

Energy Law and the Environment

(by Rosemary Lyster and Adrian Bradbrook,
Cambridge University Press, 2006)

Australia is on trial. The imperative transgressed is one of 'sustainable energy', the charge is 'wanton disregard for the needs of, or callousness, towards future generations' and the prosecutors are the tenacious Lyster and Bradbrook.

If the defence were permitted an opening statement, Prime Minister Howard may well repeat his recent address on the issue. In welcoming delegates to the 'Asia-Pacific Partnership on Clean Development and Climate' in January 2006, John Howard accepted that, "long-term commitments and significant investments are needed to tackle the sustainable generation and use of energy" and averred that Australia has a "strong commitment" to this end.¹ In response, Lyster and Bradbrook accuse the Commonwealth Government of empty platitudes and their first exhibit is 'uranium'. In 2005, the Minister for Resources announced that, "the Federal government had taken control over the future of the Northern Territory's rich uranium deposits, declaring the Territory open for business" and in the process, overriding the Territory's commitment to banning new uranium mines (p 2). Equating 'sustainable energy' with mining for radioactive material is bound to stimulate intense debate but debate aside, this is the approach taken by the Commonwealth Government. Thereafter throughout the book, and in a manner befitting the very best of Court traditions, the authors' careful dissection of government policy and practice exposes any sham logic and obfuscation.

Energy law is a subject of great breadth and Lyster and Bradbrook, no doubt for the sake of brevity, define their parameters at the outset. They focus upon stationary forms of energy, the electricity and gas sectors and, in considering the environmental effects of energy use and generation, primarily upon climate change. The context is set by an overview of 'energy production and use in Australia' in chapter 1 and an easily digestible introduction to 'energy technologies and sustainable development' in chapter 2. The third chapter, entitled 'Energy, international environmental law and sustainable development', details the relevant international law and serves to remind the reader, that in the case of practices producing global environmental effects, Australia cannot adopt an insular stance. Any suggestion that energy and climate change policy is beyond the remit of the Commonwealth Government is refuted (the constitutional "trade and commerce powers (s 51(i)), the corporations power (s 51(xx)) and the treaties power (s 51 (xxix))" provide sufficient scope (p 200)). Present and proposed federal initiatives are set out in detail (chapters 4 and 7) and, to provide the requisite balance, the rationale for such is given.

A common theme runs through the federal Government's approach to energy.

¹ The Prime Minister, Hon. John Howard MP, *Address to the Asia-Pacific Partnership on Clean Development and Climate Inaugural Ministerial Meeting*, Government House, Sydney, 12th January 2006.

The focus is upon limiting regulation and promoting voluntary schemes and free market economics. The authors address in particular the restructuring of the Australian electricity market to create the 'National Electricity Market'; a reform dictated by pure competition policy that has achieved price reductions for consumers. However, in contrast to, for example, the United States and Denmark, Australia has failed to integrate any environmental safeguards into the restructured market. As coal is still the primary fuel for electricity generation, the likely environmental effects of the National Electricity Market were perfectly clear. In the first year of operation, Australia saw a "10.35% spike" in greenhouse gas emissions from the electricity sector (p 123). Thus, Lyster and Bradbrook argue that the de-regulation of the industry has added to environmental degradation rather than eased this problem. They call for appropriate re-regulation. Recent Government reforms have included the establishment of the Australian Electricity Regulator but the authors report that once again an opportunity has been lost to regulate with regards to environmental concerns.

Other federal initiatives receive equally intense scrutiny. The Australian Greenhouse Office emerges as a sop, the *Renewable Energy (Electricity) Act 2000* will fail to deliver that promised (chapter 4) and to focus on the geo-sequestration of carbon may prove to be inefficient, expensive and potentially dangerous (chapter 7). Fundamentally, Lyster and Bradbrook successfully make the case that the Commonwealth Government is failing to adopt "progressive paradigms for energy" (p 182). Of particular appeal is the perfunctoriness of writing that, when required, beautifully reveals the authors' intolerance with any claims to the contrary.

The Australian states, however, receive less condemnation. In contrast to the stance taken federally, and analogous to the scenario in the United States, Australian states and territories are taking action where Commonwealth Government leadership has been absent. The authors summarise the range of initiatives that the various states are adopting to promote a renewable energy future and provide links to materials containing detailed information (chapter 6). Of particular interest, is the embryonic agreement between states to establish a 'cap-and-trade' greenhouse gas emissions trading scheme (p 140), regulation to promote sustainable construction, green-power schemes (p 155), the development of geo-thermal power (p 164) and measures mandating energy performance standards and labelling requirements (p 174).

Lest the foregoing appear too instantiatie (and this book may require regular revision to remain relevant), Lyster and Bradbrook end on a note that resonates with global, long-term significance. Appendix A contains the authors' vision for a 'Draft non-legally binding Statement of Principles for a Global Consensus on Sustainable Energy Production and Consumption'. If any store can be placed on the role soft-law instruments play in crystallising practice, the adoption, in some form or other, of this document may prove to be the book's greatest contribution to a renewable energy future.

Australian optimism undimmed, the authors also include a proposed 'Draft Protocol on Energy Efficiency and Renewable Energy to the United Nations Framework Convention on Climate Change'. This suggested treaty mirrors the framework of the Kyoto Protocol but (arguably) the gravamen is to regulate

specific activities. The Draft Protocol is certainly thought provoking, although I was not entirely convinced of the justification for such ("a binding document can be justified because of the urgency of the climate change problem and because of the overwhelming importance of the energy issue to its resolution" (p 199)). What would this Protocol add to an efficient treaty regime that set a bottom line for emissions of greenhouse gases and permitted states to achieve this by whatever means appropriate?

Energy Law and the Environment is a slim volume that whets the appetite for more. Over and above the relevance to environmental law, the book promotes interest in energy law per se, a subject sadly neglected by law schools in New Zealand, and raises interest in the types of questions we should ask in relation to energy from the perspectives of property, contract, tort, planning and international law. For my part, I would have liked to have read more about emerging technologies, the integral part that law may play in rendering new technologies economically viable, the legal issues associated with the development of fuel cells, clean coal and synthetic fuels, for example. This was not the role of this present publication however, and no doubt Lyster and Bradbrook will turn their considerable expertise to addressing such issues in the future.

Essentially, the overwhelming conclusion of the book is one repeated by environmental lawyers the world-over. To safeguard our environment, voluntary initiatives seldom work and to rely upon a free market approach when that market fails to put any or any true price on environmental degradation is inherently and fatally flawed. The book is further evidence that a truly sustainable energy future can only be achieved by promulgation of both regulation and stimulation (fiscal and/or educative measures) and the genuine participation of all interested and affected bodies. New Zealand, take heed.

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