THE INVENTION OF THE ENVIRONMENT AS A LEGAL SUBJECT

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BA LLB (Melb)

Submitted in fulfillment of the requirements of the degree of Doctor of Philosophy

October 2006

DECLARATION

This work has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, the thesis contains no material published or written by another person except where due reference is made in the thesis itself.

The thesis research has been the subject of fourteen conference papers, presented at conferences in Australia and internationally. In addition, material from the following chapters of the thesis has been peer reviewed and published as indicated below:

- Chapters One, Two, Four and Six - Goodie (2003).
- Chapter Six - Goodie (2000); Goodie and Wickham (2000)*

  *While the argument pursued in Chapter Six reflects my contribution to that jointly authored journal article, I would like to acknowledge here the importance and influence of Dr Wickham's ideas on the association between law and rhetoric in developing them.
- Chapters Seven and Eight - Goodie (2001).

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October 2006

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ABSTRACT

The legal regulation of the environment is exemplary of the formation, practice and challenge of modern legal discourse and governance. The latter part of the twentieth century has seen the emergence of environmentalism and the problematisation of the environment in terms of the management of hazard and risk. The social authority of law has meant that it has been inevitably implicated in the contestation and negotiation of environmental governance. In turn, environmental governance and discourse have required a certain refiguring of legal rationality as legal discourse has been confronted by the immanent critique of environmentalism. This thesis will focus on how the environment emerged as problematic and how it came to be governed and of legal interest. Several examples of legal thinking concerning specific environmental problems are analysed, and the manner in which the environment is constructed within the legal discursive domain is examined.

Much modern knowledge and understanding regarding the environment developed in part from the specialisation of scientific discourse and experiment, which formed certain areas of expertise, including biology, ecology and toxicology. This scientific knowledge significantly contributed to governmental identification and elucidation of the environment. Modern ecology and associated technologies have facilitated the detailed mapping and auditing of physical environments, and have profoundly effected our modern appreciation of 'the environment' as an interdependent, dynamic and potentially

fragile web of interdependent physical zones, spaces and activities. Modern environmentalism has emerged through the application of this type of technical scientific knowledge, in combination with certain forms of 'environmental sensibility' which treat the environment, not as a thing, or somehow 'out there', but as a dynamic process of which humans are a part, which has a history, an economy, and a power to transform and be transformed. The shape of modern environmental governance has been especially influenced by the scientific and ethical critique of environmentalism that connects the origin of ecological risks to technological application and commodity production.

Throughout this thesis, specific aspects of the 'analytics of government' or governmentality approach derived from Foucault's writing on governmentality are taken up. Governmentality theory is largely concerned with the contingent relationship between knowledge and power; thus, with analysing specific discourses and associated spaces within which differing knowledge and forms of thinking interrelate and resist each other. The contestation and negotiation associated with environmental governance has confronted legal discourse and led to a refiguring of legal rationality. Legal governance of the environment has stretched and unsettled legal orthodoxy, as the environment does not readily fit into any of the usual categories pertaining to legal rights and interests. The environment, as a legal subject, is not simply a physical space; it is a contingent and instrumental concept, determined by human activity, social values and legal and non-legal calculation.

Analysis in this thesis of legal governance of the environment focuses on two different modes in which law has been employed as a governmental technology to address the ‘environmental problem’. The first, is the legal recognition of environmental lobbyists, and their claim to represent the ‘public interest’ as stakeholders in the management of non-human environments. Specifically, the processes by which non-pecuniary public interests are subject to ‘pragmatic and situated’ calculation within the common law are closely examined. The second, is the extent to which the common law has assimilated the vocabulary and techniques of calculation associated with risk in the legal assessment of environmental harm and hazard in toxic tort litigation. These two examples of legal environmental governance are loosely united in that they converge on the management and control of environmental harm, both harm caused by toxic environments and harm to environments.

ACKNOWLEDGMENTS

I would like to acknowledge and thank the many people who helped and supported me in the writing of this thesis. First, my supervisor Patricia Harris, whose insightful comment on so many drafts and patient support truly helped me to explore the environment-law connection and bridge the disciplinary divide. Thank you as well to Barbara Evers, Kirsten Harley, Rachel Kitchens, Liam Stone, Eric Whittle and Gary Wickham for 'SOC' and the critical comment those wonderful seminars encouraged. Anne Greenshields our Law Librarian at Murdoch provided so much help locating sources. My dear friends Barbara Evers and Corinne Reid were there for coffee and PhD empathy whenever it was required. Thanks to my colleagues Janice Dudley, Anna Copeland, Naomi Sidebotham, Diana Sedgwick, Tracey Summerfield, Lisa Young and Sonia Walker for reading bits and commenting and just for being along the corridor. Without Mo George and Murdoch University Child Care, who cared for and loved Max when he was small, the thesis could not have begun. My parents, Ann and Joe and late grandmother, Margaret Warden, sent me off to university and have remained ever constant in their love and support.

My most special thanks must go to my loves, Gary and Max Wickham for their endless support and making sure I got on with the best part of our life together.