

## **Watching over the Watch-Dogs: Regulatory Theory and Practice, with Particular Reference to Environmental Regulation**

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### **1 Introduction: regulatory discretion**

Environmental agencies in Western Australia are charged with conserving, preserving, protecting, enhancing and managing the environment, and are vested with discretion to do so. However, several recent incidents of pollution in Western Australia have revealed that environmental agencies may be failing to exercise their discretion appropriately. The failure of agencies to exercise discretion appropriately is particularly concerning at present, as legislators are tending to move from a “command and control” system of regulation which provides little discretion for environmental agencies, to a more flexible “pollution prevention” approach which provides substantial discretion to such agencies.

Important mechanisms for controlling the discretion of agencies and ensuring that they exercise their discretion lawfully are:

- 1) Confining the exercise of discretion; and
- 2) Reviewing (in a broad sense) the exercise of discretion.

Problems arise in the application of these mechanisms because of the tension inherent in the very notion of discretion – the tension involved in determining how much choice decisionmakers should be given. If agencies have too little discretion or choice, the advantages of environmental agencies staffed by experts implementing environmental regulation is diminished. This problem arises if discretion is overly confined. If, however, such agencies have too much discretion or choice, they are beyond control<sup>1</sup> - they are not confined enough.

The balance between too much and not enough discretion is a very difficult one to strike, which makes seeking to confine the exercise of discretion a difficult mechanism to apply. For this reason, there is little confinement of discretion in respect of environmental agencies in WA, and the primary mechanism by which to ensure that agencies carry out their decisions lawfully is review of discretion. However, this paper submits that review of discretion is inherently unsuitable to the task, and therefore that reform is required. It looks at potential areas of reform, including the use of “objects clauses” in legislation, with particular reference to the precautionary principle, privitising some types of environmental regulation, and requiring decisionmakers to provide reasons for their decisions.

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<sup>1</sup> Yataganas, X *Delegation of Regulatory Authority in the European Union* (2001) Harvard Jean Monnet Working Paper 03/01 at 51 – 52.

## **2 Recent failure of agencies to appropriately exercise their discretion**

### **2.1 Arsenic spill**

In 1999 Wesfarmers CSBP Limited released arsenic into Cockburn Sound over a period of 6 weeks. The spill was a result (in part) of Wesfarmers CSBP Limited's failure to monitor its discharges for contaminants, and its failure to check the results of its analysis of monthly discharge samples. When the spill was discovered, the Health Department issued an urgent warning to the public advising them not to eat any seafood from Cockburn Sound.

At the time of the offence, Wesfarmers CSBP Limited's operations were the subject of a licence issued by the Department of Environmental Protection ("DEP"). However, Wesfarmers CSBP Limited was not charged with breach of its licence conditions - as its licence did not in fact deal with the issues which resulted in the pollution<sup>2</sup>. Since the pollution, the DEP has amended the licence to include never-to-be-exceeded discharge limits, daily monitoring with immediate notification to the DEP of elevated discharges, and monthly reporting of all results to the DEP. However, given the dramatic consequences of the arsenic spill, why didn't the licence containing such provisions in the first place?

### **2.2 Toxic fire**

On 15 February 2001 fire broke out at a site at Bellevue operated by Hazardous Waste Solutions Pty Ltd for recycling and treating large quantities of solvents and other chemicals. Approximately 50 people had to be evacuated from the surrounding area, and streets, including Roe Highway were blocked off. The fire was extremely intense, causing drums and other containers to explode and send balls of flame into the air. Drums were seen flying up to 100 metres vertically. At the time of the fire the site was licensed by the DEP. The site operator had also been issued with notices under the *Environmental Protection Act 1986 (WA)* requiring it to stop leaks from drums and containers on the site. However, as at the time of the fire the operator had not been prosecuted for any offence and was permitted by its licence to continue operating.

After the fire, the DEP revoked the operator's licence and successfully prosecuted it for offences which occurred *prior to the fire*. (Note: there was no prosecution for the fire itself.) In considering the record in the proceedings, ie *State Crown Solicitor v Waste Control Pty Ltd*, as heard in Petty Sessions on 19 April 2001, it is instructive to note the close physical proximity between the operation of the waste storage premises in an industrial area and where members of our community live:

*"The defendant's premises were located in an industrial area in Bellevue. However, those premises were also located within approximately 500 metres of the Bellevue Primary School, 200 metres of residents and 100*

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<sup>2</sup> Rather, Wesfarmers CSBP Limited were charged with, and pleaded guilty to, failing to take reasonable and practicable measures to prevent or minimise the discharge of arsenic waste from its premises into Cockburn Sound.

*metres from the Roe Highway. Drains from streets adjacent to the defendant's premises run into the Helena River which, in turn, flows into the Swan River.*" (page 2 of the record)

The Bellevue fire record further makes sombre reading in relation to the role of the DEP. The fire occurred in February 2001 and but for the wind direction on the day, could have had very serious effects on the health of people living not only in the location but also much further away. As early as 1999, DEP had sent notices to the company, but no enforcement steps were taken when these were ignored. The DEP even took the quite unusual step of making a loan of some \$98,000 to the company to move about 1,000 waste drums that were leaking! This appears to be a curious action, given the absence of any concurrent enforcement action.

### **2.3 Dust emissions**

In March 2002 a leak from Alcoa of Australia Pty Ltd Wagerup refinery's calciner plant caused particulates to enter into the environment at more than eight times the licensed limit for in excess of eight hours. The Minister for the Environment apparently urged the DEP to prosecute in respect of the licence breach, but the DEP declined to do so<sup>3</sup>.

### **2.4 Breach of best practice environmental licence**

In 1999 the Water Corporation's Woodman Point facility was issued with the first Best Practice Environmental Licence ("BPEL") to be issued in WA. Already in 2002 there have been two serious spills from the facility causing waste water to be discharged into Cockburn Sound. However, a BPEL is intended to apply only to those premises where best practice environmental management is utilised and there is an ongoing program of continual improvement in environmental performance. The DEP website provides that "this approach to licensing is designed to provide industry with greater flexibility in achieving agreed environmental performance objectives through a process of "audited self management"". The DEP has recently stated that it will review the BPEL licence<sup>4</sup>. However, it is of great concern that a facility which is apparently committed to best practice does not even comply with the base practice required by its licence.

Such incidents highlight the apparent failure of environmental agencies to appropriately exercise their discretion. This paper now looks at the mechanisms which are currently available to regulate environmental agencies' discretion.

## **3 Regulatory theory – the mechanisms to regulate discretion**

There is no serious disagreement about the need to delegate some regulatory powers to agencies<sup>5</sup>. As Volker notes:

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<sup>3</sup> *The West Australian* June 12 2002 page 7

<sup>4</sup> *The Greener Times* June 2002

<sup>5</sup> Yataganas, X *Delegation of Regulatory Authority in the European Union* (2001) Harvard Jean Monnet Working Paper 03/01 at 25.

“There needs to be enough flexibility in administration to be able to identify those applications which are worthy of approval even though they may not fit squarely within the rules. This becomes a matter for almost instinctive behavior on the part of experienced decision makers who see a large number and variety of applications.”<sup>6</sup>

However, the provision of discretion will only lead to better environmental regulation if that discretion is exercised appropriately and lawfully.

The failure of environmental agencies to exercise discretion appropriately is particularly concerning when we consider that legislators are tending to move from a “command and control” system of regulation which encompasses little discretion to a more flexible “pollution prevention” approach which incorporates substantial discretion<sup>7</sup>. The traditional “stick” form of environmental regulation which developed in the 1970s left little room for the exercise of discretion. Statutes provided specific means by which specific activities could be carried out, and agencies simply applied those laws. Today, however, environmental regulation consists of a mixture of stick and “carrot”, or incentive, approaches designed to allow industry to determine its own preferred economic approaches to dealing with environmental issues. Such approaches necessarily afford greater discretion to environmental agencies, as it is those agencies who determine the best mix of carrot and stick to apply to a particular proposal.

Commentators describe the mechanisms which are available to ensure agencies exercise their discretion lawfully in many ways<sup>8</sup>. For example, Allars<sup>9</sup> states that there are three main mechanisms available to ensure agencies exercise their discretion lawfully, being 1) confining, 2) structuring and 3) checking. Discretion is confined when alternatives for choice of decision are limited. Discretion is structured when a decision maker has to follow a certain procedure to make a decision. (Note that both confining and structuring discretion are commonly undertaken through the formulation of administrative policies.) Discretion is checked when its exercise is the subject to review. Yataganas, however, identifies only two mechanisms to ensure that agencies are accountable, being 1) a limit on their independence; and 2) supervision<sup>10</sup>. Despite these difference of description, for the purpose of this paper the mechanisms which are available to ensure agencies exercise their discretion lawfully may be characterised in two ways:

- 1) Confining the exercise of discretion; and
- 2) Reviewing the exercise of discretion.

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<sup>6</sup> Volker, “Just Do It – How the Public Service Made It Work” Volume 8 *Australian Journal of Administrative Law* August 2001 at 209.

<sup>7</sup> Lipman and Bates *Pollution Law in Australia* (2002) Butterworths Australia

<sup>8</sup> See Laws of Australia Volume 2 page 174 (paragraph 166 footnote 1) which cites Davis KC, *Discretionary Justice: A Preliminary Inquiry* (Louisiana: Louisiana State University Press, 1969).

<sup>9</sup> Allars *Introduction to Australian Administrative Law* (1990) Australia at 11.

<sup>10</sup> Yataganas, X *Delegation of Regulatory Authority in the European Union* (2001) Harvard Jean Monnet Working Paper 03/01 at 21.

This paper now considers the mechanisms which exist in WA to confine the exercise of environmental agencies' discretion.

#### **4 Confining the exercise of discretion**

Discretion in the exercise of environmental laws in WA is granted in respect of two main activities – assessment of the likely environmental impact of a proposed development, and the regulation of existing development.

##### **4.1 Environmental impact assessment**

The Environmental Protection Authority (“EPA”) is the repository of discretionary powers with respect to environmental impact assessment. The EPA has the power to assess any proposal which is referred to it which in the opinion of the EPA is “likely to have a significant effect on the environment”. There are no statutory limits on the matters which the EPA may or must consider in determining whether a proposal is likely to have a significant effect on the environment. (Note: the *Environmental Protection Act 1986* does not state what types of proposal should or should not be assessed. While there is provision in the Act to prescribe the types of activities which must be assessed<sup>11</sup>, so far no such activities have been prescribed.) The only confining mechanism on the EPA’s power is administrative guidelines which are drafted and adopted by the EPA itself. These guidelines indicate whether or not the EPA will consider a proposal is likely to have a significant effect on the environment, but are not legally enforceable.<sup>12</sup>

##### **4.2 Environmental regulation of existing development**

The Chief Executive Officer (“CEO”) of the DEP is the repository of discretionary powers with respect to regulation of existing development. The CEO has the power to issue works approvals (for construction of premises) and licences (for operation of premises) in respect of operations which may cause pollution. The CEO’s power to grant or refuse applications for licences and works approvals is not confined by legislation in any way – the CEO has the sole power to determine whether or not to grant an application in a particular case, and if so, what conditions to attach to that grant<sup>13</sup>.

The paucity of legislative confinement on the exercise of environmental agencies’ discretion in WA means that the primary mechanism by which to ensure that agencies carry out their decisions lawfully is by way of review of discretion. This paper now

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<sup>11</sup> Section 38 (1).

<sup>12</sup> Contrast this with the position in NSW under the *Environmental Planning and Assessment Act 1979*, particularly in respect of designated development. Designated development is development of a prescribed class, such as “Chemical industries or works for the commercial production of, or research into, chemical substances that crush, grind or mill more than 10,000 tonnes per year of chemical substances”. Designated development cannot be approved unless it is the subject of a formal environmental impact statement.

<sup>13</sup> Contrast again with the position in NSW. The *Protection of the Environment (Operations) Act 1995* provides a list of factors which must be taken into account when a environmental protection licence is issued – including whether an applicant is a fit and proper person to hold a licence: section 45(f).

considers the mechanisms which are available in WA to review the exercise of environmental agencies' discretion.

## **5 Reviewing discretion**

The mechanisms which are available in WA to review the exercise of environmental agencies' discretion include:

- ∄ judicial review;
- ∄ review of prosecutorial discretion;
- ∄ liability for wrongful decisions in tort;
- ∄ ex gratia payments; and
- ∄ Ministerial directions.

### **5.1 Judicial review**

The most obvious mechanism to “watch the watchdog” which springs to the minds of administrative lawyers is judicial review of environmental agencies' decisions. For example, a person may seek to review an environmental agency's decision to grant a licence to a person with a poor environmental record, or an agency's decision to permit a development to proceed in a sensitive environmental location. The most often cited grounds for judicial review in such cases will be that the agency did not consider a relevant consideration, that the agency took into account an irrelevant consideration or that the agency's decision was manifestly unreasonable.

The ability of judicial review to ensure that environmental agencies implement environmental regulations appropriately in every case is severely limited by the following factors:

- ∄ A person may not bring judicial review proceedings unless they have sufficient standing. The test for standing is generally that a person must have a special interest in the subject matter of the proceedings over and above that enjoyed by the public generally<sup>14</sup>. Until recently, standing had never been denied in the Supreme Court of Western Australia for persons wishing to review the actions of an environmental agency, but a decision of the Full Court on 10 June 2002 denied the relief sought by an environmental group on the basis they did not have sufficient standing<sup>15</sup>. (See by

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<sup>14</sup> *Australian Conservation Foundation v Cth* (1980) 146 CLR 493, *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27.

<sup>15</sup> In *Re Western Australian Planning Commission; ex parte Leeuwin Conservation Group* (2002) WASCA 150, Justice Wheeler (Justice Anderson concurring, Justice Steytler disagreeing) held that the Leeuwin Conservation Group did not have a sufficient interest to bring the proceedings for a writ of certiorari of the WAPC's subdivision approval for a particular area of private land. Justice Wheeler stated that the Group did not have any real interest in the particular land in question, as Group members did not use the land, most members of the Group did not live near the land, and the amenity of land actually used by the members of the Group would not be affected. Her Honour also noted that the mere fact that the Group had made submissions on the application and had participated in consultative groups, and the fact that the Group was formed in order to protect the environment within the Shire of Augusta-Margaret River, did not

way of contrast the open standing rules in the *Environmental Protection and Biodiversity Conservation Act 1999*(Cth): s.487 and the *Environment and Planning and Assessment Act 1979* (NSW): s.123.)

- ⊘ Applications for judicial review cannot be brought in respect of an error of fact. However, often the real issue in dispute will actually be of a factual nature. Unless an error of fact means that a decision is manifestly unreasonable, or is otherwise connected with an established ground of review, judicial review proceedings cannot be brought in circumstances where the primary complaint is an error of fact.
- ⊘ Judicial review proceedings often have a strongly procedural flavour and are usually expensive, both of which act as substantial barriers to people who may otherwise seek to use this avenue of review.
- ⊘ The Court has a discretion to refuse to grant a remedy even though a person may have established sufficient standing and established several grounds of review. One of the reasons which influences the Court's discretion is a consideration of whether the remedy sought would be futile. This is often a factor in environmental cases, as many proposals will have been substantially commenced by the time a final declaration is made, thus making it futile for the Court to order that the development approval complained of be quashed.

## 5.2 *Review of prosecutorial discretion*

A significant part of regulation deals with law enforcement. Indeed, one of the most visible ways in which agencies implement environmental regulations is to conduct prosecutions for breaches of those environmental regulations. However, the remedies available to ensure that agencies institute prosecutions in appropriate cases are virtually non-existent.

### 5.2.1 *Agencies' decisions in respect of prosecution are difficult to judicially review*

Although we do not tend to classify the police and public prosecutors with environmental agencies or other regulators (such as the Australian Securities and Investment Commission), many of the leading cases on the relative *unreviewability* of administrative discretion concerning law-enforcement have been decided in relation to attempts to obtain the remedy of mandamus against the police where they have exhibited various degrees of inaction in the face of what appears to be a clear breach of the law. Such applications for mandamus have, for instance, been brought in relation to the non-enforcement of gaming laws<sup>16</sup>, non-intervention in industrial disputes<sup>17</sup>, a containment policy for brothels<sup>18</sup>, and even adopting a "a low profile" in trouble spots<sup>19</sup>. These cases

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give the Group a special interest in the particular parcel of private land over and above the interest of the public at large.

<sup>16</sup> *R v Commissioner of Police of the Metropolis; ex parte Blackburn* [1968] 2 QB 118, *R v Metropolitan Police Commissioner; ex parte Blackburn* The Times, 7 March 1980

<sup>17</sup> *R v Chief Constable of Devon & Cornwall; ex parte Central Electricity Generating Board* [1982] QB 458, *R v Commissioner of Police (Tasmania); ex parte North Broken Hill Ltd* (1992) 44 IR 214

<sup>18</sup> *King-Brooks v Roberts* (1991) 5 WAR 500

<sup>19</sup> *R v Oxford; ex parte Levey* The Times, 18 December 1985: A policy of not sending police patrol cars into a particular area may be justified.

have in turn have influenced the courts in shaping similar rules of relative unreviewability in relation to prosecutorial decisions by bodies other than the police or public authorities in deciding whether to bring a prosecution or not. In short, it is very difficult to get mandamus against any body with prosecutorial or quasi-prosecutorial functions or powers to force it to take action in relation to a category of cases or a specific case. Such authorities are entitled to consider the costs involved in deciding whether or not to institute civil or criminal proceedings<sup>20</sup>, together with factors such as the precedent value of the case, the need to enforce the law in the particular case, the likelihood of success (with reference to matters such as the seriousness of anticipated disputes of fact or law<sup>21</sup>) and the availability of staff<sup>22</sup>.

Even where "duties" of regulation and enforcement are cast upon public bodies by legislation, closer analysis may show that one is really dealing with so-called duties of imperfect obligation, generally unenforceable by mandamus, or even by declaration. Although framed as "duties", the legislative provisions operate essentially to set goals for and to define the sphere of activities of the authority in question. Duties of imperfect obligation exhibit all or most of the following characteristics: they are couched as general directives; are expressed to be unconditional; go to the root of the particular public body's activities; relate to the provision or regulation of general services; contain a large element of discretion; and are subject to, and in practice regulated by, Ministerial control<sup>23</sup>.

### 5.2.2 *No liability for failure to investigate or prosecute*

As noted above, it is unlikely that an agency's decision not to prosecute in a particular case will be able to be judicially reviewed. It is also unlikely that environmental agencies' decisions to prosecute or investigate offences can be reviewed in a civil context, as such agencies do not have an enforceable duty of care to prosecute or investigate environmental regulation. The common law position in respect of an agency's duty to prosecute is set out in *Hill v Chief Constable of West Yorkshire*<sup>24</sup>. In that case, the Court noted that:

"The manner of conduct of (such) an investigation must necessarily involve a variety of decisions to be made on matters of policy and discretion, for example as to which particular line of inquiry is most advantageously to be pursued and what is the most advantageous way to deploy the available resources. Many such

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<sup>20</sup> An interesting case where by way of an exception a mandamus was granted against a prosecuting authority, is *R Braintree District Council, ex parte Willingham* (1982) 81 LGR 70 (DC). There the English Divisional Court granted mandamus against a local authority who had refused to prosecute illegal Sunday trading because it would cost them money and because the trading was popular. But even then the Court only ordered that the authority should properly consider whether to bring proceedings or not.

<sup>21</sup> *R v Lancashire County Council; ex parte Guyer* (1980) 40 P & CR 376

<sup>22</sup> *Visy Board Pty Ltd v Attorney General (Cth)* (1983) 72 FLR 458

<sup>23</sup> See generally Laws of Australia Volume 2 page 161 at paragraph 138, and Harding AJ, *Public Duties and Public Law* (Oxford, Clarendon Press, 1989), 26 – 27.

<sup>24</sup> (1989) AC 53

decisions would not be regarded by the courts as appropriate to be called into question.”

This case has been adopted in Australia<sup>25</sup>. Therefore it appears that no action will lie in common law in respect of the exercise by an environmental agency of either:

- 1) their investigative functions; or
- 2) the performance of their prosecutorial functions, whether:
  - (i) in the initiation of the prosecution;
  - (ii) in the conduct of the prosecution; or
  - (iii) in respect of the continuance of the prosecution to the time of decision by a curial body.

### 5.3 *Ensuring agencies are liable in tort for their decisions*

A person may suffer damage because of an environmental agency’s wrongful administrative decision. For example, if an environmental agency issues a licence subject to conditions requiring that the licensee carry out monitoring, the agency may determine not to regularly inspect the premises but rely instead upon the results reported thorough the licensee’s monitoring. Surrounding landowners may suffer damage if the licensee causes pollution, which pollution could have been discovered if the agency had conducted even a routine inspection of the premises. Affected landowners may therefore wish to bring a common law action for damages suffered by the environmental agency’s decision not to carry out regular inspections. Such an action would probably fail.

It has generally been accepted in Australian common law that damages are not available for non negligence and non intentional wrongful decisions: *Dunlop v Woollahra Council*<sup>26</sup>. A wrongful administrative decision is therefore incapable, by itself, of supporting a claim for damages. A person suffering damage due to a wrongful administrative decision must bear that damage unless the circumstances of the wrongful decision fall within an established head of liability for which damages is a remedy, such as negligence, misfeasance in a public office or breach of statutory duty.

Legislation to date has not amended the common law position. For example, while the *Administrative Decisions (Judicial Review) Act 1977* (Cth) permits the Court to direct the parties to “do any act or thing which the Court considers necessary to do justice between the parties”, this does not authorise an award for damages: *Park Oh Ho v Minister for Immigration and Ethnic Affairs*<sup>27</sup>.

#### 5.3.1 *Liability for wrongful decisions in negligence*

We note that the Courts are traditionally reluctant to find that statutory bodies are liable in negligence for maladministration, partly based on the presumption that the tort of

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<sup>25</sup> *Sullivan v Moody* (2001) 183 ALR 404

<sup>26</sup> (1982) AC 158 at 169

<sup>27</sup> (1989) 167 CLR 637 at 645

misfeasance of public office provides a sufficient remedy<sup>28</sup>. Even when issues of negligence do arise, there are several differing formulations of the approach to be adopted to the determination of the existence or non existence of a duty of care in negligence related to the exercise of functions by a statutory body<sup>29</sup>. Despite this, the general rule as to negligence of public agencies may be generally stated as in *Pyrenees Shire Council v Day*<sup>30</sup>. This case is authority for the proposition that a public authority who enters into the exercise of statutory powers with respect to a particular subject matter may place itself in a relationship to others which imports a common law duty to take care. If an agency which exercises a statutory power could by reasonable precaution prevent an injury, and it is likely that an injury will be occasioned by that exercise, damages for negligence may be recovered.

A statutory body is not, however, liable in negligence for purely policy decisions. It is only liable for operational acts or omissions or for policy decisions in the operational process<sup>31</sup>. In *Sutherland, Shire Council v Heyman*<sup>32</sup> Mason J stated that:

“The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognise that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care.”<sup>33</sup>

Matters of policy include how many inspectors, with what expert qualifications, it should recruit, how often inspections are to be made and what tests are to be carried out by an agency (*Anns v Merton London Borough Council*<sup>34</sup>). It is therefore unlikely that many of an agency’s decisions, such as not to inspect a premises even when that inspection could have alerted it to the fact of pollution and breach of licence conditions, could form the basis of a common law claim in negligence.

### 5.3.2 Expansion of heads of liability?

In *Beautesert Shire Council v Smith*<sup>35</sup> the High Court stated that:

“Independently of trespass, negligence or nuisance, but by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other.”

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<sup>28</sup> *Three Rivers District Council v Bank of England (No 3)* [2000] 2 WLR 1220 per Lord Steyn, *Yuen Ku-Yeu v Attorney General for Hong Kong* [1988] 1 AC 175, *Northern Territory of Australia v Mengel* (1995) 185 CLR 307

<sup>29</sup> See, for example, *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1

<sup>30</sup> (1998) 192 CLR 330

<sup>31</sup> *Commonwealth v Eland* (1992) Aust Torts Reports ¶181-157

<sup>32</sup> (1985) 157 CLR 424

<sup>33</sup> *ibid* at 469.

<sup>34</sup> [1978] AC 728

<sup>35</sup> (1966) 120 CLR 145

However, in 1995 the High Court overruled the *Beaudesert* principle: *Northern Territory v Mengel*<sup>36</sup>. In so overruling, the Court noted that:

“There may be cases in which there is a liability for harm caused by the unlawful acts directed against the plaintiff or the lawful activities in which he or she is engaged.”

However, this slight window to a new head of liability has subsequently been interpreted to apply only to positive acts “forbidden by law” and to acts done with the intention of causing harm to the plaintiff<sup>37</sup> - essentially confining it within the existing head of misfeasance of public office.

### 5.3.3 *Limitations on tortious actions as a “watch on the watch dog”*

There are many limitations on the ability of common law damages claims to ensure the proper enforcement of environmental regulation. For example:

- ∄ damages are only available for damage which is caused – and therefore cannot be used to prevent damage occurring; and
- ∄ a decision may be “wrong” if it is made on one particular ground, but be valid if based on another ground – therefore it will usually be said that no loss can be shown to have actually been caused by the decision when taken as a whole.

### 5.4 *Commonwealth Ombudsman – ex gratia payments*

The Commonwealth Ombudsman has the power to investigate complaints of defective administration and to recommend ex gratia payments as a remedy for defective administration. To obtain such relief, the Ombudsman must first recommend that the agency in question make an ex gratia payment. If the agency is not subject to the *Financial Management and Accountability Act 1997*, the agency ultimately decides whether or not to accept the recommendation. If the agency is subject to the Act, the “Scheme for Compensation of Detriment Caused by Defective Administration” applies. The Scheme applies to cases alleging financial loss resulting from wrongful administrative decisions made by a person on behalf of the Commonwealth. Under the Scheme, a payment may only be approved if an official agency acting or purporting to Act in the course of duty has caused the claimant to suffer detriment or has prevented the claimant from avoiding detriment by:

- ∄ Unreasonably delaying compliance with existing administrative remedies;
- ∄ Unreasonably failing to apply relevant administrative procedures to cover claimant’s circumstances;
- ∄ Giving incorrect or ambiguous advice to or for the claimant; or
- ∄ Failing to give to or for the claimant proper advice that the official knew or could reasonably have known.

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<sup>36</sup> (1995) 185 CLR 307

<sup>37</sup> Pancetta “Damages for Wrongful Administrative Decisions” (1999) *Australian Journal of Administrative Law* Volume 6 page 163 at 167.

There are many limits to the power of such ex gratia payments to provide a real check and balance upon environmental agencies' decisions. For example, the merits of the case will not be the only considerations an agency takes into account when it makes a decision whether or not to make a payment --other considerations will include whether the payment will serve as a precedent and whether the administrative cost of the payment is less than the compensation cost. Further, the Ombudsman's jurisdiction to investigate a complaint is discretionary and therefore will not provide a remedy in every case.

### **5.5 Ministerial directions**

The decisions of environmental agencies may be overseen and directed by the Minister responsible for a particular Act. For example, section 18 of the *Town Planning and Development Act 1928* (WA) provides that any person can make a representation to the Minister that a local government has failed to effectively enforce the observance of its scheme. The Minister may decide to hold an inquiry into the local government on the basis of that representation. If the Minister is satisfied, after holding an inquiry, that a local government has failed to effectively enforce the observance of a scheme, the Minister may order the local government to do all things necessary for enforcing the observance of the scheme. This means that if a local government chooses not to prosecute in respect of a particular polluting facility, the Minister may hold an inquiry into that decision and order the local government to carry out a prosecution.

Similarly, section 24 of the *Conservation and Land Management Act 1984* provides that the Minister may give directions in writing to the Conservation Commission with respect to the exercise or performance of its functions, either generally or in relation to a particular matter, and the Conservation Commission is to give effect to any such direction.

However, there are obvious limits to the ability of Ministerial directions to ensure that environment agencies' decisions are adequately reviewed. Ministerial directions are inherently political, and therefore do not provide a holistic solution to the problem of "enforcing enforcement" or watching the watchdog.

It appears from the above discussion that review of environmental agencies' decisions will not ensure that such agencies implement environmental regulation in every appropriate case. This paper now explores ways in which traditional review and confinement mechanisms may be supplemented to ensure that agencies appropriately exercise discretion in the implementation of environmental regulations.

## **6 Avenues for Reform**

### **6.1 Objects clauses**

One way of regulating the exercise of direction by an environmental agency is to use an "objects clause" to specify the object of the legislation which the agency is instructed to

administer. Objects clauses in legislation draw attention to principles which the agency should apply to consideration of all decisions while leaving sufficiently broad discretion to permit flexibility in agency decision making. Objects clauses are a unique and valuable tool in that they have the dual ability to both confine agency discretion and to assist in the review of that agencies' decisions.

#### 6.1.1 *Objects clauses confine discretion*

Objects clauses confine decisionmakers to make decisions in furtherance of specific and particular objectives. In Australia, objects clauses are generally interpreted in a way that requires decisionmakers to further the goals of a statute<sup>38</sup>. That is, while objects clauses do not prevail over express provisions, they do command weight, requiring decisionmakers to tip the balance in favour a statute's objectives when reaching a determination<sup>39</sup>.

#### 6.1.2 *Objects clauses assist in review of discretion*

With respect to the review of agency discretion, objects clauses are relevant considerations in decisionmaking, and the failure of an agency to take into account the objects clause may form a ground of judicial review: *Parramatta City Council v Hale*<sup>40</sup>. Consideration of such clauses must be adequate, and not a mere cursory review: *King v Great Lakes Shire Council*<sup>41</sup>. Further, if a particular objects clause confines discretion, a decision outside of the specified limits may be declared to be beyond power: *Woollahra Municipal Council v Minister for the Environment*<sup>42</sup>. However, it should be noted that no particular weight needs to be given to the factors in an objects clause, or indeed any weight at all, if the legislation merely provides that they have to be taken into account: *Randwick Municipal Council v Manousaki*<sup>43</sup>.

#### 6.1.1 *Objects clauses must be internally consistent*

The implementation of objects clauses in WA must take account of the history of problems with preambles (a broad form of objects clause<sup>44</sup>) in that State. For example, the preamble of the *Conservation and Land Management Act 1985* (WA) is:

“An Act to make better provision for the *use, protection* and management of certain public lands and waters and the flora and fauna thereof” (italics added)

The Act therefore provides for both the use (exploitation) and protection (conservation) of forests. Until recently, the sole agency charged with implementing this Act was the Department of Conservation and Land Management, the Executive Director of which had

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<sup>38</sup> Barton “Aiming at the Target: Achieving the Objects of Sustainable Development in Agency Decision Making” *The Georgetown International Environmental Law Review* (2001) Volume XIII Issue 4 at 852.

<sup>39</sup> Id.

<sup>40</sup> (1982) 47 LGRA 319

<sup>41</sup> (1986) 58 LGRA 366

<sup>42</sup> (1991) 23 NSWLR 710

<sup>43</sup> (1988) 66 LGRA 330

extensive discretionary powers. This was of significant public concern for a long period of time, because, as the Ecologically Sustainable Development Committee Report on Logging Practices noted:

“an operational forest manager empowered to sell off the resource (and retain the funds resulting), would have an inherent conflict with the role of conservationist-regulator.”<sup>45</sup>

The Act was amended in 2000 to create separate and distinct bodies, each charged with different responsibilities to carry out particular objects of the Act. The Conservation Commission is now charged with the protection of lands, the Department charged with the management of lands, and the Forest Products Commission charged with the use of lands. While this amendment dealt with the public concern in management of forests, the same concern exists today in respect of the object of the management of fisheries. The object of the *Fish Resources Management Act 1994* (WA) is:

“The objects of this Act are to conserve, develop and share the fish resources of the State for the benefit of present and future generations.”

This objects clause places Fishwest in the powerful position of being both conservation regulator of the State’s fishstocks and vendor by contract of those stocks.

Given the above experience, it appears that any objects clauses which are implemented in WA must be specifically tailored to influence and direct the agency they are directed towards. It is particularly important that objects clauses do not contain any potentially conflicting objects. Such objects have a paralysing and diluting effect upon legislative schemes, and will cause one or more of the objects to be sidelined<sup>46</sup>.

#### 6.1.2 Particular objects clauses – the precautionary principle

Guiding discretion in environmental decision making is particularly difficult because of the problem of scientific uncertainty. That is, if decisionmakers are constantly working in a context where there are no certainties, they must be provided with discretion cope with those uncertainties. The inclusion of the precautionary principle in objects clauses is one way of drawing attention to and managing those uncertainties<sup>47</sup>.

The precautionary principle states:

“Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, public and private decisions should be guided by:

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<sup>45</sup> Report in relation to *The Sustainability of Current Logging Practices* tabled in WA Legislative Council on 9 December 1999.

<sup>46</sup> Barton op cit at 894-5.

<sup>47</sup> Barton op cit at 862.

- i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and
- ii) an assessment of the risk weighted consequences of the various options.’<sup>48</sup>

It is arguable that the adoption of this principle in WA could in the past have led to environmental agencies exercising their discretion in different ways. For example, in *Coastal Waters Alliance of Western Australia Incorporated v Environmental Protection Authority; Ex parte Coastal Waters Alliance*<sup>49</sup>, the EPA assessed a proposal by Cockburn Cement Limited to, among other things, dredge areas in Cockburn Sound which were covered in seagrass. The EPA recognised that there was a strong body of scientific evidence that some seagrasses cannot be regrown. However, despite this, the EPA recommended that the proposal be permitted, subject to a condition that the regrowth of seagrasses be monitored. That is, it recommended that the seagrass be allowed to be removed even in the face of evidence that it may not be able to be regrown. The adoption of the precautionary principle in the *Coastal Waters* case would have prevented the EPA from recommending that the proposal go ahead.

However, the adoption of the precautionary principle in an objects clause has peculiar problems. In the opinion of at least one judge, this principle is no more than a statement of common sense which is already applied by decisionmakers in appropriate circumstances<sup>50</sup>. Therefore it is arguable that the precautionary principle would not cause agencies to alter their decisionmaking processes at all. Further, it has been held in WA that while the precautionary principle does dictate caution, it does not dictate inaction, and it will not generally dictate one specific course of action to the exclusion of others<sup>51</sup>. That is, it will rarely affect the actual outcome of a decision. Therefore if the precautionary principle is to have any real impact upon the exercise of agencies’ discretion, it must be given some form of paramountcy.

### 6.1.3 Limitations of value of objects clauses

While incorporation of aspirational language by way of an objects clause may lead to more consistent implementation of environmental regulation, such clauses have limited effect because:

- ∄ Such clauses may have limited value if they are incompatible with the existing value structure of an organisation;
- ∄ If such clauses are overly prescriptive, decisions of the agency may tend to be assessed on conscience and not a sound application of facts to governing principles; and

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<sup>48</sup> Intergovernmental Agreement on the Environment (1992)

<sup>49</sup> (1996) 90 LGERA 136

<sup>50</sup> *Leatch v National Parks and Wildlife Service* (1993) 81 LGERA 270 at 282 per Stein J.

<sup>51</sup> *Bridgetown /Greenbushes Friends of the Forest Inc v Executive Director of Conservation and Land Management* (1997) 18 WAR 102 per Wheeler J

- ≠ While such clauses are a relevant matter in decisions and may therefore support a ground of judicial review, it will be difficult to show that the clause was not taken into account unless that clause has paramountcy over other objects clauses.

## **6.2 Privatising the implementation of regulation**

Often an agency's failure to implement environmental regulation is due to lack of resources. Obviously, regulations can only be enforced when a government agency has resources to investigate breaches, assemble evidence and attend to prosecutions. For example, in 2000/2001 the DEP administered approximately 900 licences. However, due to its limited resources it was able to carry out only 173 inspections of licensed premises<sup>52</sup>. Even when an agency does collect sufficient evidence to found a prosecution, the agency has a discretion to prosecute, and the decision whether to prosecute will be governed by a consideration of the available resources, and factors such as those indicated in enforcement policies.

One response to limited resources (other than to provide more!) is to "privatise" the implementation of environmental regulations. However, this brings its own limitations.

### *6.2.1 Privatised environmental impact assessment*

Agencies can require proponents to prepare the reports and documents necessary to assess the potential impact of a proposal. Such proponents will often engage private consultants to carry out such work. This removes a large burden from the agency, which need assess only the consultant's reports, rather than carry out the entire assessment. However, the independence of consultants is often brought into question, thus undermining the value of the privatisation of assessment.

If privatisation of assessment by widespread use of consultants is to be implemented, it should be absolutely clear that the consultant is preparing the documents for the agency, and not for the proponent. Note that in the case of *Burns Philp Trustee Co Ltd v Wollongong City Council*<sup>53</sup> the NSW Land and Environment Court held that if outside consultants are to prepare documents as part of an environmental assessment process, those consultants should be independent and it must be clear that the documents are prepared for the consideration of the agency. This is so even if the proponent will ultimately pay the consultants fees. The consultant's duty should always be to the agency.

The EPA in WA assesses proposals which are likely to have a significant effect. Some members of the EPA act as independent consultants. Under the common law test of perceived conflict of interest, those members would be precluded from participating in any decision about a proposal they have been involved in. However, the *Environmental Protection Act 1986* provides that:

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<sup>52</sup> Department of Environmental Protection *Annual Report 2000 – 2001*, pers. comm. Lee McIntosh with Wayne Ennor.

<sup>53</sup> (1983) 49 LGRA 420

“(1) An Authority member who has a direct or indirect pecuniary interest in a matter that is before a meeting of the Authority shall, as soon as possible after the relevant facts have come to his knowledge, disclose the nature of his interest to Authority members who are at that meeting, and that disclosure shall be recorded in the minutes of the proceedings of that meeting.

(2) An Authority member who has disclosed under subsection (1) his interest in a matter may take part in the consideration or discussion of the matter, but shall not vote thereon.” (section 12)

The participation of particular EPA members in decisions about proposals which those members have consulted about is a common cause of perceived conflict of interest in the assessment process and therefore undermines the value of the privatisation of that system.

### 6.2.2 *Privatisation of inspection*

Many entities currently conduct "voluntary environmental audits" to determine whether their operations comply with statutory requirements. There are many reasons why an entity may carry out a voluntary audit, including:

- € to identify ways of reducing costs of production and waste disposal;
- € to detect inefficient production processes;
- € to identify and remedy environmental harm; and
- € as part of an asset sale or finance arrangement<sup>54</sup>.

Some commentators believe that environmental agencies can take advantage of the fact that such audits are being done, and should encourage more widespread use of audits (for example, by ensuring that the results of voluntary audits cannot be used against an entity in any prosecution which the environmental agency may bring)<sup>55</sup>. Such commentators state that voluntary environmental audits should be preferred to audits and inspections carried out by environmental agencies, as voluntary audits are a cheaper and more comprehensive form of inspection than an environmental agency could carry out, and therefore a cheaper and more comprehensive form of law enforcement<sup>56</sup>. This assertion is based upon the presumption that an entity is in the best position to determine its compliance with applicable standards, and to determine the necessary strategies to rectify non compliance.

However, it is worth noting that recent, spectacular failures and frauds in the heartland of auditing, namely the financial control of corporations (HIH, Enron, WorldCom - the list goes on), raise very large questions about how effective such auditing can really be. It should also be noted in respect of the Bellevue fire referred to above, that despite the bad

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<sup>54</sup> Lowe P, "How Green is My Company? An Examination of Curial and Statutory Processes Protecting Environmental Audits from Disclosure" *Environmental and Planning Law Journal* December 1997 at 747.

<sup>55</sup> Bowman, M "New Legislative "Protection" of Voluntary Environmental Audits: Incentive or Indictment?" *Australian Business Law Review* Vol 27 October 1999 at 392.

<sup>56</sup> See for example Howarth, "Self Monitoring, Self Pricing, Self Incrimination and Pollution Law" (1997) 60 *Modern Law Review* 200 at 228.

record of the company involved in relation to the management of their site (as it emerged in the criminal proceedings), the company could point to the fact that they were a “quality assured” company and had received positive feedback in this context. Giving evidence in mitigation, the principal of the company referred to two documents in support of his case. The first one was an audit. He pointed out that they often got “the larger corporates” to come to their site and to audit their site. He also said that they were a quality assured company and had had an audit report by the quality assurance company in December (presumably 2000) and by another company in September (presumably 2000). “Only a couple of queries” were raised by these companies, he observed. This situation calls into question the efficacy of such “private” or peer regulatory controls.

It is often said that auditors seeking to certify compliance with environmental standards, must, and usually are, independent of the company being monitored. However, they may in one sense be independent (ie unconnected), yet they are usually still paid by the monitored company. In relation to corporations in general, it is often the case that the same accounting firm advises the company in commercial matters, and yet its audit section (behind a so-called Chinese wall) acts as auditors. In our view, these controls are often weak and inefficient (as many corporate failures have shown), when compared for instance with the type of audit and control functions performed by the Auditor-General in relation to public entities. In our view environmental auditing should be undertaken by auditors appointed from a panel by the regulating authority, and with the relevant companies paying for it on a generalised basis. Such auditors should have a duty to report to the regulating authority as well.

In any event, voluntary environmental audits can never completely replace an environmental agency's need to inspect and prosecute. For example, if the entity discovers an area of non compliance, it may decide not to rectify it immediately (for example because of the high costs of rectification) - in which case the voluntary audit does not actually lead to less environmental harm. In such cases an environmental agency is still required to carry out inspections and conduct prosecutions in order to prevent environmental harm.

### 6.2.3 *Privatisation of enforcement*

At common law, any person has the right to initiate a prosecution for the benefit of the public at large. However, this right is usually qualified in respect of the enforcement of environmental regulations. For example, under the *Environmental Protection Act 1986* (WA) prosecutions may only be brought by an authorised officer (usually the CEO with the approval of the Minister for the Environment)<sup>57</sup>. Environmental agencies are therefore often the sole repository of power and discretion to prosecute for a breach of an environment law.

Privatisation of the right to prosecute may relieve the load of overworked prosecutors. For example, Part 4A of the *Environmental Planning and Assessment Act 1979* (NSW) provides that private certifiers may issue various certificates specifying that particular work or development has been carried out in accordance with the conditions of the

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<sup>57</sup> other than an offence under section 79 of the *Environmental Protection Act 1986* (WA)

development consent of that work or development. Such certifiers have powers under the Act to issue enforcement notices requiring work to be done in the same way as the government agencies does.

Nowhere in Australia is the privatisation of the right to prosecution complete, and it is often said that providing the public at large with the right to commence prosecutions will “open the floodgates” and permit “busybodies” to commence spurious prosecutions. However, members of the public have long had a right to commence prosecutions under various Acts in WA, including the *Mining Act*, and none of the oft quoted concerns have been observed. In any event, the cost and time involved in legal proceedings would probably provide any barrier which is required to ensure that prosecutions are only brought in appropriate cases.

### **6.3 Requiring agencies to provide reasons for decisions**

Environmental agencies are often the sole repository of power and discretion to make decisions about the application and enforcement of environment law. Such agencies usually make decisions behind closed doors, and often subject to confidential legal advice. No reasons are published for such decisions. This is despite the fact that one of the most effective mechanisms to ensure that an agency’s decision is sound is to require it to provide reasons for its decision. As Volker notes:

“Probably the most significant of all the changes for improving administration was the requirement to provide written statements of reasons and findings of fact. This meant that public servants had to be more systematic and disciplined in their approaches to decision making. They even had to ensure that their decisions were in accordance with the applicable legislation and any policy guidelines that might apply.”<sup>58</sup>

The fact that many decisions are made on an opaque and confidential basis without the requirement to provide reasons for decision means that it is very difficult to determine whether there is a ground of judicial review available in respect of such a decision, let alone prove to the satisfaction of the Court that the ground is made out. It also means that the public perception of environmental agencies is that such agencies make decisions with little regard to the effect of those decisions on people’s lives and in cohort with the very polluters the agency is meant to regulate. Requiring environmental agencies to publish reasons for their decisions would have far reaching benefits, including assisting agencies to make good decisions, enabling review of those decisions, and restoring public confidence in environmental agencies.

### **6.4 Providing civil remedies for criminal offences**

Where a criminal penalty is prescribed for an offence, Courts generally presume that such penalty is the only remedy available. This presumption is based on the general common law principle that:

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<sup>58</sup> Volker, “Just Do It – How the Public Service Made It Work” Volume 8 *Australian Journal of Administrative Law* August 2001 at 204.

“Where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it... The remedy provided by the statute must be followed.”<sup>59</sup>

Accordingly, in *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, Mason J said at 49:

“The issue of an injunction to restrain an actual or threatened breach of criminal law is exceptional.”

This principle has recently been applied in WA. In December 2001 BGC (Australia) Pty Ltd authorised clearing on land without first giving notice to the Commissioner of Soil and Land Conservation (“Commissioner”). The *Soil and Land Conservation Act* provides that this is an offence, the maximum penalty for which is \$2,000. The Commissioner applied for and was granted an interlocutory injunction to prevent further clearing until the company had submitted the required notice. On 22 January 2002 the company gave the Commissioner the required notice. On 25 January 2002 the Commissioner issued a Soil Conservation Notice prohibiting the clearing. The Act provides that it is an offence to contravene a Soil Conservation Notice, the maximum penalty for which is \$3,000. The Commissioner applied to extend the injunction to restrain the company from contravening the Soil Conservation Notice.

His Honour Justice White noted that failure to comply with the Soil Conservation Notice attracted a criminal penalty, and held that as the *Soil and Land Conservation Act* provides an “exhaustive” code of available remedies, he was not authorised to grant an injunction<sup>60</sup>.

Injunctions are, however, available to restrain acts which attract a criminal penalty if legislation specifically provides. See for example section 123 of the *Environmental Planning and Assessment Act 1979* and section 475 of the *Environmental Protection and Biodiversity Conservation Act 1999*.

## **7 Conclusion**

Recent incidents of pollution in Western Australia have revealed that environmental agencies may be failing to exercise their discretion appropriately. This is particularly concerning at present, as legislators are tending to move from a “command and control” system of regulation which encompasses little discretion to a more flexible “pollution prevention” approach which incorporates substantial discretion.

The main mechanisms to ensure agencies exercise their discretion lawfully are to confine discretion and to review (in the broad sense) the exercise of that discretion. In respect of environmental agencies in WA, there is little confinement of discretion. This means that

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<sup>59</sup> *Deputy Federal Commissioner of Taxation v Brown* (1958) 100 CLR 32 at 42, citing with approval Willes J in *Waterworks Company v Hawkesford* (1859) 6 CB(NS) 335.

<sup>60</sup> *The Commissioner of Soil and Land Conservation v Nabarlek Nominees Pty Ltd, Soiland Garden Suppliers Pty Ltd and BGC (Australia) Pty Ltd* (2002) WASC 18

the primary mechanism by which to ensure that agencies carry out their decisions lawfully is review of discretion. However, review of discretion is inherently unsuitable to the task, and therefore reform is required.

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