Third Party Appeals Against Works Approvals: A Personal Journey

By Justice Stuart Morris, President, Victorian Civil and Administrative Tribunal[1]

It was on 29 June 1976, just a few days after I was permitted to accept briefs as a young barrister at the Victorian Bar, that Mr Justice Oliver Gillard handed down his decision in *Protean (Holdings) Limited v Environment Protection Authority.*[2] Although this case did not directly consider the scope of third party appeals, it was significant in the development of environmental law in Victoria. If nothing else, it established a judicial tone. The case the court was required to consider involved the nature of the powers available to the Environment Protection Authority under the *Environment Protection Act* 1970 ("the Act"). I think it can be said that Mr Justice Gillard had not come across an Act which gave a statutory authority such broad, sweeping powers.

He commented that the Act had two objectives: to provide for a licensing system whereby the discharge, emission or deposit of waste may be permitted; and to impose certain prohibitions and limitations on the enjoyment of rights of a personal and proprietary character where it might be thought that the exercise of such rights would be hurtful to the physical well being of the community in general. He said the Act contained "a number of novel and somewhat extraordinary features". But in saying this His Honour was merely warming up. After setting out the nature of the powers contained in and under the Act, His Honour said:

> *"Although it may be readily conceded that the purposes and objects of this Act are praiseworthy, the means adopted to achieve them seem to be quite authoritarian, if not draconian in character. The penalties are harsh. Because of these features, I am of opinion that the legislature must be taken to have intended that although the statutory provisions of this Act might appear to confer powers upon the subordinate bodies, which would enable them to invade or erode the existing rights and privileges of the individual, either of a personal or proprietary character, such provisions if at all ambiguous should be strictly construed in favour of the subject."*

I suspect judicial attitudes to property rights may have softened since 1976, but it remains true that the Act, and instruments made under the Act, can significantly impinge upon personal or property rights. It also remains true that there is at least a potential for the Act to operate in an arbitrary manner. This is highlighted by the High Court decision in *Phosphate Co-operative of Australia v Environment Protection Authority*[3] where Aickin J described the startling width of the definition of "waste" in the Act. He commented that:

> *"The definition is so wide that to smoke, or perhaps even to breathe, would appear to be to emit matter into the environment so as to cause an alteration in the immediately surrounding portion of the environment. To water one's garden or to drive a car would equally be to discharge waste as defined and would require a licence from the authority."*[4]

Although my personal journey with environmental appeals does not start with the *Protean Holdings* case, my first Supreme Court appearance was in front of Mr Justice Gillard. I was acting for a landlord who was seeking to prevent the extension of a lease in circumstances where the tenant claimed to have exercised an option to renew. Essentially the landlord claimed that the tenant had no right to exercise the option because it had not complied with various covenants in the lease, including covenants in relation to the use of the premises. The premises consisted of a motel in Wellington Street, St Kilda. It is said that, at least at one stage in its history, it was the biggest illegal brothel in Melbourne. Unfortunately my case floundered when my opponent alerted the court to a provision in the *Property Law Act* that the right to exercise an

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2 [1977] VR 51

3 (1977) 138 CLR 134

4 (1977) 138 CLR 134 at pages 146-147

option was not dependent upon complying with all covenants, but only covenants in respect of the payment of rent. At this point I amended my case, somewhat desperately, and pointed out that the tenant had been paying $1,666 per month in rent whereas the lease provided that the rental required was $1,666.66. Sir Oliver Gillard was somewhat taken back by the amended claim, but said little more. Next morning he delivered judgment, in my client's favour, stating that the *de minimis non curat lex* rule did not apply to the payment of rent. His Honour cited a mountain of authority, none of which I had brought to his attention, in support of this proposition. When I asked for costs, he smiled at me kindly and said "not on this occasion, Mr Morris".

A few years later I took on a brief to act for the Australian Conservation Foundation in a proceeding before the Environment Protection Appeals Board in which the ACF sought to appeal a decision of the EPA in relation to the provision of mixing zones adjacent to the Shell refinery in Corio Bay. I spent the weekend studying the Act and mixing zones. But at the commencement of the hearing, on 6 October 1980, my opponents, represented by Warren Fagan QC and H McM Wright of counsel, ambushed me with the submission that the ACF was not "a person aggrieved" and did not have any right to bring the proceeding. Displaying greater confidence than may have been appropriate, I declared that I was ready to meet the submission and carefully explained why it should not be upheld. But the then chairman of the board, Mr Russell Barton, did not agree. Russell Barton was a studious lawyer, who ran a tight but fair hearing. In the mould of his generation he was socially aware but conservative in disposition. As it turned out, over the next twenty years he played a crucial role in the development of the law concerning third party environmental appeals. In the *Shell* case he held that the ACF was not capable of being a person aggrieved and threw its case out. Some years later the Full Court of the Supreme Court of Victoria reversed this decision.[5]

The decision of the Full Court in the *ACF* case revolved around the words "person aggrieved". The court held that, in their context, these words should be interpreted broadly and included a body such as the ACF, particularly as the ACF had objected to a preliminary determination by the authority to grant a licence. The ACF case was obviously important to the future of third party appeals; as a standard strategy for those opposed to third party appeal rights is to question the standing of the appellant.

A couple of years later, in *McCubbin v Environment Protection Authority*[6], the decision of the Full Court in the ACF case was put to the test in the context of an appeal by members of the community against the issue of a licence to discharge wastes to land at Dutson Downs in Gippsland. Mr H McM Wright of counsel appeared for the licence applicant and, once again, contested the competency of the appeals. But the Planning Appeals Board rejected this argument, holding that the liberal interpretation given by the Full Court to the expression "person aggrieved" meant that a wide range of persons had an interest in the matter. Mr Wright also argued that the grounds upon which appellant objectors could rely were limited. The board did not need to rule upon the validity of the various grounds of appeal because ultimately it directed the issue of a licence. However it did observe that there must be some causal connection between the consequence or effect complained of and the proposed discharge, emission or deposit of waste. It added:

> *"The board also considers that in order for a ground of appeal to be valid, it need not be phrased in the precise terms of section 33B(2)(a) or (b). A ground of appeal is valid if the matters raised are in fact based upon either (a) or (b).*
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> *"The board also agrees with Mr Wright's submission that the suitability of another site for the disposal of the wastes is not a valid ground; nor is the suitability of alternative methods of disposal of the wastes."*

When the *Environment Protection Act* was passed in 1970 there was provision for appeals, but not by third parties. This was quickly changed. In 1972 third party appeals were introduced, with the relevant Minister, Mr Borthwick, commenting as follows:

> *"When the principal Act was drafted there was an unintentional but serious omission in the appeal procedure. The way the Act now stands the only person who has the right to appeal on the issue or non-issue of a licence for the discharge of any waste, or, the conditions attaching to any licence, is the licence applicant or the licensee, as the case may be. It is now realised that it may be possible*

5 *Australian Conservation Foundation v Environment Protection Appeal Board* [1983] VR 385.

6 (1985) 20 APA 381.

> *for the rights of many third parties to be seriously affected by the issue of a licence or the conditions of a licence, and it is therefore essential that these parties should have an avenue through which their views may be made known. An example would be that the authority might decide to issue a licence for a discharge into a stream which a downstream water user or a downstream waste discharger might consider to be detrimental to his interests. He should have the right of appeal and the amendments provide for an orderly process of hearing these appeals."*

The appeal process which was initially introduced actually involved an appeal to the EPA in respect of its own decision; but a person who was aggrieved by the determination of the authority could then appeal to the Environment Protection Appeal Board.[7] The right of a third party to appeal against a decision of the EPA was expressed to be on certain grounds. These grounds are fundamentally the same as the grounds which are in the current Act.

In 1984 the Act was amended and the provision which gave third parties a right of review was modified. This amending Act introduced section 33B, which remains the operative provision. It is useful if I set it out in some detail.

Section 33B(1)(a) provided that if the authority issues a works approval a person aggrieved by the decision may apply to the tribunal for review of the decision.

Section 33B(2) then provides:

> "... an application for review under sub-section (1)(a) is to be based on either or both of the following grounds –
>
> (a) that if the works are completed in accordance with the works approval, the use of the works will result in a discharge, emission or deposit of waste which will unreasonably and adversely affect the interests, whether wholly or partly of that person;
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> (b) that if the works are completed in accordance with the works approval, the use of the works will result in a discharge, emission or deposit of waste which –
>
> (i) will be inconsistent with State environment protection policy established for the area in which the discharge, emission or deposit will occur; or
>
> (ii) where there is no State environment protection policy established for that area, would cause pollution."

The meaning of the words used in section 33B(2) is obviously critical in determining the scope of any third party right of appeal.

The next step of significance in the development of this branch of the law occurred in 1986, at a time when I was seeking to reform municipal boundaries in Victoria. So I must rely upon the written report and my knowledge of the two principal players. The case is known as *McKinlay v Environment Protection Authority*[8] and the two principal players were Russell Barton and Michael Wright. I have already spoken of Mr Barton. Mr Wright has been an outstanding barrister in the planning and environment field over many years. Defining a strategy has always been a central focus. This case would have been no exception. The case concerned a proposal by the Shire of Flinders to establish a garbage tip at the intersection of Browns Road and Truemans Road in Rye. Various objectors sought to have the tribunal review the decision by the EPA to grant a works approval. Mr Wright, who appeared on behalf of the Shire of Flinders, submitted that it was not open to the third party appellants to challenge the validity of the works approval. He also contended that the right of an objector in pursuing an appeal against a works approval was quite limited by reason of section 33B(2) of the Act. Mr Wright focused upon section 33B(2) and, in his canny way, stressed four points:

1. That the discharge, etc, must be under the provisions of the works approval or licence, that is, in conformity with the same. While a discharge not in accordance with the works approval may amount to the commission of an offence under the Act, that is not a matter which can be relied on by an objector under s 33B(2).

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7 See section 6 of the *Environment Protection (Amendment) Act* 1972 which introduced section 32(5) and (11), in particular Both these provisions have now been superseded

8 (1986) 24 APA 294

2 That the discharge, etc, must be one which "will", not "may", unreasonably and adversely affect the interests whether wholly or partly of that person.

3 That there must be a causal connection between the consequence or effect complained of and the discharge of waste under the provisions of the works approval.

4 That, likewise, under (b) there must be a causal link between the discharge under the provisions of the works approval and the pollution caused.

The tribunal, led by Mr Barton, adopted these points and applied them in limiting, and ultimately dismissing, the appeal. It is of significance that in this case the Tribunal held that an objector could only complain about a discharge of waste that was in conformity with the applicable works approval or licence. The works approval in that case contained the usual condition that "no discharge of leachate shall occur beyond the boundaries of the site". The real concern of the appellant objectors was that leachate would escape from the site and detrimentally affect the groundwater. But on the basis of the submissions made by Mr Wright, the tribunal held that this was not a matter properly before it on two separate bases, namely:

> "1 That the board is entitled to assume that conditions in either a planning permit or a works approval will be met by the applicant.
>
> 2 That in relation to the works approval any discharge of leachate to groundwater would not be a matter arising 'under the provisions of the works approval'."

The principles adopted by the Planning Appeals Board in *McKinlay* have been repeatedly followed ever since. During that time there have been numerous third party appeals in relation to works approvals, often by environmental groups and sometimes by commercial opponents. For example in *Carrington v Minister for Planning and Environment*[9] the EPA had granted works approval for a quarry hole in Newport to be used for a putrescible landfill. The tribunal held that for the appeal to succeed the discharge of waste from the premises must arise under the particular works approval the subject of the appeal. It stressed that the test was whether the discharge *will* (as distinct from *may*) unreasonably and adversely affect the interests of the appellant. It held that for an appeal to succeed, the appellant must show that the discharge of waste authorised under the works approval would have an adverse consequence; it was not sufficient to demonstrate that there would be a deposit of waste which would exceed the levels permitted by the works approval.

Similar decisions were made by the tribunal in *McCubbin v Environment Protection Authority*[10] and *City of Sunshine v Minister for Planning*[11].

The 1980s was the era of a series of appeals by community activists in the western suburbs, led by Alan Finch and John Kirby. Virtually all the appeals by Mr Finch and Mr Kirby failed, but they were never without their excitement. I am told the police were called on one occasion. And I remember the time when Mr Finch was behaving in a manner that led part-time member, Laurie Penttila, to look at me and say sotto voce, "what is the section that says you can throw people out". In the case of *Esmore and Finch v EPA*[12] tribunal member Dr P H N Opas commented:

> *"Mr Finch showed scant regard for the proceedings and left on three occasions during the course of the hearing returning after short intervals and was not interested enough to await the determination which was delivered in the presence of those parties who saw fit to remain. The written submission which Mr Finch made commenced by accusing the solicitors for the applicant as initiating invalid proceedings because the signature to the letter of the 9th August 1988 was forged. That allegation is wildly irresponsible and has no substance in fact. A statement of this sort which is so exaggerated and actually accuses reputable solicitors of a criminal act is something like what Oscar Wilde described as the thirteenth chime of a crazy clock which casts doubt on all prior utterances. In this instance the utterances are subsequent."*

9 (1986) 26 APA 372.

10 (1986) 20 APA 381.

11 (1987) 32 APA 183.

12 Appeal No E88/1147, 22 August 1988.

The next case worth mentioning is *58th Colro Pty Ltd v Environment Protection Authority*[13] . This involved a proposal to build a rendering plant in conjunction with an export abattoir in Pakenham. At the time the rendering industry was held in relatively few hands and there was often a suspicion that objections to new entrants, although cast in worthy environmental terms, had somewhat different motivation. Originally I had the brief for *58th Colro Pty Ltd* and, in February 1989, drafted a series of technical objections to the works approval which had been issued. I was unavailable for the hearing, and Mr Roger Gillard QC and Mr T S Falkiner of counsel represented the appellant objector. Mr Gillard carefully articulated the points I had devised, but the tribunal, chaired by Mr Barton, carefully rejected each one. Mr Gillard added an argument of his own, but even this did not succeed: the tribunal commenting "we do not think that the argument is tenable". Once again the tribunal adopted the reasoning in *McKinlay* and after considering the evidence, rejected the objector's appeal.

The *58th Colro* case is just one of many strange cases that I was involved in concerning the rendering industry. For example, I well remember the time when I was briefed by a high powered corporate solicitor to act for an elderly woman on an aged pension who lived near to a proposed plant in Maribyrnong. At the first conference, the solicitor said:

> *"It doesn't matter how long the case takes. Whatever experts you need, we will obtain. In this case we will spare no expense."*

But, strange as that experience was, nothing compares with *Staffbelt Pty Ltd v Environment Protection Authority and Kamulla Holdings Pty Ltd*[14] . Kamulla Holdings Pty Ltd wished to re-establish an abattoir at Old Hume Highway, Seymour; and, as part of this proposal, wished to establish a rendering plant. My client, Staffbelt Pty Ltd, was the owner of a rural residential allotment adjacent to the abattoir site. It had recently purchased the allotment for about $65,000. It had even obtained a planning permit to build a house on the lot. Naturally, being an adjoining landowner, it was a "person aggrieved" who could lodge an appeal pursuant to section 33B of the Act.

As so often happens in these cases the works approval which had been issued was subject to conditions to the effect that no objectionable odours should be discharged off the site. Moreover there was a draft licence for the operation of the proposed rendering plant to similar effect. I recall the proposed operator was, once again, represented by Mr H McM Wright of counsel and the hearing was before a tribunal chaired by Mr Russell Barton. It was hardly surprising that heavy reliance was placed upon the tests articulated in the *McKinlay* case in order to defeat my case. As matters transpired, notwithstanding the arguments I advanced, the tribunal adhered to the principles it had established. It said:

> *"Given the ambit of the third party appeal, ... , the Tribunal is of the view that it cannot consider the likelihood of unlicensed discharges or their impact or the likelihood and consequences of discharges that would be in breach of the works approval. Nor can it consider whether the standards set by the works approval are likely to be achieved by the licensee, or whether the licensee would be tempted to operate outside the licence.*
>
> *"As is not unknown in the case of appeals under section 33B of the Environment Protection Act the appellant seemed to conduct its case on the assumption that there would be a breach of the works approval or licence conditions. This is not a permissible approach."*

It is inappropriate to complain about the decision; and, in any event, I would no longer encourage complaints about tribunal decisions! But it is at least an open question whether the tribunal satisfactorily dealt with some of the arguments that had been advanced. For example, I put the following arguments concerning the nature of the appeal:

> "3.1 It is conceded that the tribunal should generally proceed upon the assumption that the approved works will be completed in accordance with the works approval. The word *generally* is used because there may be instances where the nature of the approved works makes it inherently improbable that the works will be completed in accordance with the works approval; in which case it would be illogical to expect the tribunal to proceed on such a false basis.

13 (1989) 3 AATR 266.

14 (1995) Appeal No 00579/95 29 March 1995.

3.2 The tribunal is required to make an assessment of the *use of the works*. This means an assessment must be made of the probable use of the works; that is, the manner in which the works will be used on the balance of probabilities. (Compare section 20C of the Act.)

3.3 The contention by the respondent that the tribunal must proceed on the assumption that the use of the works will be in accordance with the provisions of the draft licence cannot be sustained.

- The draft licence is a draft, not a final licence.
- The terms of a licence can be changed from time to time.
- The licence conditions may, or may not, be observed. This will depend upon the nature of the condition, the ease with which the condition can be satisfied and the suitability of the works to satisfy the condition.

3.4 In the present context, it is ludicrous to suggest that the inclusion of a condition in a draft licence to the effect that no objectionable odours shall be discharged off the site therefore means that the use of the works will not discharge objectionable odours. This would make a mockery of the right of third parties to appeal against the issue of a works approval."

I suppose in hindsight it was ambitious to have thought that the tribunal would have departed from the previous line of authority which had been established. But I must say that I was out-manoeuvred in this case. There had been a thirteenth chime of a crazy clock which cast doubt on all my submissions. Let me explain.

My opponent repeatedly alleged that Staffbelt Pty Ltd was controlled by a large family company that dominated the rendering industry in Victoria. On every occasion this was raised, I made no admissions. Indeed I had no instructions on the matter. I recall that the directors of the company were men of straw employed by the large family company in question; but there was no other information which identified the underlying owners of Staffbelt Pty Ltd. My opponents then obtained a subpoena, to be served on a director of the family company which controlled a substantial portion of the rendering industry in Victoria. The process server was unable to effect service, but swore an affidavit to the following effect:

> *"I attended at the residence of the director, knocked on the door, which was answered by a young man. He told me he was the director's son and that his father was not home as he was out walking the dog. I returned a few minutes later and, on this occasion, spoke to a middle aged woman. She told me she was the director's wife. When I asked if the director was available to accept service, she told me he was interstate."*

Upon this being read to the tribunal Mr Wright commented: "the dog obviously needed a lot of exercise".

A few days later the summons was served, but the director, represented by separate solicitors, was excused from attendance owing to the sudden onset of a severe back complaint.

The *Staffbelt* case illustrates the aphorism so favoured by Mr C J Canavan QC: if it is a choice between having the law on one's side and having the high moral ground, give me the latter any day!

The case of *Adams v Environment Protection Authority and Rosedale Leather Holdings Limited*[15] also heard in 1995, was one in which the high moral ground was keenly sought. I acted on behalf of a group of residents who were concerned about the establishment of a leather factory near their homes in Rosedale. Mr Canavan acted on behalf of a large national company who had obtained strong support from the Kennett Government to establish its tannery. Noise and odour were the big issues. Mr Canavan sought to undermine my position by highlighting the funding of my client's case, which appeared to have some assistance from a rival tanning business. Ultimately he succeeded in persuading the tribunal to reject the third party appeals, although there seemed to be real questions as to whether the decision contained errors of law. My clients lodged an appeal with the Full Court of the Supreme Court of Victoria. However this was thwarted when, in an extraordinary intervention, the planning scheme was changed by ministerial fiat so as to make the proposed tannery an as of right use.

15 Appeal No 1995/02881, 18-24 April 1995.

In 1997 the tribunal heard *Richmond Action Coalition on Freeways v Environment Protection Authority*[16] in which third party objectors appealed under section 33B of the Act against the issue of a works approval for a ventilation system for the Burnley Tunnel. I appeared for the builder of the tunnel. I was told, in polite terms, that the name of the appellant had been chosen without me in mind: the acronym was RACOF. The case for the builder of the tunnel was largely presented through expert witnesses, but I did advance arguments, based upon the *McKinlay* principles, designed to minimise the scope of the appeals. However the tribunal was spared from any detailed analysis of legal issues because it generally agreed with the technical evidence led on behalf of the builder of the tunnel.[17]

Upon the coming into operation of the *Victorian Civil and Administrative Tribunal Act* 1998 section 33B was subtly changed by substituting the words "whose interests are affected" for the words "who is aggrieved". The effect of this change was considered by the tribunal in *Brambles Australia Limited v Environment Protection Authority*[18]. The tribunal took the view that the approach adopted by the Full Court in the ACF case continued to be applicable and that the expression should be given a wide interpretation.

Before departing from this review, I should mention some recent cases.

In *Clean Ocean Foundation Inc v Environment Protection Authority*[19] the tribunal accepted a submission I had made on behalf of Melbourne Water and dismissed the appeal by the Clean Ocean Foundation under section 75(1) of the VCAT Act as misconceived and lacking in substance. However Balmford J overturned this decision[20], essentially because she found that the appellant may have an arguable case which should be allowed to be resolved at a full hearing. I understand that, owing to changes in the applicable policy, this case is unlikely to proceed any further.

In early 2003 the tribunal decided an appeal by various environmental groups against the extension of a prescribed waste landfill at Lyndhurst: see *Residents Against Toxic Waste in the South East v Environment Protection Authority and Sita Australia Pty Ltd.*[21] I represented the landfill operator, Sita Australia Pty Ltd. In this case, it was not RACOF; rather my opponent was RATWISE.

The decision in the RATWISE case is relatively short, but represents an advance in thinking about section 33B of the Act. First, the tribunal was required to consider whether environmental groups with no direct connection with the landfill in question could rely upon section 33B(2)(a) of the Act. One group, the Western Region Environment Centre Inc, claimed that there would be a discharge of waste that would adversely affect the interests of the people of Lyndhurst in the south east suburbs. The tribunal held that the reference to "that person" in paragraph (a) was a reference back to the appellant; and that the landfill would not adversely affect the interests of the western suburbs group.

In relation to section 33B(2)(b)(i) of the Act, which is concerned with inconsistencies with policy, the tribunal accepted the submission that the words "will result" and "will be inconsistent" require the tribunal to be satisfied on the balance of probabilities that the completed works will be used in a manner which will be inconsistent with the policy.

In relation to the assumptions the tribunal should make, it said:

> "We also consider that in determining what consequences will flow from the use of the authorised works, we should assume that the works will be carried out in accordance with the approval and that the use made of them will be in accordance with the licence issued pursuant to s. 20 by the Authority. Indeed, it would not be lawful for Sita to use the works at all without such a licence. In assessing the nature and extent of the use we must have regard to the following:

16 1977/42959, 3 December 1997

17 Mr I P Pitt, for the City of Yarra, had argued that the tribunal was in the shoes of the EPA and was not constrained by section 33B of the Act This argument does not appear to have been accepted by the tribunal

18 Application No 1999/054064, 14 December 1999

19 [2003] VCAT 320

20 [2003] VSC 335

21 P1886/2002, 14 March 2003 This case is also known as *Western Region Environment Centre Inc v EPA and Sita Australia Pty Ltd* For some unfortunate reason, this case is not on AUSTLII

(a) The terms of the Licence as it currently stands;

(b) The power of the Authority under the Act to vary the terms of the Licence from time to time;

(c) The amendments that we are told the Authority proposes to make to the Licence."

The most recent case that I am aware of was last month when the tribunal decided *Department of Defence v Mitchell Shire Council*[22]. In that case the solicitor for the EPA quoted from *Staffbelt*, which in turn quoted *58th Colro*, and which in turn quoted *McKinlay*. The tribunal then concluded:

"Thus he argued and we agree, that the tribunal must be satisfied that:

- Any impact suffered is because works are performed in accordance with the works approval.
- Compliance with the works approval will result in non-compliance with the State Environment Protection Policy.

The tribunal must be satisfied that non-compliance with State Environment Protection Policy is the cause of the discharge of waste occurring under the provisions of the works approval/licence and such impacts must be unreasonable." [23]

It does not appear that the tribunal was referred to the RATWISE case.

I now wish to make some concluding comments.

It is, perhaps, surprising that section 33B of the Act has not been subject of a detailed decision by the Supreme Court of Victoria. There are various questions which might be thought to deserve further consideration.

Let me take a typical third party appeal in which an objector seeks to review a decision by the EPA to issue a works approval. The permissible ground of appeal would appear to require the assumption that the approved works will be completed in accordance with the works approval. Presumably this includes the completion of the works in accordance with the conditions of the works approval. Section 19B(7) of the Act provides that the authority shall, not later than four months after receiving an application for a works approval, either refuse to issue the works approval or issue a works approval subject to such conditions as the authority considers appropriate. This might be thought to beg the question as to whether conditions can be imposed in relation to the use of the works. However section 21 of the Act certainly authorises certain types of conditions on a works approval which relate to the use of works and the use of premises. Whatever the answer to these matters, a question would appear to remain as to whether or not compliance with conditions on a works approval, which relate to the use of the works *once they are completed*, is to be assumed on a third party appeal. Has the *Sita* decision taken this matter beyond *McKinlay*?

Another issue that warrants consideration is the use of the word "will" in the context of a third party needing to demonstrate that the discharge of waste "will" unreasonably affect their interests. The traditional view is that in proceedings before an administrative tribunal the onus of proof is upon a party asserting a particular proposition. Thus it would be the burden of the third party appellant to show that a discharge of waste "will" unreasonably affect its interests. But it is also the case that matters generally need only be proved on the balance of probabilities. Sometimes in civil proceedings a higher standard is required[24] and questions may need to be resolved as to whether a higher standard applies in this case. Once again, has the *Sita* decision taken this matter beyond *McKinlay*?

A further question that may arise in some cases is whether or not a State environment protection policy has been "established for the area in which the discharge, emission or deposit will occur". The alternative ground, namely that the discharge would cause pollution, is clearly unavailable if a State environment protection policy has been established for the relevant area.[25] In one sense, there are State environment

22 [2004] VCAT 473.

23 [2004] VCAT 473, at [71] and [72].

24 See for example *Briginshaw v Briginshaw* (1938) 60 CLR 336.

25 See for example *Residents Against Toxic Waste in the South East v Environment Protection Authority and Sita Australia Pty Ltd* [2003] VCAT.

protection policies which have been established for the whole of Victoria. It is possible that section 33B(2)(b)(ii) should be interpreted as if it read "where there is no *relevant* State environment protection policy established for that area". For example, it would be odd if the existence of a State environment protection policy in relation to the air environment, which applied throughout the whole State, rendered section 33B(2)(b)(ii) irrelevant in a case concerned with the discharge of liquid waste to a creek. On the other hand, if a policy clearly dealt with a particular part of the environment there is obviously no scope to argue that section 33B(2)(b)(ii) is available because the policy does not contain some provision that the third party appellant regards as desirable.

It is not always appreciated that State environment protection policy is a species of delegated legislation. Although described as "policy", in some circumstances it may establish rules which must be followed. This emphasises the care which must be taken in the drafting of such policy. It is desirable that the document be clear and concise; and that provisions designed to be guidelines, rather than requirements, are clearly indicated as such.

Today I have looked back, and related my personal journey, over 25 years, in relation to third party appeals against works approvals. From origin to destination, I have been privileged to be closely connected with the development of the law. From the destination I fondly look back; and consider the ideas and personalities of the likes of Russell Barton and Michael Wright. But destinations also allow one to look forward. But that is another journey. And the story of that journey must wait for another time.