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The Precautionary Principle and the Public Interest

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This article is based on a paper prepared for a conference entitled 'The Precautionary Principle in Environmental Regulation', hosted by the Australian Centre for Environmental Law.

Part One: Introduction

Public interest environmental law in Australia has continued to evolve remarkably in the last ten years since Justice Stein's seminal judgement in *Leatch*.[1] In contrast, the application of the precautionary principle in New South Wales has not moved forward since this seminal case.

On the one hand, legislation is poor, contradictory and uncertain, as noted by others.[2] On the other hand, NSW case law has not moved the principle forward and arguably it has gone backwards. This failure is seen as symptomatic of a wider malaise within the Court, namely, a failure in large part to develop a specialist environmental jurisprudence.

Part Two: What is the precautionary principle?

Many commentators have traced the development of the precautionary principle back to concepts in the German socio-legal tradition and Swedish environmental laws and policies, [3] through its employment internationally[4] and thence into domestic laws.[5] It is not the purpose of this paper to revisit this history. Rather, this part seeks to tease out the different strands of the precautionary principle, based on an appreciation of the ambiguity of the term.

A review of the literature, international instruments, case law, legislation and policies pertaining to the precautionary principle reveals a number of interrelated strands.[6]

1) The classic principle

This version states that full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage. This is the definition used under the *Environment Protection and Biodiversity Conservation Act 1999* (section 391(2)). It is less common, however, than its classic status might suggest. Rather, it is the classic formulation by virtue of being a shorthand way of referring to the principle.

In *Leatch,* Stein J took this starting point and described the precautionary principle as a 'statement of common sense'. He continued:

It is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. Its premise is that where uncertainty exists concerning the nature or scope of environmental harm (whether this follows from policies, decisions or activities), decision makers should be cautious.

His Honour then considered relevant provisions of the *National Parks and Wildlife Act 1974* (NSW) and concluded that these were aimed at the preservation and protection of endangered fauna. He observed that although the precautionary principle is not expressly stated, the cautious approach it suggests is 'clearly consistent with the subject matter, scope and purpose of the Act.'

Based on a lack of information about the Giant Burrowing Frog (and consequently about the impact of the proposed road on the survival of the Frog), His Honour concluded:

Application of the precautionary principle appears to me to be most apt in a situation of a scarcity of scientific knowledge of species population, habitat and impacts. Indeed, one permissible approach is to conclude that the state of knowledge is such that one should not grant a licence to 'take or kill' the species until much more is known.

Stein J uses the language of common sense and caution and the need to "take a hard look" *in applying the precautionary principle*. This is much more than simply using common sense and caution

2) The guiding principle

In NSW, the definition of ecologically sustainable development (ESD) is found under the *Protection of the Environment Administration Act 1991*. Section 6 provides, amongst other things, that the objectives of the Environment Protection Authority are:

(a) to protect, restore and enhance the quality of the environment in New South Wales, having regard to the need to maintain ecologically sustainable development…

One of the elements of ecologically sustainable development, as defined in the Act, is

(a) the precautionary principle—namely, that if there are threats of serious or irreversible environmental 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:

(i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and

(ii) an assessment of the risk-weighted consequences of various options,

This definition is in turn derived from the Intergovernmental Agreement on the Environment 1992.[7]

3) The "caution" principle

Contrary to the classic approach in *Leatch*, this conception conflates precaution with caution, rendering obsolete the distinction between precautionary action and preventative action. In other words, nothing more than caution or common sense are required.

The case of *Nicholls v Director-General of National Parks and Wildlife Service*[8] and *Alumino (Aust) Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979*[9] exemplifies this approach. Whilst apparently accepting the "common sense" approach adopted by Stein J in *Leatch*,[10] Talbot J seemed unsympathetic to the principle in *Nicholls*. In fact, the conclusion reached more readily exposes the difficulties inherent in a "common sense" approach:

while [the precautionary principle] may be framed appropriately for the purpose of a political aspiration, its implementation as a legal standard could have the potential to create interminable forensic argument. Taken literally in practice it might prove to be unworkable. Even the applicant concedes that scientific certainty is essentially impossible. It is only 500 years ago that most scientists were convinced the world was flat. The controversy in this matter further demonstrates that all is not yet settled.[11]

In *Alumino* Justice Talbot seemed to effectively undercut the approach taken in applying the precautionary principle in *Leatch*. His Honour noted:

Miss Murrell, in her final address, placed considerable emphasis upon the application of the so-called precautionary principle. I do not think that I do any injustice to what Stein J had to say about the precautionary principle in *Leatch v National Parks and Wildlife Service & Anor* (1993) 81 LGERA 270 when I reiterate what I said in *Nicholls v Director General of National Parks and Wildlife & Ors* (1994) 84 LGERA 397 to the effect that the precautionary principle adds nothing to the consideration that the Court undertakes by applying common sense. It is obvious that where development involves the handling and processing of materials which have the potential to cause significant harm to the health of human beings and vegetation, extreme caution must be used in determining whether development consent will be forthcoming.[12]

Such an approach leaves no room for the independent application of the precautionary principle. As was said in the Queensland case of *CSR v Caboolture Shire Council* [2001] QPELR 398, the precautionary principle did not depart in any important way from the approach conventionally taken by decision-makers. [13]

As Nagorcka has argued

Instead of "precautionary" and focused on warding off a possible evil beforehand, it becomes merely "cautionary" that is engaged in employing prudence in regard to a known evil. Australian and international documents have conflated these two ideas.

4) The qualified principle

International examples of a qualified approach to the principle are to be found under both the Rio Declaration 1992 and the *Climate Change Convention 1992*, which provide

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to

prevent environmental degradation (Principle 15, Rio Declaration)

Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be *cost-effective* so as to ensure global benefits at the lowest possible cost (Article 3(3), Climate Change Convention 1992).

This is closely related to the caution principle insofar as it is a weak – and arguably conceptually flawed[14] - variant that requires other factors to be weighed, be they as part of a cost-benefit analysis or considerations under a statutory scheme. As Pearlman J stated in *Greenpeace Australia Ltd v Redbank Power Company Pty Ltd and Singleton Council*:

The application of the precautionary principle dictates that a cautious approach should be adopted in evaluating the various relevant factors in determining whether or not to grant consent; it does not require that the greenhouse issue should outweigh all other issues."[15]

5) The evidential principle

This construction of the principle recognizes that the precautionary principle has evidential implications for the manner in which the courts should deal with environmental disputes. Beyond this, however, there is little agreement. Some have argued that it involves a reversal of the onus of proof[16] while others have suggested that the standard of proof is or should be affected.[17] Little attention has been devoted to how the principle operates under different legal circumstances (such as merits review, judicial review, exercise of the discretion).

According to the interpretation favouring a reversal of onus, it will be impermissible to carry out an activity unless it can be shown that it will not cause unacceptable harm to the environment. Examples include resolutions to suspend dumping of low-level radioactive waste at sea without the prior approval of parties (as was done under the London and Paris Conventions), a moratorium on whaling, commencing again only with approval of parties to the international Whaling Convention. The effect of such devices is to require states to submit proposed activities to international scrutiny.[18]

6) The uncertainty principle

The precautionary principle may differ according to the level of uncertainty required to trigger it. As Birnie and Boyle have noted, the precautionary principle is the same as the precautionary approach to many commentators.[19] However, the precautionary principle may apply in situations of high uncertainty with a risk of irreversible harm entailing high costs, while the precautionary approach is more appropriate where the level of uncertainty and potential costs is merely significant and the harm is less likely to be irreversible.[20]

7) The harm principle

Certain instruments also take a different approach as to the thresholds of harm. Principle 15 of the Rio Declaration and Article 3 of the Climate Change Convention speak of serious and irreversible harm. By way of contrast, marine environment treaties and the *Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa* do not.

Part Three: The precautionary principle under NSW legislation

The Honourable Paul Stein has noted that references to ecologically sustainable development and the precautionary principle are largely to be found in objectives, provide no real guidance, and are often aspirational, ambiguous, inconsistent and uncertain.[21]

This is certainly the case in NSW. The following three examples drawn from NSW legislation briefly highlight how both the objects and criteria for exercising functions deal with ESD differently.

The principal piece of planning legislation, the *Environmental Planning and Assessment Act 1979*, seeks to *encourage* ESD (as one of eight factors). In making a decision as to whether to grant consent to a development, ESD is not mentioned as a factor to be considered.[22]

Similarly, in the *Threatened Species Conservation Act 1997* one object is to ***promote*** ecologically sustainable development. The Director-General must have regard to these objects in preparing threat abatement plans and guidelines (alongside other aspects such as likely social and economic consequences). In deciding whether to grant a licence to take or kill threatened species, the Director-General must take into account the principles of ESD (but not the objects).

Under the *Coastal Protection Act 1979*, the treatment of ESD is reversed – namely, one of the objects is bounded by the need to "***have regard to ESD***"[23] while in exercising functions throughout the Act, the Minister is to promote ESD.[24]

These three examples highlight both the aspirational and inconsistent elements of sustainable development under NSW legislation noted by the Honourable Paul Stein.

Part Four: The precautionary principle under NSW case law

This part of the paper will assesses whether the Land and Environment Court has developed a discrete jurisprudence, consistent with its specialist mandate.

i) A public interest jurisprudence?

It has been strongly argued that the Court has had a key role in the development of public interest environmental law. By and large, these developments have been traced

elsewhere[25] and this paper will not attempt to reproduce them in any depth. However, the paper will briefly outline a schematic appraisal of public interest environmental law in three areas: formal access to justice, substantive access to justice and psychological or social barriers to justice.

The **first aspect** of public interest environmental law in NSW and Australia began with the remodeling of NSW planning laws and the establishment of a specialist Court. Since the "trail-blazing"[26] section 123 of the *Environmental Planning and Assessment Act* 1979 (NSW) and the oft-quoted passage of Street CJ in *Hannan Pty Ltd v The Electricity Commission of NSW (No. 3)*,[27] it has become abundantly clear that the public interest embraces the notion of public participation. Street CJ said:

the task of the Court is to administer social justice in the enforcement of the legislative scheme of the Act. It is a task that travels far beyond administering justice inter partes.[28]

Of course, public participation can take many forms apart from the right to institute proceedings. The Land and Environment Court has also been active in developing the range of participatory rights. For example, objectors have no third party rights of appeal in relation to the bulk of development appeals before the Court. Such rights are restricted to "designated" developments. The presumption is that Council will look after the interests of objectors. However, as judges of the Court have long recognised, Councils' refusal of a proposal may be motivated less by planning considerations than by a political desire not to alienate (part of) its constituency.[29] In short, Councils may pass the ball to the Land and Environment Court and oppose a development in name only. In such circumstances, the Court has recognised that all relevant parties are not before the Court. As cases such as *Double Bay Marina Pty Ltd v Woollahra MC*[30] and *Geoform Design Pty Ltd v Randwick CC*[31] exemplify, the Court has used its "inquisitorial" powers to ensure a full consideration of the issues.[32]

Furthermore, the Court has been vigilant in ensuring that notification provisions in relation to proposals are adequate.[33] As Stein J said in *Canterbury District Residents and Ratepayers Association v Canterbury MC*[34] misleading notices defeat the purpose of notification and the purpose of the legislation:

This is because it may prejudice the proper consideration of the draft LEP by the Council. The Council, even if it accidentally misleads members of the public as to the contents of a proposed plan, may be deprived of the benefit of the presentation of the objectors' views. Put another way, a defective or misleading notice may take away from the public the right to object to a plan and their opportunity to participate in the process. Furthermore, those who do actually respond to the notice may have misconceived their objections or their submissions may be incomplete.[35]

The fundamental importance of providing proper notice was affirmed by the Court of Appeal's decision in *Litevale v Lismore CC* where it was held that the requirement was a principle of law.[36]

The **second aspect** of public interest environmental law in NSW is exemplified in a passage from Justice Toohey:

Relaxing the traditional requirements for standing may be of little significance unless other procedural reforms are made. Particularly is this so in the area of funding of environmental litigation and the awarding of costs. There is little point in opening the doors to the courts if litigants cannot afford to come in.[37]

Consequently, the Court has advanced and fine-tuned a number of procedural changes to complement the formal right to institute proceedings. Many of these changes have been triggered by the public interest dimension of many environmental disputes. These include different approaches towards the ordering of costs, security for costs and undertakings for damages where the litigation is brought in the public interest. For instance, the case of *Oshlack v Richmond River Council* went to the High Court on the issue of costs. In this "key case",[38] the High Court agreed with Stein J at first instance in the Land and Environment Court (as he then was) and affirmed the width of the discretion of that Court in awarding costs, including the relevance of public interest litigation.[39] Likewise, in *Carriage v Stockland (Constructors) Pty Ltd and Ors* [No 5] [2003] NSWLEC 197 Justice Pain distinguished the case of *Melville v Craig Nolan & Associates Pty Ltd* [2002] NSWCA 32.[40] Her Honour held, in upholding an earlier decision by herself on the issue, that:

"I did not consider that I was bound by the majority decision in Melville as the discretion I exercised under section 69(3) of the Court Act is broad and the only limitation on me is that I exercise that discretion judicially."[41]

In reaching this conclusion she made the following finding:

"I consider the majority judgments are wrong on this issue because these findings essentially undercut the open standing provisions which the New South Wales Parliament has conferred in s 123 of the EP&A Act by effectively imposing a requirement on those seeking to use that provision to demonstrate, in order to resist a security for costs application, that they have a special interest which would justify not awarding security for costs because that may result in the litigation being barred. This ultimately leads, in my view, to a narrowing of the right under s 123 of the EP&A Act to take action regardless of the nature of the Applicant's interest in the subject matter of the proceedings because that right could be effectively limited by interlocutory processes before a final hearing."[42]

The new Chief Judge, Justice Peter McClellan also recently announced a number of changes to achieve the best

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possible outcome for the community including case Management in complex merit cases, Court-appointed experts in appropriate circumstances and refinements to the rule regarding cots in merit cases.[43] These complement other changes such as a liberal approach to discovery and inspection, lack of formal pleadings and case management techniques.[44]

The third aspect relates to the long tradition of making the Court accessible to the public in more intangible ways, to be a *"court of the people"*.[45] For example, the Court for most of its time has never robed, the Court Rules have been rewritten in plain English and the Court welcomes solicitors as advocates.[46] The Court has also established a Court Users Group for discussion and consultation about the way the Court is run.[47]

These three aspects show how the Land and Environment Court has developed a "public interest" jurisprudence or "public interest environmental law". The question that arises, though, is what is the difference between public interest environmental law and public interest jurisprudence in, say, administrative law or consumer law? It is arguable that there is little to public interest environmental law that sets it apart from these areas. Put another way, it could perhaps be said that the Court has developed a public interest jurisprudence in an environmental setting. The next section will analyse whether the Court has developed environmental principles as an outgrowth of its specialised knowledge of the area.

ii) an environmental jurisprudence?

These public interest developments clearly indicate a rich history on the part of the Court as a special Court. There is also little doubt that the establishment of the Court has helped in the development of environmental law. For example, acting in its supervisory role the Court is ensuring that decisions are properly made. Thus, a consistent body of law in relation to, say, environmental impact assessment[48] may send a message to decision-makers in the first instance that they must take a "hard look" at the proposal and take their environmental obligations seriously. Importantly also, it may allow the public to be involved on an informed basis.[49]

In addition, the fact of establishment – that is, the creation of the Land and Environment Court itself - coupled with a body of law emanating from a single source may have an educative effect in itself. As Stein has argued:

"The creation of an integrated specialist jurisdiction has heightened government, industry and community perception of environmental issues and has facilitated a better integration of environmental considerations in decision-making processes [emphasis added].[50] "

In this passage Justice Stein is invoking the language of the Brundtland Report,[51] which argued that a key strategy for the achievement of sustainable development is the integration of economic and environmental considerations in decision-making processes.[52] In this sense, the Court can be seen as facilitating the move towards ESD.

Furthermore, the Court's role in the emergence of a public interest jurisprudence also has clear implications for the development of environmental law. By dismantling the barriers to justice and opening up the Court, the Court allows the public to demand accountability and acts as a conduit for the development of a jurisprudence. As Sax has argued, this is a vital arm in the struggle for environmental protection:

"Litigation, then, provides an additional source of leverage in making environmental decision-making operate rationally, thoughtfully, and with a sense of responsiveness to the entire range of citizen concerns. Courts alone cannot and will not do the job that is needed. But courts can help to open the doors to a far more limber governmental process. The more leverage citizens have, the more responsive and responsible their officials and fellow citizens will be.[53] "

Furthermore, as Justice Stein argued in 1995, public participation can also help to spawn the development of an environmental jurisprudence itself:

"Citizen participation in environmental decision-making, the ability to restrain breaches of the law by civil enforcement and to judicially

review decisions, have the proven capacity to develop a new body of environmental law.[54] *"*

The Court has also taken a more active stance towards the development of environmental law. A few examples demonstrate this. First, *Corkill v Forestry Commission of NSW (No 2)*[55] (perhaps more commonly known as "the Chaelundi case") placed the issue of wildlife conservation on a firm ecological footing (whilst apparently also setting back development in NSW). Second, the public trust doctrine (much developed in the US) was the basis of the Court's decision in *Willoughby CC v Minister Administering the National Parks and Wildlife Act*[56] . Third, the Court has been vocal in its preference for civil remedies over criminal prosecutions in pollution matters[57] and defining the liability of officers and corporations under pollution law. Finally, it has also stressed the "right to pollute" also carries *obligations*.[58]

These examples show that the Land and Environment Court has actively sought to use its expertise in such matters to involve itself in the development of environmental law and principles.

However, it is also arguable that a large jurisprudential gap remains and that the Court has not engaged actively in relation to the notion of ESD. In a 1996 article considering the Court's incorporation of the precautionary principle, Pearson concluded that *"the experience in the New South Wales Land and Environment Court has so far not been encouraging"*[59] in relation to the precautionary principle and ESD generally.

It is arguable that the Court has failed to play the lead role in the interpretation of the idea.[60] This is based on the idea of the Court – as a specialist institution - being a key element in the development of environmental law:

While statutory and constitutional provisions provide the stepping stones for judges, there is nevertheless a role for independent judicial activism. Judges can play the crucial role of helping to establish, and not merely act upon society's values with regard to the environment. They can do this by giving legal cladding to environmental principles such as sustainability, intergenerational equity and, regarding a higher level of proof necessary to allow development, the precautionary principle. Another way is, when faced with unclear law to apply in cases, to apply environmental principles.[61]

The Court itself is aware of the need – in appropriate circumstances – to take issue with sustainable development. As Stein J and Assessor Bull noted in *Northcompass Inc v Hornsby Council*:

"The applicability of ESD principles to designated development under Part 4 of the EPA Act and the inter-relationship of the principles has never been fully explored in the court."[62]

Likewise, as two judges of the Court have noted on separate occasions:

"One of the current challenges for the Court is how to apply and interpret the principles of ESD in order to attempt to translate them into practical reality.[63] *"*

"...It will undoubtedly become increasingly imperative to come to grips with the translation of high sounding principles into practical application."[64]

It is true that the Court's role is circumscribed by the nature of the adversary system (as discussed above). However, in the Land and Environment Court this is true in a limited sense only: that is, the selection of issues and, in this regard, there have been a number of cases which have raised issues of sustainability directly (and, no doubt, many more indirectly).[65] Once before the Court, the Court has wide powers to intervene and act inquisitorially.[66] Such powers – in conjunction with the duty to consider the public interest[67] – have the potential to markedly shape the nature of a matter and use the Court's expertise and powers to determine environmental matters in the light of contemporary environmental principles. In *Greenpeace Australia Ltd v Redbank Power Company Pty Ltd and Singleton Council*[68] and *KA Cox Constructions v Concord Council*[69] the Court has noted the relationship between the public interest and the principles of sustainable development.

Nevertheless, as shall be shown by an analysis of *Planning Workshop v Pittwater Council*,[70] there seems a general reticence to engage in debates about sustainable development. In this case McClellan and Preston of counsel submitted that:

"This case provides an opportunity for the Court to exercise its powers to promote the concept of ecologically sustainable development. This would not only be consistent with adopted policy of all levels of government in Australia. One important benefit of merits review by the Court is that it can lead to the establishment of sensible principles for the guidance of other decision-makers, such as local councils in the administration of the Act [the (NSW) Environmental Planning and Assessment Act 1979]"[71]

The submission went on to set out in considerable detail the manner in which the Court could use the language and principles of sustainable development to determine an "everyday", garden-variety, development and subdivision proposal in respect of land at Bilgola. For example, the submission argued that the development infringed numerous principles of ecologically sustainable development – conservation of biodiversity (by its clearance of native vegetation and associated effects); intergenerational equity (by virtue of the likely damage to the natural values of the site); intra-generational equity (as occupants of the subdivision would benefit at the expense of others); and the precautionary principle (as ameliorative measures were uncertain).[72]

In short, the submission tried to facilitate what Justice Talbot has referred to as *"the translation of high*

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sounding principles into practical application."[73] By making a decision in these terms, the submission argued, the Court could assist other decision-makers. In this respect, the submission was very much based on the reasoning of Brennan J in *Re Drake v Minister for Immigration and Ethnic Affairs (No 2) ("Drake (No 2)")*

"There are powerful considerations in favour of a Minister adopting a guiding policy. It can serve to focus attention on the purpose which the exercise of the discretion is calculated to achieve, and thereby to assist the Minister and others to see more clearly, in each case, the desirability of exercising the power in one way or the other. Decision-making is facilitated by the guidance given by an adopted policy, and the integrity of decision-making in particular cases is better assured if decisions can be tested against such a policy. By diminishing the importance of individual predilection, an adopted policy can diminish the inconsistencies which might otherwise appear in a series of decisions, and enhance the sense of satisfaction with the fairness and continuity of the administrative process.[74] *"*

However, Justice Pearlman dealt with the submission in the following terms:

"Mr McClellan submitted that in these circumstances this Court was bound to apply that principle by virtue of that principle being contained in the IGAE, to which the Australian Local Government Association is a party, and by virtue of its adoption under the TSC Act as part of that Act's objective in promoting ecologically sustainable development. There are, however, countervailing arguments. The IGAE does not bind local government to observe its terms, and the amendments to the EP&A Act made by the TSC Act, whilst they reflect the thrust of the TSC Act, do not expressly incorporate into the EP&A Act the TSC Act's objective in s 3(a) of the promotion of ecologically sustainable development (thus incorporating the precautionary principle). Moreover, the amendments to the EP&A Act do not apply to the development application in this case as a consequence of the savings provisions in sch 7 of the TSC Act, as I have earlier explained.

I have put very shortly the respective arguments on this point. They merit full consideration in an appropriate case. This case is not, however, an appropriate case because, as I have said, consideration under s 90(1)(c2) has in any event led me to the conclusion that development and subdivision approval ought to be refused as a consequence of the significant effect of the proposed development upon the environment of the squirrel glider."[75]

By declining to base its decisions in the language and logic of sustainable development, the Court has largely failed to provide such guidance to other decision-makers. It has thus failed to help the development of environmental law and principles to the extent envisaged in the Parliamentary debates.

This experience is mirrored in relation to the precautionary principle.

Part Four: The Way Forward

The failure of the Court to develop an environmental jurisprudence is easily explicable. There are obvious difficulties in coming to terms with the principle(s) of ecologically sustainable development. The idea is clearly an emerging principle which is in the process of constant regeneration and change. As I have argued elsewhere, the dynamic nature of the term has made it difficult to disentangle ends and means, determine its nature (a process or a result) and/or decide what we should do with the idea (promote or seek to achieve it).[76] The Court alluded to some of the difficulties in coming to grips with the idea in *Northcompass Inc v Hornsby SC*.[77] In that case, the proposal was for a bioremediation facility to convert green waste away from landfill sites. Whilst agreeing that the proposal was "an excellent example of ecologically sustainable development",[78] the Court also noted the manner in which ecologically sustainable development principles may conflict. In this case, the uncertain aspects of the development from a public health point of view meant that the precautionary principle might be in conflict with the principle of intergenerational equity. The application was refused on its merits.

It is also important to note that ecologically sustainable development is a relatively new concept (at least in its current manifestation)[79] which, for example, was not current at the inception of the Land and Environment Court in 1979. Moreover, as briefly noted above, its reception into legislation and policy in NSW has been *ad hoc* and fragmented.[80]

The third point to note is that the Court does not consider itself bound by the principles of ecologically sustainable development in the absence of express statutory provisions[81] and "there does not seem to be strong support for the argument that ESD principles are relevant considerations, that is, considerations which must be taken into account.[82] At best, then, the

principles *may* be taken into account by a decision-maker.

What then can be done? What lies ahead?

First, one approach would be for legislation to mandate that the precautionary principle be taken into account. Section 391 of the *Environment Protection and Biodiversity Conservation Act 1997* provides a model:

"Minister must consider precautionary principle in making decisions

Taking account of precautionary principle

(1) The Minister must take account of the precautionary principle in making a decision listed in the table in subsection (3), to the extent he or she can do so consistently with the other provisions of this Act.

Precautionary principle

(2) The precautionary principle is that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage.

Similarly, section 39Z of the Commonwealth *Great Barrier Reef Marine Park Act* 1975 provides that in preparing management plans the Great Barrier Reef Marine Park Authority is to have regard to both the protection of world heritage values and the precautionary principle.

The Queensland *Integrated Planning Act 1997* seems to go further in fettering the discretion of decision-makers in order to achieve environmental outcomes. It places an obligation on certain decision-makers to advance the purpose of the Act (which is to seek to achieve ecological sustainability). The Act also sets out acts which amount to advancing the purpose, one of which is applying the precautionary principle

Second, there is room for judicial interpretation. As Pearson has noted, the precautionary principle and ecologically sustainable development presently occupies a middle ground under NSW legislation. It is neither an irrelevant nor relevant consideration. This means that it can be taken into account, but failure to do so will not vitiate the decision. To some, this offers an opportunity - as Justice Stein argued whilst at the Court of Appeal:

"there is the opportunity, if not the obligation, in the absence of clear legislative guidance, to apply the common law and assist in the development and fleshing out of the principles. Our task is to turn soft law into hard law. This is an opportunity to be bold spirits rather than timorous souls and provide a lead for the common law world. It will make a contribution to the ongoing development of environmental law".[83]

Third, an independent role for the precautionary principle would see it as having implications for the burden of proof. What has never been clarified is what these implications might be. As Farrier has observed, the precautionary principle is triggered by proof of threats falling short of the degree of probability recognized by science as constituting proof. However, current laws fail to offer clear guidance regarding what degree of proof is required before the principle is operational. Nor do they address the equity issue of placing this burden on those opposing an activity or development. As Weeramanty J argued in his dissenting opinion in the *Nuclear Tests Case (New Zealand v France)*,[84] France was in the best position to provide information about the activity of nuclear testing, being the proponent.

In fact, it has been argued that the precautionary principle reverses the onus of proof. Indian law reflects this approach with the onus being on the proponent to demonstrate that the activity is environmentally benign.[85] However, two issues remain unclear. First, it is still unclear what triggers the reversal (for example, a prima facie threat). Second, it is unclear to what standard the proponent must demonstrate an activity is benign. As Nagorcka has noted, the usual standard of balance of probabilities would allow for development to proceed where it was more likely than not that a threat of serious or irreversible environmental harm would occur. On the other hand, a criminal standard would seem too high.[86] This area is ripe for judicial exploration, with an obvious mandate to do so.

Fourth, if the Government commitment to evidence-based programs is to be taken seriously, then the application of the precautionary principle is likely to become more of an issue as decision-makers become more conscious of their responsibilities within this environment.

Fifth, the mainstreaming of sustainable development needs to continue. Sustainable development is certainly in most environmental and related legislation.[87] However, it is not built into non-environmental laws, such as tax law, corporations law and trade practices legislation. Provisions such as section 516A of the *Environment Protection and Biodiversity Conservation Act 1997*, which places obligations on all Commonwealth agencies and authorities to report, monitor and look forward vis-a-vis sustainable development provide promise in this respect.

Conclusion

To move the precautionary principle forward in NSW – as has happened in other jurisdictions – legislation in NSW needs to provide more (and consistent) guidance to decision-makers. At the same time, the Court needs to engage actively with the idea of sustainable development and the application of the precautionary principle to resolve some of the operational issues. The resolve of the new Chief Judge to develop Planning Principles for merit appeals together with other changes to expert evidence, case management and costs arguably signals that the Land and Environment Court is keen to move beyond its admirable history in developing a public interest jurisprudence to develop a specialist jurisprudence befitting a specialist Court.

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Case Update: Protecting Whales in the Australian Whale Sanctuary

Jessica Simpson, Solicitor and Samantha Magick, Public Affairs Officer, EDO New South Wales

Photo: Neil Stone

EDO New South Wales will continue to push for Australian law to be upheld in its case against a Japanese whaling company operating in the Australian Whale Sanctuary adjacent to Australia's Antarctic Territory.

Japanese whalers are expected to resume operations in Australian waters from the middle of next month, despite the creation of an Australian whale sanctuary by the Australian Government in 2000.

The Federal Court is yet to rule on whether EDO New South Wales, representing the Humane Society International, has the leave to bring a case against Kyodo Senpaku Kaisha Ltd.

In a submission recently presented to the court, the Australian government has expressed its preference for pursuing diplomatic channels, rather than legal ones.

The EDO is of a different view. "It is entirely appropriate to challenge whaling in our courts" says EDO Solicitor, Jessica Simpson.

"There are laws in place which recognise Australia's sovereignty over Australia's Antarctic Territory and which protect whales in Australian waters. Those laws should be upheld," Simpson says.

If successful in getting approval from the Federal Court to proceed, the EDO will seek an injunction against the whale hunt, and a declaration that Kyodo Senpaku Kaisha's activities are illegal under the EPBC Act.

For more information contact Jessica Simpson, Solicitor, EDO New South Wales on 02 9262 6989.

Court Rejects Appeal for Environmental Flows in NSW

Ilona Millar, Principal Solicitor and Samantha Magick, Public Affairs Officer, EDO New South Wales

EDO New South Wales is disappointed by the decision in the New South Wales Court of Appeal on 9 February 2005 to dismiss an appeal by the NSW Nature Conservation Council challenging the validity of the Water Sharing Plan for the Gwydir Regulated River Water Source 2003.

The Environmental Defender's Office (NSW) and barristers Tim Robertson SC and Jayne Jagot, acting on behalf of the NCC, argued that the plan should be declared invalid because it failed to adequately address environmental necessities, such as performance indicators and environmental flows.

The Court's decision not to invalidate the plan was made notwithstanding the Court's finding that the Minister for Natural Resources had failed to satisfy the statutory requirement to set aside water for environmental health prior to allocating water for irrigation and other consumptive purposes.

The Gwydir River is located in the environmentally stressed Murray-Darling Basin and comprises the internationally significant Gwydir wetlands. In NSW, water sharing plans are to set the basis for allocating water for environmental and consumptive uses. The Court of Appeal's judgment clearly found that the statutory framework in the Act is intended to prioritise environmental flows and maintain the health of the Gwydir river system and its wetlands.

While the Court of Appeal's decision upholds the legal validity of the Gwydir water sharing plan, the fact remains that the Minister failed to give effect to the statutory priorities in the Act. It is extremely disappointing that, although NSW has not demonstrated that the basis for determining environmental flows is scientifically sound or ecologically sustainable, the general rules provided in the Gwydir WSP are considered legally sufficient.

In December 2004, the National Competition Council recommended that $26 million of NSW competition payments be withheld on the basis that NSW had failed in its obligation under the water reform agreement signed by federal, state and territory governments in 1994 and the 2004 National Water Initiative to demonstrate that it had set environmental allocations and extraction limits using best available science.

The Environmental Defender's Office and Nature Conservation Council are reviewing their options in light of the court's decision.

Gunns Sues Environmentalists

Gunns Limited, Tasmania's largest logging company, has served writs on twenty defendants - 'the Gunns 20' - claiming $6.4 million dollars in damages associated with claims arising from the campaign to protect Tasmania's old-growth forests.

The company is claiming damages for financial loss allegedly suffered as a result of protest actions by the environmental groups and individuals, including the Wilderness Society and Greens Senator Bob Brown.

The writ includes allegations of machinery sabotage, destruction of property, trespassing, blocking access to land and obstructing police officers at Lucaston, Hampshire, Triabunna and Styx logging sites.

The Wilderness Society faces a total compensation claim of $3.5 million after being accused of organising a campaign against Gunns.

The defendents have filed papers outlining their intent to contest the company's claim against them at the Supreme Court.

Senator Brown said he would fight the writ and it would not stop him from campaigning for Australian forests.

"We are elected to speak up for our constituency," said Senator Brown, who faces a $305,000 compensation claim.

"Neither Gunns nor anybody else will silence me for one, nor I am sure any of the other defendants here when it comes to defending and campaigning for our forests."

Coogee Coastal Action Coalition in WA Court of Appeal

The long-running campaign by the Coogee Coastal Action Coalition Inc against the proposed Port Coogee marina in Cockburn will go to the Court of Appeal for a hearing on 3 March 2005.

The proposed Port Coogee marina involves developing a 1.5 kilometre strip of the coast and 37 hectares of foreshore and seabed which had been rezoned 'urban' in the Metropolitan Region Scheme in June 2004.

Due to a prior agreement between the developers and the Western Australian Planning Commission, the rezoned land is to be transferred to the developers in freehold. In effect the Minister has authorised parts of the foreshore and ocean to be privatised, in perpetuity.

Marina and boat harbours have traditionally been earmarked as 'parks and recreation' or 'public purpose' reservations in the Metropolitan Region Scheme. Under such public reservations the use of traditional boat harbours has been regulated successfully for the benefit of the broader community, but has not been alienated.

The Government is preparing to transfer the seabed at Coogee to the proponent, as well as large areas of the coastal strip, including old sand dunes and natural limestone headlands. These are to be sold to the developer for about $50 per square metre - far less that market value according to a review carried out by the Parliament's Public Accounts Committee. The proponent intends to subdivide most of this land and seabed into small residential lots, including canal-style lots.

Whilst the proposal includes a boutique marina, the majority of the ocean and seabed are to be used solely for private houses. Nearly two thirds of the ocean is to be filled in and there will be no boat ramps, boating clubs or boat lifting and maintenance facilities in this marina. Indeed, the actual marina component is quite small.

The Coogee Coastal Action Coalition's campaign recognises the need for a new boat harbour, but also argues that there are several alternative sites where a marina can be built without destroying the natural beach.

The Coalition has spent three years campaigning for the Port Coogee development to be modified so that the beaches are retained and redeveloped as the area's first genuine regional beach node available to the public, but still incorporating appropriate urban development.

Part of the Coalition's legal challenge claims the development will take away the common law rights of the public to access and use the beach and sea area for activities such as swimming, fishing, diving and navigating.

EDO Western Australia and Dr Hannes Schoombee will present the Coalition's argument that the Minister and the Planning Commission did not properly consider the planning matter but acted to carry out the project agreement that was entered into between the Planning Commission and the proponent.

For more information, please contact Leigh Simpkin, Principal Solicitor, EDO Western Australia on 08 9221 3030.

Community Group Denied Standing in Airport Land Clearing Appeal

Leigh Simpkin, Principal Solicitor, EDO Western Australia

On 19 August 2004, the Administrative Appeals Tribunal (AAT) refused an appeal by the Urban Bushland Council (UBC) against the Federal Minister for Transport and Regional Service's decision to allow clearing of 40 hectares of bushland at Perth Airport, to build a Woolworths distribution store.

In summary, the basis of the decision was that UBC did not have 'standing' under section 27 of the Commonwealth *Administrative Appeals Tribunal Act 1989*, which confers jurisdiction on the tribunal to review various administrative decisions, including (in this case) decisions made pursuant to the Commonwealth *Airports Act 1996*.

Section 27(2) of the AAT Act states that: "*an organisation or association of persons, whether incorporated or not, shall be taken to have interests that are affected by a decision if the decision relates to a matter included in the objects or purposes of the organisation or association."*

Although the UBC was recognised as a peak environmental and conservation body, the Deputy President of the Tribunal distinguished this situation from the general law:

*"We're dealing here with the question of standing under the AAT Act but, perhaps more to the point, we're dealing with standing to seek review of a decision under the Airports Act, that of course being the Act which confers the jurisdiction on the Tribunal in relation to certain decisions under that Act, and that is in section 242 [*of the *Airports Act]."*

"I accept ... the intention of Parliament regarding the person or persons who would have standing to seek review by the Tribunal of a decision of the Minister to approve a major development plan or, indeed, to reject a plan or, as in this case, to approve a plan subject to conditions. I accept... that the intention of Parliament, having regard to the subject matter, scope and purpose of that Act, is that standing is to be confined generally to the relevant airport lessee body in question and not to be granted to third parties – even to bodies such as the UBC."

Reference was made to the submissions on behalf of the Minister regarding the analysis of Dowsett J in the Federal Court in *Brisbane Airport Corporation Ltd v Wright* [2002] FCA 359. The contention by counsel for UBC that the *Brisbane Airport Corporation Ltd's* analysis of the subject, scope and purpose of the *Airports Act,* which led to its conclusion that Parliament must be taken to have intended that the Airport-lessee company alone is an 'interested party', for the purposes of standing to seek review of a decision, occurred in the context of an attempt to review a 'master plan' rather than a 'major development plan', was rejected.

In response to the evidence before the AAT of the UBC's objects being:

- to promote the recognition and conservation of urban bushland;
- to promote policy development for the protection and management of urban bushland;
- to provide an avenue for lobbying and seek legislative changes for bushland protection; and
- to raise awareness of the values and problems facing urban bushland,

the Deputy President of the AAT concluded that:

"I'm not prepared to go so far as to say that there is absolutely no relationship between the Minister's decision and those objects but what I do say is that any such relationship is of far too general, insubstantial and tenuous a nature to give standing ...".

And so the bush was, and will remain, cleared.

For more information, please contact Leigh Simpkin, Principal Solicitor, EDO Western Australia on 08 9221 3030.

Queensland Biodiscovery Legislation Commences Operation

Jo Cull, Solicitor, EDO North Queensland

Following the Queensland Biodiscovery Discussion Paper, released in May 2002, Queensland's Draft Biodiscovery Bill was released in June 2003, with the final Bill introduced to Parliament in May 2004. The Bill was passed in August 2004 and commenced in November, making it the first biodiscovery specific legislation in Australia.

Unfortunately, a number of the issues raised by various interest groups in submissions on the Draft Bill were not addressed prior to its enactment.

Failure to include the precautionary principle; failure to provide for public notification and appeals in relation to collection authorities; exclusion of the application of the *Freedom of Information Act* 1992 in a range of circumstances and failure to recognize and protect Indigenous traditional knowledge and ensure equitable sharing of benefits with owners of traditional knowledge are particularly disappointing aspects of the new legislation.

For further information contact Joanna Cull, Principal Solicitor, EDO North Queensland on 07 4031 4766.

New Marine Parks Legislation for Queensland

Jo Cull, Solicitor, EDO North Queensland

On 7 October 2004, the Queensland Parliament passed the *Marine Parks Bill 2004*. The new legislation is the result of a review of the *Marine Parks Act 1982* to strengthen the marine parks and achieve modern standards for conservation, management and ecologically sustainable use of marine parks. The *Marine Parks Act 2004* brings in new provisions to deal with establishment and revocation of marine parks, reclamation of tidal land, zoning and management plans, general enforcement provisions and review procedures.

The EDO Queensland and EDO North Queensland made a joint submission on the review. Some of the comments contained in the submission have been reflected in the legislation. The *Marine Parks Bill* originally had detailed objects including ecologically sustainable development, which suggested that development was likely to occur in these areas. These provisions have been removed. Further, the revocation procedures have also been amended to ensure that certain procedures have to be followed to revoke a marine park, and that revocation cannot occur by way of Regulation, unless there is a parliamentary motion supporting such revocation and notice given of the debate.

The new Act also adopts the recommendations in the submission in relation to standing, granting environmentalists and groups the same standing rights as under other Acts such as the *EPBC Act* and *Nature Conservation Act*, to seek judicial review of decisions made under the Act.

The submission also recommended allowing third parties to take enforcement action in relation to all of the offences created under this Act. However, the third party rights have been limited to only two of the nine offences in the Act - the power to bring enforcement orders to remedy or restrain entry or use of the Park for a prohibited purposes, and unlawful serious environmental harm.

The amended *Marine Parks Act 1982* is available online at www.legislation.qld.gov.au.

For more information, please contact Jo Cull, Principal Solicitor, EDO North Queensland.

Case Update: Mackay Conservation Group Inc v East Point Pty Ltd and Mackay City Council

The EDO-NQ is representing Mackay Conservation Group in a Planning and Environment Court appeal that has been set down in the Planning and Environment Court in Brisbane for an eight day hearing in March this year.

The appeal is against the approval of a large coastal development at East Point in Mackay. The appeal will involve a range of expert witnesses including a geomorphologist, oceanographer, zoologist, ecologist, civil engineer and planner.

Please c*ontact Kirsty Ruddock on kruddock@edo.org.au for further details.*

New Commonwealth Zoning Plan for the Great Barrier Reef

On 1 July 2004, the new Commonwealth *Great Barrier Reef Marine Park Zoning Plan* 2003 commenced.

The new zoning plan is designed to amalgamate the park into one zoning plan. It also increases the number of marine national park zones or green zones (no take zones) from 4.5% to 33.1% and decreases the amount of general use zones from 78% to 33.8%.

The Commonwealth's zoning of the Great Barrier Reef Marine Park (GBRMP) extends from the low water to beyond the continental shelf. It excludes waters internal to Queensland which commence at the low water mark and include internal waters such as estuaries, rivers, creeks, channels and significant mangrove forests.

On 20 October 2004, the Queensland Government in response unveiled the new Great Barrier Reef Coast Marine Park. The new marine park took effect on 5 November 2004. The park ensures consistency in application of zoning and activities permitted within a zone adjacent to the GBRMP. The proposed zoning will have the same use and entry provisions as the new Commonwealth zoning for GBRMP, and will extend to the high water mark.

It will not however include estuaries, rivers, creeks, channels, and mangrove forests that are not already in State marine parks. Beach fishing will still be permitted along 85% of the Great Barrier Reef coastline, while most of the beaches where fishing will be banned are remote and barely accessible. Following the public consultation process, recreational fishing will also be permitted in four designated areas-Sabina Point and McDonald Point in Shoalwater Bay, an area next to Charon Point Conservation Park and selected beaches on Bamborough Island.

More information about the new Great Barrier Reef Coast Marine Park can be found on the Queensland EPA website at www.epa.qld.gov.au or by phoning 1800 177 291.

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Footnotes

[1] *Leatch v National Parks and Wildlife Service and Shoalhaven City Council* (1993) 81 LGERA 270. In this case, the EDO acted for May Leatch in challenging the issue of a licence to kill endangered fauna granted to Shoalhaven City Council to construct a road through bushland in North Nowra, the land being habitat for a number of endangered species including the giant burrowing frog. The case was the first time the Court had applied the precautionary principle – it refused to grant a licence because it had insufficient information to make a decision.

[2] The Honourable Justice Paul Stein AM (2000) "Are Decision-makers too Cautious with the Precautionary Principle 17 Environmental Planning and Law Journal 1 at p 3.

[3] See, for example, Cameron J and Tim O'Riordan T (1994) *Interpreting the Precautionary Principle,* Earthscan and Birnie and Boyle (2002) *International Law and The Environment*, Oxford University Press.

[4] The Ministerial Declaration of the Second International Conference on the Protection of the North Sea 1987 and Principle 15 of the Rio Declaration.

[5] The Honourable Justice Paul Stein AM (2000) "Are Decision-makers too Cautious with the Precautionary Principle 17 Environmental Planning and Law Journal 1.

[6] See Wyman L (2001) "Acceptance of the Precautionary Principle – Australian v International Decision-Makers" 18 *Environmental Planning and Law Journal* 395 at 396 who identifies at least three different formulations from weak to strong.

[7] Section 3 of the IGAE sets out a number of principles which the parties agree will inform their decision-making in the environmental context, including polluter pays, intergenerational equity and the precautionary principle.

[8] (1994) 84 LGERA 397.

[9] (Unreported, Land and Environment Court, Talbot J, 29 March 1996).

[10] See *Nicholls v Director-General of National Parks and Wildlife Service* (1994) 84 LGERA 397 at p 419. See also more generally the comments of Justice Talbot in Talbot RN (1995) "Important Decisions of the Court" Paper Presented to University of NSW School of Town Planning, Planning Law and Practice Short Course, Wednesday 29 November 1995 at pp 16-18.

[11] *Nicholls v Director-General of National Parks and Wildlife Service* (1994) 84 LGERA 397 at p 419.

[12] *Alumino (Aust) Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979* (Unreported, Land and Environment Court, Talbot J, 29 March 1996) at p 14.

[13] Nagorcka F (2003) "Saying what you mean and meaning what you say: precaution, science and the importance of language" 20 *Environmental Planning and Law Journal* 211 at p 216

[14] As Nagorcka has argued: "The precautionary principle exists to overcome the "decision-making paralysis" that results from scientific uncertainty by building into these processes a bias towards protecting the environment. If the principle itself involves a cost/benefit analysis it loses this ability and we arrive again at the beginning of the problem": Nagorcka F (2003) "Saying what you mean and meaning what you say: precaution, science and the importance of language" 20 *Environmental Planning and Law Journal* 211 at 217.

[15] (1995) 86 LGERA 143.

[16] See Cameron J and Abouchar J (1991) "The Precautionary Principle: A Fundamental Principle of law and Policy for the Protection of the Global Environment" 14 *Boston College International and Comparative Law Review* 1 at p 22

[17] See Birne and Boyle at pp 117 and 119 and Nagorcka F (2003) "Saying what you mean and meaning what you say: precaution, science and the importance of language" 20 *Environmental Planning and Law Journal* 211 at 221.

[18] Birne and Boyle at p 118.

[19] Birne and Boyle at p 116.

[20] Birne and Boyle at p 116.

[21] The Honourable Justice Paul Stein AM (2000) "Are Decision-makers too Cautious with the Precautionary Principle 17 Environmental Planning and Law Journal 1 at p 3.

[22] In cases such as *Greenpeace Australia Ltd v Redbank Power Company Pty Ltd and Singleton Council* (1995) 86 LGERA 143 and Cox Constructions Pty Ltd v Concord Council (Unreported, LEC, Bignold J, 27 February 1995 the concept of ESD was considered as part of the public interest

[23] 3b) is "to encourage, promote and secure the orderly and balanced utilisation and conservation of the coastal region and its natural and man-made resources, having regard to the principles of ecologically sustainable development".

[24] See ss 37A and 54A.

[25] See Stein P (1996) "The Role of the Land and Environment Court in the Emergence of Public Interest Environmental Law" 13 *Environmental and Planning Law Journal* 179.

[26] An expression used by McClelland J (1983) Paper Presented to the All Nations Club, 4 May 1983 at p 8 and more recently by Talbot RN (1996) "Approaches to Environment Protection: The Land and Environment Court of NSW" Paper Presented to the Australasian Conference of Planning and Environment Courts and Tribunals *Shared Goals, Different Approaches* held on 7-8 October 1996, Melbourne at p 6.

[27] (1985) 66 LGRA 306.

[28] *Hannan Pty Ltd v The Electricity Commission of NSW (No. 3)* (1985) 66 LGRA 306 at p 313.

[29] See McClelland J (1981) Paper Presented to Australian Institute of Urban Studies Conference, Sebel Town House, Sydney, 22 October 1981 at pp 6-7.

[30] (1985) 54 LGRA 313 per Cripps J.

[31] (1995) 87 LGERA 140 per Pearlman J.

[32] See, in particular, where the Court may "inform itself on any matter in such manner as it thinks appropriate and as the proper consideration of the matters before the Court permits" ((NSW) *Land and Environment Court Act* 1979 s 38(2)) and the Court "obtain the assistance of any person having professional or other qualifications relevant to any issue arising for determination in the proceedings and may receive in evidence the certificate of any such person" ((NSW) *Land and Environment Court Act* 1979 s 38(3)). Based on the approach taken in these cases and the issues arising from resident groups not being parties, the EDO recently proposed, and the government accepted, an amendment to the *Land and Environment Court Act* to allow for joinder of parties where, amongst other things, it is in the public interest: see s 39A.

[33] See *CSR v Yarrowlumla SC* (Unreported, Land and Environment Court, Cripps J, 2 August 1985); *Monaro Acclimatisation Society v The Minister* (Unreported, Land and Environment Court, Stein J, 2 March 1989); *Porter v Hornsby SC* (1989) 69 LGRA 101; *Canterbury District Residents and Ratepayers Association v Canterbury MC* (1991) 73 LGRA 317; *Curac v Shoalhaven CC* (1993) 81 LGERA 124; *Friends of Katoomba Falls Creek Valley Inc. v Minister for Planning* (Unreported, Land and Environment Court, Pearlman J, 31 January 1996).

[34] (1991) 73 LGRA 317.

[35] *Canterbury District Residents and Ratepayers Association v Canterbury MC* (1991) 73 LGRA 317 at p 320.

[36] (Unreported, Court of Appeal, Cole, Sheppard and Rolfe JJ, 29 September 1997).

[37] Toohey (1989) "Environmental Law – Its Place in the System" in *Proceedings of the First NELA/LAWASIA International Conference on Environmental Law* June 1989 at p 79. The passage is also contained in the judgments of Justice Stein in *Oshlack v Richmond River Council and Iron Gates Development Pty Ltd* (Unreported, Land and Environment Court, Stein J, 18 February 1994) at pp 3-4 and *Seaton v Mosman Council and The Bathers Pavilion Pty Ltd* (Unreported, Land and Environment Court, Stein J, 25 June 1996) at pp 4-5.

[38] As defined by the former Chief Judge in her Keynote Address to the New Zealand Planning Congress. The Honourable Justice Pearlman AM, Chief Judge of the Land and Environment Court of New South Wales *Managing Environmental Impacts - The Role of the Land and Environment Court of New South Wales* delivered as a Keynote Address at the Australia - New Zealand Planning Congress Wellington, New Zealand 9 April 2002.

[39] See *Oshlack v Richmond River Shire Council & Anor* (1994) 82 LGERA 236; (1996) 91 LGERA 99; and (1997) 96 LGERA 173].

[40] In *Melville v Craig Nolan & Associates Pty Ltd* [2002] NSWCA 32, the Court of Appeal considered the question of security for costs where a litigant was impecunious. At first instance, the impecunious claimant had brought proceedings under section 123 of the *Environmental Planning and Assessment Act 1979* for injunctive and declaratory relief regarding the invalidity of a development consent. Security for costs were sought and granted in the Land and Environment Court under s 69 of the *Land and Environment Court Act 1979*, which dealt with the power of the Court to make orders regarding security for costs. The Court of Appeal held that whilst section 69 did confer a discretionary power, it should not be read to maintain the "basic" or general" rule that an order for security

for costs would not be made against an impecunious person. Accordingly, the majority of the Court re-exercised the discretion in favour of an order for security for costs.

[41] See *Carriage v Stockland (Constructors) Pty Ltd and Ors* [No 5][2003] NSWLEC 197 at para 36.

[42] See *Carriage v Stockland (Constructors) Pty Ltd and Ors* [No 5][2003] NSWLEC 197 at para 35.

[43] The Honourable Justice Peter McClellan (2003) "Land & Environment Court – Achieving The Best Outcome For The Community" Speech Delivered at The EPLA Conference 28-29 November 2003, Newcastle

[44] The most recent example is in relation to a new Practice Direction for expert witnesses. For a full discussion of all these issues see generally Stein P (1996) "The Role of the Land and Environment Court in the Emergence of Public Interest Environmental Law" 13 *Environmental and Planning Law Journal* 179.

[45] As was claimed in the publicity surrounding the advent of the Court: see Anon (1991) *Land and Environment Court, 1980-1991: Navel-Gazing Time?* at p 17.

[46] See (NSW) *Land and Environment Court Rules* 1996 generally and on the subject of robing see Part 2 r 8. See also (NSW) *Land and Environment Court Act* 1979 s 38(1) in relation to classes 1, 2 and 3 and an anonymous paper entitled *Land and Environment Court, 1980-1991: Navel-Gazing Time?* in relation to the success of the Court in meeting its mandate of informality (at p 17).

[47] See Pearlman ML (1996) "Introduction" in *Land and Environment Court of NSW: Annual Review 1996* at p 1.

[48] Ramsay and Rowe, amongst others, have questioned whether there is a link between judicial review in relation to environmental impact assessment and substantive outcomes: see Ramsay R and Rowe G (1995) *Environmental Law and Policy in Australia* Butterworths, Sydney at p 512. On the other hand, the Forestry Commission (now State Forests) could arguably be seen to have undergone a transformation as a result of the scrutiny of judicial review: see Bonyhady T (1993) *Places Worth Keeping: Conservationists, Politics and Law* Allen and Unwin, Sydney at pp 83-103.

[49] See, for example, Prineas v *Forestry Commission of NSW* (1983) 49 LGRA 402 at 417; *Liverpool CC v RTA (NSW)* (1991) 744 LGRA 265 at 278 and Schaffer Corporation Ltd v Hawksbury CC (1992) 77 LGRA 21 at p 30.

[50] See Stein P (1995) "A Specialist Environmental Court: An Australian Experience" in Robinson D and Dunkley J (eds) *Public Interest Perspectives in Environmental Law* Wiley Chancery at pp 256-273 at p 264.

[51] The full title is WCED (World Commission on Environment and Development) (1987) *Our Common Future* Oxford University Press, Oxford.

[52] See, in particular, WCED (World Commission on Environment and Development) (1987) *Our Common Future* Oxford University Press, Oxford at pp 62-65. However, in a recent paper, Justice Stein and Sue Mahony have argued *against* the inclusion of economic factors in the weighing up process: see Stein P and Mahony S (1997) Sustainable Development: From Theory to Practice: Incorporating Sustainability Principles in Legislation" Paper Presented to the Third Environmental Outlook Conference, Australian Centre for Environmental Law, 9-10 October 1997 at p 6.

[53] Sax JL (1971) *Defending the Environment* Vintage Books at p 115.

[54] Stein P (1995) "An Antipodean Perspective on Environmental Rights" 12 *Environmental and Planning Law Journal* 50 at p 53.

[55] (1991) 73 LGRA 126.

[56] (1992) 78 LGERA 19. For discussion of this case see Bonyhady T (1995) "A Usable past: The Public Trust in Australia" 12 *Environmental Planning and Law Journal* 329 at pp 330-331.

[57] See *Farrell v Dayban Pty Ltd* (Unreported, Land and Environment Court, Cripps J, 7 June 1989) and Hemmings J (1990) "The Role of the Land and Environment Court in Pollution Control" Paper Presented to National Environmental Law Conference, 15 June 1990.

[58] As Justice Cripps said in *SPCC v CSR Ltd*: CSR Limited was given a licence to pollute. Its licence was conditional upon it not polluting any more than permitted and maintaining certain standards to ensure that its limit was not exceeded. Its licence placed it in a special category over and above other persons and corporations and consequently imposed on it certain obligations. In effect, CSR was trusted so to conduct its operations that it would not pollute the water more than that for which permission was given. (Unreported, Land and Environment Court, Cripps J, July 1989). See also the Court's dismissal of a submission that licences imposed targets not limits in *SPCC v BHP Pty Co Ltd (No 1)* (1991) 74 LGRA 351.

[59] Pearson L (1996) "Incorporating ESD Principles in Land-Use Decision-Making: Some Issues after Teoh" 13 *Environmental and Planning Law Journal* 47 at p 53.

[60] B Preston SC, and J Smith, *Legislation Needed for an Effective Court* published in the proceedings of the Nature Conservation Council Conference, 27 - 28 August 1999.

[61] Robinson D (1995) "Public Interest Environmental Law – Commentary and Analysis" in Robinson D and Dunkley J (eds) *Public Interest Perspectives in Environmental Law* Wiley Chancery pp 294-326 at pp 314-315.

[62] *Northcompass Inc v Hornsby Council* (Unreported, LEC; Stein J and Assessor Bull 26 August 1996).

[63] Stein P (1995) "An Antipodean Perspective on Environmental Rights" 12 *Environmental and Planning Law Journal* 50 at p 53.

[64] Talbot RN (1996) "Approaches to Environment Protection: The Land and Environment Court of NSW" Paper Presented to the Australasian Conference of Planning and Environment Courts and Tribunals *Shared Goals, Different Approaches* held on 7-8 October 1996, Melbourne at p 17.

[65] Apart from those cases stated throughout the paper, a number of other cases have also raised issues or revealed plans related to principles of ecologically sustainable development: see, for example, *Simpson v Ballina Council* (Unreported, Land and Environment Court, Stewart A, 27 July 1993); *Brecknock v Sydney CC* (Unreported, Land and Environment Court, Talbot J, 9 February 1996); *Sydney Water Corp Ltd v South Sydney CC* (Unreported, Land and Environment Court, Stein J, 21 March 1996); *Bottrill v Snowy River Council* (Unreported, Land and Environment Court, Watts A, 30 August 1996); *Tymbrand Pty Ltd v Sydney CC*, Jensen A, 3 September 1996); and *In Adam Pty Ltd v South Sydney CC* (Unreported, Land and Environment Court, Andrews A, 6 September 1996).

[66] See, in particular, (NSW) *Land and Environment Court Act* 1979 s 38(2).

[67] (NSW) *Land and Environment Court Act* 1979 s 39(4).

[68] (1995) 86 LGERA 143.

[69] (Unreported, Land and Environment Court, Bignold J, 27 February 1995) at pp 4-6.

[70] Written submissions by McClellan PD and Preston B in *Planning Workshop Ltd v Pittwater Council*.

[71] Written submissions by McClellan PD and Preston B in *Planning Workshop Ltd v Pittwater Council* at pp 1-2 .

[72] Written submissions by McClellan PD and Preston B in *Planning Workshop Ltd v Pittwater Council* at p 43.

[73] Talbot RN (1996) "Approaches to Environment Protection: The Land and Environment Court of NSW" Paper Presented to the Australasian Conference of Planning and Environment Courts and Tribunals *Shared Goals, Different Approaches* held on 7-8 October 1996, Melbourne at p 17.

[74] (1979) 2 ALD 634 at p 640.

[75] *Planning Workshop Ltd v Pittwater Council* (Unreported, Land and Environment Court, Pearlman J, 22 August 1996) at pp 30-31.

[76] Smith J (1997) "Skinning Cats, Putting Tigers in Tanks and Bringing Up Baby: A Critique of the Threatened Species Conservation Act (NSW) 14 *Environmental Planning and Law Journal* 17 at pp 23-24.

[77] (Unreported, Land and Environment Court, Stein J with Assessor Dr C Bull, 26 August 1996).

[78] (Unreported, Land and Environment Court, Stein J with Assessor Dr C Bull, 26 August 1996) at p 24.

[79] Justice Stein and Sue Mahony refer to the timelessness of the principle and prefer to see it as undergoing a "revival": see Stein P and Mahony S (1997) Sustainable Development: From Theory to Practice: Incorporating Sustainability Principles in Legislation" Paper Presented to the Third Environmental Outlook Conference, Australian Centre for Environmental Law, 9-10 October 1997 at p 7.

[80] For a review of the legislative position in NSW and Australia see Stein P and Mahony S (1997) Sustainable Development: From Theory to Practice: Incorporating Sustainability Principles in Legislation" Paper Presented to the Third Environmental Outlook Conference, Australian Centre for Environmental Law, 9-10 October 1997 at pp 5-12. The principle of ecologically sustainable development has also been incorporated in numerous international instruments

EDO Network News

Australian Capital Territory

EDO Australian Capital Territory welcomes June Weise as Administrator.

New South Wales

EDO New South Wales would like to thank Scott King for his hard work as Scientific Advisor.

Tom Holden will begin as the new Scientific Advisor in March 2005.

North Queensland

Two positions are currently available at EDO North Queensland.

PART-TIME ADMINISTRATOR

EDO-NQ is seeking an experienced part time office administrator with strong office administration and financial management skills (including familiarity with MYOB) to join our Cairns office. The position is 20 hours per week at SACS award level 4.1 ($36, 7890) pro rata.

PART-TIME SOLICITOR

EDO-NQ is seeking a part time solicitor to join our Cairns office. Experience in the field of environmental law preferable but not essential. The position is 3 days per week at SACS award level 5.1 ($41,039) pro rata.

For a position description and selection criteria phone Kirsty Ruddock on 07 4031 4766 or email kruddock@edo.org.au

Applications close 5pm Monday 7 March 2005.

Queensland

EDO Queensland has moved offices to Level 9, 193 North Quay (Corner Herschel St) Brisbane QLD 4000. The new telephone number is 07 3211 4466 and new fax number is 07 3211 4655.

Victoria

EDO Victoria welcomes Thierry Basset into the position of Projects and Administration Coordinator.

Also, special thanks to Barnaby Ilrath for all his work as Solicitor with EDO Vic.

Western Australia

The EDO WA 2005 'Water Law' Conference will be held on 8 July 2005. This conference will interest anyone who uses water in Western Australia.

A range of speakers will look at how current laws affect the quality and quantity of our water resource and how those laws can be improved. Special attention will be paid to water management plans water pricing and water trading. Whether or not we have a State Government which plans to pump water from the Kimberley, or desalinate at Cockburn Sound, this conference aims to cut through muddy waters and bring clarity into the decision-making process.

For further information, contact Leigh Simpkin at the EDO WA on 08 9221 3030.

and has been the subject of countless articles and discussions. As to the present status of international instruments in domestic law post-Teoh see Pearson L (1996) "Incorporating ESD Principles in Land-Use Decision-Making: Some Issues after Teoh" 13 *Environmental and Planning Law Journal* 47 and Blay S and Piotrowicz R (1996) 13 Environmental Planning and Law Journal 40.

[81] See *Nicholls v Director-General of National Parks & Wildlife Service, Forsetry Commission of NSW and Minister for Planning* (1994) 84 LGERA 397 at p 419; *Greenpeace Australia Ltd v Redbank Power Company Pty Ltd and Singleton Council* (1995) 86 LGERA 143 at p 153; and *Planning Workshop Ltd v Pittwater Council* (Unreported, Land and Environment Court, Pearlman J, 22 August 1996) at pp 30-31. See also Pearson L (1996) "Incorporating ESD Principles in Land-Use Decision-Making: Some Issues after Teoh" 13 *Environmental and Planning Law Journal* 47 at p 50.

[82] Pearson reaches this conclusion on the basis of an analysis of *Leatch*, *Nicholls* and *Greenpeace*: see Pearson L (1996) "Incorporating ESD Principles in Land-Use Decision-Making: Some Issues after Teoh" 13 *Environmental and Planning Law Journal* 47 at p 50.

[83] The Honourable Justice Paul Stein AM (2000) "Are Decision-makers too Cautious with the Precautionary Principle 17 Environmental Planning and Law Journal 1 at 3

[84] [1995] ICJ Rep 288.

[85] *A.P. Pollution Control Board v. Nayudu*, Civil Appeals 368-371 of 1999 (27 January 1999)

[86] Nagorcka F (2003) "Saying what you mean and meaning what you say: precaution, science and the importance of language" 20 *Environmental Planning and Law Journal* 211 at 221.

[87] As noted by the Honourable Justice Paul Stein AM in (2000) "Are Decision-makers too Cautious with the Precautionary Principle 17 Environmental Planning and Law Journal 1 at 3.

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