J J Spigelman, 'The poet's rich resource: Issues in statutory interpretation' (2001) 21 *Australian Bar Review* 224, 224.

<sup>3</sup> Gerry Bates, *Environmental Law in Australia* (5<sup>th</sup> ed, 2002) 7. See also Stein, above n 1, 10.

<sup>4</sup> For example, for a list of 43 pieces of Commonwealth environmental legislation, see ANZECC, *Guide to Environmental Legislation in Australia and New Zealand* (5<sup>th</sup> ed, Report No 31, 1999) 163-76.

<sup>5</sup> Neal R Bignold, 'An Overview of the Court its Constitution, Jurisdiction and Procedures' (Paper presented at NSW Young Lawyers' Seminar, Sydney, 28 February 2001) <<http://www.lawlink.nsw.gov.au/lec.nsf/pages/bignold2>>.

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all attempts at statutory interpretation such as the inherent imprecision of language.<sup>6</sup> As noted by Bignold J<sup>7</sup> and elsewhere by other judges,<sup>8</sup> environmental law presents as a particularly complex collection of statutory provisions. The task is further complicated by often-unwieldy factual disputes requiring ‘prophetic’ insight<sup>9</sup> and because key environmental terms are either not defined<sup>10</sup> or have not previously been judicially considered.<sup>11</sup>

Over time, the legal system, first judges, and more recently the legislature by way of Acts Interpretation Acts,<sup>12</sup> has established approaches to statutory interpretation and a range of assumptions that are designed to assist courts in determining the meaning of legislative provisions.<sup>13</sup> Even with the help of these approaches to statutory interpretation and assumptions, hard choices must be made. Stein J commented:

[W]ith all the assistance which rules of construction and precedents (and the Interpretation Act) may offer, judges will still sometimes be faced with a choice of construction. One construction may favour the environment and one may not.<sup>14</sup>

As environmental legislation is not always exclusively concerned with the protection of the environment,<sup>15</sup> the outcome of the choice referred to by Stein J might not be expected to favour the environment in every case. However, choices adverse to

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<sup>6</sup> D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (5<sup>th</sup> ed, 2001) 2, para [1.3].

<sup>7</sup> Bignold, above n 5.

<sup>8</sup> *Professional Fishers Association Inc v Minister for Fisheries* [2002] NSWLEC 15, para 9 (Pearlman J); *Strathfield Municipal Council v Poynting* (2001) 116 LGERA 319, 348, para 133 (Young CJ in Eq).

<sup>9</sup> Justice Paul L Stein, ‘Down Under Perspective of the Environmental Court Project’ (Paper presented at the United Kingdom Environmental Law Association Seminar on the Final Report on the Environmental Court Project, London, 27<sup>th</sup> June 2000) <[http://www.agd.nsw.gov.au/sc%5Csc.nsf/pages/stein\\_down](http://www.agd.nsw.gov.au/sc%5Csc.nsf/pages/stein_down)>.

<sup>10</sup> Monique Hain and Chris Cocklin, ‘The Effectiveness of the Courts in Achieving the Goals of Environmental Protection Legislation’ (2001) 18 *Environmental and Planning Law Journal* 319, 323.

<sup>11</sup> Stein, above n 1, 10.

<sup>12</sup> *Acts Interpretation Act 1901* (Cth); *Interpretation Act 1987* (NSW); *Interpretation of Legislation Act 1984* (Vic); *Acts Interpretation Act 1954* (Qld); *Acts Interpretation Act 1915* (SA); *Interpretation Act 1984* (WA); *Acts Interpretation Act 1931* (Tas); *Interpretation Act 1967* (ACT); *Interpretation Act 1987* (NT).

<sup>13</sup> Pearce and Geddes, above n 6, 4, para [1.4]. Cf Francis Bennion, *Statutory Interpretation* (2<sup>nd</sup> ed, 1992) 2.

<sup>14</sup> Stein, above n 1, 10.

<sup>15</sup> See Robert Fowler, ‘Environmental Law and its Administration in Australia’ (1984) 1 *Environmental and Planning Law Journal* 10, 18-19. Fowler suggests that modern environmental legislation comprises four identifiable regimes: (1) developmental legislation; (2) legislation relating to the disposition of natural resources; (3) conservation of natural and cultural resources; and (4) environmental planning and protection legislation. The first two of these represent the ‘negative or exploitative’ component of environmental law while the second two encompass the ‘positive or protective’ component.

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the environment also occur in relation to the interpretation of legislation considered to fall within the ‘positive or protective’<sup>16</sup> component of environmental law.

The first aim of this paper is to examine the potential of the ‘purposive’ approach, as compared to the ‘literal’ approach, to positively influence the environmental outcomes of the interpretation of environmental legislation. Chapter II introduces both the purposive and literal approaches and Chapter III examines their judicial application in a range of environmental disputes. This examination also provides examples of the way that judicial approaches to environmental legislation and the ensuing interpretative outcomes both engage and are shaped by a range of issues that exist in wider social, economic and environmental debate. Such issues include: the appropriate demarcation of the separation of powers; the extent of power that should be wielded by the State; the extent to which economic considerations should be allowed to influence environmental outcomes; and the difficulties of reconciling developing environmental principles with established common law property rights. It will be suggested that application of the purposive approach generally results in more favourable environmental outcomes, but that it is not free from difficulty. These difficulties will be briefly highlighted and will include a recognition of the problem associated with interpreting legislation designed to address a number of issues, extending beyond environmental protection.

Chapter IV examines the influence of objects clauses on the process of statutory interpretation. Objects clauses work in concert with the purposive approach to secure beneficial environmental outcomes by forming *statutory* canons of interpretation in environmental law. However, objects clauses also raise a number of concerns which include the potential introduction of conflict between environmental and economic outcomes. These conflicts are analysed and some possible solutions are advanced.

Chapter V pursues the secondary objective of this paper, which is to examine the feasibility of recognising a special environmental canon of statutory interpretation at common law. This investigation is divided into two parts. The first examines the practicality of recognising a ‘green’ canon tentatively proposed by Farber.<sup>17</sup> The second examines whether the well-known canon relating to beneficial or remedial legislation can have any application to Australian environmental legislation.

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<sup>16</sup> Ibid 18.

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## II. INTERPRETING LEGISLATION IN AUSTRALIA

### A. *Legislative Intention*

Due to the ‘wonderful flexibility’<sup>18</sup> of the English language, courts must inevitably engage in the process of statutory construction to adjudicate disputes that arise over the meaning of legislative provisions. The fundamental object of statutory construction is to ascertain the legislature’s intention.<sup>19</sup> Views regarding what ‘legislative intention’ *is* have differed across the common law world.<sup>20</sup> Nevertheless, most authorities now appear to agree that legislative intention does not refer to what Parliament subjectively intended to communicate.<sup>21</sup> Rather, they suggest that when a court seeks to determine legislative intention, it is seeking ‘the meaning of the words which Parliament used.’<sup>22</sup>

### B. *The Purposive and Literal Approaches*

Having established *what* ‘legislative intention’ *is*, the second task of statutory interpretation is to establish *how* this intention may be ascertained.<sup>23</sup>

#### 1. *The Literal Approach*

Prior to the statutory elevation of the purposive approach throughout Australia,<sup>24</sup> the other major approach to statutory interpretation at common law was the literal

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<sup>17</sup> Daniel Farber, *Eco-Pragmatism: Making Sensible Environmental Decisions in an Uncertain World* (1999).

<sup>18</sup> Spigelman, above n 2, 224.

<sup>19</sup> *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 247, 320 (Mason and Wilson JJ) (*‘Cooper Brookes’*); Bennion, above n 13, 345.

<sup>20</sup> See generally David Miers, ‘Barking up the Wrong Tree: Determining the Intention of Parliament’ (1992) 13 *Statute Law Review* 50; G C MacCallum Jr, ‘Legislative Intent’ (1966) 75 *Yale Law Journal* 754 cited in Jeffrey W Barnes, ‘Statutory Interpretation, Law Reform and Sampford’s Theory of the Disorder of Law – Part One’ (1994) 22 *Federal Law Review* 116, 129.

<sup>21</sup> *Regina v Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd* [2001] 2 AC 349, 397-8 (Lord Nicholls of Birkenhead); *Bass v Perpetual Trustee Co Ltd* (1999) 198 CLR 334, 372 (Kirby J); *Mills v Meeking* (1989) 169 CLR 214, 234 (Dawson J). See generally Spigelman, above n 2, 225; Bennion, above n 13, 348.

<sup>22</sup> *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 (Lord Reid). See especially *Regina v Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd* [2001] 2 AC 349, 397-8 (Lord Nicholls of Birkenhead). See also *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 518 (Mason CJ, Wilson and Dawson JJ); *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 459 (McHugh and Gummow JJ). See generally Spigelman, above n 2, 225-6.

<sup>23</sup> *Mills v Meeking* (1989) 169 CLR 214, 234 (Dawson J).

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approach.<sup>25</sup> The literal approach required the court to determine legislative intention by ascertaining the meaning of statutory language ‘in its ordinary and natural sense’ by examining ‘the language used in the statute as a whole’.<sup>26</sup> In its most extreme form, the literal approach required obedience to the meaning of the language thus found even if the result was ‘inconvenient or impolitic or improbable’.<sup>27</sup> Generally speaking, the purpose of the legislation could only be considered if the application of the literal approach resulted in ambiguity or inconsistency.<sup>28</sup> Therefore, the meaning of statutory language would only be read in light of the purpose of the legislation, if at all, in a secondary stage of analysis.

In a comparative sense, it is useful to consider application of the literal approach because of its similarity to the ‘textualist’ approach, currently championed by Justice Antonin Scalia in the United States.<sup>29</sup> This approach suggests that the ‘only object of statutory interpretation is to determine the meaning of the text and that the only legitimate sources for this inquiry are text-based or -linked sources.’<sup>30</sup> Thus, the textualist places most emphasis on the text itself and will avoid assessing legislative purpose, particularly if the text is clear. In addition, the textualist will virtually never look to the legislative history of a statute.<sup>31</sup> However, the textualist will examine context by a thorough review of all the Act’s provisions and how they interrelate.<sup>32</sup> ‘Text linked’ sources include similar provisions in related Acts that have been judicially considered.<sup>33</sup>

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<sup>24</sup> *Acts Interpretation Act 1901* (Cth) s 15AA; *Interpretation Act 1987* (NSW) s 33; *Interpretation of Legislation Act 1984* (Vic) s 35(a); *Acts Interpretation Act 1954* (Qld) s 14A; *Acts Interpretation Act 1915* (SA) s 22; *Interpretation Act 1984* (WA) s 18; *Acts Interpretation Act 1931* (Tas) s 8A; *Interpretation Act 1967* (ACT) s 11A; *Interpretation Act 1987* (NT) s 62A.

<sup>25</sup> See generally Pearce and Geddes, above n 6, 20-2.

<sup>26</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 161-2 (Higgins J) (‘Engineers’ Case’).

<sup>27</sup> *Engineers’ Case* (1920) 28 CLR 129, 162 (Higgins J); *Cooper Brookes* (1981) 147 CLR 297, 305 (Gibbs CJ).

<sup>28</sup> *Mills v Meeking* (1989) 169 CLR 214, 235 (Dawson J).

<sup>29</sup> William N Eskridge Jr, Philip P Frickey and Elizabeth Garrett, *Legislation and Statutory Interpretation* (2000) 14.

<sup>30</sup> *Ibid* 228.

<sup>31</sup> *Ibid*.

<sup>32</sup> *Ibid*.

<sup>33</sup> *Ibid*.

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## 2. *The Purposive Approach*

In Australia, the ‘modern’ purposive approach was first recognised with authority by Dawson J in *Mills v Meeking*<sup>34</sup> and it has been regularly applied in recent Australian environmental jurisprudence.<sup>35</sup> The purposive approach is codified in s 15AA of the *Acts Interpretation Act 1901* (Cth) and in corresponding legislation enacted by the States and Territories.<sup>36</sup> Section 15AA provides:

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.<sup>37</sup>

Section 15AA requires the legislative purpose or object is taken into account at the first stage of statutory interpretation *even if* the meaning of the words in their context is clear.<sup>38</sup> The consequence of this approach is that interpretative possibilities extend beyond the literal or ‘plain meaning’ of the text to include any other meaning the words will bear when the text is read with the Act’s purpose or object specifically in mind.<sup>39</sup> A secondary consequence is that this approach may actually create ambiguity about the meaning of a legislative provision that would otherwise be considered clear.<sup>40</sup> Where an Act’s express *or* inferred purpose or object is to protect the environment, therefore, the

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<sup>34</sup> (1989) 169 CLR 214, 235 (Dawson J). See also Pearce and Geddes, above n 6, 25, para [2.9].

<sup>35</sup> *Cartier Holdings Pty Ltd v Newcastle City Council* (2001) 115 LGERA 407, 415-6, para 34 (Pearlman J); *Sandig & Anor v Ku-ring-gai Council* (2001) 114 LGERA 7, 16, para 48 (Sheahan J); *Creighton v Sutherland Shire Council* [2001] NSWLEC 190, para 10 (Lloyd J); *Forma Holdings Pty Ltd v Minister for Urban Affairs and Planning* (2000) 109 LGERA 391, 395, para 18 (Pearlman J); *Carstens v Pittwater Council* (1999) 111 LGERA 1, 11, para 20 (Lloyd J). For recent rejection of Australian purposive approach in favour of the literal approach in the United Kingdom, see Irish Law Reform Commission, *Statutory Drafting and Interpretation: Plain Language and the Law* Report No LRC 61 (2000) paras 2.39-42.

<sup>36</sup> *Interpretation Act 1987* (NSW) s 33; *Interpretation of Legislation Act 1984* (Vic) s 35(a); *Acts Interpretation Act 1954* (Qld) s 14A; *Acts Interpretation Act 1915* (SA) s 22; *Interpretation Act 1984* (WA) s 18; *Acts Interpretation Act 1931* (Tas) s 8A; *Interpretation Act 1967* (ACT) s 11A; *Interpretation Act 1987* (NT) s 62A.

<sup>37</sup> *Acts Interpretation Act 1901* (Cth) s 15AA.

<sup>38</sup> *Mills v Meeking* (1989) 169 CLR 214, 235 (Dawson J); Pearce and Geddes, above n 6, para [2.8]; *Morrison v Peacock & Roslyndale Shipping Co Pty Ltd* [2000] NSWCCA 452, para 16 (Spigelman CJ, Wood J at CL and Barr J agreeing); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 335, 381; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408. Cf *Acts Interpretation Act 1915* (SA) s 22; Pearce and Geddes, above n 6, 30, para [2.13].

<sup>39</sup> Mr Justice Bryson, ‘Statutory Interpretation: An Australian Judicial Perspective’ (1992) 13 *Statute Law Review* 187, 201. See also *Mills v Meeking* (1989) 169 CLR 214, 235 (Dawson J); Pearce and Geddes, above n 6, 25, para [2.8]. See generally Kent Greenawalt, *Statutory Interpretation: 20 Questions* (1999) 38-43.

<sup>40</sup> Cf Ruth Sullivan (ed), *Driedger on the Construction of Statutes* (3<sup>rd</sup> ed, 1994) 320-1.

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purposive approach ensures that the meaning of all legislative language is construed, as it were, through an environmental or ‘green’ lens. It is suggested that this is the essential environmental advantage of the purposive approach over the literal approach.<sup>41</sup>

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<sup>41</sup> Cf *Saraswati v R* (1990) 172 CLR 1, 21 (McHugh J).

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### III. STUDIES OF STATUTORY INTERPRETATION IN ENVIRONMENTAL LAW

#### A. *Application of the Literal Approach*

In *Phosphate Co-operative Co. of Australia Ltd v Environment Protection Authority*<sup>42</sup> (*Phosphate*), Stephen and Aickin JJ applied the literal approach with differing effect upon the environmental outcome. Although the literal approach has been displaced by statute in Australia, an examination of *Phosphate* is instructive for two of reasons. Firstly, Stephen J's judgment demonstrates that the literal approach *can* be successfully deployed to determine the purpose of legislation 'by implication from its structure, form and content.'<sup>43</sup> Secondly, it provides an introduction to concerns in the environmental context about the proper role of courts vis-à-vis the legislature and government agencies; judicial concern with the breadth of environmental legislation and its impact upon individual freedoms, particularly those associated with the ownership of property; and the tension between competing environmental and economic interests in society.

#### *The Phosphate Case*

*Phosphate* involved an application by the Phosphate Co-operative Company ('the Company') to the Victorian Environment Protection Authority ('the Authority') for a licence to discharge waste from one of its plants into the atmosphere. The company manufactured artificial fertilisers and in the process produced an acid gas, particularly upon start-up of the plant. The Authority granted the company a licence, but imposed a number of conditions including a prohibition from starting its plant if winds were offshore. The Company believed that this condition would severely restrict the occasions upon which the Company could legally start-up its plant. The Company appealed the condition without success to the Environment Protection Appeal Board ('the Board') and in the Supreme Court of Victoria.<sup>44</sup> On final appeal, the High Court

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<sup>42</sup> (1977) 138 CLR 134.

<sup>43</sup> D E Fisher, 'Considerations, Principles and Objectives in Environmental Management in Australia' (2000) 17 *Environmental and Planning Law Journal* 487, 492. Cf Justice D Graham Hill, 'A Judicial Perspective on Tax Law Reform' (1998) 72 *Australian Law Journal* 685, 687. See Pearce and Geddes, above n 6, 29, para [2.12].

<sup>44</sup> *Phosphate Co-Operative Co. of Australia Ltd v Environment Protection Authority* (Unreported, Supreme Court of Victoria, Crockett J, 1977).

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had to determine whether the Board could or should have taken into account economic consequences arising from the imposition of the condition. Justice Stephen dismissed the appeal with Mason J agreeing and Aickin J dissenting.

### 1. *Justice Stephen*

Justice Stephen's lead judgment presents a rigorous application of the literal approach to statutory interpretation. Fixing his attention upon the precise question to be addressed, he clearly encapsulates his interpretative premise:

For this Court the answer to this question lies *exclusively* in an interpretation of the Environment Protection Act.<sup>45</sup>

Accordingly, Stephen J's analysis appears to remain within the 'four corners' of the Act. Justice Stephen did not pursue a purposive inquiry and he did not consult 'extrinsic' or extra-legislative material. Justice Stephen devoted himself to a thorough dissection of the Act's provisions and their interrelationship.<sup>46</sup> Justice Stephen concluded that the Authority and the Board were not at liberty to take into account the economic consequences to the community of the imposition of a condition. Justice Stephen also held that the Authority and the Board could not take into consideration the utility to the public of the operations affected by the licence, or the economic cost to the holder of the licence of the imposition of a condition:

[T]he bodies which it creates are intended to be single-minded in approach, being concerned, regardless of the consequences, with the protection of the environment.<sup>47</sup>

Justice Stephen also refused to be drawn into passing judgment upon the social efficacy of favouring the environment so absolutely. In his view, the burden of weighing competing environmental and economic interests lay squarely with the legislature.<sup>48</sup>

Due to the introduction of s 15AA in the *Acts Interpretation Act 1901* (Cth), debate as to the environmental merits of the literal approach has not flourished in Australia as it has in the United States. Several commentators in the United States have explored the extent to which the approach of textualists, such as Justice Scalia is 'pro-

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<sup>45</sup> *Phosphate Co-Operative Co. of Australia Ltd v Environment Protection Authority* (1977) 138 CLR 134, 137 ('*Phosphate*') (emphasis added).

<sup>46</sup> For a summary of the matters Stephen J considered, see D E Fisher, *Environmental Law: Text and Materials* (1993) 565.

<sup>47</sup> *Phosphate* (1977) 138 CLR 134, 142.

<sup>48</sup> *Ibid* 137.

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environmental’.<sup>49</sup> At least one commentator has suggested that a textualist approach to environmental legislation may be frustrated by aspirational language that regularly appears in environmental statutes, for example in the form of objects clauses, because it invokes judicial discretion by requiring the court to look beyond or behind the statute.<sup>50</sup> However, in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*,<sup>51</sup> Stephen J appears to suggest that a literalist may exercise greater judicial discretion where the legislature invites it by drafting legislation in more open terms:

Statute law, the direct product of the legislature, is perhaps the least appropriate field of all in which to indulge in judicial law-making. The corner of that field occupied by closely drafted statutes of high complexity should be particularly uninviting to the judicial law-maker. It provides the very antithesis of those occasional legislative measures which lay down only general principles *and invite the courts to supply the details*.<sup>52</sup>

Bearing this observation in mind, Stephen J’s circumspection in *Phosphate* was arguably well founded for two reasons. Firstly, as described earlier, environmental statutes are often intricate, or in Stephen J’s terms, ‘closely drafted statutes of high complexity.’<sup>53</sup> Secondly, although the Act allowed for development and recommendation of State environment protection policies by the Authority,<sup>54</sup> no such policy had yet been forthcoming.<sup>55</sup> This fact was acknowledged explicitly by both Stephen<sup>56</sup> and Aickin JJ,<sup>57</sup> although only Stephen J was of the opinion that this policy vacuum was not one to be filled from the bench.<sup>58</sup>

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<sup>49</sup> Karin P Sheldon, “‘It’s Not My Job To Care’: Understanding Justice Scalia’s Method of Statutory Interpretation Through Sweet Home and Chevron” (1997) 24 *Boston College Environmental Affairs Law Review* 487; Bradford C Mank, ‘Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking is Better than Judicial Literalism’ (1996) 53 *Washington and Lee Law Review* 1231. Cf Diane L Hughes, ‘Justice Stevens’s Method of Statutory Interpretation: A Well-Tailored Means for Facilitating Environmental Regulation’ (1995) 19 *Harvard Environmental Law Review* 493; Michael Herz, ‘Judicial Textualism Meets Congressional Micromanagement: A Potential Collision in Clear Air Act Interpretation’ (1992) 16 *Harvard Environmental Law Review* 175.

<sup>50</sup> Mank, above n 49, 1251-2.

<sup>51</sup> (1981) 147 CLR 247.

<sup>52</sup> *Cooper Brookes* (1981) 147 CLR 247, 310 (Stephen J) (emphasis added).

<sup>53</sup> *Ibid.*

<sup>54</sup> *Environment Protection Act 1970* (Vic) ss 13(c), 16 – 17.

<sup>55</sup> *Phosphate* (1977) 138 CLR 134, 138.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid* 146.

<sup>58</sup> *Ibid* 137.

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## 2. *Justice Aickin*

For the purpose of analysing the issues of statutory interpretation that arise from Aickin J's dissent, it is convenient to consider His Honour's reasons as comprising two phases. In summary form, the first phase involved establishing the nature and limits of the power exercisable by the Authority and the Board. The first phase provided Aickin J with a foundation for the second phase, which involved establishing that the Authority and the Board could and should take into account economic consequences arising from the imposition of a condition on a license. While Aickin J employed the literal approach in both phases, each phase also exhibited uniqueness in construction that was crucial to His Honour's ultimate findings.

The first phase is characterised by Aickin J's recognition of and discomfort with the widely drafted provisions and coercive reach of the environmental legislation. In Aickin J's view, a literal reading of the Act granted virtually limitless power upon the Authority and the Board to eliminate all waste and pollution.<sup>59</sup> For example, Aickin J found that an accurate reading of the definition of 'waste' led to the conclusion that smoking or perhaps even breathing were activities that would require a licence from the Authority.<sup>60</sup> Further, he observed that a proper reading of the definition led to the conclusion that even spraying weedkiller on a garden bed could amount to 'pollution'.<sup>61</sup> Justice Aickin commented:

These examples may seem at first sight to be fanciful and exaggerated but a reading of the definition appears plainly to demonstrate that the conclusion is inescapable.<sup>62</sup>

However, unlike Stephen J, Aickin J held that the Authority and the Board were *not* exclusively concerned with the elimination of pollution and that they *did not* have a warrant to pursue the elimination of pollution single-mindedly and without regard to consequences.<sup>63</sup>

It can be inferred from Aickin J's judgment that he employed a canon of statutory construction to modify what in his view was the unacceptable outcome of a bald

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<sup>59</sup> Ibid 147.

<sup>60</sup> Ibid 146-7.

<sup>61</sup> Ibid 147.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid 148.

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application of the literal approach.<sup>64</sup> As will also be mentioned in Chapter V, judges sometimes use canons of statutory interpretation, also known as common law presumptions, to soften the impact of what might otherwise be considered oppressive legislation.<sup>65</sup> One such canon or presumption is the presumption that the legislature is not taken to have intended to extinguish fundamental rights or freedoms without using clear words in the relevant legislation to express that intention.<sup>66</sup> Justice Aickin felt that the granting of virtually limitless power upon the Authority and the Board to eliminate all waste and pollution was so unlikely an intention that clear words were required to convey it.<sup>67</sup> Due to the absence of the requisite clear words, Aickin J applied the relevant presumption and held:

[T]he Authority and the Board are not exclusively concerned with the elimination of pollution (as defined) of any and every kind, nor are they committed by the Act to the elimination of discharge of all waste (as defined) irrespective of the consequences.<sup>68</sup>

Having decided that the Authority and the Board were not to be oblivious to the consequences of controlling pollution, Aickin J entered the second phase of his judgment. In the second phase, Aickin J needed to determine whether economic consequences were a relevant consideration. Like Stephen J, Aickin J found that the Act did not *explicitly* require economic interests to be considered by the Authority and the Board. Nevertheless, Aickin J ultimately held:

As it seems to me they would be bound to consider at least some other matters of general public interest, including some economic interests of the community, which may outweigh the prevention or elimination of some particular example of pollution.<sup>69</sup>

It is submitted that the second phase of Aickin J's dissent is characterised by an overly literal approach to the third party appeal provisions in Part IV of the Act.<sup>70</sup>

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<sup>64</sup> See above, n 59.

<sup>65</sup> Pearce and Geddes, above n 6, 131, para [5.1].

<sup>66</sup> For a modern statement of this presumption, see *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Re Bolton; ex parte Beane* (1987) 162 CLR 514, 523 (Brennan J).

<sup>67</sup> *Phosphate* (1977) 138 CLR 134, 148.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> *Environment Protection Act 1970* (Vic) ss 32(5)(a)-(c).

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Section 32(5)(a) of the Act provided a right of appeal to the Authority, to a person aggrieved by the grant or amendment of a licence or the removal of a suspension of a licence, on grounds:

- (a) that the discharge, emission, or deposit of wastes under the provisions of the licence will unreasonably and adversely affect the interests, whether wholly or partly, of that person.<sup>71</sup>

Justice Aickin held that the expression ‘unreasonably and adversely affect the interests’ of the person aggrieved was not defined and should be given its ordinary meaning, which included the economic interests of the person aggrieved.<sup>72</sup>

Intuitively, s 32(5)(a) would allow an appeal brought by a third party whose economic interests had been affected by the impact of pollution upon them. As is discussed in the next section, such an interpretation would be supported by a purposive approach to s 32(5)(a). In contrast, it is difficult to see how the expression could be read so as to support a third party appeal based on economic grounds that had as its object the *relaxation* of a condition imposed upon a polluter. Yet, this precise outcome flows implicitly from Aickin J’s holding in the case,<sup>73</sup> based on the following propositions: economic interests are relevant to third party appeals; any third party (including one whose only interest in the matter is a vested financial interest in the operation of the polluter) in the community economically affected by a condition placed on the licence of a polluter may appeal the condition; *thus*, the Authority should take economic factors into account *in the first instance* when licence conditions are being considered.

### B. *Application of the Purposive Approach*

In *Phosphate*, the majority of the High Court held that the purpose of the *Environment Protection Act 1970* (Vic) was to protect the environment.<sup>74</sup> A purposive approach to the second phase of Aickin J’s judgment would have revealed that economic impacts must exhibit an identifiable nexus with the impact or potential impact of pollution upon a third party if they are to be relevant. Justice Rowland’s purposive analysis of the definition of ‘environment’ in the *Environment Protection Act 1986*

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<sup>71</sup> Ibid ss 32(5)(a).

<sup>72</sup> *Phosphate* (1977) 138 CLR 134, 149.

<sup>73</sup> Ibid 148.

<sup>74</sup> Ibid 142 (Stephen J, Mason J agreeing).

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(WA) in *Coastal Waters Alliance of Western Australia Inc v Environmental Protection Authority*<sup>75</sup> ('*Coastal Waters*') illustrates this point.

*The Coastal Waters Case:  
Economics versus the Environment*

The crucial question in *Coastal Waters*, as it was in *Phosphate*, was whether the Western Australian Environment Protection Authority (EPA) could weigh environmental and economic factors when making recommendations to the Minister. The answer to this question depended ultimately upon whether or not, by taking into account commercial considerations including economic impacts in a report to the Minister under s 44(1) of the *Environment Protection Act 1986* (WA),<sup>76</sup> the EPA went beyond its authority to report on 'environmental factors' in relation to a proposed development.<sup>77</sup> The difficulty of statutory interpretation facing the Full Court of the Western Australian Supreme Court was that although the primary purpose of the *Environment Protection Act 1986* (WA) was the protection of the environment, 'the two-tiered definition of environment'<sup>78</sup> appeared to import an economic Trojan Horse.<sup>79</sup>

'Environment' was defined by s 3(1):

Unless the contrary intention appears – "environment", subject to subs (2), means living things, their physical, biological and social surroundings, and interactions between all of these.<sup>80</sup>

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<sup>75</sup> (Unreported, Full Court of the Supreme Court of Western Australia, Malcolm CJ, Rowland and Franklyn JJ, 10 August 1995; 26 March 1996).

<sup>76</sup> Pursuant to s 44(1) the EPA could prepare a report on:

- (a) the environmental factors relevant to the proposal; and
- (b) the conditions and procedures, if any, to which any implementation of that proposal should be subject and may make such recommendations in that report as it sees fit and shall give the prescribed number of copies of that report to the Minister.

<sup>77</sup> *Coastal Waters Alliance of Western Australia Inc v Environmental Protection Authority* (Unreported, Full Court of the Supreme Court of Western Australia, Malcolm CJ, Rowland and Franklyn JJ, 10 August 1995; 26 March 1996), 7 (Rowland J) ('*Coastal Waters*').

<sup>78</sup> Sali Banche, John Bailey and Nathan Evans, 'Interpreting the Environmental Protection Act 1986 (WA): Social Impacts and the Environment Redefined' (1996) 13 *Environmental and Planning Law Journal* 487, 489.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Environment Protection Act 1986* (WA) s 3(1).

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Section 3(2) provided:

For the purposes of the definition of “environment” in subs (1), the social surroundings of man are his aesthetic, cultural, *economic* and social surroundings to the extent that those surroundings directly affect or are affected by his physical or biological surroundings.<sup>81</sup>

Justice Rowland restricted the scope of economic considerations in two ways. Firstly, as was suggested in relation to interpretation of the third party appeal provision in *Phosphate*, Rowland J’s purposive approach constrained the definition of ‘man’ in s 3(2):

[T]he extent that environmental factors concern “man” within the definition in s 3(2) of the Act, they are those which affect man in all of his activities. But the “man” there referred to is not the “man” who proposes to interfere with the geographic location, but the “man” who will be affected by this interference.<sup>82</sup>

Secondly, Rowland J understood the expression ‘economic surroundings’ in s 3(2) to introduce a requirement of physical proximity to the activity causing the environmental impact, which in this case was the proposed dredging of shell sand from Cockburn Sound by Cockburn Cement Pty Ltd:

Whatever may be the meaning of the expression “economic surroundings” in s 3(2), it seems to me that, *in context*, they must be related to the physical area involved in the proposed dredging. It is not a relevant environmental matter if it be the fact that no other shell sand material is available to Cockburn to fulfil its contracts. It is not an environmental factor that Cockburn will suffer loss if it is unable to dredge and that its work force will suffer if it is unable to dredge. These are no more than the results of the failure to obtain approval to dredge because of the impact on the environment.<sup>83</sup>

### C. *Interpretation and the Influence of Environmental Awareness*

Returning to *Phosphate*, Aickin J expressed the view that ‘pollution’ referred, in the ‘ordinary sense of the term’ to ‘industrial waste’.<sup>84</sup> By adopting this view, Aickin J narrowed the otherwise broad definition of the term in the *Environment Protection Act 1970* (Vic). In effect, Aickin J imposed an industrial paradigm upon the statutory definition that may not necessarily have advanced the environmental purpose of the legislation.

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<sup>81</sup> Ibid s 3(2) (emphasis added).

<sup>82</sup> *Coastal Waters* (Unreported, Full Court of the Supreme Court of Western Australia, Malcolm CJ, Rowland and Franklyn JJ, 10 August 1995; 26 March 1996), 18 (Rowland J).

<sup>83</sup> Ibid 18-9 (Rowland J) (emphasis added).

<sup>84</sup> *Phosphate* (1977) 138 CLR 134, 147-8.

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This observation provides a counterpoint to more recent recognition that when environmental legislation is being interpreted, an understanding of environmental matters may predispose a judge to adopt a purposive approach.<sup>85</sup> An understanding of environmental matters may also influence the judge to assess situations with greater environmental sensitivity.<sup>86</sup> An extra-curial statement of Stein J is apposite:

Our environment poses endless challenges. Most of our environmental laws are directed towards the goals of environmental protection and enhancement, rather than its *degradation*. An environmental ethic therefore permeates the law. Specialist judges and commissioners approach the construction of legislation and assessment of factual situations (often premised on the basis of prophecy) with that philosophy in mind.<sup>87</sup>

Justice Stein's use of the word 'degradation' in this context is clearly intended to convey a meaning opposite to whatever constitutes 'protection and enhancement', such as 'to lower in character or quality'.<sup>88</sup> Justice Stein's comment was made some nine years after the case of *Palos Verdes Estates Pty Ltd v Carbon*<sup>89</sup> ('*Palos Verdes*') was heard. However, its juxtaposition with the approach the *Palos Verdes* court took to the same word provides another example of the disadvantage the environment may suffer when judges do not approach environmental statutes and the assessment of difficult factual situations with an 'environmental ethic'. Justice Stein does not explain what constitutes an 'environmental ethic'. However, it is suggested that at the minimum, an 'environmental ethic' would in His Honour's view constitute the full recognition and rigorous advancement of the purpose or object of environmental legislation.<sup>90</sup>

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<sup>85</sup> William S Blatt, 'Interpretative Communities: The Missing Element in Statutory Interpretation' (2001) 95 *Northwestern University Law Review* 629, 652-3.

<sup>86</sup> Stein, see above n 9. See also Justice Mahla L Pearlman, 'Managing Environmental Impacts – The Role of the Land and Environment Court of New South Wales' (Paper presented at the Australia – New Zealand Planning Congress, Wellington, 9<sup>th</sup> April 2002) <[http://www.lawlink.nsw.gov.au/lec.nsf/pages/pearlman\\_5](http://www.lawlink.nsw.gov.au/lec.nsf/pages/pearlman_5)>.

<sup>87</sup> Ibid (emphasis added).

<sup>88</sup> Arthur Delbridge, J R L Bernard (eds), *The Macquarie Concise Dictionary* (2<sup>nd</sup> ed, 1988) 245.

<sup>89</sup> (1991) 72 LGERA 414.

<sup>90</sup> See, eg, Stein J's approach in deciding that the objects of the *Environmental Planning and Assessment Act 1979* (NSW) in ss 5(b) and (c) were not overthrown by ss 37 and 39 of the same Act in *Rosemount Estates Pty Ltd v The Minister for Urban Affairs and Planning* [1996] NSWLEC 59. Cf *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31, 44 (Sheller JA), 78, 97 (Cole JA) ('*Rosemount*').

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*The Palos Verdes Case:  
A ‘Hard Case’ of Statutory Interpretation*

*Palos Verdes* required the Full Court of the Western Australian Supreme Court to determine whether the appellant, by engaging in activity that included the knocking down of trees and other vegetation, cutting through sand dunes and other activities associated with bulldozing a track to provide an access route to the appellant’s property, committed the offence of polluting, contrary to s 49(1) of the *Environmental Protection Act 1986* (WA). ‘Pollution’ was defined, among other things, as a direct or indirect alteration of the environment to its ‘detriment or degradation’.<sup>91</sup> The magistrate at first instance held that bulldozing vegetation and relocation of topsoil was a direct alteration of the environment to its degradation.<sup>92</sup> The magistrate’s view conforms to Stein J’s usage, in that the effect of bulldozing of vegetation is clearly opposite to ‘protection and enhancement’ of the environment. It is submitted that this view amounts to an environmentally sensitive interpretation of the term ‘degradation’.

1. *Avoidance of the Statutory Purposive Approach*

By way of contrast, Malcolm CJ and Wallace and Rowland JJ disagreed with the magistrate’s finding and upheld the appeal. It is clear that all three judges approached the definition of ‘degradation’ and therefore ‘pollution’ burdened by the realisation that if the word was given its natural meaning, in the words of Rowland J, ‘almost any activity undertaken by man could be classified as pollution in one way or another’.<sup>93</sup> Rowland J came to the conclusion that ‘pollution’ should not be understood by its definition in the Act, but rather by its ‘ordinary meaning’:

I have already mentioned that perhaps the word “pollution” when appearing in s 49 does not in context bear its defined meaning and that it carries its ordinary meaning. *In the end, although it seems to me that this was not the result intended, it is probably the only practicable method of dealing with the matter.*<sup>94</sup>

Fortunately for the *Palos Verdes* court the appeal could be decided on technical grounds other than deciding whether or not the appellant was guilty of polluting.<sup>95</sup>

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<sup>91</sup> *Environment Protection Act 1986* (WA) s 49(1)(a).

<sup>92</sup> For reference to the magistrate’s findings, see *Palos Verdes Estates Pty Ltd v Carbon* (1991) 72 LGRA 414, 425 (Malcolm CJ) (*‘Palos Verdes’*).

<sup>93</sup> *Palos Verdes* (1991) 72 LGRA 414, 442 (Rowland J).

<sup>94</sup> *Ibid* (emphasis added).

<sup>95</sup> *Ibid* 422 (Malcolm CJ), 443 (Rowland J).

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Acknowledging Rowland J's frank admission emphasised above, it is suggested that there is a real difference between departing from the natural words of the statute because it is thought that the legislature could not have possibly intended the result that follows, and advocating an interpretation that the judge suspects is contrary to the legislature's intention. Perhaps Rowland J did recognise that, as has already been mentioned in relation to the later case of *Coastal Waters* in which Rowland J also participated, one of the primary purposes and objectives of the *Environmental Protection Act 1986* (WA) was protection of the environment.<sup>96</sup>

Additionally, the *Palos Verdes* judges failed to refer to the statutory injunction of s 18 of the *Interpretation Act 1984* (WA) to prefer an interpretation that advanced the purposes and objects of the *Environmental Protection Act 1986* (WA).<sup>97</sup> This suggests that in some cases the judiciary is retreating from addressing the tension that can be created between application of the mandated purposive approach and its possible consequences. It is not submitted, however, that the *Palos Verdes* court should *necessarily* have reached a different result. Theirs was perhaps a 'hard case' previously referred to by Stein J.<sup>98</sup> While application of Stein J's 'environmental ethic' may have resolved the case in favour of the environment, it must be recognised that there is a countervailing principle involved.

## 2. *A Countervailing Principle of Statutory Interpretation*

Justice Spigelman<sup>99</sup> and a number of Australian cases cited by His Honour<sup>100</sup> express the countervailing principle of statutory interpretation by quoting with approval from *Rodriguez v United States*:<sup>101</sup>

[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.<sup>102</sup>

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<sup>96</sup> Banche, Bailey and Evans, above n 78, 489.

<sup>97</sup> Cf *Saraswati v R* (1990) 172 CLR 1, 21 (McHugh J).

<sup>98</sup> Stein, above n 1, 10.

<sup>99</sup> Spigelman, above n 2, 225.

<sup>100</sup> *Brennan v Comcare* (1994) 50 FCR 555, 574; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 459; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 248; *Morrison v Peacock* (2000) 50 NSWLR 178, para 33.

<sup>101</sup> 480 US 522 (1987).

<sup>102</sup> *Rodriguez v United States* 480 US 522 (1987), 525-6.

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The observation that legislation does not pursue its purposes at all costs commands attention. However, if the courts are to develop a coherent body of environmental law then it is the responsibility of courts faced with ‘hard cases’ such as that faced by the *Palos Verdes* court, to apply the statutory purposive rules of interpretation as they are required to and to work through the difficulties arising thereby. By taking this open approach, Australian courts may avoid Llewellyn’s charge that judges use canons of interpretation ‘to bolster their own statutory interpretations based on altogether separate reasoning.’<sup>103</sup>

*The Greentree Case:*

*Towards the Ascendancy of the Statutory Purposive Approach*

The purposive approach has been more readily and explicitly applied over the last few years, particularly in the specialist environmental courts in Australia.<sup>104</sup> *Greentree v Director-General of the Department of Land and Water Conservation*<sup>105</sup> (‘*Greentree*’) represents one example where a judge was prepared to adopt the statutory purposive approach when to do so, at least on the Applicant’s case, would trample fundamental rights and freedoms associated with property ownership.

*Greentree*, heard by Pain J of the Land and Environment Court of NSW, dealt with the impact of legislative environmental regulation upon the clearing of land on private property. The Respondent Director-General of the Department of Land and Water Conservation issued a Stop Work Order against the Applicant. The purpose of the Stop Work Order was to prevent the Applicant from engaging in land clearing activities on his property, which would impact native vegetation, contrary to s 46 of the *Native Vegetation Conservation Act 1997* (NSW).

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<sup>103</sup> Karl N Llewellyn, ‘Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed’ (1950) 3 *Vanderbilt Law Review* 395, 400 cited in Joel A Mintz, ‘Can You Reach New “Greens” If You Swing Old “Clubs”? Underutilized Principles of Statutory Interpretation And Their Potential Applicability In Environmental Cases’ (2001) 7 *Environmental Lawyer* 295, 306-7.

<sup>104</sup> *Cartier Holdings Pty Ltd v Newcastle City Council* (2001) 115 LGERA 407, 415-6, para 34 (Pearlman J); *Sandig & Anor v Ku-ring-gai Council* (2001) 114 LGERA 7, 16, para 48 (Sheahan J); *Creighton v Sutherland Shire Council* [2001] NSWLEC 190, para 10 (Llyod J); *Forma Holdings Pty Ltd v Minister for Urban Affairs and Planning* (2000) 109 LGERA 391, 395, para 18 (Pearlman J); *Carstens v Pittwater Council* (1999) 111 LGERA 1, 11, para 20 (Lloyd J).

<sup>105</sup> [2002] NSWLEC 53.

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Section 46 appears in Part 6, which is entitled ‘Other Conservation and Remedial Measures’, and provides:

If the Director-General is of the opinion that a person *is* contravening, or *is about to* contravene, Part 2, the Director-General may, by notice in writing given to the person, order the person not to carry out the clearing concerned.<sup>106</sup>

Section 46(5) provides:

A person who does not comply with an order in force under this section is guilty of an offence and is liable to a penalty not exceeding 1,000 penalty units and, in the case of a continuing offence, to a further penalty not exceeding 100 penalty units for each day the offence continues.<sup>107</sup>

The Stop Work Order issued by the Director-General was in the following terms:

I Robert Patrick Smith, Director-General of the Department of Land and Water Conservation, am of the opinion that [that] [sic] you *have* cleared and *are about to* clear native vegetation in contravention of Part 2.<sup>108</sup>

The Applicant argued that the Stop Work Order was void for invalidity because it applied a criterion contrary to that specified in s 46(1), in that the Order involved an opinion as to past and future (and not present and future) contraventions of the Act.<sup>109</sup>

From the perspective of statutory interpretation, the Applicant argued that s 46 had to be interpreted strictly, and that the Order had to comply strictly with the legislative power to make it, for two reasons. Firstly, the Applicant suggested that s 46 was penal in the sense that it imposes substantial penalties for non-compliance; and secondly, because the implications of an Order are serious in that the Order interferes with fundamental rights of freedom, those rights being the security of land and right to use land for one’s own purposes.<sup>110</sup> This was the approach to interpretation adopted by Wallace J in *Palos Verdes*.<sup>111</sup>

The Respondent urged the court to adopt a purposive approach to interpreting the provision.<sup>112</sup> Among other authorities, the Respondent cited *NSW Crime Commission v*

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<sup>106</sup> *Native Vegetation Conservation Act 1997* (NSW) s 46 (emphasis added).

<sup>107</sup> *Ibid* s 46(5).

<sup>108</sup> See *Greentree v Director-General of the Department of Land and Water Conservation* [2002] NSWLEC 53, para 5 (Pain J) (*‘Greentree’*) (emphasis added).

<sup>109</sup> *Ibid* para 1.

<sup>110</sup> *Ibid* para 11.

<sup>111</sup> *Palos Verdes* (1991) 72 LGRA 414, 434 (Wallace J).

<sup>112</sup> *Greentree* [2002] NSWLEC 53, para 14.

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*Murchie*,<sup>113</sup> in which James J referred to McHugh J's judgment in *Saraswati v The Queen*,<sup>114</sup> where McHugh J 'pointed to the necessity of adopting the construction which will promote the underlying purpose or object of an Act'.<sup>115</sup> Pain J commented:

I take the Respondent's argument to mean that I must look at the purpose of the statute as a whole in considering the provisions on which the Order is based.<sup>116</sup>

Pain J preferred the Respondent's submissions and upheld the validity of the Stop Work Order. In doing so Pain J approved McHugh J's reasons and consequently applied s 33 of the *Interpretation Act 1987* (NSW).<sup>117</sup>

#### D. *Problems with the Statutory Purposive Approach*

The purposive approach has been advocated in this paper as the preferable approach to interpretation of environmental law statutes. However, the purposive approach is not free from difficulty. The first and most obvious difficulty arises in the case of an Act having a number of uncertain or conflicting purposes.<sup>118</sup> Justice Spigelman has observed another difficulty:

The statutory enactment of the "purposive" approach, directs a court to prefer a construction that promotes the purpose or object of an Act, over a construction that does not promote that purpose or object. The choice is rarely of that kind. Usually the issue is whether to adopt a construction that more completely or to a greater degree "promotes" the "purpose or object". That choice calls for finer judgment than the "purposive" approach required by statute.<sup>119</sup>

In this respect, the now widespread introduction of objects clauses into legislation helps by explicitly stating an Act's objectives and purposes – sometimes 'in quite a lengthy fashion'.<sup>120</sup> While objects clauses may assist to clarify legislative purpose, as discussed in the Chapter VI, objects clauses can also suffer from internal conflicts that give rise to difficulties similar to that referred to by Spigelman J.

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<sup>113</sup> (2000) 49 NSWLR 465.

<sup>114</sup> (1991) 172 CLR 1, 21.

<sup>115</sup> *Greentree* [2002] NSWLEC 53, para 16.

<sup>116</sup> *Ibid* para 15.

<sup>117</sup> *Ibid* para 19.

<sup>118</sup> *Avel Pty Ltd v Attorney-General for New South Wales* (1987) 11 NSWLR 126, 127 (Kirby P).

<sup>119</sup> Spigelman, above n 2, 225.

<sup>120</sup> Stein, above n 1, 10.

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#### IV. OBJECTS CLAUSES IN ENVIRONMENTAL LEGISLATION

##### A. *The Role of Objects Clauses in Statutory Interpretation*

Objects clauses are primarily a tool of administrative law. Jan Rohde has described objects clauses as:

the linchpin of a new statutory vehicle for the encapsulation of policy and strategy within legislation as a factor or consideration which must be taken into account by a decision-maker in the exercise of a power conferred by the Act.<sup>121</sup>

Less technically, the objects clause could be characterised as the legislation's rudder *and* sails, or perhaps as the legislature's guiding hand, which reaches up from the pages of the statute to rest, in a reminding fashion, on the shoulder of a decision-maker. Whether or not, and when, an objects clause's content 'must' be taken into account in the administrative law context by a decision-maker is a subject of some debate.<sup>122</sup> However, it suffices to say that in the normal course of events, an objects clause will substantially influence the choice of matters that a decision-maker includes in his or her deliberations.

Aside from this primary function, objects clauses or purposes clauses, by virtue of their form, also play a critical role in the 'law of statutory interpretation'.<sup>123</sup> It will be recalled that both the *Phosphate* and *Palos Verdes* courts had appreciable difficulty in interpreting the broadly defined term 'pollution' in the *Environment Protection Act 1970* (Vic) and the *Environment Protection Act 1986* (WA) respectively. Neither of these Acts incorporated objects clauses at the time of hearing. Neaves comments that historically, objects clauses played an important role in assisting the courts in the interpretation of widely drafted legislative provisions:

One effect of this device has been that the draftsman is able to use very general language in the operative provisions on the basis that the general language will be read down by reference to the objects clause.<sup>124</sup>

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<sup>121</sup> Jan Rohde, 'The Objects Clause in Environmental Legislation – The Nature Conservation Act 1992 (Qld) Exemplified' (1995) 12 *Environmental and Planning Law Journal* 80, 80.

<sup>122</sup> See especially Rohde, above n 121, 80. Cf *Rosemount* (1996) 91 LGERA 31, 97 (Cole JA); Paul Stein and Susan Mahony, 'Incorporating Sustainability Principles in Legislation' in Paul Leadbeter, Neil Gunningham and Ben Boer (eds), *Environmental Outlook No 3 Law and Policy* (1999) 62.

<sup>123</sup> Spigelman, above n 2, 224.

<sup>124</sup> Alan Neaves, 'Objects in Acts' in Attorney-General's Department, *Another Look at Statutory Interpretation* (1982) 14; Rohde, above n 121, 83. For authority that objects clauses may also widen the

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More recently, objects clauses have assumed a greater interpretative significance in Australian environmental law. Consider s 1A of the *Environment Protection Act 1970* (Vic):

1A. Purpose of Act

(1) The purpose of this Act is to create a legislative framework for the protection of the environment in Victoria having regard to the principles of environment protection.

(2) The principles of environment protection are set out in sections 1B to 1L.

(3) *It is the intention of Parliament* that in the administration of this Act regard should be given to the principles of environment protection.<sup>125</sup>

Section 1A(3) explicitly states that it is the ‘intention of Parliament’ that the contents of the purpose clause, set out in ss 1B-1L<sup>126</sup> and summarised as ‘the principles of environmental protection’, are to be considered in pursuance of all activities under the Act.

It is not suggested that the court can discharge finally and completely its requirement to determine the legislature’s intention merely by reference to an explicit objects clause in this or some similar form where it is included in an Act.<sup>127</sup> An objects clause that is included as an operative provision thereby becomes a substantive part of the Act. In this context, the objects clause will contribute, albeit in a significantly heightened sense, to ascertaining the Act’s overall purpose and object in the same way as every other substantive part of the Act.<sup>128</sup>

The reason for the prominence of objects clauses in Australian environmental law is that they have become a favoured method of introducing contemporary environmental principles and policy into both the Federal and State regulatory frameworks.<sup>129</sup> A principle that is commonly invoked by Australian environmental legislation in the context of objects clauses is the principle of ecologically sustainable development

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interpretation of legislation, see *IDA Safe Constructions Pty Ltd v Woollahra Municipal Council* (1981) 48 LGRA 62, 80-2 (McClelland CJ).

<sup>125</sup> *Environment Protection Act 1970* (Vic) s 1A (emphasis added).

<sup>126</sup> See Appendix A.

<sup>127</sup> Cf Rohde, above n 121, 82.

<sup>128</sup> Pearce and Geddes, above n 6, 122-3, para [4.40].

<sup>129</sup> Rohde, above n 121, 80-1. See also D E Fisher, ‘Sustainability – the Principle, its Implementation and its Enforcement’ (2001) 18 *Environmental and Planning Law Journal* 361, 364.

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(ESD).<sup>130</sup> ESD may be defined as ‘the effective integration of economic and environmental considerations in decision-making processes.’<sup>131</sup> ESD comprises four core principles, being: (1) the precautionary principle; (2) inter-generational equity; (3) conservation of biological diversity and ecological integrity; and (4) improved valuation, pricing and incentive mechanisms.<sup>132</sup> Some objects clauses include a substantially longer list of principles. For example the purpose clause in the *Environment Protection Act 1970* (Vic)<sup>133</sup> as inserted by the *Environment Protection (Liveable Neighbourhoods) Act 2001* (Vic) refers to a range of 11 environmental principles.<sup>134</sup>

From the point of view of statutory interpretation, objects clauses are viewed with optimism.<sup>135</sup> This optimism arises from an expectation that when faced with a difficult task of construction, the courts will mine the rich vein of principles of environmental protection, which, via objects clauses, comprise the building blocks of the legislature’s intention. Applied in this way, these principles assume the character of ‘green’ statutory canons of interpretation.<sup>136</sup> However, some commentators have serious reservations about incorporating concepts such as ESD in the objects clauses of environmental legislation.<sup>137</sup> Their concern is that principles associated with ESD juxtapose the apparently conflicting considerations of economics and the environment.<sup>138</sup>

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<sup>130</sup> Stein and Mahony, above n 122, 62-3.

<sup>131</sup> Dr Peter E Nygh and Peter Butt (eds), *Butterworths Concise Australian Legal Dictionary* (2<sup>nd</sup> ed, 1998) 144. See also *National Strategy for Ecologically Sustainable Development, Pt 1* ‘What is ecologically sustainable development?’ <<http://www.ea.gov.au/esd/national/strategy/intro.html#WIESD>>.

<sup>132</sup> *Intergovernmental Agreement on the Environment 1992* s 3.5; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3A; *Protection of the Environment Administration Act 1991* (NSW) s 6(2); Stein and Mahony, above n 122, 57.

<sup>133</sup> *Environment Protection Act 1970* (Vic) s 1A.

<sup>134</sup> *Ibid* ss 1B-L. See also Appendix A.

<sup>135</sup> Farber, above n 17, 126-7.

<sup>136</sup> Cf *ibid*.

<sup>137</sup> Banche, Bailey and Evans, above n 78, 489.

<sup>138</sup> *Ibid*. Cf David James, ‘Economic Concepts and the Precautionary Principle and Implementation of Safe Minimum Standards’ in Ronnie Harding and Elizabeth Fisher (eds), *Perspectives on the Precautionary Principle* (1999) 154; A Dan Tarlock, ‘Environmental Law, But Not Environmental Protection’ in Lawrence J MacDonnell and Sarah F Bates (eds), *Natural Resources Policy and Law: Trends and Directions* (1993) 177. See also *Rosemount* (1996) 91 LGERA 31, 34 (Handley JA); Jennifer Caldwell, *An Ecological Approach to Environmental Law* (1988) 15, 124.

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The theme of conflict between economics and the environment has been apparent in most of the cases considered in this paper.<sup>139</sup> The task for the court engaged in statutory interpretation is *not* one of assessing the relative weight to be afforded to the *substantive operation* of the various principles that are encompassed by an objects clause.<sup>140</sup> Rather, if the legislation's express purpose is the protection of the environment, it is to determine to what extent economic considerations should encroach upon this object for the purposes of statutory construction or the Acts Interpretation Acts.<sup>141</sup> This is the point Spigelman J was making when he stated that the issue is usually whether to adopt a construction that more completely or to a greater degree promotes the purpose or object of the Act.<sup>142</sup>

### B. *Difficulties with Objects Clauses in Statutory Interpretation*

Concerns relating to potential conflicts from the perspective of statutory interpretation between the environment and economics can be illustrated by a consideration of the pre and post *Phosphate* form and effect of the *Environment Protection Act 1970* (Vic). *Phosphate* held that under Act, as it stood at the time, the Victorian Environment Protection Authority had no authority to consider economic matters.<sup>143</sup> A recent amendment to the *Environment Protection Act 1970* (Vic)<sup>144</sup> expressly incorporates the purpose of 'protection of the environment' in s 1A(3). This protection is no longer unqualified in the *Phosphate* sense, because it is to be understood by reference to the principles of environmental protection.<sup>145</sup> Section 1B, the first principle of environmental protection, is the 'Principle of integration of economic, social and environmental considerations'.<sup>146</sup> Section 1B(3) requires that measures

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<sup>139</sup> See also *Patra Holdings Pty Ltd v Minister for Land and Water Conservation* [2001] NSWLEC 265; *Cartier Holdings Pty Ltd v Newcastle City Council* (2001) 115 LGERA 407; *City West Housing Pty Ltd v Sydney City Council* (1999) 110 LGERA 262; *Fabcot Pty Ltd v Hawkesbury City Council* (1997) LGERA 373; *Kentucky Fried Chicken Pty Ltd v Gantidis and Anor* (1979) 140 CLR 675.

<sup>140</sup> Cf *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 41 (Mason J).

<sup>141</sup> *Acts Interpretation Act 1901* (Cth); *Interpretation Act 1987* (NSW); *Interpretation of Legislation Act 1984* (Vic); *Acts Interpretation Act 1954* (Qld); *Acts Interpretation Act 1915* (SA); *Interpretation Act 1984* (WA); *Acts Interpretation Act 1931* (Tas); *Interpretation Act 1967* (ACT); *Interpretation Act 1987* (NT).

<sup>142</sup> Spigelman, above n 2, 225.

<sup>143</sup> *Phosphate* (1977) 138 CLR 134, 142 (Stephen J).

<sup>144</sup> *Environment Protection (Liveable Neighbourhoods) Act 2001* (Vic).

<sup>145</sup> *Environment Protection Act 1970* (Vic) s 1A(3).

<sup>146</sup> *Ibid* s 1B.

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adopted ‘should be cost-effective and in proportion to the significance of the environmental problems being addressed.’<sup>147</sup> With this in mind, it is suggested that the *Phosphate* court, faced with the *Environment Protection Act 1970* (Vic) in its contemporary form, could not refute the submission that economic factors should play *some* positive role in the amended Act’s operation.

If economic factors play a positive role under the Act pursuant to s 1B, then the combination of ss 1A(3) and 1B requires the court to recognise that economic considerations must feed into a purposive interpretation of the Act. If it is also accepted that principles of natural resource development, such as ESD contained in s 1B, and environmental protection such as the precautionary principle contained in s 1C, may conflict, then it is possible that two interpretations of a statutory provision may exist. One would favour the environment and the other may favour the environment to a lesser extent or not at all. Nevertheless, both would be supported by the Act’s principles of environmental protection.<sup>148</sup>

In the absence of any express statutory indication of priority, the crucial inquiry of statutory interpretation then becomes whether there is any discernible hierarchy amongst the principles of environmental protection. The answer to this inquiry will assist in determining whether one interpretation or another more appropriately reflects the legislature’s intention.

There is some evidence that a textual inquiry will assist this determination. In relation to the *Threatened Species Conservation Act 1995* (NSW), Smith identifies the objectives of conservation of biological diversity and the promotion of ESD contained in s 3(a), as the primary objectives amongst a list that extends to s 3(f).<sup>149</sup> Smith’s rationale is that ss 3(b)-(f) ‘reflect the means of achieving’ the objectives of s 3(a).<sup>150</sup> Smith also observes that different principles are introduced by verbs of varying force.<sup>151</sup> For example, the Act requires ‘conservation’ of biological diversity but merely

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<sup>147</sup> Ibid s 1B(3).

<sup>148</sup> Ibid ss 1B, 1C.

<sup>149</sup> Jeff Smith, ‘Skinning Cats, Putting Tigers in Tanks and Bringing Up Baby: A Critique of the Threatened Species Conservation Act 1995 (NSW)’ (1997) 14 *Environmental and Planning Law Journal* 17, 19.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid 23. See also Rohde, above n 121, 88-9.

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‘promotion’ of ESD.<sup>152</sup> Therefore a possible solution for resolving priority between conflicting objectives is the recognition of a *rebuttable presumption* that the objective expressed in the strongest terms should prevail.<sup>153</sup> If the strength of legislative intention is proportional to the strength of the language used then this presumption may have some legitimacy.

One deficiency of this approach is that it would require the courts to enter indeterminate investigations into the hierarchy of language itself. For example, while ‘ensure’ may intuitively prevail over ‘promote’, should ‘ensure’ prevail over ‘eliminate’? Another deficiency may be inferred from Smith’s explanation that the apparent lack of emphasis on ESD relates to the inherent nature of ESD as a concept. Smith claims that ESD may actually be a ‘process’ that ‘can no more *be achieved* than one can achieve public participation.’<sup>154</sup> Therefore, the linguistic strength of a particular objects clause may have as much to do with inherent nature of the principle it precedes, as it has to do with the strength of legislative intention it reflects. However, in the context of the *Environment Protection Act 1970* (Vic), a textual approach is unhelpful. Section 1A(3) requires ‘regard’ to be had to *all* 11 principles of environmental protection; no principle has any presumptive linguistic priority over another.

Alternatively, Stein J has proposed a purposive approach to resolve competing interpretations, one that favours the environment and one that does not. In an extra-curial statement, His Honour asserted:

It is in this area that it is my firm view that if the general purpose of a statute is, for example, the achievement of ecological sustainability (see eg. s 1.2.1 Integrated Planning Act 1997) and we are told by the Parliament that this purpose is to be advanced by ensuring that decision-making processes apply the precautionary principle and the principle of inter-generational equity (s 1.2.3), then the construction which advances the statutory objectives is to be preferred.<sup>155</sup>

This observation reaffirms that a court should look to the principles that underlie an express statutory statement of object or purpose when approaching the interpretation of an Act. As the objects of the *Integrated Planning Act 1997* (Qld) are relatively homogeneous, an inquiry into its objects may not need to extend beyond Stein J’s

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<sup>152</sup> *Threatened Species Conservation Act 1995* (NSW) s 3(a).

<sup>153</sup> See Eskridge, Frickey and Garrett, above n 29, 341.

<sup>154</sup> Smith, above n 149, 23 (emphasis added).

<sup>155</sup> Stein, above n 1, 10-11.

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suggested approach. As illustrated by Smith's analysis, the objects of the *Threatened Species Conservation Act 1995* (NSW) are similarly supportive of each other and thus the issue of priority does not arise. In contrast, reference to the principles that underlie express objects will not be conclusive in more complex Acts where the principles themselves conflict, although such reference might provide a useful starting point for analysis.

Thereafter, an attempt must be made to determine what the overall purpose of the Act is, not just by reference to the express statutory purpose or object, but by reference to the Act as a whole and any other relevant material.<sup>156</sup> For example, this investigation may refer to the Act's long title.<sup>157</sup> The courts have demonstrated their ability to undertake this level of analysis in environmental cases, even in the absence of express statutory purposes and objects.<sup>158</sup>

By way of one further example, potential conflict between ss 1B and 1E in the *Environment Protection Act 1970* (Vic) may be resolved by reference to the Act's core purpose of 'protecting the environment'. This is essentially the approach adopted in *Coastal Waters* whereby the court restricted the influence of economic factors through a purposive reading of the Act.<sup>159</sup> Approaching environmental legislation in this way would at least mitigate any trade-offs between the environment and economic factors.

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<sup>156</sup> For an analysis of the intrinsic and extrinsic material Kirby J referred to in determining the overall object of the *National Parks and Wildlife Act 1974* (NSW) in *Woollahra Municipal Council v Minister for the Environment* (1991) 23 NSWLR 710, see Rohde, above n 121, 87-8.

<sup>157</sup> *Woollahra Municipal Council v Minister for the Environment* (1991) 23 NSWLR 710, 723.

<sup>158</sup> *Woollahra Municipal Council v Minister for the Environment* (1991) 23 NSWLR 710, 721-2 (Kirby J); *Phosphate* (1977) 138 CLR 134, 141 (Stephen J).

<sup>159</sup> Above, Chapter III, 14-5.

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## V. COMMON LAW PRESUMPTIONS

Another solution to breaking a deadlock between two interpretations, one that favours the environment and one that does not, may be found by turning to common law presumptions, also known as canons of statutory interpretation. Over time, judges have developed and applied common law presumptions to soften the impact of what might otherwise be considered oppressive legislation.<sup>160</sup>

Canons of statutory interpretation can be divided into three general classes: (1) textual, intrinsic or grammatical canons; (2) extrinsic canons; and (3) substantive canons.<sup>161</sup> This paper is concerned primarily with substantive canons, referred to by Pearce and Geddes as ‘legal assumptions’.<sup>162</sup> Substantive canons are described as the embodiment of fundamental public values that judges implement through the process of statutory interpretation.<sup>163</sup> However, they may also reflect ‘the expectation that certain tenets of our legal system will be followed by the legislature.’<sup>164</sup>

For example, Australian society places value upon private ownership of land and the rights that flow from this ownership. In the realm of statutory interpretation, this value is embodied in a substantive canon whereby courts presume that Parliament does not intend to divest property from a property owner without compensation in mind.<sup>165</sup> However, as *Palos Verdes* and *Greentree* demonstrated, the application of substantive canons associated with property rights do not always favour environmental outcomes.<sup>166</sup>

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<sup>160</sup> D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (5<sup>th</sup> ed, 2002) 131, para [5.1].

<sup>161</sup> Eskridge, Frickey and Garrett, above n 29, 329-30; William N Eskridge Jr, ‘Norms, Empiricism, and Canons in Statutory Interpretation’ (1999) 66 *University of Chicago Law Review* 671, 674.

<sup>162</sup> Pearce and Geddes, above n 6, 131-54.

<sup>163</sup> Eskridge, Frickey and Garrett, above n 29, 343; Greenawalt, above n 39, 206-7; Daniel B Rodriguez, ‘The Presumption of Reviewability: A Study in Canonical Construction and its Consequences’ (1992) 45 *Vanderbilt Law Review* 743, 749; William Eskridge Jr, ‘Public Values in Statutory Interpretation’ (1989) 137 *University of Pennsylvania Law Review* 1007, 1018.

<sup>164</sup> Pearce and Geddes, above n 6, 131, para [5.1].

<sup>165</sup> Pearce and Geddes, above n 6, 131, para [5.1].

<sup>166</sup> *Palos Verdes* (1991) 72 LGRA 414, 434 (Wallace J); *Greentree* [2002] NSWLEC 53, para 11 (Pain J).

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### A. *Environmental Canons of Statutory Interpretation*

In his book Farber notes the absence of an environmental or ‘green’ canon of statutory interpretation:

In interpreting statutes today, courts apply a number of “canons” of interpretation: for instance, that waivers of sovereign immunity must be express and that ambiguous criminal statutes are construed in favour of the defendant. But there is no particular canon dealing with environmental issues.<sup>167</sup>

Farber uses *Reserve Mining Co v United States*<sup>168</sup> (*‘Reserve Mining’*) to provide a backdrop to introduce the possibility of a ‘green’ canon. The Reserve Mining Company, a leading producer of iron ore and a major employer in its region, had been engaged in the large scale dumping of rock and dirt tailings into Lake Superior. As a result of the discovery of asbestos fibres in drinking water by scientists,<sup>169</sup> the plaintiffs argued that the dumping endangered the lives of residents in the Lake Superior area.<sup>170</sup> However, the Company claimed that the cost of alternative dumping arrangements was prohibitive. The Company argued that if this cost were imposed, it would in all probability be forced to cease operations.

The forensic hurdle for the court was that there was no clear scientific proof that the consumption of water contaminated with asbestos constituted a threat to human health in the same way as the inhalation of asbestos fibres was known to. This difficulty is typical of the factual complexity of many environmental issues that often involve the drawing of conclusions about future events and impacts in the absence of comprehensive data.

Farber explains the task of statutory interpretation confronting the court:

The Reserve Mining court was faced with the need to interpret some ambiguous language in the Clean Water Act. The statute allowed the government to seek judicial relief when discharges ‘endanger...the health or welfare of persons.’ The issue of statutory interpretation was whether the existence of a *potential* threat to public health met this standard of endangerment.<sup>171</sup>

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<sup>167</sup> Farber, above n 17, 124.

<sup>168</sup> *Reserve Mining Co v United States* 514 F.2d 492 (8<sup>th</sup> Cir. 1974).

<sup>169</sup> See Frank D Schaumberg, *Judgment Reserved: A Landmark Environmental Case* (1976) 149.

<sup>170</sup> Farber, above n 17, 20-1.

<sup>171</sup> *Ibid* 123-4.

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The court held that the Act did prevent potential threats:

Calling for a “common sense” interpretation of the statute, the court concluded that the term should be construed in a “precautionary or preventative sense,” rather than requiring clear proof of a significant risk.<sup>172</sup>

In other words, the court applied an extra-legislative ‘common sense’ principle of ‘precaution’ in the construction of the relevant statutory provision. In response, Farber proposes his own environmental canon of interpretation. He suggests that an environmental canon would require that ambiguous statutes be interpreted to ‘cover significant environmental risks (with an escape hatch for infeasibility).’<sup>173</sup> In other words, where a statute’s provision is open to at least two interpretations, one that may lead to serious environmental consequences and one that may not, the environmentally responsible interpretation should be preferred so as to ‘cover’ the environmental risk. However, this interpretation should not be preferred, if to do so would incur infeasible economic and social costs to society. Farber’s canon is a substantive canon in the sense that if it were to be applied by a court, it would represent judicial recognition of the demonstrable ‘public value’ modern society places upon preservation of the environment.

It may be presumed that modern Australian courts would readily resolve a case like *Reserve Mining*, particularly if the objects of the relevant environmental legislation included reference to principles of ESD, as many do.<sup>174</sup> In those statutes, specific reference is normally made to both the precautionary principle, a version of which was applied by the *Reserve Mining* court itself, and the principle of inter-generational equity. A purposive approach to these statutes could be expected to recognise that such principles must bear upon the interpretation of provisions within the statute as has already been discussed.

However, Australian environmental statutes do not all refer to principles of ESD.<sup>175</sup> Even environmental legislation that does include an objects clause can descend into ambiguity due to the competition between, and vagueness of, various principles of

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<sup>172</sup> *Reserve Mining Co v United States* 514 F.2d 492, 527-9 (8<sup>th</sup> Cir. 1974) cited in Farber, above n 17, 124.

<sup>173</sup> Farber, above n 17, 124.

<sup>174</sup> Stein and Mahony, above n 122, 72-5.

<sup>175</sup> See, eg, *Environment Protection Act 1986* (WA). See also Fisher, ‘Sustainability – the Principle, its Implementation and its Enforcement’, above n 129, 363.

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environmental protection. Under these circumstances, Farber's suggested environmental canon of statutory interpretation may have utility – but could it and should it be recognised in Australia?

Justice Hill has examined the question of special approaches to particular legislation in relation to Australian tax law.<sup>176</sup> Courts normally approach penal statutes with special care.<sup>177</sup> That is, in cases of ambiguity, a penal provision should be resolved in favour of the defendant.<sup>178</sup> Justice Hill suggests that historically, tax or revenue statutes have been seen as analogous to penal statutes<sup>179</sup> and that on this view, taxation provision should not be applied 'unless the Crown is able to show that the subject taxpayer falls squarely within its terms.'<sup>180</sup> His Honour commented:

It is, in my view, important in a democracy, that the government be required to legislate with precision if it is to impose a liability upon its subjects, and conversely it would be a sad day if the courts were to abandon the rule [favouring the taxpayer], even if it is but a rule of last resort. A rule which says that in tax cases there should be an attempt on the part of the courts to make the legislation work (in favour of the revenue) is an encouragement to sloppy drafting ... [T]here must still be room for the rule that ultimately the legislature must hit its mark. If it fails to do so, it is not for the court to rewrite the law.<sup>181</sup>

It is possible to conceive that Hill J's view is also arguable on behalf of the environment. At least conceptually, it may be attractive to suggest that in cases where an environmental statute is ambiguous, any ambiguity should be resolved in favour of the environment. However, enthusiasm for this assertion is dampened by Hill J's recognition that a number of cases have rejected the notion that tax legislation should be construed in any other way than by the application of normal principles of statutory interpretation.<sup>182</sup>

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<sup>176</sup> Hill, above n 43. See generally Sullivan, above n 40, 383-415.

<sup>177</sup> *Scott v Cawsey* (1907) 5 CLR 132, 154-5 (Issacs J).

<sup>178</sup> D C Pearce and R S Geddes (5<sup>th</sup> ed, 2001) 233, para [9.9].

<sup>179</sup> Hill, above n 43, 685.

<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid* 689.

<sup>182</sup> *Ibid* 688-9.

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As alluded to by Hill J in the above quote, in *Beckwith v R*<sup>183</sup> Gibbs J said:

The rule formerly accepted, that statutes creating offences are to be strictly construed, has lost much of its importance in modern times. In determining the meaning of a penal statute the ordinary rules of construction must be applied, but if the language of the statute remains ambiguous or doubtful the ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences ... The rule is perhaps one of last resort.<sup>184</sup>

This authority militates against the recognition of special rules or approaches to particular categories of legislation.<sup>185</sup> Nevertheless, a line of cases stemming from the decision of Stein J in *Leatch v National Parks and Wildlife Service*<sup>186</sup> (*Leatch*) is evidence that an extra-legislative ‘common sense’ precautionary approach has at times been referred to by the Australian judiciary when approaching environmental disputes.<sup>187</sup> Establishing the status of the ‘common sense’ approach in Australian common law is a difficult task. Justice Stein has argued that the precautionary approach is now part of the common law,<sup>188</sup> but Australia’s specialist environmental courts, perhaps because they have not had the opportunity, do not appear to have adopted this view. Greenawalt comments, perhaps self-evidently:

Novel proposals about principles of interpretation do not become canons until they become rooted in judicial acceptance.<sup>189</sup>

At the least, it could be said that the judiciary treats the precautionary approach as an environmental touchstone. In this guise, the ‘common sense’ precautionary approach appears analogous to a common law environmental canon of statutory interpretation. It is not a decisive rule, but it is nevertheless a basic assumption embodying public values

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<sup>183</sup> (1976) 135 CLR 569.

<sup>184</sup> *Beckwith v R* (1976) 135 CLR 569, 576 (Gibbs J).

<sup>185</sup> Cf Jonathan R Macey and Geoffrey P Miller, ‘The Canons of Statutory Construction and Judicial Preferences’ (1992) 45 *Vanderbilt Law Review* 647, 660-1.

<sup>186</sup> (1993) 81 LGERA 270, 281-2 (Stein J).

<sup>187</sup> *Jeffrey Nicholls v Director-General of National Parks and Wildlife* (1994) 84 LGERA 397, 419 (Talbot J); *Simpson v Ballina Shire Council* (1994) 82 LGERA 392, 395-6 (Pearlman J); *Greenpeace Australia Ltd v Redbank Power Company* (1995) 86 LGERA 143, 154 (Pearlman J); *Alumino (Aust) Pty Ltd v Minister Administering the Environment Planning and Assessment Act 1979 (Cth)* (Land and Environment Court, 29 March 1996, unreported) (Talbot J); *Miltonbrook Pty Ltd v Kiama Municipal Council* [1998] NSWLEC 281 (Bignold J); *Friends of Hinchinbrook Society Inc v Minister for Environment* (1997) 93 LGERA 249, 296 (Sackville J).

<sup>188</sup> Paul Stein, ‘Are Decision-makers too Cautious with the Precautionary Principle?’ (2000) 17 *Environmental and Planning Law Journal* 3, 12.

<sup>189</sup> Greenawalt, above n 39, 211. Cf Eskridge, Frickey and Garrett, above n 29, 372.

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of environmental protection, which the courts have in mind when interpreting environmental legislation.

Taking a contrary view, it is difficult to accept that Farber's proposed canon, or the Australian 'common sense' precautionary approach, could achieve full recognition as a canon of statutory interpretation at common law for two reasons. Firstly, there is a problem in that its inherent nature undermines a key justification for the existence of canons. Eskridge explains this justification:

The canons of statutory interpretation can be defended if they generate greater objectivity and predictability in statutory interpretation.<sup>190</sup>

Farber's suggested canon requires ambiguous statutes to be interpreted to 'cover significant environmental risks (with an escape hatch for infeasibility).'<sup>191</sup> In the context of environmental law, this formulation will not necessarily promote 'greater objectivity and predictability'.<sup>192</sup> As has been discussed, a range of environmental principles have developed in recent times having as their focus 'covering ... environmental risks'. Principles associated with ESD are the best known.<sup>193</sup> However, as has been demonstrated with respect to the *Environment Protection Act 1970* (Vic), a much wider range of principles has been recognised as contributing to environmental protection. Also, while environmental principles have independent spheres of operation, they may conflict.<sup>194</sup> Even with respect to ESD, Australian courts have not yet addressed the interaction between environmental principles in any comprehensive sense.<sup>195</sup> Further, the principles that comprise ESD, and most particularly the precautionary principle, can be described as 'rapidly evolving'.<sup>196</sup> The lack of stability of substantive canons over time also poses 'serious problems'.<sup>197</sup>

Therefore, when attempting to give some meaning to the phrase 'covering ... environmental risks', the courts will be grasping amongst principles, which may be

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<sup>190</sup> Eskridge, above n 161, 678-9.

<sup>191</sup> Farber, above n 17, 124.

<sup>192</sup> Eskridge, above n 161, 678-9.

<sup>193</sup> See Stein and Mahony, above n 122, 62.

<sup>194</sup> *Rosemount* (1996) 91 LGERA 31, 38 (Handley JA).

<sup>195</sup> Cf *Northcompass Inc v Hornsby Shire Council* [1996] NSWLEC 213, 227 (Stein J).

<sup>196</sup> Stein, 'Are Decision-makers Too Cautious With The Precautionary Principle?', above n 188, 5.

<sup>197</sup> Greenawalt, above n 39, 209.

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evolving and each of which could potentially take a matter in a different direction. This result must be eschewed if the point of Justice Scalia's admonition that 'these artificial rules increase the unpredictability, if not the arbitrariness of judicial decision'<sup>198</sup> is to be avoided.<sup>199</sup>

Another problem with recognising Farber's formulation, or the 'common sense' precautionary approach, as a canon of statutory interpretation at common law relates to the established proposition that canons 'readily give way in the face of an indication in the legislation that it is to operate contrary to them.'<sup>200</sup> At their simplest, both formulations are variations upon ESD's precautionary principle, although neither formulation corresponds with the prevailing statutory definitions of the precautionary principle.

Section 3A(b) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), the centrepiece of federal environmental legislation, appears in the following terms:

if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.<sup>201</sup>

Section 391(2) of the same Act puts the definition more explicitly:

The *precautionary principle* is that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage.<sup>202</sup>

Clearly, ss 3A(b) and 391(2) do not make reference to the second half of Farber's canon, relating to 'infeasibility'. 'Infeasibility' is a potential injunction to Farber's canon's primary focus of environmental protection.<sup>203</sup> However, ss 3A(b) and 391(2) do go further than merely to suggest that 'caution' is required.

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<sup>198</sup> See, eg, Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law: An Essay* (1996) 28.

<sup>199</sup> But see Jonathan R Macey and Geoffrey P Miller, 'The Canons of Statutory Construction and Judicial Preferences' (1992) 45 *Vanderbilt Law Review* 647, 660-1.

<sup>200</sup> Pearce and Geddes, above n 6, 131, para [5.1]

<sup>201</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3A(b).

<sup>202</sup> Ibid s 391(2). See also J I Cunningham, *Explanatory Notes to Integrated Planning and Other Legislation Amendment Bill 2001 (Qld)* (28<sup>th</sup> November 2001) 9.

<sup>203</sup> Farber, above n 17, 126-7.

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Acts such as the *Protection of the Environment Administration Act 1991* (NSW) that *do* include a ‘concession’ to the operation of the precautionary principle usually employ the following language:

In the application of the precautionary principle, public and private decisions should be guided by:

- (ii) an assessment of the risk-weighted consequences of various options.<sup>204</sup>

This formulation differs from Farber’s because it provides a ‘guide’ to the application of the principle rather than a potential injunction against the principle’s operation.

Two conclusions flow from the fact that the form of Farber’s canon and the ‘common sense’ precautionary approach differ from the prevalent legislative expressions of the precautionary principle. Firstly, the proposed common law canons would be overridden when applied to any of the various Acts explicitly incorporating the precautionary principle. Secondly, as most of the major pieces of environmental protection legislation do incorporate such a reference either explicitly or through their reference to ESD,<sup>205</sup> the canons would, by virtue of the narrow field of their possible application, have little relevance.

For these two overarching reasons, it is unlikely that Farber’s proposed canon or the ‘common sense’ forms of the precautionary principle, as applied extra-legislatively, could be recognised as environmental canons of statutory interpretation in Australia.

### B. *Environmental Application of the Beneficial Canon*

If a special environmental canon of statutory interpretation cannot be recognised at common law in the face of contemporary environmental legislation, the question remains whether other established canons of statutory interpretation may assist courts in approaching environmental legislation.

One established canon that may be of assistance is the remedial or beneficial canon. This canon requires that where a provision is intended to achieve some beneficial purpose with respect to a particular person or class of persons, then it is preferable for any ambiguity to be resolved in favour of the intended beneficiary.<sup>206</sup> There is also

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<sup>204</sup> *Protection of the Environment Administration Act 1991* (NSW) s 6(2).

<sup>205</sup> Stein and Mahony, above n 122, 72-5.

<sup>206</sup> Pearce and Geddes, above n 6, 230, para [9.4].

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authority to suggest that the beneficial canon does not only apply in cases of ambiguity.<sup>207</sup> The canon is usually effected by the adoption of a liberal approach to the legislation in question.<sup>208</sup>

### 1. *Environmental Legislation as Beneficial Legislation*

There is sparse authority on the issue of whether environmental legislation can be categorised as ‘beneficial’ or ‘remedial’. No reference is made to environmental statutes by Pearce and Geddes in the extensive list of legislation that has been classified as remedial or beneficial in *Statutory Interpretation in Australia*.<sup>209</sup> However, this is not to say that environmental legislation has not been so recognised.

In *Fencott Drive Pty Ltd v Lake Macquarie City Council*<sup>210</sup>, Bignold J was required to determine whether a particular provision of an environmental planning instrument was a ‘development standard’. To do this, Bignold J needed to interpret that phrase within *State Environment Protection Policy No 1* (SEPP No 1). He said:

In this respect, I think the task of determining whether a particular provision of an environmental planning instrument is a ‘development standard’ calls for a purposive and beneficial construction which recognises the beneficial purpose of SEPP No 1....<sup>211</sup>

The beneficial purpose to which Bignold J referred was the relief of the otherwise harsh operation of a development standard upon a ‘person’. In contrast, in one case of the Victorian Civil and Administrative Tribunal, Member Komesaroff noted that she was ‘not persuaded that the *Planning and Environment Act* 1987 and its subordinate legislation is remedial or beneficial legislation’.<sup>212</sup> It is respectfully suggested that the Member’s comments were not intended to suggest that the Act in question could *not* be characterised as remedial or beneficial. Rather, it is suggested that the Member’s observation stemmed from concerns relating to the absurd *consequences* of accepting the Applicant’s unmeritorious submissions on this point.

In any event, at least two reasons may be advanced to explain a general failure to recognise environmental legislation as beneficial. Firstly, it is suggested that the

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<sup>207</sup> Ibid 228, para [9.2].

<sup>208</sup> Ibid, para [9.3].

<sup>209</sup> Ibid 228-30, para [9.3].

<sup>210</sup> [2000] NSWLEC 146.

<sup>211</sup> *Fencott Drive Pty Ltd v Lake Macquarie City Council* [2000] NSWLEC 146, para 63 (Bignold J).

<sup>212</sup> *Payton v Hartelt* [2000] VCAT 216, para 69 (Member Tonia Komesaroff).

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environment is not perceived to be a relevant ‘subject’ of benefit in the same way that a natural person is. Secondly, the now dominant purposive approach to statutory interpretation may have subsumed the beneficial canon under most circumstances.

## 2. *The Environment as an Intended Subject of Benefit*

As mentioned above, the beneficial canon is normally understood as applying to legislation intended to benefit ‘a particular person or class of persons’.<sup>213</sup> This definition does not encompass a subject such as ‘the environment’. Therefore, the following question is posed. Can the environment, or elements of the environment, be a ‘subject’ for the purposes of a beneficial canon?

There is no uniform definition of the term ‘environment’. Due to the dominance of legislation in environmental law, the definition of ‘environment’ usually takes its colour and content from its context within the legislation.<sup>214</sup> Traditionally, statutory definitions of ‘environment’ have been anthropocentric.<sup>215</sup> That is, they define the environment in terms of ‘man’ and ‘man’s’ interaction with his or her surroundings. Bates observed:

In reality, of course, there will be few if any human activities affecting the environment which do not also affect people, directly or indirectly. For example...[a] trust for the preservation of fauna and flora...has been held to be ‘charitable’, ie for the benefit of the public “by reason of the fact that such trusts tend to promote human feelings and to improve public morality”.<sup>216</sup>

In *R v Murphy*<sup>217</sup>, Mason CJ, Brennan, Deane, Gaudron and McHugh JJ explained:

What constitutes the relevant environment must be ascertained *by reference to the person, object or group surrounded or affected*.<sup>218</sup>

It is this close relationship between people and the environment that makes possible the recognition of at least some environmental legislation as ‘beneficial’, thereby attracting the operation of the beneficial canon. For example, legislation designed to prohibit or control pollution is potentially beneficial legislation not only

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<sup>213</sup> Pearce and Geddes, above n 6, 230, para [9.4].

<sup>214</sup> Bates, above n 3, 4-5.

<sup>215</sup> Ibid 3. See also Ben Boer, ‘Social Ecology and Environmental Law’ (1984) 1 *Environmental and Planning Law Journal* 233, 241.

<sup>216</sup> Bates, above n 3, 6 (footnotes omitted).

<sup>217</sup> (1990) 64 ALJR 593.

<sup>218</sup> *R v Murphy* (1990) 64 ALJR 593, 596 (Mason CJ, Brennan, Deane, Gaudron and McHugh JJ) (emphasis added).

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because it is designed to ‘protect the environment’ but also because the ‘environment’ is often defined in the legislation in anthropocentric terms.<sup>219</sup> Protecting the environment would seem to be the same as protecting society’s interests. By inference *people* are the real subjects of environmental legislation.

A more philosophical approach may argue that the environment deserves recognition in its own right, irrespective of man’s relationship with the environment. Stone has expressed this point of view with vigour.<sup>220</sup> However, the view has not yet permeated environmental legislation and so will not be further explored here.

### 3. *The Beneficial Canon and the Purposive Approach Compared*

Application of the beneficial canon or the purposive approach may result in similar interpretative outcomes. For example, consider a statute that has as its major object or purpose the prevention of pollution. A purposive reading of the legislation will favour an interpretation that promotes prevention of pollution over one that does not. If it is also accepted that the legislation is beneficial, in the sense that prevention of pollution is for the benefit either of the environment, individuals, or ‘man’ generally, then the beneficial canon applies. Application of the beneficial canon would require provisions to be read liberally in favour of the subject. In other words, the legislation would be construed generally, but not only, in cases of conflict between interpretations so as to protect the subject from pollution. This result is virtually identical to that produced by a purposive approach. Thus, Bignold J’s apparently interchangeable use of the terms purposive and ‘beneficial’ construction quoted above should not be surprising.<sup>221</sup>

The obvious exception to this analysis is the case where ambiguity arises as a result of conflicting purposes in beneficial legislation. Conflicting purposes arising from conflicting principles of environmental protection are a real concern in relation to Australian environmental law. Therefore, while the beneficial canon may not have a heavy load to bear, it may provide a useful means of resolving conflicts between, for

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<sup>219</sup> Bates, above n 3, 6.

<sup>220</sup> Christopher D Stone, ‘Should Trees Have Standing? – Toward Legal Rights for Natural Objects’ (1972) 45 *Southern California Law Review* 450; Christopher D Stone, ‘Should Trees Have Standing? Revisited: How Far Will Law And Morals Reach?’ (1985) 59 *Southern California Law Review* 1.

<sup>221</sup> *Fencott Drive Pty Ltd v Lake Macquarie City Council* [2000] NSWLEC 146, para 63 (Bignold J).

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example, principles that favour the environment and those that appear to favour economic concerns.

## VI. CONCLUSION

There is little doubt that Australian environmental law poses significant challenges of statutory interpretation to the judiciary. In many cases, the court's task of statutory interpretation is made difficult by complex factual scenarios, intricate legislation and the express legislative inclusion of environmental concepts such as ESD that are often poorly defined.

These sometimes seemingly irreconcilable issues throw up 'hard cases' that require judges to canvas fundamental policy questions while they attempt to give meaning to the environmental legislation. Such policy questions, as illustrated by the brief survey of environmental case law in this paper, focus on issues such as: the appropriate demarcation of the separation of powers; the extent of power that should be wielded by the State; the extent to which economic considerations should be allowed to influence environmental outcomes; and the difficulties of reconciling developing environmental principles with established common law property rights. Cases such as *Phosphate*, *Coastal Waters* and *Palos Verdes* illustrate that these policy questions weigh heavily on the court's mind and that they influence the court's approach to statutory construction. On some occasions, such as in *Phosphate* and *Coastal Waters*, the approach to interpretation favoured the environment. On others, such as in *Palos Verdes*, the statutory purposive approach was abandoned and the environment was not favoured. It is unlikely that an environmental or 'green' canon of statutory interpretation at common law could be recognised in Australia to assist the courts. However, it may be feasible to recognise environmental law as beneficial legislation in some cases and this recognition could enhance future environmental outcomes that will benefit society.

If environmental law is to continue to develop coherently, it is suggested that the statutory injunction to apply the purposive approach, as embodied by s 15AA of the *Acts Interpretation Act 1901* (Cth) and associated State and Territory legislation, should be applied. The difficulties it raises should be dealt with. The case of *Greentree* in the Land and Environment Court of NSW is an encouraging sign that this challenge is indeed being accepted.

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APPENDIX A: PRINCIPLES OF ENVIRONMENTAL PROTECTION

*Environmental Protection Act 1970 (Vic), Section 1.*