Human rights and environmental rights
A role for domestic courts? - an Australian perspective

Presentation by The Hon Justice Nicola Pain Land and Environment Court of New South Wales Australia to the Global Network for the Study of Human Rights and the Environment symposium (GNHRE) 30 June 2014, Tarragona, Spain

There has been much discussion of the links between the environment and human rights over a number of years at the international level.

Report of the United Nations Independent expert on human rights and the environment

On 11 March 2014 the "Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment" (Report) was delivered to the United Nations Human Rights Council.[1] The Report usefully identifies those substantive and procedural rights which must be considered if the enjoyment of such a human right is to be achieved.

Human rights obligations relating to the environment

Section II of the Report considers human rights obligations relating to the environment based on international agreements and bodies which interpret them.

The statement is made that human rights law imposes certain procedural obligations on nation states (States) in relation to environmental protection, including:

(i) duties to assess environmental impacts and make environmental information available to the public, duties to facilitate public participation in environmental decision-making, including by protection of the rights of expression and association and the provision of access to remedies for harm. Rights to

[1] John H Knox, Independent expert, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN HRC, 25th sess, UN Doc A/HRC/25/53 (30 December 2013).

information and rights to participation are linked. Both are rights in themselves and also essential to the achievement of other rights such as the right to life;[2]

(ii) duties to facilitate public participation in environmental decision-making are identified;[3] and

(iii) a duty to provide access to legal remedies is identified. States should provide an effective remedy for violations of protected human rights.[4]

State substantive obligations

States have substantive obligations to protect their populations against environmental harm which interferes with the enjoyment of human rights.[5] These substantive obligations on States include:

(i) the obligation to adopt and implement legal framework and institutional frameworks that protect against and respond to environmental harm that may or does interfere with the enjoyment of human rights;[6]

(ii) the obligation to protect their populations from environmental harm from private actors. States must play a key role in regulating and adjudicating abuse by business enterprises;[7] and

(iii) obligations to prevent transboundary environmental harm are identified.[8]

Obligations relating to members of groups in vulnerable situations

The Report recognises that vulnerable groups such as women, children and indigenous peoples may need particular protection to ensure they receive equal protection under environmental law.[9]

[2] Ibid 8 [29].
[3] Ibid 10 [36].
[4] Ibid 11-12 [41].
[5] Ibid 12 [44].
[6] Ibid 13 [47].
[7] Ibid 16 [58].
[8] Ibid 17-18 [62]-[68].
[9] Ibid 19 [69].

As with much international law or aspiration the extent to which these duties are implemented relies on States for implementation in their own political, economic and legal systems.

One part of that legal system is domestic courts. Some aspects of the requirements identified in the Report above will be considered in an Australian context.

Legal framework in Australia in relation to human and environmental rights

There is little dialogue in Australia about human rights and environmental rights at the federal level, reflecting in part perhaps the absence of such a rights framework in the *Australian Constitution*. There is no federal statute containing a charter of rights. Two Australian state or territory jurisdictions have human rights instruments. Victoria passed the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Victorian Charter) and the Australian Capital Territory passed the *Human Rights Act 2004*. While not constitutional instruments, individuals may challenge executive actions which infringe on their human rights under these statutes in these jurisdictions.

As a former British colony Australia inherited the English common law system including its adversarial litigation model. As an Australian state court judge it is interesting to see the impact of the European Union (EU) legal system with rights contained in the European Convention on Human Rights[10] on the English judicial system. The requirement for the United Kingdom to comply with the EU legal framework was achieved in part through passage and application of the *Human Rights Act 1998* (UK) (UK Human Rights Act). The UK Human Rights Act includes a clearly articulated individual human rights framework extending beyond traditional property and individual rights recognised under a common law system.

Jurisprudence is starting to develop in Victoria based on decisions considering the Victorian Charter. The Victorian Charter is modelled on the UK Human Rights Act. Cases in Victoria have considered the right to life, the right to a fair trial and the right

[10] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

to respect for family and private life.[11] The Victorian Civil and Administrative Tribunal has considered the Victorian Charter in planning appeals, particularly in the area of privacy.

All judges swear an oath of office in which they promise they will uphold the law and act impartially without fear or favour. Judicial decision-making must be impartial and not swayed by the identity of the parties before them. That is essential for courts which are reviewing governmental decisions. With the expansion of administrative law, reflecting the increasing amount of legislation passed by state and federal governments in Australia, there are likely to be increasing numbers of disputes before judges which have political consequences. This is likely to lead to more criticism of the courts.[12]

Underscoring their impartial role, Australian courts cannot choose the cases that come before them or the issues which the parties raise. In that sense their consideration of particular issues is somewhat random. This will mean that at times the law appears to lurch in new directions or suddenly gain new emphases because a particular issue of significance comes before the court. There is not necessarily a smooth path in the trajectory of law developed before courts.

Australian litigation is based on an adversarial system which relies on the parties bringing their issues and maintaining litigation to finality before the Court. There are also a number of practical and procedural issues or hurdles which affect whether cases are able to be brought before a court. This has been described as the most significant challenge to the development of judicial principles on, for example, environmental governance.[13] The same observation could be made for other areas of public law.

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[11] Justice Kevin Bell (Supreme Court of Victoria), 'Human Rights and the Environment' (Speech delivered at the Australasian Conference of Planning and Environment Courts and Tribunals, Sydney, 2010).

[12] Justice David Ipp AO, 'Maintaining the Tradition of Judicial Impartiality' in Greta Bird and Nicole Rogers (eds), *The Art of Judging, A special issue of the Southern Cross University Law Review* (Vol 12, 2008) 87.

[13] Linda Pearson, 'Australia' in Louis J Kotzé and Alexander R Paterson, *The Role of the Judiciary in Environmental Governance, Comparative Perspectives* (Kluwer Law International, 2009) 321, 344.

Judicial Review

Administrative law including judicial review of executive action is an important part of the division of power between the three branches of the Westminster system of government: the executive, the judiciary and the legislature. Countries inheriting the English common law system such as Australia inherit also the principles of administrative law based on judicial review of administrative decision-making. The right of citizens to judicial review is entrenched by the structure of the *Australian Constitution* as recently confirmed by the High Court in *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531. In most areas of governmental work subject to judicial scrutiny a decision-maker will be an elected minister or elected official or body making decisions and exercising powers conferred by statute which impact on the rights, responsibilities and interests of an individual. Ultimately the aim of this judicial recourse must be improving the quality of administrative decision-making. Many of the administrative law cases in the High Court of Australia arise from decisions made under migration law.

Standing to sue

Access to courts and tribunals is an essential requirement for public participation in decision-making.[14] A threshold matter someone approaching a court must satisfy is the existence of standing to sue to bring proceedings. Under the common law sufficient interest in a decision, historically a proprietary interest, must be demonstrated by an applicant seeking legal redress. In *Australian Conservation Foundation Incorporated v Commonwealth* (1980) 146 CLR 493 the High Court held that a special interest meaning more than a pecuniary right or interest must be demonstrated to enable access to that court. The Australian Conservation Foundation was unable to convince the court on that occasion its interest was more than intellectual or emotional. Subsequent cases adopt a somewhat wider approach to establishing the necessary interest.[15]

[14] Ibid 340.
[15] Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook Co, 5th ed, 2013) [11.80].

The principal administrative review statutes at the federal level broadly provide for legal standing for any person whose interests are (adversely) affected by a decision.[16] This has often been broadly construed by courts and tribunals.

Justiciability

Whether a particular executive or administrative decision is justiciable, namely can be brought before a court for judicial review at all, is another threshold question. Decisions which are political in nature have been found not to be justiciable.

A lengthy consideration of justiciability was undertaken in the full Federal Court of Australia in *Minister for the Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 75 ALR 218. The Federal Court had to consider whether the exercise of a prerogative power by the Federal Cabinet rather than a decision made under a statute was justiciable. The decision of the Federal Cabinet to nominate a national park for inclusion on the UNESCO World Heritage list was held to be non-justiciable as it involved a number of complex policy questions which were more appropriately dealt with in cabinet rather than by a court. The lead judgment of Wilcox J at 244-253 analyses the leading cases and the relevant history leading to his determination that a cabinet decision could be justiciable depending on the nature of the decision made and its effect, albeit not in that case.

Statutory construction by courts concerning fundamental rights

A fundamental aspect of judicial review by a court is often the construction of the relevant statute under which the administrative power challenged has been exercised. Well understood principles of statutory construction require that the words of a statute be given a purposive approach to their construction usually informed by the objects of a statute.[17]

[16] See *Administrative Appeal Tribunal Act 1975* (Cth) s 27 and *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3.
[17] D F Jackson and J C Conde, 'Statutory interpretation in the first quarter of the twenty-first century' (2014) 38 *Australian Bar Review* 168, 170.

The High Court in *Coco v R* (1994) 179 CLR 427 at 437 held that courts should not interpret statutes as interfering with fundamental common law rights without clear language. The nature of the common law means there are no fixed categories of fundamental rights. The Supreme Court of the Australian State of New South Wales (NSW) in *Fernando v Commissioner of Police* (1995) 36 NSWLR 567 (*Fernando*) and *Thiering v Daly* [2011] NSWSC 1345; (2011) 83 NSWLR 498 (*Daly*),[18] and the Supreme Court of Victoria in *Martino Developments v Doughty* [2008] VSC 517; (2008) 51 MVR 365 (*Martino*)[19] considered personal rights that are readily identifiable as fundamental personal rights which the common law protects in the absence of clear statutory language to the contrary.

Fernando concerned the powers of NSW police to take blood samples from a suspect in custody potentially in breach of a common law right prohibiting assault on a person. *Martino* considered whether a common law right to claim personal damages had been overturned by a Victorian statute. *Daly* considered a broadly similar right in relation to whether a common law right to claim damages was constrained by NSW motor vehicle accident legislation. These decisions expressly accepted that specific common law rights existed which would be affected by the statutes in question.[20]

The High Court in *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; (2003) 211 CLR 476 at 492-3 confirmed the constitutional right to seek judicial review in the High Court, which could not be overridden by legislation.

Pearce and Geddes[21] at [5.35] quote McHugh J in *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33; (2003) 214 CLR 269 at [36]:

> … nowadays legislatures regularly enact laws that infringe the common law rights of individuals. The presumption of non-interference is strong when the right is a fundamental right of our legal system; it is weak when the right is merely one to take or not take a particular

[18] *Daly* was affirmed in *Daly v Thiering* [2013] NSWCA 25; (2013) 63 MVR 14 and reversed by the High Court in *Daly v Thiering* [2013] HCA 45; (2013) 249 CLR 381, which held that there was an unmistakable statutory intention to curtail the common law right in question: at [33].
[19] *Martino* was reversed by the Victorian Court of Appeal in *Doughty v Martino Developments Pty Ltd* [2010] VSCA 121; (2010) 27 VR 499, which held that the legislature intended to abolish the common law right in question: at [24].
[20] *Fernando* at 583, *Martino* at [17], *Daly* at [147].
[21] D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis, 7th ed, 2011).

> course of action. Courts should not cut down the natural and ordinary meaning of legislation evincing an intention to interfere with these lesser rights by relying on a presumption that the legislature did not intend to interfere with them. Given the frequency with which legislatures now abolish or amend "ordinary" common law rights, the "presumption" of non-interference with those rights is inconsistent with modern experience and borders on fiction. If the presumption still exists in such cases, its effect must be so negligible that it can only have weight when all other factors are evenly balanced.

Pearce and Geddes go on to state at [5.36]:

> Notwithstanding McHugh J's pessimistic view of the value of the presumption against interference with common law principles and rights, there are many cases in which the principle has been applied.

Alison Duxbury identifies that Australian courts have not expressly used international human rights law to define common law rights in her book chapter considering the relationship between human rights and judicial review.[22]

Duxbury also identifies the presumption of statutory construction that a statute enacted pursuant to a treaty obligation should be interpreted so as to conform with the treaty obligation unless displaced by the relevant statute citing *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 247 (*Teoh*).[23] At issue in *Teoh* was whether the *United Nations Convention on the Rights of the Child* (UNCRC),[24] which Australia had ratified but not implemented in domestic legislation, could give rise to a legitimate expectation that the Minister for Immigration and Ethnic Affairs would act in conformity with the UNCRC. The High Court found that it did.

The common law duty to act fairly applies to administrative decisions which affect rights and interests of individual citizens.

Grounds of judicial review

[22] Alison Duxbury, 'Human Rights and Judicial Review: Two sides of the Same Coin?' in Matthew Groves (ed), *Modern Administrative Law in Australia* (Cambridge University Press, 2014) 78.
[23] Ibid 79.
[24] Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

There are several well defined grounds of judicial review including at least a failure of the duty to accord procedural fairness (natural justice) to a person affected by an administrative decision.

Courts have recognised for centuries that rules of natural justice apply to certain decisions. That the rules require that people obtain a fair and unbiased hearing before decisions which affect them are made is part of the fabric of the common law and is found in numerous statutes, treaties and codes of conduct.[25] This ground of judicial review for administrative decisions and the seminal decision of the High Court in *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550 established the scope of the ground in Australia. In *Kioa v West* at 584, Mason J stated that the common law duty to act fairly applies to administrative decisions which affect rights, interests and legitimate expectations of individual citizens. As an example of a decision to which the duty does not attach, his Honour gave the imposition of a rate on ratepayers and at 584 quoted Jacobs J in *Salemi v MacKellar [No 2]* [1977] HCA 26; (1977) 137 CLR 396:

> …the duty [to act fairly] does not attach to every decision of an administrative character. Many such decisions do not affect the rights, interests and expectations of the individual citizen in a direct and immediate way. Thus a decision to impose a rate or a decision to impose a general charge for services rendered to ratepayers, each of which indirectly affects the rights, interests or expectations of citizens generally does not attract this duty to act fairly. This is because the act or decision which attracts the duty is an act or decision:
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> > " ... which directly affects the person (or corporation) individually and not simply as a member of the public or a class of the public. An executive or administrative decision of the latter kind is truly a `policy' or `political' decision and is not subject to judicial review."
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> (*Salemi* [No 2] [99], per Jacobs J)

There has been much judicial consideration over time of whose interests are directly affected so as to trigger the requirement for procedural fairness. Such interests are not restricted to legal interests. Issues arise where a class of persons or the general public is affected so that the duty may not apply. Part of the duty of procedural fairness requires that a person whose interests are directly affected be given the

[25] Aronson and Groves, above n 15, [7.10].

opportunity to be heard and must therefore have sufficient notice to make any submissions about the decision pending.

Decision-makers are bound to take into account mandatory relevant matters whether explicit or implicit, which will generally require construction of a particular statute.[26]

Another longstanding ground of judicial review is that decisions must not be made that are irrational or unreasonable, the latter meaning not arbitrary or capricious or lacking in common sense.[27]

An important limit on a court engaged in judicial review is that it must not consider the merits of an administrative decision.

Remedies

Courts can declare statutory decisions invalid and void. If necessary they can make ameliorative orders the necessity for which will depend on the circumstances.

Land and Environment Court of New South Wales

Environmental protection and planning law in Australia is statute based. It is largely within the domain of state governments with limited statutes at the federal level, reflecting the different constitutional roles and responsibilities of these levels of government.

The Land and Environment Court of New South Wales (the LEC) was established in 1979.[28] In the LEC major projects which have economic consequences at state and local level and also potential for environmental harm are considered in merit appeals and judicial review proceedings. Judges and commissioners on the LEC undertake merit assessment of development projects. Judges also regularly determine judicial

[26] *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 39.
[27] *Minister for Immigration and Citizenship v Li* (2013) HCA 18; (2013) 249 CLR 332 considering *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 at 228.
[28] *Land and Environment Court Act 1979* (NSW).

review challenges to government decisions about development amongst many other statutory decisions which can be brought before the LEC.

The LEC resolves disputes in relation to decisions under a wide variety of legislation including all major environmental statutes in NSW. Judges and commissioners often focus on statutory construction which must include consideration of the objects of the relevant statutes. This has led to an evolution in the application of the principles of ecologically sustainable development (ESD) within the context of both judicial review proceedings and in merit appeals. Recognition of these principles is part of the objects of major environmental law statutes. ESD can be achieved through the implementation of the following principles and programs:

> (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,
>
> (b) inter-generational equity—namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations,
>
> (c) conservation of biological diversity and ecological integrity—namely, that conservation of biological diversity and ecological integrity should be a fundamental consideration,
>
> (d) improved valuation, pricing and incentive mechanisms—namely, that environmental factors should be included in the valuation of assets and services, such as:
>
> (i) polluter pays—that is, those who generate pollution and waste should bear the cost of containment, avoidance or abatement,
>
> (ii) the users of goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste,
>
> (iii) environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, that enable those best placed to maximise benefits or minimise

> costs to develop their own solutions and responses to environmental problems.[29]

While not located in a human rights discourse these principles resonate in human rights concerns. Intergenerational equity has been considered in judicial review proceedings as an important principle guiding administrative decision-making in relation to whether approval should be given to a permit to enable the destruction of Aboriginal relics.[30] In *Gray v The Minister for Planning* [2006] NSWLEC 720; (2006) 152 LGERA 258 ESD principles, particularly the precautionary principle, were held to apply in relation to the environmental assessment by a government planning department of a large coal mine project. This resulted in a failure to consider in the assessment process the greenhouse gas effects of burning coal from the mine for electricity generation in overseas countries.

In *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133; (2006) 146 LGERA 10 the LEC considered the precautionary principle in an appeal by a telecommunications company against the decision of a council to refuse a mobile phone tower, finding that the principle was not established in relation to potential health impacts of emissions from such towers. Intergenerational equity was also considered as relevant by the LEC in a merit appeal by a third party objector group opposing a wind farm on the basis of its visual impact on rural scenery as supportive of the need to have renewable energy to meet national and global concerns about reducing fossil fuel use.[31]

Procedural rules that facilitate access to justice in the LEC

I have referred to the requirement that standing to sue must be demonstrated under common law rules of standing in order to access a court. Most environmental statutes in NSW have broad standing provisions which provide that anyone can go to court to remedy or restrain a breach of an Act. Third party objectors to development also have limited appeal rights to the LEC in merit appeals on development projects.

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[29] *Protection of the Environment Administration Act 1991* (NSW) s 6.
[30] *Anderson v The Director-General of the Department of Environment and Conservation* [2006] NSWLEC 12; (2006) 44 LGERA 43.
[31] *Taralga Landscape Guardians Inc v Minister for Planning* [2007] NSWLEC 59; (2007) 161 LGERA 1.

Since the LEC was established in 1979 there have been a number of public interest cases where individuals or community organisations have sought relief in the LEC in both merit appeals and judicial review proceedings.

Costs rules that courts apply are also important as these inhibit public interest proceedings. In merit appeals the usual rule is that each party pay its own costs unless it is fair and reasonable to make another costs order.[32]

In judicial review proceedings the usual rule is that costs are awarded in favour of the successful party. The LEC has a specific rule that in public interest matters this rule does not apply automatically in public interest litigation.[33] There are a number of cases where the Court has not made a costs order against an unsuccessful public interest litigant where the proceedings have merit and particularity.[34]

Security for costs orders can also inhibit access to courts including in judicial review proceedings. Recently implemented court rules for all superior courts in NSW provide that security for costs orders will not generally be made in judicial review proceedings.[35]

In 2009 the first cost capping order in the LEC was made early in public interest proceedings to limit any costs order that might be made at the completion of proceedings.[36] This is one mechanism to ensure that public interest cases can proceed without the 'freezing' effect of an adverse costs order.

Judges exercising powers in other jurisdictions

A judge's ability to consider rights whether framed as environmental rights or human rights, and whether explicitly or implicitly, depends inevitably on the nature of their court system, their jurisdictional limits and the society in which they operate. It is

[32] Land and Environment Court Rules 2007 (NSW) r 3.7.
[33] Ibid r 4.2.
[34] See *Gray v Macquarie Generation (No 2)* [2010] NSWLEC 82 and *Hill Top Residents Action Group Inc v Minister for Planning & Anor (No 3); Strang v Minister for Planning & Anor* [2010] NSWLEC 155; 176 LGERA 20.
[35] Uniform Civil Procedure Rules 2005 (NSW) r 59.11.
[36] *Blue Mountains Conservation Society Inc v Delta Electricity* [2009] NSWLEC 150; (2009) 170 LGERA 1.

fascinating as an Australian judge to read of innovative remedies granted by courts in many lesser developed countries where the judiciary has been very active in proposing remedies, particularly where a constitutional right to life or similar is used as part of the reasoning of the court.[37] The Supreme Court of India and other higher courts provide a number of examples of such cases enabled in part by innovative application of the *Constitution of India*.[38]

Conclusion

In conclusion human rights and environmental rights however conceived require a domestic legal system with independent courts in order to provide remedies to those affected by government action affecting those rights. This paper has focussed on aspects of the Australian legal system including the LEC.

Judicial review of administrative action is of paramount importance in ensuring a fundamental balance between the executive, legislature and the judiciary in relation to any right.

In addition, courts must have in place jurisprudence in areas such as standing to sue and justiciability which enable matters to be brought before them by affected individuals and groups. Courts must also have procedural measures in place to enable access to justice so that access to courts is not unduly affected by, for example, prohibitive costs orders.

[37] Shyami F Puvimanasinghe, 'Towards a Jurisprudence of Sustainable Development in South Asia: Litigation in the Public Interest' (2009) 10 *Sustainable Development Law & Policy Fall* 41;
Jona Razzaque, 'Linking Human Rights, Development, and Environment: Experiences from Litigation in South Asia' (2006-2007) 18 *Fordham Environmental Law Review* 587.
[38] Justice Hima Kohli (High Court of Delhi) 'Human Rights and the Environment' (Speech delivered at the Australasian Conference of Planning and Environment Courts and Tribunals, Sydney, 2010).