

Introduction

Land use and Liability: An introduction and review¹

The papers published here are taken from papers delivered in two UKELA conferences at Plymouth in 2003 and Manchester in 2004. As such they represent issues that have proved topical and engaging in UK environmental law and policy in recent years. The annual conference themes, while naturally concerned with issues that are currently pressing, are not chosen with a view to publication, but are likely to reflect the a variety of influences ranging from the location of the conference to the interests of the programme directors. Not all conference offerings are suited or ever intended for publication. The Plymouth conference falling in the middle of a national consultation on GM crops² began with a debate on this topic, rather than formal presented papers. The Manchester conference allowed time for a meeting of the various working groups of UKELA. Of the remaining papers, it is the task of the editors to pull these together and organise these under some common theme or thread.

The UK Environmental Law Association is some way from being the UK environmental lawyers' association. The Association prides itself on the breadth of its constituency. Lawyers are represented from all branches of practice, together with academic lawyers and law students, but the Association is open to all with an interest in environmental regulation through legal mechanisms. So too, not all the papers at the conference each year come from the discipline of law. Effective regulation depends upon an informed understanding of the problems to be addressed. Regulation implies intervention. Many matters go apparently unregulated in the sense that we are happy to allow property to be enjoyed, and bargains relating to property rights to be freely transacted, without any apparent need to interfere with such dealings. These matters are actually regulated, of course, by the very allocation of property rights, and by the almost unthinking application of the common law, which governs the relationship between economic actors in a market setting. If we are to intervene in relation to these mechanisms, which we accept ordinarily work well, then

¹ Robert Lee and Elen Stokes, ESRC Research Centre for Business Relationships, Accountability, Sustainability and Society (BRASS), Cardiff University

² See now GM Nation: The Findings of the Public Debate, available at http://www.gmnation.org.uk/docs/gmnation_finalreport.pdf

the basis for that intervention must be clear. So too should be a confidence that the regulatory solution will prove more effective than that already provided by a market that is proving less than perfect.

The cast list

The task of law-making comes at the end of the long chain in the development of environmental policy. As some other papers in this volume shows, considerable technical and scientific evidence may be needed to frame the problem before the question of appropriate policy response can even be put. This helps explain the presence in this edition of papers that would grace, equally well, volumes on environmental science. The papers by Myles Allen on climate change, and by Tony Kendle and Juliet Rose on native species provide excellent examples of this. Their importance lies in the care with which they found the basis for an appropriate policy response. In the case of Allen, this is in the identification and explanation of an appropriate methodology through which one may begin to chart the phenomenon of climate change. In the case of Kendle and Rose, the paper lays the ground for a measured response, and a sense of perspective through which one can assess calls for the curbing of so-called 'alien' plant species.

Other papers in this collection, contributed from disciplines other than law, are more closely connected with policy formulation. Bonnie VandeSteeg writes in her paper: 'any discussion of environmental issues must be integrated with an analysis of the social, economic and political context and a consideration of policy'.

Her own paper on environmental decision-making and environmental justice, informed by empirical, anthropological understandings of this problem, offers enormously important insights to those responsible for the procedural frameworks of development control. Chris Anastasi's paper on energy policy, addressing the place of nuclear power in a low carbon economy, provides a wonderfully clear case study in policy evaluation. Tauni Brooker's paper allows us to understand how the interaction of various policy initiatives can produce changes in corporate behaviour, and offers a rich insight into the interaction of formal legal change, 'softer' policy initiatives, and self-regulation.

As for the papers on environmental law itself, these, too, fall into different groupings. Caroline Blatch introduces new and complex regulatory concepts enshrined within the Environmental Liability Directive, and greatly aids our understanding of these by reference to comparative legal material from the USA. Although the primary thrust of his paper concerns the application of environmental information, Simon Boyle opens up to us another area of reform in the shape of the Environmental Information Regulations 2004. Phil Michaels continues with this theme, offering a thorough account of major developments in access to environmental information in the UK and the EC. The Manchester Conference of 2004 provided a time the opportunity to review the contaminated land regime, which by this stage had been operative, in England at least,³ for four years. Two papers from the environmental agency allowed us, in different ways, to take stock of this development. Mary Thackray's paper is an important contribution to the literature in this area, not least because, in offering the facts and figures surrounding designations and remediation of contaminated sites, we gain a much greater insight into the practical workings of the regime. This is then matched by Martha Grekos' paper, which, by taking a case study approach, leads us to a similar set of insights, but from a very different approach and direction. Finally, we have a paper from Peter Barham that, while considering the very latest developments in the area, deals with a relatively established body of law in the context of a particular environmental problem, namely addressing the need for port developments that regularly create problems in relation to nearby habitats. This review of the ensuing difficulties constitutes a call for considered reform in the area.

Setting the scene

In relation to the themes pursued in this volume, it is quite clear that many of the papers relate to land and land use. Indeed Simon Boyle's paper, while concerning access to information on the environment, is written, unsurprisingly given his experience,⁴ from the point of view of the application of that information to the transactions for the sale or purchase of land. Through a narrative of the involvement of the Friends of the Earth in freedom of information issues, Phil Michaels' contribution provides a thorough account

³ See the Contaminated Land (England) Regulations 2000, S.I. 2000/227, which came into force on 1 April 2000.

⁴ Simon was Group Environmental Lawyer to GEC, later Marconi at a time of substantial revision of the group structure and its property holdings.

of the legislative landscape relating to freedom of information, and highlights practical problems associated with the introduction of a new Environmental Information Regime. In his analysis of the cultural obstacles to freedom of information, Michaels makes specific reference to the Yusufeli Dam construction dispute in which Friends of the Earth requested a copy of an Environmental Impact Assessment Report. Using this case-study, he highlights his concern that the notion of commercial confidentiality poses the greatest threat to access to environmental information.

In addition to the papers on contaminated land, the papers on environmental liability, environmental justice, ports and habitats, and biodiversity conservation all concern land and environment. Nor is it too far-fetched to claim that the papers on climate change relate might strongly to this topic. In his paper on nuclear power, Chris Anastasi deals with the ecological footprint of nuclear power, and the crucial issue of nuclear waste. In a more general sense, however, the papers on climate change raise important issues of land management, and Myles Allen begins his paper by pointing to billions of dollars in losses to agriculture and forestation, as well as widespread premature loss of life, emanating from the heat wave in the Summer of 2003.

Only Tauni Brooker's paper does not raise directly issues of land use, but it does deal with questions of non-financial risk. Practitioners in this area will be aware of continuing pressure, emanating particularly from the USA in the aftermath of the collapse of Enron, for companies to account, in a transparent manner, for their liabilities including those arising out of land-based pollution on their operating sites. Not driven directly by the Sarbanes-Oxley legislation, of which she writes, but rather by stricter application of SEC requirements, this has actually given way to business opportunities in an attempt to take brown land liabilities off the balance sheet.⁵

Brooker's paper reflects yet another vein running through many of the contributions here - that of the liability. Here Brooker is concerned with wider issues of liability arising out of matters such as reputational risk and reflected in share value in an era of corporate governance in which social responsibility issues have become all the more prominent. The law-based papers address the potential for environmental liability, and issues

⁵ Anon 'WSP links with Willis to Take on Brownfield Liabilities' (2003) *ENDS Environmental Consultancy Bulletin* January/February.

concerning avoidance, mitigation or remedying of such liability. Even Myles Allen's paper on climate change is written against a backdrop of questions of causation should civil law remedies for the impact of climate change ever be pursued.

Sub-themes of remediation and conservation arise clearly in the material on land use. The papers explore problems of restoration of brown land to fruitful use alongside questions of the preservation of habitats, flora and fauna and areas of natural beauty. It seemed appropriate also to speak of acclimatisation. This acknowledges the important material on climate change, but has wider resonances. To 'acclimatise' is to adapt or become accustomed to a new climate or environment. While the climate change papers address the need to adapt our behaviour in the circumstance of global warming, this theme of acclimatisation plays out equally well in other contexts discussed in this book – be it companies having to accommodate new found social responsibilities, economic development having to recognise its ecological footprint, or practitioners having to address new notions of risk and risk transfer in an information age.

The running order

The ordering of these papers was no easy matter. In the end it was decided to lead with the papers on Part IIA of the Environmental Protection Act 1990, and the workings of the contaminated land regime. As indicated earlier, these two papers sit well together and address the way in which we are now beginning to come to terms with an historic legacy of land-based pollution. Mary's overview of activity under the regime provides perhaps the most important review to date of the regulatory impact. It seemed logically to precede Martha's cleverly devised case study illustration. Thereafter, Caroline's paper allows an insight into how future problems of environmental pollution will be addressed, and as indicated earlier, this paper addresses difficult issues of restoration and remediation back to appropriate baseline standards.

Caroline's paper, along with the earlier papers on contaminated land, addresses very directly the liability theme. This then fits nicely with the papers by Simon and Tauni. Simon's paper is very much about environmental due diligence and the avoidance of liability through careful investigation. Tauni's contribution reminds us that modern due diligence must encompass a much wider sustainability agenda in which the social and

environmental performance of business is no less critical than its economic operation. In an engaging paper, Tauni Brooker allows an insight into many different strands of the corporate governance agenda, which knit together to form a daunting area of non-financial risk. Both of these papers, in their different ways, make an important contribution to our understandings of risk evaluation.

While addressing a theme of environmental justice, Bonnie's paper is concerned not so much with ex post liability for damage but with the ex ante resolution of disputes and conflicts arising out of developments in sensitive environmental locations. It forms a neat bridge between Brooker's paper, in terms of its exploration of the tensions between economic development and related social and environmental issues, and the later papers by Tony and Juliet, and by Peter on wider conservation issues. In fact there are strong resonances between Bonnie's paper and that of Peter's, as he examines a seemingly intractable difficulty of meeting the need for port expansion while respecting the environment. It seemed appropriate, however, to place in the middle of these, the paper by Tony and Juliet, if only because it helps to remind us that our environment has inevitably evolved in the face of human impacts.

Finally we conclude with the papers on climate change. The question of quantitative causal attribution of specific weather events (such as the heat wave in the Summer of 2003, which is studied here) and associated changes in weather-related risk to externally driven climate change is one that will engage anyone interested in the environment, and a reading of the paper will serve only to emphasise how seriously the issue of climate change might be viewed. Myles raises issues of both attribution of fault and causation that are close to the heart of any lawyer dealing with civil liability issues. A reading of the paper might suggest, however, that rather than waiting for the remedying of the impacts of climate change through the litigation process, all efforts should be devoted to serious application of regulatory solutions without delay.

Mirroring the pattern elsewhere in this collection, a more general essay on climate change is followed by a specific case study application of the dilemmas thrown up in the devising of policies for climate change minimisation. Chris Anastasi's paper points to the current coincidence of the end point for a declining nuclear power industry and the critical need to combat climate change by curbing greenhouse gas emissions. In this

context, the absence of such emissions in the generation of nuclear power suddenly gives the generation of such power an attraction not previously realised. As Chris points out there are few technological problems attaching to the opening up (as opposed to the keeping open) of nuclear power, other than an ageing expertise in the UK nuclear industry as present facilities run down. The problem is of the type dealt with by Bonnie VandeSteege; one of public engagement and public trust, not least in relation to the 'Achilles heel' of nuclear waste. Here past dealings of trying to sell solutions to a sceptical public make the task harder than it might otherwise be. Anyone reading this paper with an open mind, however, might conclude that the debate will have to be conducted in the next decade.

The plot

Out of a selection of conference papers, all reflecting current concerns in relation to the environment and regulation of activity affecting it, but otherwise a relatively eclectic collection, what wider lessons might be drawn? There are some that are surprisingly striking. One immediate reflection is that the United Kingdom is a small and crowded island state in which there is increasing pressure on the environment and increasing concern about the impacts of environmental pollution whether in terms of conservation of habitats or the threat of climate change. Many of the papers illustrate both the necessity to find policy and legal solutions to such problems and, at the same time, their increasingly intractable nature. Resolution of these difficulties is becoming harder, especially where public engagement is crucial to consensus in problematic policy areas and in instances in which the not only the solutions are unclear, but the very nature of the environmental threat is shrouded in ambiguity.

Yet there is a curiosity here. Writing in the Spring of 2005, we are heading into an election in which the environment hardly seems an issue of concern for any of the major parties. It is an issue that can be easily sidelined. To take one example, the nuclear power debate so effectively elaborated here by Chris Anastasi must fall under policy consideration by the next government of whatever political persuasion, but at all hustings there is silence on the topic. It is true for energy policy more generally. Notwithstanding intense local opposition to wind farms, and clear bifurcation of opinion on the issue nationally, this does not translate into a general election issue. And for

energy, road transport, waste management, preservation of the green belt, corporate social responsibility, etc etc.

On one hand, this should concern us. There is a need for clear and open engagement on the type of big picture questions raised above. It is sad to see them given such little attention at the one point in the political life cycle when politicians appeal to what they believe will motivate people to express a view in the ballot box. On the other hand, it should not alarm us unduly, for there are strong counter trends to this centralised apathy. All of the papers show that environment is the subject of involvement in local communities whether a matter of local development, conservation, reparation of environmental damage and the like. It is clear that there is regular engagement with the public on these issues by local government, business and agencies, and that the outcomes of such engagement are actively pursued and heavily contested. Environmental pressure groups and NGOs thrive. Unlike political parties, their membership grows and their campaigning material is read. All the signs are that environment is important to people in a way that mainstream politics may find uncomfortable.

As with the nuclear power or the port development issues, environmental concerns are not amenable to simple solutions. Political parties struggle already with the decline of old alliances. No longer is it possible to say that there is a solid working class vote which will go the way of Labour. The industrial society that created and understood those allegiances has gone. Indeed, one of the issues of the pre-election period has been the decline of manufacturing industry in the shadow of the Rover Group collapse. The post-industrial society is much less cohesive, and much less trusting. Opposition to technologies, such as the genetic modification of crops, does not follow easy political lines. Uncertainty surrounding the impact of such developments on the environment produces individualised reactions that are not easy to chart or manage. As an easy example of this, look at the pressure on companies in relation to the environmental and social aspects of their performance as described by Tauni Brooker. The range of stakeholders capable of generating pressure on the company is complex and bewildering. We may be included as stakeholders, but whether as shareholders, customers, employees, or by virtue of the investments made by our pensions' funds may be not be immediately obvious. The forms of engagement with issues may be from a

perplexing mixture of perspectives as members of NGOs, interest groups on poverty alleviation or health, church groups, or locally formed pressure groups come together to campaign on fair trade, GM, or access to countryside and the like.

All of this may make it most difficult for political parties to know quite how to align themselves on such issues. There are no easy votes. Radical solutions are unlikely to be promised and may prove even more difficult to honour. Transport policy in terms of the continuing commitment to car travel over and above public transport, or the effective subsidy of cheap air travel provide good examples of this. So, in our small island, as these issues become more pressing, we may see the growing and active participation of people in environmental choices, invoking the increasingly complex regulatory structures to find a voice to demand the employment of regulatory solutions to pollution, to invoke action by the regulators, to call those responsible for environmental degradation into account, and to seek the preservation of our precious environmental resources. The essays in this volume are indicative of the emergence of such movements and ultimately these may prove to be forces that politicians ignore at their peril.