CLIMATE CHANGE LITIGATION

Justice Peter Biscoe, Land and Environment Court of New South Wales

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Introduction

1. Climate change litigation is at the cutting edge of the law.

2. Climate change litigation in the Land and Environment Court of New South Wales has so far been conducted in the context of the overarching principles of ecologically sustainable development. The internationally accepted principles of ecologically sustainable development are those adopted at the 1992 Earth Summit (the United Nations Conference on Environment and Development) in Rio de Janeiro attended by representatives of 172 countries including Australia. In New South Wales those principles have been incorporated in almost identical form in s 6(2) of the *Protection of the Environment Administration Act 1991*, which has been adopted by reference in s 4(1) of the *Environmental Planning and Assessment Act* 1979 *(NSW)* (EPA Act) and other NSW statutes. One of the objects of the *EPA Act* is to encourage ESD: s 5(a)(vii). Section 6(2) provides:

> "…ecologically sustainable development requires the effective integration of economic and environmental considerations in decision-making processes. Ecologically sustainable development 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.
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> In the application of the precautionary principle, public and private decisions should be guided by:
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> (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."

Growing Public Concern

3. Over the last few years the most topical field for the application of ESD principles has been climate change. Public concern over climate change and climate change litigation have been stimulated by several important events: the UK Stern Review Report on *The Economics of Climate Change in 2006*; the *Fourth Assessment Report of* the United Nations Intergovernmental Panel on Climate Change (IPCC) in 2007; Australia's ratification of the Kyoto Protocol in 2008; the *Garnaut Climate Change Review* in 2008; the pending Commonwealth bill for an Australian carbon trading emissions scheme; and the United Nations Climate Change Conference to be held in Copenhagen in December 2009.

4. The IPCC comprises hundreds of leading climate change scientists from many countries. It is fair to say that the consensus of most climate change scientists is reflected in its *Fourth Assessment Report*. The Report brings the precautionary principle of ESD into play. Lack of full scientific certainty is not a reason for doing nothing to prevent environmental degradation. The IPCC Report says that climate change is real and dangerous and has anthropogenic causes.

5. Much of Australia's population lives along the coast, which is vulnerable to climate change. Tides, storm surges and wind can drive ocean waves several metres above the average sea level.[1] The IPCC Report estimates sea level rises by 2100 in a no-mitigation case at 26 – 59 cm. This does not include the potential for rapid dynamic change in ice flow which could add 10 cm to the upper bound. Rises above 70 cm could not be excluded. The report says that sea level rise is virtually certain to cause greater coastal inundation, erosion, loss of wetlands and salt water intrusion into fresh water sources with impacts on infrastructure and coastal resources.

6. The Australian Climate Group[2] report entitled, *Climate Change Solutions for Australia 2008* states:

> "There is now compelling evidence that both the extent and the impacts of climate change are likely to be at the higher end of the range projected by the Intergovernmental Panel on Climate Change (IPCC). Australian policy needs to take account of this possibility by designing a national emission reduction scheme that is flexible enough to respond to new information quickly. The Intergovernmental Panel on Climate Change has found that global emissions of greenhouse gases would have to peak by 2015 and fall by 50% to 85% by 2050 to limit global temperature rise to 2.0 to 2.4 Celsius over pre-industrial times. This rise is likely to avoid many of the worst impacts of climate change but will not be without very significant consequences."

[1] McInnes KL, Walsh KJE, Hubbert G D and Beer T, "Impact of Sea Level Rise and Storm Surges on Coastal Community" (2003) 30(1) *Natural Hazards* 187.

[2] Australian Climate Group was formed in 2003 by World Wildlife Fund – Australia and Insurance Australia Group (IAG) in response to the increasing need for action on climate change in Australia. It consists of academics from universities throughout Australia, the Chief Risk Officer and Group Actuary of IAG and the CEO WWF – Australia.

7. Small changes in climate can have a large impact on hazards such as flood, lightning, fire and cyclones.[3] Small changes in hazard intensity can have large impacts on damage. For example, it has been estimated that a 25 percent increase in peak wind gust speeds would cause a 650 percent increase in building damages.[4] The risk to human life and health of climate change is illustrated by a World Health Organisation report that there were more than 20,000 excess deaths across 12 European countries during the European 2003 summer heatwave.[5]

8. In October 2007 the Department of Environment and Climate Change published guidelines entitled *Floodplain Risk Management Guideline: Practical consideration of Climate Change*, aimed to assist councils in the implementation of floodplain risk management plans. The guidelines state that "The impacts of climate change and the associated ramifications…cannot be ignored in decision-making today", and that "climate change is expected to have adverse impacts upon sea levels and rainfall intensities, both of which may have significant influence on flood levels". In 2009 the Department of Environment and Climate Change published a *Draft Sea Level Rise Policy Statement*, which adopted a sea level rise planning benchmark above 1990 mean sea levels of 40 cm by 2050 and 90 cm by 2100. In April 2008 Manly Council released a document *Climate Change Actions for Manly LGA 2008-2038* which showed the substantial flooding effect of a 0.91 metre sea level rise. Much of the damage that rising sea levels would cause is not currently insured. Property insurance does not generally cover land value.

Climate Change and the Courts

9. The work of the courts is to decide concrete cases within the general principles of ESD. However, "General principles do not decide concrete cases": *Lochner v New York* 198 US 48, 69 (1908) per Justice Oliver Wendell Holmes. Therefore it is necessary for the courts to work out the general ESD

[3] Mills E, Lecomte E and Peara A (2001), *US Insurance Industry Perspectives on Global Climate Change*, US Department of Energy, University of California.
[4] World Wildlife Fund Australia (2004), *Climate Change Solutions for Australia – the Australian Climate Group*.
[5] Menne B et al (eds) (2008) *Protecting Health in Europe from Climate Change*, World Health Organisation.

principles more specifically, through judgments at the points of application. Beneath the overarching general principles of ESD, a body of precedent is being developed, including in relation to climate change, which, in time, should lead to more specific sub-principles to guide the rational and consistent determination of different kinds of cases.

10. In Australia, ESD litigation, including climate change litigation, has so far been confined to administrative law, whether judicial review or (where available) merit appeals such as from refusals of development applications. Judicial review grounds include: error of law, failure to have a requisite state of mind required as a condition precedent to exercise of power, failure to consider mandatory relevant matters, failure to attribute statutorily required weight or priority to a relevant matter, and non-compliance with procedural requirements. Particularly in the area of climate change litigation, potential remedies for environmental damage and misrepresentation may be provided by tort actions in nuisance, negligence and conspiracy; actions for misrepresentation in tort, contract and under the *Trade Practices Act 1974* (Cth) and *Fair Trading Act 1987* (NSW); and actions for infringing human rights by pollution contrary to international conventions

11. The Australian Competition and Consumer Commission, the regulatory body with responsibility for administering the *Trade Practices Act*, released two reports in 2008: *Green Marketing and the Trade Practices Act* and *Carbon Claims and the Trade Practices Act*. The former contains guidelines aimed at businesses using environmental claims as part of their marketing campaigns. The latter informs business and consumers as to their obligations and rights under the *Trade Practices Act* in relation to carbon offset and neutrality claims[6].

12. Climate change cases fall into two broad categories. Those concerned only with the effect of climate change irrespective of the causes (eg coastal erosion), and those also concerned with anthropogenic causes (eg coal fired power stations and coal mines). Climate change cases are dependent upon a sound scientific basis for the proposition that climate change is occurring and

[6] See Justice Preston, "Climate Change Litigation" (2009) 9(2) *The Judicial Review* 205.

threatens serious or irreversible environmental damage. Climate change cases concerned with anthropogenic causes are also dependent upon a sound scientific basis for the proposition that there are anthropogenic causes. A sound scientific basis for both propositions has been provided by the IPCC's *Fourth Assessment Report*.

13. The most authoritative United States climate change case is the decision of the Supreme Court of the United States in *Massachusetts v Environmental Protection Agency* 549 US 1 (2007). The State of Massachusetts and others petitioned the Environmental Protection Agency (EPA) to regulate the emission of greenhouse gases, including carbon dioxide, from new motor vehicles under the *Clean Air Act*. Greenhouse gases are air pollutants. The Act required the EPA to prescribe standards applicable to the emissions of air pollution from new motor vehicles in the event that it formed a judgment that such emissions cause or contribute to air pollution reasonably anticipated to endanger public health or welfare. The EPA denied the petition, explaining that it lacked statutory authority to regulate such emissions and that, even if it had such authority, it would decline to exercise it. The applicants sought judicial review of the EPA's denial. They were successful in the Supreme Court which held (reversing a circuit court decision) that the EPA possessed authority to regulate such emissions and had failed to provide a "reasoned explanation" for its conclusion that it would not regulate such emissions even if it possessed the authority to do so. The majority commenced their judgment by stating:

> "A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related. For when carbon dioxide is released into the atmosphere, it acts like the ceiling of the greenhouse, trapping solar energy and retarding the escape of reflected heat. It is therefore a species – the most important species – of a greenhouse gas."

The majority held:

> "The harms associated with climate change are serious and well recognized. Indeed, the NRC [National Research Council] Report itself—which EPA regards as an objective

> and independent assessment of the relevant science…identifies a number of environmental changes that have already inflicted significant harms, including the global retreat of mountain glaciers, reduction in snow-cover extent, the earlier spring melting of rivers and lakes, [and] the accelerated rate of rise of sea levels during the 20th century relative to the past few thousand years…"

The majority concluded:

> "Nor can EPA avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time...If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so. That EPA would prefer not to regulate greenhouse gases because of some residual uncertainty…The statutory question is whether sufficient information exists to make an endangerment finding.
>
> In short, EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore arbitrary, capricious, …or otherwise not in accordance with law…"

Even the dissentients acknowledged that:

> "Global warming may be a crisis, even the most pressing environmental problem of our time…Indeed it may ultimately affect nearly everyone on the planet in some potentially adverse way, and it may be that governments have done too little to address it'."

14. Climate change litigation in the Land and Environment Court of NSW is illustrated by four judicial review cases: *Gray v Minister for* Planning [2006] NSWLEC 720, (2006) 152 LGERA 258 (Pain J); *Drake-Brockman v Minister for Planning* [2007] NSWLEC 490, (2007) 158 LGERA 349 (Jagot J); *Walker v Minister for Planning* [2007] NSWLEC 741, (2007) 157 LGERA 124 (Biscoe J); and *Aldous v Greater Taree Council* [2009] NSWLEC 17 (Biscoe J).

15. ESD principles and the Australian and overseas cases were reviewed by me in *Walker* at [85] – [119] and *Aldous* at [34]. The IPCC *Fourth Assessment Report* was examined in *Walker* at [125] and in *Aldous* at [36] – [38]

16. In *Gray*, Pain J held that downstream burning of coal from a proposed coal mine was a relevant matter for consideration under Part 3A of the *EPA Act* in the environmental assessment of the mine, and in the Director-General's decision as to whether the environmental assessment adequately addressed the Director-General's requirements: at [100], [115], [125], [126], [135]. As it had not been considered, the decision was declared to be void.

17. A significant issue can be whether the decision-maker is obliged to consider the principles of ESD at the level of particularity for which the applicant contends. A judicial review challenge failed for this reason in *Drake-Brockman*. In that case there was a challenge to the validity of a concept plan approval under Part 3A of the *EPA Act* for a large redevelopment of a former brewery site at Chippendale. The applicant contended that, although the Minister had specifically considered ESD and greenhouse gas emissions, the approval was nevertheless invalid because the Minister had not carried out a quantitative analysis. Jagot J held that the challenge failed because, assuming the Minister was obliged to consider ESD, he was under no obligation to do so at that level of particularity.

18. *Walker* was concerned with a concept plan approval by the Minister for Planning under Part 3A of the *EPA Act*. The Minister for Planning granted a concept plan approval for a major project, a retirement village on a flood affected coastal plain just north of Wollongong known as Sandon Point. The applicant, Ms Walker, was an environmental activist who sought judicial review of the Minister's decision, utilising the open standing provision in s 123 of the *EPA Act*. I held that the Minister was bound to take into consideration the public interest, that the public interest included relevant principles of ESD, that the Minister had failed to take the relevant ESD principles into account by failing to consider climate change flood risk, and that, consequently, the concept plan approval was invalid. I reasoned to the following conclusion at [166]:

> "In my opinion, having regard to the subject matter, scope and purpose of the *EPA Act* and the gravity of the well-known potential consequences of climate change, in circumstances where neither the Director-General's report nor any other document before the

> Minister appeared to have considered whether climate change flood risk was relevant to this flood constrained coastal plain project, the Minister was under an implied obligation to consider whether it was relevant and, if so, to take it into consideration when deciding whether to approve the concept plan. The Minister did not discharge that function."

19. The Minister appealed successfully to the Court of Appeal: *Minister for Planning v Walker* [2008] NSWCA 224, (2008) 161 LGERA 423. An application for special leave to appeal to the High Court was refused.

20. Although Ms Walker did not win that battle, she won the war for four reasons. First, a majority of the Court of Appeal (the third member of the Court expressing no view), after saying that they were surprised and disturbed that the Minister had not considered the effect of climate change flood risk, held that it was mandatory that the decision-maker do so at the next stage of determining any development approval application: at [61] – [62]. Secondly, the majority indicated that if the concept plan approval had not been granted in 2006 but at some later time, there would be a strong prospect that failure to consider the effect of ESD would avoid the decision because of a growing public perception that ESD is plainly an element of the public interest: at [56]. Thirdly, the Court of Appeal approved a line of authority in the Land and Environment Court that, in determining a development application under Part 4 of the *EPA Act*, the s 79C obligation of a consent authority (and of the Court on a merits appeal) to consider the public interest includes consideration of relevant ESD principles: [42] – [43]. Fourthly, although Ms Walker lost the appeal, the Court of Appeal subsequently declined to order her to pay any costs because she had brought the proceedings in the public interest and there were additional special circumstances: *Minister for Planning (No 2) v Walker* [2008] NSWCA 334.

21. A significant matter apparently not brought to the Court of Appeal's attention in *Walker* was that the *EPA Act* authorises the Minister, when granting concept plan approval, to dispense with development approval, environmental assessment or report which would otherwise be required under Part 3A: s 75P(1)(c). If the Court of Appeal had been seized of this point, I venture to suggest that it may have influenced them to uphold my decision. On a literal

reading of the majority judgment, it might be argued that the Minister could avoid any obligation to take relevant ESD principles into consideration by dispensing with the requirement to obtain development approval when granting concept plan approval. The preferable view – and I think the majority would agree with at least this much – is that if the Minister were to dispense with the requirement for development approval, then the Minister would be obliged to take relevant principles of ESD into consideration at the concept plan approval stage. This is a qualification to the Court of Appeal's decision that the Minister does not have to do so at the concept plan approval stage.

22. Ironically, over the period that the Minister for Planning pursued the appeal in *Walker*, contending that he did not have to take climate change flood risk into consideration in relation to coastal plain development, another arm of the NSW government was telling councils that they had to do so when considering development applications under Part 4 of the Act: see [8] above and see *Aldous* at [32].

23. The Court of Appeal confirmed the relevance of the principles of ESD in *Anderson v Director-General of the Department of Environment and Climate Change* [2008] NSWCA 337.

24. *Aldous* was a case of judicial review of a council decision to grant consent to a residential development on a beachfront block at Old Bar beach, near Taree. The claim was brought by the owner of an adjoining property, located immediately behind the subject property. One of the claimed grounds for judicial review was that the council had failed to take ESD principles into consideration; in particular climate change induced coastal erosion. Old Bar beach has been badly eroded by coastal storms over the last 10 years. It was argued that if erosion continued at the same rate, then the proposed new residential development could be affected by erosion in due course. I rejected this ESD ground on the facts (the applicant succeeded on an unrelated ground). I held that the council was bound to consider ESD, in particular climate change induced coastal erosion, but that it had properly done so. Moreover, the proposed residence was to be built at the rear of quite a deep beachfront block, about as far from the beach as possible, and was to replace

an existing dwelling on the edge of the beach, which was vulnerable to the coastal erosion. Short of sterilising development of the block, the development consent seemed not unreasonable.

25. The expanding law on climate change has attracted writers including Preston J, "Climate Change Litigation" (2009) 9(2) *The Judicial Review* 205; Phillips et al (eds), "Climate Change Law in Australia" (2008) 31(3) *UNSWLJ*: Horn, "Climate Change Litigation Actions for Future Generations" (2008) 25 *EPLJ* 115; and Peel, "The Role of Climate Change Litigation in Australia's Response to Global Warming" (2007) 24 *EPLJ* 90.

Costs

26. Concerned persons who bring judicial review climate change proceedings bear the risk of an adverse costs order if they lose. Therefore, costs can be a deterrent. However, that risk in the Land and Environment Court is mitigated by the Court's discretion not to award costs (or to limit the award of costs) in public interest cases: *Land and Environment Court Rules 2007*, r 4.2.

Conclusion

27. The enforcement of ESD principles, including in relation to climate change, depends on the vigilance and willingness of authorities and concerned persons to litigate where there has been an actual or threatened breach of ESD principles. The expanding case law owes much to their initiatives.