Democracy, environmental justice and a clash of world views
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Australian environmental democracy and the rule of law — thoughts from APEEL
Bruce Lindsay ENVIRONMENTAL JUSTICE AUSTRALIA and Hanna Jaireth IUCN WORLD COMMISSION ON ENVIRONMENTAL LAW

Differing conceptions of environmental democracy in New Zealand resource management law
Ceri Warnock UNIVERSITY OF OTAGO

The politics of public interest environmental litigation: lawfare in Australia
Cristy Clark SOUTHERN CROSS UNIVERSITY

Safeguarding advocacy on behalf of the environment
Emily Howie HUMAN RIGHTS LAW CENTRE

Atmospheric Trust Litigation in Washington State: advocating for a constitutional right to a stable climate for the young and future generations
Andrea Rodgers WESTERN ENVIRONMENTAL LAW CENTER

Information Commissioner directs release of information on seal and dolphin deaths
Jessica Feehely ENVIRONMENTAL DEFENDERS OFFICE (TASMANIA)

Case note: People for the Plains Inc v Santos NSW (Eastern) Pty Ltd
John Zorzetto LAND AND ENVIRONMENT COURT OF NSW

Case note: Australian Conservation Foundation Inc v Minister for the Environment
Mark Slaven LAND AND ENVIRONMENT COURT OF NSW
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Introduction

This new century sees the clash of two ideological world views — neoliberalism, which has dominated western democracies for 3 or 4 decades, and a developing world view based on the need for sustainability of our planet’s resources. Democracy and environmental justice are being challenged in this clash as shown by a number of articles in this edition.

Neoliberal ideas

Neoliberalism was promulgated as far back as the 1930s, got its academic backing in the 1950s from Milton Friedman and the Chicago School of Economics, and in the 1980s moved into the public political sphere. According to Daniel Stedman Jones, a transatlantic network of academics, businessmen, journalists and think tanks funded by wealthy backers worked to ensure its promulgation. Conservative US and UK governments under Ronald Reagan and Margaret Thatcher introduced its policies. While in Australia, it was the Hawke-Keating Labor Government that brought in neoliberal economic changes in the 1980s. Since then, neoliberal policies have been the consensus of both Labor and Coalition governments in Australia.

These policies are based on a “market” view of the world in which free trade, deregulation, privatisation, public spending cuts, and small government are claimed to result in a “trickle down” effect to provide benefit to all. In relation to environmental governance, these changes, particularly deregulation and small government, have provided a weakening of the legislation overseeing environmental protection at both the state and federal level.

A neoliberal world view has also challenged long-held principles of a pluralist society in which debate across difference and a contested public sphere allow many players such as non-governmental organisations (NGOs), corporations, and professional associations to be seen as legitimate voices in public policy debates. In essence, it is argued that public advocacy distorts the “market”. This part of the neoliberal paradigm addressing the role of interest groups is known as “public choice theory”. Its development in Australia can be traced in the speeches of politicians from the mid-1990s. However, the logic of public choice theory appears in the statements of politicians directed at the role of civil society, not at the public advocacy of corporations. It is a view of society directly at odds with the many voices of pluralism.

Neoliberalism effects

For a number of decades, decisions linked to the logic of public choice have challenged the rule of law and the operation of our democracy. In the 1990s and early 2000s, attempts to limit advocacy and freedom of speech were most obvious in the defunding of NGOs, in attempts to change the definition of a charity to limit tax deductibility and in the use of “confidentiality clauses” to “silence” civil society organisations which were in financial relationships with government. The Australian Taxation Office was used to tighten definitions relevant to tax deductibility and to conduct multiple audits on NGOs that were seen as being particularly active.

More recently, attempts to limit advocacy and debate in the public sphere have shown up in government policies and legislation with specific impact and focus on environmental advocacy and policy. The defunding of environmental legal centres, a number of state anti-protest laws, and blocking environmental organisations’ access to the courts are cases in point. The Inquiry into the Register of Environmental Organisations by the House of Representatives Environment Committee was an example of this increasing emphasis on environmental organisations’ access to the courts is cases in point. The Inquiry into the Register of Environmental Organisations by the House of Representatives Environment Committee was an example of this increasing emphasis on environmental organisations. It focused on their tax deductibility and ignored similar concessions available to most community organisations and to think tanks and industry groups, including critics of environmental groups such as the Institute of Public Affairs and the Minerals Council of Australia.

The neoliberal argument in favour of smaller government and freer markets has seen continual weakening of environmental legislation by governments of various political persuasions at state and national levels. This
has included attempts by the Commonwealth to divest from national environmental responsibility by handing it to the states.

Sustainability and climate change

Our international current rate of resource use needs the equivalent of three or more planets, not one. A new world view based on the need for sustainability is a logical response to such a situation. At the same time, an important aspect of the sustainability argument is the urgent need to address climate change.

As often happens in the sweep of history, the seeds of a new world view were sprouting at the same time the previous set of ideas were coming to maturity. As the 1980s saw neoliberalism enter the public sphere under Reagan and Thatcher, two significant reports put sustainability and climate change on the international agenda. In 1987, the Report of the World Commission on Environment and Development: Our Common Future⁶ (Brundtland Report) was published by the UN Commission on Environment and Development — bringing together resource development and environmental conservation and recognising that there are environmental limits to economic growth. In 1988, environmental scientists at the World Conference on the Changing Atmosphere in Toronto established the first international benchmark for greenhouse emissions calling for developing countries to reduce CO₂ emission levels of 1988 worldwide by 20% by 2005.

In the intervening 30 years, the ideas of sustainability and the need to address climate change have been emerging as the imperative issues of the 21st century. In 2006, Sir Nicholas Stern described the world’s response to climate change as the greatest market failure of all time. More recently, Naomi Klein has made the link between neoliberalism and climate change.⁷ It can be argued that a conflict of differing world views — between sustainability and neoliberalism — overarches much debate in modern western democracies, including challenges to democracy and environmental justice.

A clash of world views?

Many authors are suggesting that the neoliberal consensus is now breaking down.⁸ Over the decades, there has been a wealth of academic literature criticising its underlying premises, but public policies in western democracies have continued to reflect its principles. More recently, those arguing that the theory has become an ideology and has not been delivering its economic claims have been joined by significant institutional voices. For example, three research economists from the International Monetary Fund (IMF) have published a paper “Neoliberalism: oversold?”⁹ in which they refer to a “neoliberal agenda” spreading across the world in the past 30 years. They write from the view that such an “agenda” has become a political ideology rather than an economic theory and that in many jurisdictions, both social and political institutions have been restructured to echo a “market” format because of this ideology. Significantly for the environment, the IMF authors claim that “curbing the size of the state” could incur costs “much larger than the benefit”.¹⁰ They are suggesting that deregulation and smaller government may not be producing economic, social and environmental benefits and are calling for a much more nuanced approach.¹¹ Increasingly, similar concerns are surfacing in public policy forums.

Placing policy, legislation and judicial development within the context of two world views provides a lens through which to view immediate challenges and conflicts. We may be witnessing the end of the neoliberal consensus and a move to adopt more sustainable practices, but it is a process that will take decades. Nor will it occur smoothly, or without debate and serious challenges. What takes the place of the current consensus will be shaped by the individual work of policymakers, public advocates, legislators, judicial decision-makers and all those who contribute to the public sphere. This edition includes analysis of some of the challenges of neoliberal-inspired policy and practice that have been occurring.¹²

Work in shaping a new world view is also represented in a number of exciting articles in this edition. Cases brought by Our Children’s Trust in federal and state courts in the US are formalising the concept of intergenerational responsibility in relation to climate change. Developments in NZ are extending the right of standing to include natural places. Probably one of the most ambitious tasks undertaken by environmental lawyers in recent years is the work by the Australian Panel of Experts in Environmental Law (APEEL). APEEL has been determining overarching principles and goals and delineating the breadth of their future research. Proposing the reform of our legislative framework to make it fit appropriately for the 21st century — pressured as it is by climate change and the need for sustainability — is a mammoth task. It is visionary work and to be commended.

In Australia and other western democracies, the past 3 decades of public policy and law shaped by neoliberal concepts has provided challenges to democracy and environmental justice. The extent to which a new framework of sustainability is established in the public sphere in the coming decades will be critical for the planet. How this is achieved, and the embedding of democratic processes and principles in the change, is a work in progress.
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Footnotes
5. In this edition, the report on Safeguarding Democracy by the Human Rights Law Centre spells out the implications of these policies and legislation: see Human Rights Law Centre Safeguarding Democracy (February 2016) available at http://hrlc.org.au/wp-content/uploads/2016/02/HRLC_Report_SafeguardingDemocracy_online.pdf.
10. Above n 9, at 40.
11. Above n 9.
12. Note particularly the Human Rights Law Centre article on their recent report, Safeguarding Democracy, above n 5, and Cristy Clark’s article on the politics of public interest environmental litigation.
Australian environmental democracy and the rule of law — thoughts from APEEL

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Over more than 18 months, the Australian Panel of Experts in Environmental Law (APEEL) project has brought together a group of volunteer environmental law scholars, lawyers, and former judges to discuss ideas about the future of environmental law in Australia, with a view to developing recommendations for the next generation of environmental laws. APEEL collaborates in this project with the more than 40 leading environmental non-government members of the Places You Love Alliance. The project has developed eight technical papers focused on various areas of potential law reform. Australian democracy and the environmental rule of law is the focus of one of those papers, written by the co-authors of this “key issues” article.

Here we discuss several issues addressed in that paper including:

- foundational concepts;
- long-established human rights and responsibilities relevant to environmental democracy;
- emerging rights to a safe and healthy environment;
- procedural laws concerned with participation, access to information and access to justice; and
- the rights of Aboriginal and Torres Strait Islander peoples.

Environmental democracy

As John H Knox, the UN Special Rapporteur on Human Rights and the Environment has emphasised, environmental democracy requires just access to, and protection of, the ecosystems upon which communities depend for survival and vitality. Biodiversity, air, water and food, protection against climate change, protection of land, and the ecosystem services that nature provides are essential for current and future generations to enjoy and exercise fully their democratic rights. Environmental democracy also requires access to lawful means for participating effectively in political, social and economic opportunities, including environmental decision-making. Democratic processes seek to optimise transparency, integrity and accountability, and encourage innovation and learning-by-doing.

Environmental democracy establishes more than a contest over representation and engagement with governments and other stakeholders. It presupposes engagement with a broader object of human needs and experience — sometimes described as the ecological “commons”. The commons are public goods and ecological systems with a public interest character, and, additionally, social practices that generate, use and preserve common resources and products. Common and typical pool resources include air, seas, water, biodiversity, landscapes, soil and subsoil resources, space, and culture. Various governance tools and approaches include state regulation and management, market-based models, and intergovernmental and international agreements.

Democratic governance is premised upon participation, whether directly or through institutions, and accompanying rules and norms. Yet environmental governance also poses another important relationship — participation is not solely founded on the idea of the “social contract” between state and citizen, but also involves relationships of trust between actors or authorities governing environmental resources and the communities who are the beneficiaries of common environmental resources. Although the public trust doctrine has received little support in Australian law, the principled analogy of trusteeship over the commons is a useful and powerful one. As the Rt Hon Sir Garfield Barwick GCMG put it:

In the idealism which trained minds are wont to display, there is room for a very strong sense of the trusteeship or guardianship of the environment … That trusteeship is of a particular and perhaps unusual order, for the trustee has the usufruct of the resources of the country in respect of which on this view it has fiduciary obligations.

The trusteeship analogy is also similar to a principle of stewardship obligations, which is discussed in APEEL’s Technical Paper 1, where APEEL recommends that a general duty of care be prescribed as a routine component of the next generation of environmental legislation. In the absence of a willingness to impose such a duty in Australia’s various constitutions, we envisage that it would need to be incorporated in general environmental legislation on an Act-by-Act basis. This principle of
stewardship also has international and corporate dimensions, as APEEL discusses in other technical papers. We also note that Australia has an international obligation, a legal responsibility, not to cause harm to other countries, which poses pressing obligations in relation to reducing greenhouse gas emissions and overconsumption.

It is perhaps because of this beneficial character of the commons environmental resources that democratic models are particularly appropriate to environmental governance and contested by those who have reaped the benefits of environmental externalities for too many years. Participatory models have evolved since at least the 1970s in many parts of the world, generating international law and policy development which in turn has influenced the domestic reforms of laws, institutions and social practices. The democratic developments that we highlight in the APEEL paper are:

- the emergence of a substantive right to a safe and healthy environment and responsibilities of environmental stewardship;
- procedural democratic rights concerning public access to information about the environment, public participation in environmentally relevant decisions, and access to justice;
- Aboriginal and Torres Strait Islander peoples’ rights in relation to the environment;
- the role of the “rights of nature” or “placed-based” laws (not discussed here); and
- public integrity institutions for the environment.

The emerging right to a safe and healthy environment

Since the Universal Declaration of Human Rights (UDHR) was adopted in 1948, the right to life and a standard of living adequate for personal and family well-being, and access to justice to protect recognised rights, has been part of international law. As noted above, environmental degradation can and does adversely affect the enjoyment of a broad range of long-established human rights, such as the right to life, to health and to dignity, and that the exercise of various civil and political rights contributes to better environmental policymaking. The right to a safe and healthy environment has been recognised in several regional agreements and soft law instruments, and in more than 90 national constitutions. In the Danube Dam case before the International Court of Justice, Vice President Weeramantry noted:

The protection of the environment is ... a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.

General environmental duties exist in certain Australian jurisdictions, framed as duties not to cause environmental harm or pollution. An express, international or national right to a safe and healthy environment, framed as a human right, has not yet been established. In 2009, the National Human Rights Consultation recommended unsuccessfully that a new national Human Rights Act creates rights of action for breaches of civil and political rights initially, with nonjusticiable protection for several economic and social rights. This led to a strengthened Human Rights Framework. During the National Consultation, 15 focus groups recommended that basic amenities, essential healthcare, and equitable access to justice and personal safety be included in unconditionally protected rights. These elements accord with a broad right to a safe and healthy environment.

Such a right for present and future generations could be established in federal legislation and state and territory constitutions. This would best be achieved as part of a wide-ranging update and harmonisation of Australian environmental legislation and governance led by the Commonwealth. Establishing a general, foundational provision in national law would serve a number of purposes, including the strengthening of environmental law and regulation generally, providing an environmental safety net, facilitating improved environmental accountability and performance, preventing rollback in environmental protections, and levelling the playing field of competing environmental and economic considerations. The right should give rise to an enforceable cause of action. A starting point might be the model of the 1993 Environmental Bill of Rights in Ontario, Canada, under which an actionable right arises in relation to causing (or imminently causing) significant harm to a “public resource”. A public resource includes air, public waterways, unimproved public land, public land used for various public purposes if larger than 5 ha, and associated plants, animals and ecological systems. The content of a right to a safe and healthy environment can also be informed by corresponding obligations on public and private actors to protect against and respond to environmental harm that may or does interfere with the enjoyment of human rights.

The Aarhus and Rio pillars: procedural environmental laws

The ordinary institutions of representative democracy such as the rule of law, parliamentary democracy and civil rights are essential to environmental democracy. The established recourse of citizens to their local members of parliament and local councillors remains an
important, and often understated, mechanism for dealing with administrative (as well as policy) dimensions of environmental issues. Some states have reformed their political donations laws. New South Wales, for instance, imposes limits on political donations, prohibits property developers from making political donations, and restricts indirect campaign contributions. Such reforms are needed nationally.

The public character of environmental management requires the implementation of other democratic norms and procedures with an effective participatory character. Procedural environmental rights can drive the operation of substantive rights such as the right to a healthy environment and the protection of biological diversity. Procedural rights include the right of the public to be informed, to participate in environmental decision-making processes, dispute resolution and access to means of redress where there is a perceived breach of environmental law or related procedural law. Each of these dimensions of participatory democracy is reflective of the key pillars of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention). The pillars of the Aarhus Convention — access to information, public participation, and access to justice — represent a valuable model and standard for Australian environmental law. The Aarhus Convention gives effect to Principle 10 of the 1992 Rio Declaration on Environment and Development (Rio Declaration), which Australia has signed. It also draws on the rights long protected under the human rights conventions in the International Bill of Human Rights.

Although a European-based instrument, the Aarhus Convention contains principles and rules highly appropriate to Australian circumstances. In 2009, the Tehran Declaration on Human Rights and the Environment urged all states in that region to become members of human rights and environmental conventions, including the Aarhus Convention. Australia’s performance in providing procedural environmental rights at the national level is patchy.

Access to information is crucial to the management of environmental matters and the making of environmental decisions. A significant amount of important environmental information is acquired and held by the private sector but should be openly accessible in project portals. In certain fields such as pollution management and greenhouse gas emissions regulation, there are duties on the private sector to provide environmental information, but this is the exception rather than the rule. A positive development is the Australian Government’s commitment that Australia will participate in the global Open Government Partnership (OGP) and work with civil society to develop an Open Government National Action Plan. The Freedom of Information Bill introduced to the ACT Legislative Assembly in May 2016 provides a state-of-the-art model for best practice freedom of information legislation, consistent with the federal “push” model and strong positive obligations to release information publicly. National harmonisation of this model would advance environmental democracy.

Greater facilitation and embedding of community and civil society organisations in the making of environmental policy and regulation and in planning and programme development would also align with the Aarhus Convention and Rio Declaration. Maturing Australian practices of deliberative democracy are consistent with this participatory impulse. Such developments also demonstrate ways in which Australian experience can contribute to, and borrow from, models of practice in other jurisdictions. More extensive and systematic tools such as public inquiries should be part of the participatory reform, provided access to appeals on the merits or judicial review of environmental decisions are not foreclosed as a result. We need a paradigmatic shift beyond “notice and comment” consultation with community and civil society actors. Public participation can unsettle the concentration of power over decision-making currently vested in government actors and commercial interests.

In relation to the third Aarhus Convention and Rio Declaration pillar of access to justice, Australia’s record is again mixed. For example, in several state jurisdictions such as NSW, SA and Queensland, innovative, specialist environment courts have been developed. Open standing can be accessed in NSW, some public interest costs protections exist, and merits review of decisions is reasonably commonplace. Many of these mechanisms were instituted in waves of law reform through the 1970s-90s. At the federal level, these mechanisms are less common. While merits review of federal environmental decisions can be sought in the Administrative Appeals Tribunal, a case can be made for the adoption of a federal court national practice area with a panel of specialist environmental law judges broadly similar to Hawaii’s Environmental Court, with similar reforms in state Supreme Courts where specialist courts and tribunals do not yet exist. This is needed because of the complex multiparty, multidisciplinary, public nature of most environmental disputes. As there are great financial risks and disincentives to public interest, environmental litigation costs orders on public interest grounds and public subsidies for cases in the environmental sphere are also needed. The significant constraints on accessing justice in environmental controversies are perhaps exemplified in the relatively small number of public interest cases brought under key laws such as
the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act).27

In 2015, the Australian Law Reform Commission (ALRC) restated its 1996 recommendation in favour of open standing:

... allowing any person to commence and maintain public law proceedings, unless:

- the relevant legislation clearly excludes the class of persons of which the applicant is one; or
- it would not be in the public interest in all the circumstances, because it unreasonably interferes with a person with a private interest’s ability to act differently.28

Other inquiry bodies have highlighted the lack of national consistency in standing provisions and impacts.29 Several legal commentators support a liberal approach to standing.30 APEEL supports this reform because courts have inherent powers to deal with frivolous and vexatious litigation, and there is no evidence of a flood of litigation arising from liberal or open standing, mainly because of the costs deterrents. Harmonised open standing reforms for merit and judicial review applications would be a welcome reform. The new Global Judicial Institute for the Environment may foster such reforms.

Aboriginal and Torres Strait Islander peoples’ rights related to the environment

Expanding the availability and implementation of substantive and procedural rights to enhance environmental democracy may not be sufficient to achieve just and equitable outcomes for communities who have been historically or structurally marginalised. The relationship of Aboriginal and Torres Strait Islander peoples to democratic governance, as a result of invasion and its consequences, is exceptional. Aboriginal and Torres Strait Islander peoples’ relationships to the environment and commons — that is, to country — is also unique, not only because of dispossession and disruption, but because of its continuous, ancient nature. The reform of environmental law needs to come to terms with these issues in a way that builds on legal and participatory gains such as the management of culture and Aboriginal country and, by extension, Aboriginal societies. These types of arrangements often overlap with environmental and natural resources governance, including the management of land and resources concurrently with the management of culture and Aboriginal country and, by extension, Aboriginal communities.38 The concept can apply to private instruments, such as contracts or corporate policies.39

Agreement-making and co-management arrangements established under land rights,40 native title41 and various other statutory42 and legal43 arrangements are important practical or effective analogues to the FPIC principle. They are widespread44 and are typically built on legal title, rights or recognisable interests. Importantly, these types of arrangements often overlap with environmental and natural resources governance, including the management of land and resources concurrently with the management of culture and Aboriginal country and, by extension, Aboriginal societies. These types of approaches demonstrate that the exercise of rights of “shared governance” and/or co-management over land and resources is already well-established, despite normative and doctrinal uncertainties regarding the content of formal principles of FPIC.35

A further question remains as to how and to what extent principles of FPIC might operate within environmental protection and conservation decision-making within environmental legislation. The EPBC Act contains provisions for Aboriginal co-management of reserves46 and for the preservation of traditional take of wildlife.47 Other natural resources legislation such as the Water Act 2007 (Cth) contains duties to consult with Aboriginal representative bodies over key decision-making.48 This does not apply (or attempt to apply) principles of FPIC to key environmental decisions, such as, in the context of actions impacting on environments and Aboriginal interests concurrently, application to approvals, planning, management or implementation mechanisms, nominations or listings. It does not attempt to develop principles of Aboriginal FPIC as a matter of general application within environmental law and decision-making. In part, because of the unevenness with which agreement-making and co-management processes have evolved, it is time to look at how environmental and natural
resources legislation can contribute stronger mechanisms of Aboriginal participation and control, through FPIC principles, to benefit the environment, Aboriginal communities, and restorative justice.

Performance: public integrity mechanisms

Other key issues for APEEL include accountability and responsibility for sustainable development. For representative democracies, key democratic institutions for accountability and the dispersal of power — notably, parliament and courts — have proven over recent decades to be insufficient in themselves to ensure governmental integrity. The emergence of the “integrity branch of government” in the form of ombudsmen, auditors-general, parliamentary budget offices, human rights commissions, anti-corruption bodies, and so on, is now basic to the web of government. A Select Standing Committee is currently inquiring into the need for a National Integrity Commission (NIC). The distinction of these integrity actors is that they have ongoing functions of inquiry, scrutiny, performance monitoring, and accountability. They need not depend, for instance, on a controversy arising before them, as courts do. There are jurisdictions in which integrity models have been extended to environmental governance, such as NZ’s Parliamentary Commissioner for the Environment, Australia’s Environmental Commissioner, and until 2012 Hungary’s Parliamentary Commissioner for Future Generations. Although Australia, in Victoria and the ACT, has experience with establishing “sustainability commissioners” and similar bodies, certain distinguishing factors from overseas institutions include the status of ombudsmen as parliamentary officers and functions and powers underpinned by an Environmental Bill of Rights. Environmental “commissions” at state and territory level typically monitor, report or assess programs or environmental performance and advise executive government.

At the national level, Australia does not have authoritative integrity institutions for protection of the environment comparable to the overseas models noted above. Just as there have been calls for general national integrity bodies, such as a national Independent Commission Against Corruption (ICAC), so there is a need for specialised institutions to ensure integrity and ongoing accountability of environmental decision-making and practice, at arms-length from government. The functions of such a body might additionally include non-exclusive standing to commence or join proceedings on behalf of the environment (including natural and cultural places or objects or species) as means of seeking environmental protection.

Conclusions

Four interconnected themes run through APEEL’s proposal for the legal and normative reform of environmental democracy:

- rights;
- procedure;
- empowerment of subjects and “voices”; and
- greater accountability and integrity in environmental decision-making.

In working towards the next generation of national environmental laws, recognition of the alignment of “access to justice” principles with strong models and foundations of participation, and the substantial public interest character of environmental laws, is essential. Strong procedural protections are necessary to safeguard the public benefits of healthy environments, and this can provide strong accountability of those authorities and institutions with trustee-like responsibilities. Enhanced integrity mechanisms might occur through a Parliamentary or National Environmental Commissioner, contributing to the development of public trust. Foundational human rights, such as to a safe and healthy environment, are powerful indicators of what the law should deliver. Greater overlap and alignment of Aboriginal and Torres Strait Islander peoples’ rights and interests with environmental laws, building on existing developments, will provide multifold benefits including justice, recuperating the richness of culture within land and natural resources management, and improved environmental outcomes.

APEEL’s work seeks to bring together forward-looking research and analyses and begin the task of translating this into a long-term law reform agenda. Once the suite of APEEL Technical Papers has been released, feedback on the papers and the proposals contained within them would be well-received.

For more information and to access the papers once released, please visit www.apeel.org.au/

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Footnotes


11. See for example Environmental Protection Act 1994 (Qld), s 319; and Environment Protection Act 1970 (Vic), ss 39, 41 and 45.


15. In 2015, the High Court upheld the Election Funding, Expenditure and Disclosures Act 1981 (NSW), which imposes caps on political donations, prohibits property developers from making such donations, and restricts indirect campaign contributions: see McCloy v New South Wales (2015) 325 ALR 15; (2015) 89 ALJR 857; [2015] HCA 34; BC201509677.


17. See Rio Declaration, above n 1. The Rio Declaration had 113 parties as at 11 April 2016.


22. In August 2016, the Department of the Prime Minister and Cabinet (PM&C) called for stakeholder expressions of interest to join an Interim Working Group to help co-draft Australia’s National Action Plan (NAP) for the Open Government Partnership (OGP). This NAP is expected to be completed by November 2016: see https://opgpau.govspace.gov.au/.


33. Above n 31, Arts 26–29 and 32.


35. B McGee “The community referendum: participatory democracy and the right to free, prior and informed consent to development” (2009) 27(2) Berkeley Journal of International Law 570 at 591: “The major focus of disputes over the meaning of FPIC is the definition of ‘consent.’ The dictionary definition, ‘capable, deliberate, and voluntary agreement or concurrence in some act or purpose …’ also includes several synonyms — agreement, assent, and approval. The original treaty source of FPIC, Convention 169 of the ILO, does not state that FPIC gives communities absolute veto power over a proposed project.”

36. The Canadian approach to “deep” consultation and accommodation is perhaps a normative framework situated somewhere between bare consultation and a duty to obtain consent: see Gitxaala Nation v Canada, 2016 FCA 187.

37. See McGee, above n 35 at 571: “The concept of free, prior and informed consent is based on the rights of participation and consultation, self-determination, and indigenous property rights.”

38. See S Bass, above n 34 at 2.

39. See for example A Lehr and G Smith Implementing a Corporate Free, Prior and Informed Consent Policy: Benefits and Challenges (July 2010).

40. For example, see Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), Pt IV.

41. Native Title Act 1993 (Cth), Pt 2, Div 3, Subdiv P.

42. For example, the settlement process established under the Traditional Owner Settlement Act 2010 (Vic).

43. For example, see Kungun Ngarrindjeri Yunnan Agreement 2009, which establishes obligations under a common law agreement between the South Australian Government and Ngarrindjeri representative organisations in SA.

44. See generally Agreements, Treaties and Negotiated Settlements Project at www.atns.net.au/.

45. See McGee, above n 35 at 589–91.

46. Environment Protection and Biodiversity Conservation Act 1999 (Cth), s 377.

47. Environment Protection and Biodiversity Conservation Act 1999 (Cth), s 303BAA.

48. Water Act 2007 (Cth), s 21(4)(c)(v); and Basin Plan 2012 (Cth), Ch 14, Pt 10.

49. See Parliamentary Commissioner for the Environment at pce.parliament.nz/.

50. See Environmental Commissioner of Ontario at eco.on.ca/.

51. See also Wales’ Future Generations Commissioner at gov.wales/topics/people-and-communities/people/future-generations-act/?lang=en.

52. Environment Act 1986 (NZ), Pt 1.

53. Environmental Bill of Rights (1993) (Ont), Pt III.

54. See for example National Resources Commission Act 2003 (NSW); Commissioner for Sustainability and the Environment Act 1993 (ACT); and Commissioner for Environmental Sustainability Act 2003 (Vic).


56. Arguably, the closest Australia has come to establishing this type of body was the Resources Assessment Commission under the Resources Assessment Commission Act 1989 (Cth). This was not a body that could make inquiries, for instance, at large though or on its own motion or receive or investigate complaints.

57. In 2015, the Supreme Court of the Philippines heard a petition brought on behalf of resident marine mammals in the Tàfon Strait by two individuals acting as legal guardians and stewards of the marine mammals, see: Resident Marine Mammals of the Protected Seascape Tàfon Strait v Secretary Angelo Reyes GR No 180771 (21 April 2015).

Differing conceptions of environmental democracy in New Zealand resource management law

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Introduction

Present proposals for law reform in NZ would shift the balance towards greater ministerial decision-making in environmental management and are serving to highlight a tension in the law between competing manifestations of democracy. Principles developed in environmental law tend to promote public participation in decision-making through forms of “participatory” or “deliberative democracy”, whereas underlying common law doctrine can reinforce conceptions of “representative democracy” by isolating ministerial decision-making from public participation. This article explains and explores how divergent legal principles and doctrine can impact public participation and pull in different directions by considering the changes proposed by the Resource Legislation Amendment Bill 2016 (NZ). Fundamentally, this article concludes that this tension in the law is problematic and should be explicitly acknowledged and addressed within the present debate and any future debates concerning environmental decision-making.

Proposed reforms

The Resource Legislation Amendment Bill proposes significant changes to a number of NZ’s environmental statutes, including the Resource Management Act 1991 (NZ) (RMA), the primary planning and environmental Act that governs all land, air and water. Three particular themes are apparent in the Bill:

• the first concerns increased ministerial decision-making;
• the second reduces public participation in both plan-making and individual permitting decisions; and
• the third marks a general shift away from judge-led dispute resolution.

The proposals provide various ways to increase ministerial powers to influence the content of local plans. Regulation-making powers of wide scope and a National Planning Template that could impose specific content-requirements on local authority plans would be introduced.1 Of particular note however are “streamlined planning” processes that would empower the Minister to make decisions about certain plan changes and have the final say in relation to the objectives, policies and rules in those planning documents.2 This streamlined process could be triggered to “implement a national direction” or “meet a significant community need” among other things.3

Under these “streamlined” processes, ministerial decisions could be made on the papers (considering a summary of public submissions and a cost benefit analysis prepared by the local authority among other things).4 Both the NZ Law Society and the Parliamentary Commissioner for the Environment have submitted that the proposed changes would override local communities’ autonomy in determining how best to manage their environments.

In relation to reduced public participation, the amendments would empower the Minister to prescribe which parties are eligible to be notified of resource consent applications,5 preclude public notification of certain activities subject to resource consent,6 and limit the right to appeal to the NZ Environment Court (NZEnvC) in relation to various activities such as residential development on a single allotment.7 Two new mechanisms for creating local authority plans also constrain full public participation (which hitherto has been the norm).8 The explanatory note to the Bill acknowledges that all of these measures serve to reduce public participation and in turn, act to limit the “subject community” of the NZEnvC.

The existing role of the judiciary would also be constrained by the amendments. For example, it would no longer be mandatory that a judge chair boards of inquiries into nationally significant projects.9 Further, ministerial decision-making in relation to local plans (mentioned above) would not be subject to merits appeal before the NZEnvC or appeals on a point of law before the High Court.10 At present, the NZEnvC hears disputes concerning local authority plans and its decision may be
between private rights and the public good. It is important to convey just how radical a change this latter proposal would be. New Zealand has had a specialist town planning and environmental adjudicative body for 90 years, and the function of hearing and determining objections to planning schemes on the merits, and thus approving final plans, has remained intact throughout. In 1953, the original ministerial-led town planning board was replaced by an independent appeal board headed by a legally qualified chair, supported by professionally qualified members. The change reflected the desire for the adjudicatory body to be a neutral arbiter and for public access to justice to increase. At the time, parliament stated the need for a body independent from central government (though guided by it) that could fairly determine the difficult balance between private rights and the public good and that could travel around the country to be accessible to communities — a body that was “much asked for by town-planning authorities” as:

… they like to feel that if there is a mistake another mind can be brought to bear to correct it … they do not want to feel that they are tyrants.

The present proposals undermine much of this rationale.

Wider themes

The Environmental Defence Society has submitted that many of the proposals will serve to “politicise” resource management decision-making, while diminishing the ability of the wider public to contribute directly to environmental management. Certainly, reducing public participation runs counter to international trends in environmental law, the general legal culture of NZ, and conceptions of the RMA as a “constitutional document”, providing a framework for public discourse and deliberation. But these proposals are not unheralded. Rather, they are part of the consistent ideology of the national government. Moreover, moves towards de-judicialising and politicising environmental dispute resolution reflect a tension that is ever-present, not just in NZ but around the world, that is: who should make decisions concerning the environment?

Interestingly, the present proposals and many of the submissions opposing those proposals are demonstrating two conceptually different political ideas about environmental decision-making and dispute resolution. The government’s proposals are based upon the idea that those entrusted with the tasks of governing possess “a subjective right to public power”. This conception concerns “representative democracy” and the dominant idea that “the real guarantee is to be found in the electoral and representative system”. The second conception, favoured by opponents to the proposals and reflecting core environmental law principles, concerns “participatory” or “deliberative democracy”. Deliberative democracy suggests that “democracy revolves around the transformation rather than simply the aggregation of preferences” and necessitates:

… collective decision-making by all who will be affected by the decision or their representatives: this is the democratic part … and includes decision-making by means of argument offered by and to participants who are committed to the values of rationality and impartiality: this is the deliberative part.

Deliberative democracy has become one of the “major positions in democratic theory” and accords with an idea of government that is “under the obligation to employ [its] power to organize public service”, creating institutional conditions that best facilitate participatory democracy. Importantly, these divergent political ideologies are reflected in the law. Principles of environmental law suggest the need for “broad, inclusive and democratic decision-making processes” as pre-conditions for substantive forms of environmental justice such as distributive justice and justice as recognition. Better environmental decision-making is said to flow from increased participation because:

- it results in the receipt of fuller information (including potential effects);
- enables decision-makers to better determine the “public interest”, particularly in relation to discrete, localised, or novel issues; and
- legitimises decisions and reduces possible future challenges.

As evidenced by Principle 10 of the Rio Declaration on Environment and Development and Agenda 21, such reasoning points towards “participatory” and “deliberative democracy”. These principles are well-known and not addressed further in this article, but common law conceptions of natural justice — the procedural standards that a reviewing court would hold a decision-maker to — also have considerable implications for access to environmental justice and should be considered by those debating the NZ amendments. However, these common law foundations tend to reinforce conceptions of “representative democracy”, so pulling in the opposite direction to environmental law principles.

Natural justice implications

While the ability for the public to participate directly in environmental dispute resolution will vary depending upon the relevant legislative regime and specific national
legal culture, common law principles of “natural justice” also seek to establish fair procedures for parties’ roles in dispute resolution. But the specific requirements for natural justice are flexible and context-specific and will depend on the public power in question, the effect of the exercise of its use and the nature of the decision-making body. As the Supreme Court of Canada (SCC) stressed in the Attorney-General of Canada v Inuit Tapirisat of Canada case, the very nature of the decision-making body must be taken into account in determining what procedures would be considered fair and appropriate.

Rigorous standards of natural justice are expected from courts and judicial bodies compared to other forms of decision-making processes. Common law doctrine establishes that there is a right to be heard in judicial proceedings, and a right to challenge facts that are in dispute, including expert or technical evidence. Making submissions requires parties to proffer arguments for their stance based on the facts and aligned with the legal tests, and the presumption is for judicial reasons to be given. In the NZ context, the NZEnvC has the statutory power to establish its own procedures, but the fact that it is a court of record and is judge-led influences the approach taken. As Principal Judge Laurie Newhook reports, although the NZEnvC operates at times “with a little less formality … for [example], rules about hearsay [may be relaxed]”, in general it follows traditional civil court processes but without restrictive locus standi rules.

The same standards of natural justice do not necessarily apply to alternate fora. In relation to ministerial decision-making, reviewing courts are slow “to treat the Executive Council or Cabinet as under any duty to follow a procedure at all analogous to judicial procedure” Absent any statutory requirements to the contrary, the SCC held that there was no need for the Executive Council to hold any kind of a hearing or even to acknowledge the receipt of a petition, and executive decision-makers are not required to give reasons. The rationale is that administrative decision-making should not be shackled with legal “formalism” taken from adjudication — ministers and administrative bodies have developed different approaches to resolving disputes to those developed by the courts:

Cabinet is not a fact-finding body in the ordinary sense. It is not accustomed to conducting hearings or receiving representations directly from public interest groups or private individuals … [thus] it is inherently improbable that in delegating the power of decision … the [legislature] contemplated the injection of the requirements of natural justice … into the decision-making process.

As stated above, the nature of the claim will influence conceptions of procedural fairness. If individual rights are impacted by decision-making, higher standards of natural justice are expected compared to decision that can be categorised as “policy decisions”, and resource management planning would fall into the latter “policy” category. Even if rights are impacted, there is no common law requirement for an oral hearing before the Minister. At its highest, the test is that the impacted individual should be able to see any evidence placed before the Minister that adversely impacts upon their rights and be able to respond — the Minister should not make a decision in ignorance. In practice, however, this doctrine will be of little use to those wishing to challenge the Minister’s decision on local plans. There are no constitutionally enshrined rights to environmental protection in NZ — those wishing to challenge ministerial decisions that impact upon the conservation of nature, arguing for a more comprehensive role in decision-making, will struggle to do so through a rights-based route. There is the possibility that adversely impacted property rights would found a basis for claiming greater standards of natural justice, but in a “policy-based” scenario, a reviewing court may require evidence of particular and individualised damage over that suffered by the general public.

The quality and type of “evidence” that suffices for ministerial decision-making is also entirely different to court-based adjudication. Absent clear statutory requirements, ministers will not be expected to base decisions on the “best available information”, and even with such a statutory mandate, the NZ courts have been unwilling to impose a high test — rather the Minister retains discretion as to what would be reasonable information to obtain in the circumstances. Further, ministers may rely upon in-house experts. Ministry employees may advise the Minister and there would be no common law requirement to disclose the advice given because knowledge of ministerial officials is deemed in law to be the Minister’s knowledge and “decision makers bear no responsibility to disclose matters that are particular to the decision-maker.” In-house advice may not be objective and may merge factual information, opinion and judgment of the issues, but there would be little scope for challenge. Moreover, confidentiality may apply to any communication between the Minister and external advisers. Legislation in NZ prioritises the need for the free flow of advice between ministers and civil servants, over the desirability of that communication being made publicly available. The Official Information Act 1982 (NZ) protects these communications as privileged — one of the few exceptions to the general purpose to make all official information freely available (although this protection can be overturned by persuasive public interest arguments to the contrary).

Ministers may be under a statutory requirement to “consult” affected persons and a duty under the Treaty of
Waitangi to consult with Maori iwi that are impacted. However, consultation does not equate to negotiation and does not require the consulting body to adopt the views of the other. Rather, the highest formulation of the test means that the consulting party “must keep its mind open and be ready to change … while quite entitled to have a working plan already in mind”. Pre-determination is to be expected with ministerial decision-making, again allowing political ideology to dominate, so providing a sharp contrast to judge-led adjudication.

Deliberative democracy and adjudication

The political scientist Jon Elster has drawn analogies between court-based adjudication and “deliberative democracy”. He argues that the forum or setting for deliberative democracy, “as a set of institutional conditions that promotes impartiality”, is important, and that deliberative democracy (ie, the procedure of debating one another before an audience) is analogous to “adversarial proceedings in the courtroom … the interchanges can serve to weed out falsehoods and inconsistencies and thus enable the [decision-maker] to make a good decision”. Deliberate democracy is said to foster political engagement and to provide “a basis for self-respect that encourage the development of a sense of political competence, and that contribute to the formation of a sense of justice”. Further, the public are said to “prefer institutions in which the connections between deliberation and outcomes are evident to ones in which the connections are less clear”.

Judicial views mirror political science thinking about deliberative democracy. Megarry J described “the feelings of resentment” that will be aroused if a party to legal proceedings is placed in a position where it is impossible for him to influence the result, whereas the UK Supreme Court referred to participation in decision-making as fostering human dignity and the rule of law.

In the judgment of the court, procedural requirements that decision-makers should listen to persons who have something relevant to say “promote congruence between the actions of decision-makers and the law which should govern their actions”. The rule of law values identified by the UK Supreme Court — promoting participation and thereby fostering responsive decision-making and respecting human dignity — are normative in environmental justice and promoting greater participatory democracy in environmental management has been a dominant theme in international treaty-making, case law, and the writing of jurists over the last three decades.

Conclusion

Taken in their totality, the present NZ proposals appear to be a contradiction to well-established environmental law principles — principles that promote “participatory” or “deliberative democracy” in environmental management. Importantly, the greater use of ministerial decision-making under the Resource Legislation Amendment Bill will limit public participation. While ministerial decision-making may be subject to judicial review, wider legal doctrine serves to reinforce conceptions of “representative democracy” in that scenario so creating a direct tension with environmental law principles. In conclusion, the importance of the law — and this legal tension in particular — should be expressly acknowledged and addressed in political debates concerning the choice of environmental decision-maker.

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Footnotes
2. Above n 1, cl 52.
3. See the new s 80C(2), above n 1, cl 52.
4. Above n 1, new Sch 1, Pt 5, cl 83.
5. Above n 1, cl 151.
6. Above n 1, cl 120–22 and 125.
7. Above n 1, cl 135.
8. Above n 1, new Sch 1, Pts 4 and 5.
9. Above n 1, cl 72.
10. Above n 1, new Sch 1, Pt 5, cl 93.
13. 299 NZPD 689.
14. 299 NZPD 799.

17. New Zealand has requirements for full participatory democracy at all stages of the law-making process.


20. Above n 19, p 457.


22. Above n 21, p 1.


26. R v Secretary of State for the Home Department; Ex parte Daly [2001] UKHL 26; and CREEDNZ Inc v Governor-General [1981] 1 NZLR 172 at 188.


28. CREEDNZ Inc v Governor-General, above n 26 at 178.

29. See R v Electricity Commissioners; Ex parte London Electricity Joint Committee Co [1924] 1 KB 171; and PA Joseph Constitutional and Administrative Law in New Zealand (4th edn) Brookers, 2014 p 1024.


31. R (West) v Parole Board; R (Smith) v Parole Board (No 2) [2005] 1 WLR 350; [2005] UKHL 1 at [31]. Above n 21, p 8 and Ch 4.


33. Constitutional and Administrative Law in New Zealand, above n 29, p 1050.

34. The only routes to challenge would be via “mistake of fact” or “implied mandatory considerations” arguments.

35. CREEDNZ Inc v Governor-General, above n 26 at 188.

36. For a classic example, see above n 42 at 136–37.


39. Official Information Act 1982 (NZ), ss 9(2)(g) and 9(1).

40. Wellington International Airport Ltd v Air New Zealand [1993] 1 NZLR 671 at 675.


42. Treaty of Waitangi obligations may provide some protections to Maori, but this complex issue is not addressed in this article.

43. See cases stemming from Cooper v Wandsworth Board of Works (1863) 14 CBNS 180.

44. See cases stemming from Cooper v Wandsworth Board of Works (1863) 14 CBNS 180.


The politics of public interest environmental litigation: lawfare in Australia

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Introduction

In August 2015, the Australian Government moved to restrict the capacity of environmental groups to challenge major developments under Commonwealth environment law in direct response to a successful appeal against the approval of a controversial new coal mine (Mackay Conservation Group Inc v Commonwealth\(^1\) (Adani case)). According to the government, this litigation was part of an illegitimate coordinated strategy among environmental groups to use “green lawfare” to “disrupt and delay key projects and infrastructure” and to increase investor risk.\(^2\) The Attorney-General further characterised the Adani case as “vigilante litigation by people … who have no legitimate interest other than to prosecute a political vendetta against development and bring massive developments … to a standstill”.\(^3\)

This characterisation is significant given that the litigation was settled by consent orders under which the Environment Minister accepted he had breached the Environmental Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act) by failing to consider conservation advice provided by the Department of Environment on the impact of the proposed mine on two vulnerable species. In this context, it is concerning that the government is now attempting to limit standing under the EPBC Act to those persons aggrieved by the decision. By doing so, the government would not only limit the scope for public interest litigation in defence of the environment, it would also curtail the rule of law by restricting the public’s capacity to challenge decisions made in breach of the law.

The Australian Government’s attempts to shut down community access to environmental adjudication is out of step with emerging international norms around public participation in governance, as outlined in Principle 10 of the Rio Declaration on Environment and Development (Rio Declaration) and the Aarhus Convention.\(^4\) Although Australia is one of few countries that have not explicitly adopted this right, the Australian community have demonstrated a growing expectation that they will have the right to participate in decision-making that affects the environment.\(^5\)

Legitimate interests

The government’s characterisation of the Adani case as “vigilante litigation by people … who have no legitimate interest”,\(^6\) and its stated goal of limiting standing to “persons aggrieved by the Minister’s decision”,\(^7\) raises the question of what qualifies as a legitimate interest when it comes to the approval of mining projects. The legal meaning of a “person aggrieved” is defined in s 7 of the Judicial Review Act 1991 (Qld) as “a person whose interests are adversely affected by the decision”. While the High Court has made it clear that this should not be interpreted narrowly,\(^8\) the clear intention of the government in proposing this change is to primarily limit standing to those with an economic interest at stake.

This narrow definition of what constitutes a legitimate interest is out of step with emerging international norms around public participation in governance and, particularly, the right of the community to participate in decisions that affect the environment. As the International Law Association (ILA) have noted:

> In contemporary society, legitimacy largely depends on the consent of the governed, and hence on the sense that the governed have a voice through direct participation, representation, deliberation, or other methods.\(^9\)

This expectation of participation has its roots in liberal theories of citizenship,\(^10\) under which democratic governments historically relied on representative democracy to justify their legitimacy. However, as the United Nations Development Programme (UNDP) argues,\(^11\) elections are not enough to guarantee inclusive democracy. Contemporary citizenship theory reflects a more active concept of citizenship — as ‘one which recognises the agency of citizens as ‘makers and shapers’ rather than as ‘users and choosers’ of interventions or services
designed by others”.12 From this perspective, meaningful participation can be seen as a fundamental citizenship right, one that empowers citizens to protect and realise their other human rights.13

This shift towards the recognition of (meaningful) participatory rights has been most developed within the international instruments relating to environmental management. The first instrument signalling a shift in this direct was the 1972 Stockholm Declaration,14 which recognises both a right to a healthy environment and a responsibility to “protect and improve the environment for present and future generations”.15 This was followed in 1992 by the Rio Declaration16 and Agenda 21,17 and the 2002 Johannesburg Plan of Implementation,18 all of which call for increased community involvement in environmental decision-making. Unifying these instruments is a recognition of the interdependent nature of human rights and the environment and an understanding that communities need to directly participate in environmental management decisions in order to ensure these rights are protected.

These procedural justice rights associated with protecting the right to a healthy environment have been given their most explicit protection in the Aarhus Convention (1998),19 which is devoted entirely to participatory rights, including:

- a right to access publicly held environmental information;
- a right to participate in environmental decision-making; and
- (significantly for our purposes) a right to challenge public decisions made in violation of environmental laws in court.20

Although it is a regional agreement, having been developed by the United Nations Economic Commission for Europe (UNECE), Art 19(3) of the Aarhus Convention provides that it is open to accession by any UN member state “upon approval by the Meeting of the Parties”. Following the Aarhus Convention, the ILA asserts that “there can be little doubt that a right of public participation has now become a general rule of international law regarding environmental management”.21

This right of community participation has also been recognised in the procedural rights associated with the right to a healthy environment.22 This is significant because it has been estimated that at least 177 nations recognise this right through their constitution, environmental legislation, court decisions, or ratification of an international agreement.23 It is also evolving to incorporate a more Earth-centric approach to environmental protection, as can be seen in the recent Constitutions of Bolivia and Ecuador, which call on their communities “to respect the rights of nature”.24

Although Australia is one of few nations that have not recognised the right to a healthy environment, it cannot ignore the almost universal recognition of the interdependent nature of human rights and environmental protection,25 or of the procedural rights necessary to enable the community to protect their environment.26 Relevant to the government’s attempt to limit standing, Dinah Shelton argues:

Establishing a strict scrutiny standard of judicial review for any measure that would implicate the right to a clean and healthful environment is one of the most important practical consequences of taking a rights-based approach to environmental protection.27

Community expectation of a right to participate

Shelton also argues that the speed with which the right to a healthy environment has been incorporated into national law:

… and invoked in judicial actions throughout the world attest[s] to the public support for environmental rights, but also indicate[s] concern for the continuing degradation of the environment, with its impact not only on present values but on future human security.28

The Australian community has demonstrated that it shares this growing concern over the impact of resource extraction on the state of the local and global environment and a clear expectation of a right to actively participate in environmental management.

Over the last decade in Australia, there has been a marked increase in visible community concern over both the impact of resource extraction and the lack of community power to influence decision-making around mining development.29 This increase can be attributed to a number of factors, but the most significant of these are:

- the ease with which local communities can now create alliances with other like-minded local, national and international organisations; and
- mounting community concern around environmental degradation and climate change.

Historically, when mining companies moved into a rural area in Australia, the community had little political power to oppose new development.30 As Linda Connor and others describe, the political capital of communities has traditionally been limited because the mining companies and the government carefully restrict access to information about the development process, and deliberately divide the community by negotiating secret land access deals.31 These tactics often resulted in isolating and disempowering small local social action groups, but are losing their effectiveness in an age of digital activism.
Today, local activists are able to draw on support from national and international environmental non-governmental organisations (NGOs) to enhance their visibility and gain access to the information they had previously been denied. Most significant have been the alliances formed between local groups. One particularly successful example is the Lock the Gate coalition — a national alliance formed in 2010 between farmers, conservationist and other community groups concerned with gas and coal developments. A unifying concern among these groups has been the lack of transparency and community participation in past mining development processes, in addition to the environmental impact of these developments.

Studies of mine-affected communities have reported that landholders start out being concerned about direct impacts, including noise, reduced property values and traffic, but that broader environmental concerns such as water quality, contamination, biodiversity and climate change have become more significant as awareness about these issues spreads and landholders start to form alliances with conservationists and local Indigenous peoples.

Public concern about climate change has been increasing in Australia as the community has become more aware of climate science and experienced more of the effects. The significant of these tangible effects is reflected in surveys of community attitudes. A 2013 survey found that the three top concerns of the Australian community in relation to climate change were:

1) “droughts affecting crop production and food”;
2) pollution; and
3) “destruction of the Great Barrier Reef”.

As a direct result of these concerns, a majority of Australians (63%) would like the government to take climate change more seriously and, particularly, to start planning to move away from coal (72%).

Political influence of mining sector

Given the community’s increasing insistence on participating in development decisions around mining, why is the Australian Government seeking to curtail avenues for this participation? The likely explanation goes to the heart of the functioning of Australia’s democracy, because it raises the question of whose interests our government is most committed to representing.

The mining industry exerts a disproportionate level of political influence in Australia and has successfully leveraged this influence to protect its profitability. One of the outcomes of this influence has been the industry’s successful rent-seeking. Richard Denniss and David Richardson report that the industry “pays the lowest rate of tax on profits of any industry [in Australia] … due primarily to … generous tax concessions”. Sandi Keane reports that “Australia’s effective tax rate for foreign multinational miners is a mere 13%”. This has resulted in high levels of profit, which mostly goes offshore since the mining industry is estimated to be 83% foreign-owned and to employ just 2.3% of the Australian workforce.

One of the most pointed examples of the mining industry’s influence was its campaign against the Rudd Government’s proposed Resource Super Profits Tax (RSPT), which was designed to collect around 40% of mining profits in Australia. In May and June of 2010, the mining industry spent just over $22 million to run an aggressive 6-week advertising and public relations campaign against the RSPT. As part of the lobbying campaign:

Lurid articles were planted, suggesting that overseas investment in Australia would dry up, tens of thousands of jobs would be lost and the mining boom, the saviour of the economy, would grind to a halt.

The campaign was extremely damaging to the government’s political standing and ended when the Prime Minister was replaced by his party just 53 days after announcing the tax. In her first public speech after her installation, the new Prime Minister committed to negotiating a more favourable deal with the industry — so favourable, in fact, that it raised almost no revenue in its first few years of operation. As one UK newspaper stated in response to these unfolding events: “the awesome political power of the mining companies that has been revealed by this affair is … breathtaking.”

Discussion

In their analysis of the discursive factors that dominate public debate around coal seam gas (CSG) in Australia, Alexandra Mercer, Kim de Rijke and Wolfram Dressler argue that the language used by both industry and government demonstrate a “neoliberalising political economy” that serves to normalise particular perspectives and “foreclosure” others. This same discourse of normalising neoliberal perspectives, while delegitimising and silencing opposing viewpoints, can also be seen in political discourse around coal mining and, particularly, in the government and the Minerals Council of Australia’s response to the Adani case. From within a neoliberal framework, the only legitimate concerns are those relating to profit or private property rights, but this framework does not reflect the views of the Australian community. Unless this tension is resolved, we can expect to see a lot more conflict between the government and the community in rural and regional areas of Australia.
Footnotes

1. Mackay Conservation Group Inc v Commonwealth [2015].
5. See for example Metgasco Ltd v Minister for Resources and Energy [2015] NSWSC 453; BC201502970; and the “Bentley” blockade mentioned therein.
8. Above n 7.
13. See for example above n 10, at 4.
15. Above n 14, p 71.
19. Aarhus Convention, above n 4.
20. Aarhus Convention, above n 4, Arts 4, 6–9.
26. Above n 25; S Atapattu “The right to a healthy life or the right to die polluted?: the emergence of a human rights to a healthy environment under international law” (2002) 16 Tulane Environmental Law Journal 65 at 90–96.
28. Above n 27, at 17.
31. Connor et al, above n 30 at 490.
32. See for example Connor et al, above n 30; and Lloyd et al, above n 30 at 150.
33. For more details, see Lock the Gate Alliance, accessed 6 June 2016 available at www.lockthegate.org.au/about_us.
34. See for example, Lloyd et al, above n 30 at 150.
35. See Lloyd et al, above n 30 at 150; Connor et al, above n 30 at 500; and Turton, above n 29 at 59.

37. The Climate Institute, above n 36, p 11.

38. The Climate Institute, above n 36, pp 2–3.


45. Mitchell, above n 39.


47. Above n 40 at 5.


50. Above n 49 at 282.
Safeguarding advocacy on behalf of the environment

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Introduction
Across Australia, government laws, policies and practices are gradually eroding our basic democratic rights such as freedom of assembly and expression. The environment movement is not immune from this anti-democratic trend. In fact, governments have actively sought to restrict advocacy on behalf of the environment. A federal parliamentary inquiry into the Register of Environmental Organisations and state-based anti-protest laws are just two examples of how environmental advocacy is under attack in Australia.

Australia needs law and policy reform not only to reverse this trend but to actively protect the space in which civil society can speak out. This is important not just for environmental advocacy, but in order to safeguard robust, pluralistic public debate and the foundations of Australian democracy.

Background
In February 2016, the Human Rights Law Centre (HRLC) published Safeguarding Democracy, a report that documents how governments at the state and federal level are damaging the free and independent press, strong and diverse civil society, and open and accountable government.

The report makes 38 recommendations for reform on issues as broad as compulsory metadata retention, the aggressive pursuit of whistleblowers, personal attacks on the President of the Australian Human Rights Commission, and the ousting of the judiciary’s vital oversight role.

Two aspects of that report of particular relevance to environmental advocacy are the funding pressures that stifle criticism by government-funded civil society and state-based anti-protest laws.

Controlling advocacy through funding levers
The Australian Government has used a range of funding pressures to control or stifle environmental advocacy. The bluntest instrument has been the funding cuts to outspoken groups. In December 2013, the Australian Government cut funding to Environmental Defenders’ Offices across the country, without warning, leaving many on the brink of closure. This move was consistent with the federal government’s broader view that its role is not to fund advocacy. For example, when The Hon Scott Morrison MP cut all of the Refugee Council of Australia’s funding in 2014, he explicitly stated that government should not be funding advocacy.

In March 2015, the government delivered a broader and more potent attack against environmental advocacy when it established the House of Representatives Standing Committee on the Environment’s (Environment Committee) Inquiry into the Register of Environmental Organisations. The inquiry was established following the Federal Liberal Party’s endorsement of a motion to strip environmental organisations of their deductible gift recipient status (DGR status). DGR status allows organisations to receive tax deductible gifts and is central to the financial viability of many not-for-profit organisations.

In its final report, the Environment Committee sought to delegitimise advocacy by environmental organisations. Government members of the Environment Committee found that “practical environmental work in the community,” not advocacy, is the purpose of the grant of DGR status to environmental organisations. It recommended that in order to be eligible for DGR status, an environmental organisation should be required to spend no less than 25% of its annual expenditure on environmental remediation work. Remediation work includes revegetation, wildlife rehabilitation, plant and animal pest control, land management and covenanting. Importantly, advocacy, research, education, legal services and overseas activities were expressly excluded from “remediation work”.

Environmental advocacy groups that do not undertake remediation works could lose their eligibility for DGR status under this test. Even for those groups that do engage in remediation works, proving that a percentage of activities are in fact remediation works creates unnecessary red tape.

Pro Bono Australia’s 2015 survey of the not-for-profit sector showed the high degree of concern across the sector, with nine out of 10 respondents regarding recognition of their advocacy role as the most important factor in developing the sector.
Community legal centres (CLCs), for example, are under financial pressure in relation to their advocacy work. Their government funding agreements now contain a clause that expressly prohibits funding from being used to lobby government or engage in public campaigns, with extremely narrow exceptions. In language, echoing the Environment Committee’s distinction between practical environment work and advocacy, Attorney-General George Brandis said that government should only fund “services [that] are actually helping a flesh and blood individual”.

The impact has been a chilling effect on CLCs’ willingness to speak out. As Amanda Alford, Deputy Director of the National Association of Community Legal Centres noted:

These restrictions have a number of implications, including that CLCs feel that they are less able to undertake absolutely crucial preventative and early intervention work, or assist by addressing legal problems in a systemic way.

While community organisations may not have a right to receive government funding to conduct advocacy, equally, the government should not suppress the free expression of those it funds to provide services to the community.

Restricting protest

A second direct attack on environmental advocacy is being conducted through anti-protest laws passed in Tasmania and NSW, and currently proposed in WA.

The WA Bill was introduced in response to the campaign to protect James Price Point and anti-logging protesters in the south west of the state. It seeks to prevent protesters from locking themselves on to equipment, trees and other objects using thumb locks or arm locks. The Tasmanian law seeks to protect forestry and mining from any disruptive protest action that prevents them from “operating on [a] normal commercial basis”. The NSW laws increased 10-fold the penalties for protesters engaged in unlawful entry on to land to interfere with a business. Yet at the same time, the NSW laws reduced the penalties for illegal mining to a maximum fine of $5000 instead of a maximum fine of $1.1 million.

The laws are written in broad and vague terms that would capture protest that has nothing to do with the environment. For example, WA’s laws would make “possession of things [for the purpose of preventing a] lawful activity” an offence. It could potentially make the possession of everyday objects such as bike locks the basis for an arrest. In Tasmania, the law criminalises legitimate protest or peaceful civil disobedience that, even temporarily, “hinders” access to business premises or “disrupts” business operations.

Three UN human rights experts have condemned the Tasmanian legislation and the proposed WA law as violations of Australia’s international obligations to protect and promote peaceful assembly and freedom of expression.

In NSW, the anti-protest laws include police powers to shut down protest that obstructs traffic. Under international human rights law, governments have a positive obligation to facilitate peaceful assemblies. Protests can still be peaceful if they annoy, hinder, impede or obstruct the activities of third parties. International human rights law suggests that it is as valid to use public space for protests as it is for access to business.

Meanwhile, at the federal level, there are further plans to diminish the space in which to protest and assemble, again arising from the Environment Committee’s Inquiry into the Register of Environmental Organisations.

The Environment Committee recommended administrative sanctions for organisations “that encourage, support, promote or endorse illegal or unlawful activity undertaken by employees, members, or volunteers of the organisation or by others without formal connections to the organisation”. The Environment Committee explained that it expected that activities such as blocking access, trespass, destruction of property, violence and assault, and acts of civil disobedience be subject to the administrative sanctions.

The joint expression of ideas or views in the form of protest or peaceful assembly can be uncomfortable or irritating for government, but it is a fundamental pillar of Australian democracy.

In a dissenting report, the Hon Jason Wood MP, a government member of the Environment Committee, made a strong argument against these recommendations, drawing on the important work done to protect the Franklin River in Tasmania, including the use of a blockade, and to oppose Japanese whaling in the Southern Ocean. He said:

These protests, which were actively supported by environmental groups, would be prohibited under this recommendation and history would now show that, if it was not for these protests and national awareness, the World Heritage Franklin River would have been dammed.

Australian law contains no constitutional or legislative right to freedom of peaceful assembly. However, the constitutionally implied freedom of political communication restrains government power to some extent, including state government power, to pass laws that disproportionately burden communication on political matters.

Former Senator and Greens Leader Bob Brown will test the limit of this implied freedom. He was arrested in
January 2016 under the Tasmanian anti-protest law and has challenged the validity of the law in the High Court of Australia. He is arguing that the Tasmanian legislation is inconsistent with the implied freedom of political communication.

Law and policy reform to strengthen advocacy

In the Safeguarding Democracy report, the HRLC called on the Australian Government to create an environment in which Australian civil society can freely advocate without fear of reprisals. Australia has an obligation under international law to do so, as do the states and territories.28

The Safeguarding Democracy report sets out a range of law and policy reform options available to strengthen protections.

First, reform of the Not-for-profit Sector Freedom to Advocate Act 2013 (Cth) could prevent the Australian Government from using its funding relationships as a lever to stifle advocacy by community organisations. That law currently prevents the Australian Government from inserting gag clauses into community sector agreements.29 However, while the government has made it plain that advocacy is unwelcome, it has fallen short of expressly gagging its funding recipients. In doing so, it has sidestepped the reach of the Not-for-profit Sector Freedom to Advocate Act.

In order to address this issue, the Not-for-profit Sector Freedom to Advocate Act could be strengthened in two important ways. It could contain a statement of principles that articulates the importance of advocacy by the not-for-profit sector and its contribution to effective and informed government policymaking. It could also require the government to adopt policies that are consistent with those principles and specifically enable and empower community organisations to undertake advocacy consistent with their mission.

Second, organisations that are funded by government should also call for standard terms in all funding agreements to clarify that they are not prevented from engaging in public debate, even if that engagement is critical of government. This was introduced under the Gillard Government and subsequently removed during the period of Tony Abbott’s prime ministership.

Third, in order to demonstrate the value that government places on robust and pluralist debate, the Australian Government should enshrine the importance of civil society advocacy and the freedom to advocate in the public service values and codes of conduct.

Fourth, the government must not limit the provision of DGR status by excluding advocacy organisations. Currently, the threat to strip such entities of their DGR status is confined to environmental advocacy groups. There must be a concerted resistance to any stripping of tax concessions on the basis that advocacy is not a valid activity.

Since the Aid/Watch Inc v Commissioner of Taxation30 case, it is clear that charities can engage in advocacy in accordance with their mission. The High Court has recognised that advocacy by community organisations is a vital part of the nation’s political communications that are, in turn, “an indispensable incident” of Australia’s constitutional system and that contribute to public welfare.31

The government should be urged to progressively widen the scope for gift deductibility to include all endorsed charitable institutions and funds, as recommended by the Productivity Commission.32

Finally, anti-protest laws at the state level should be resisted and, where already in force, repealed.

A human rights Act for Australia

The reforms outlined above require unified action because the impacts are widespread. Attacks on environmental advocacy are part of a broad nationwide trend of governments to diminish basic democratic rights and freedoms. Environmental organisations, community services, human rights defenders, journalists, faith-based groups, philanthropists and unions are concerned about the limits being placed on public debate. The HRLC was joined by leaders from each of those groups to launch Safeguarding Democracy in February this year.

These worrying restrictions on environmental and other advocacy also highlight a glaring omission in legal human rights protections in Australia. Unlike all other western democratic nations,33 Australia does not provide any comprehensive protection of human rights in its domestic law. Australians have very few avenues through which to restrain excessive uses of government power that infringe rights to free speech and assembly.

While law and policy reform is necessary to address specific issues, in the medium term, there should be broader structural and institutional reform required to properly protect democratic rights.

If the current anti-democratic trend has an upside, it will be to galvanise support across the community for mutually beneficial institutional reforms such as a human rights Act to safeguard voices of dissent and the ability to protest.

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Footnotes


5. Inquiry into the Register of Environmental Organisations, above n 4, at [4.79].

6. Inquiry into the Register of Environmental Organisations, above n 4, Recommendation 5.

7. Inquiry into the Register of Environmental Organisations, above n 4, at [4.82].

8. Inquiry into the Register of Environmental Organisations, above n 4, at [4.83].


10. There is a very limited exception to that for providing community legal education or “where a legal assistance service provider makes a submission to a government or parliamentary body to provide factual information and/or advice with a focus on systemic issues affecting access to justice”.


17. Above n 13.

18. See above n 14.


25. Inquiry into the Register of Environmental Organisations, above n 4, p 65 at [5.95].


see International Covenant on Civil and Political Rights opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Arts 19(1)–(2), 21 and 22.

29. Not-for-profit Sector Freedom to Advocate Act 2013 (Cth), ss 4 and 5(1).


31. Above n 30, at [44]. This was subsequently enshrined in the Charities Act 2013 (Cth).


33. For example, human rights are explicitly protected in the UK through the Human Rights Act 1998, in NZ through the New Zealand Bill of Rights Act 1990, in Canada through the Canadian Charter of Rights and Freedoms in Pt 1 of the Constitution Act, 1982, and in the US through the Bill of Rights in the US Constitution.
Atmospheric Trust Litigation in Washington State: advocating for a constitutional right to a stable climate for the young and future generations

Andrea Rodgers WESTERN ENVIRONMENTAL LAW CENTER

Introduction
In April 2016, eight young people aged 12–16 from the State of Washington in the US secured a court victory in the form of a judicial order directing the Washington State Department of Ecology (Ecology) to promulgate a rule capping and regulating carbon dioxide emissions generated in the state. The case, part of a coordinated, youth-driven legal campaign known as Atmospheric Trust Litigation, is the first time a court in the US ordered a regulatory agency to address climate change by regulating carbon dioxide emissions. The goal of the litigation is to force sovereign governments to develop and implement enforceable climate recovery plans mandating reductions of greenhouse gases (GHGs) in accordance with best available science.

How does it affect you?
Atmospheric Trust Litigation cases are being brought in several different states and countries throughout the world. The case in Washington can be used as a template in other jurisdictions by youth interested in vindicating their fundamental legal rights to a stable climate.

Background
The failure of sovereign governments to address climate change is well-documented. For nearly 30 years in Washington, the agency charged with managing and protecting the state’s natural resources (Ecology) has acknowledged “the potential impacts of global warming dwarf those of other environmental threats.” In December 2008, Ecology wrote: “Even then [in 1990], it was clear the societal threat that climate change presents is of a nature and magnitude unlike any other we have faced”. Ecology recognised:

- Climate change is not a far off risk. Globally, it is happening now and is worse than previously predicted, and it is forecasted to get worse. We are imposing risks on future generations (causing intergenerational inequities) and liability for the harm that will be caused by climate change that we are unable or unwilling to avoid.
- The science is clear that we must move forward quickly to reduce greenhouse gas (GHG) emissions in order to mitigate its effects. Without action, climate change will negatively affect nearly every part of Washington’s economy through changes in temperature, sea level, and water availability.

Most recently, in December 2014, Ecology acknowledged:

- If we delay action by even a few years, the rate of reduction needed to achieve these [GHG emission reduction] goals would have to be beyond anything achieved historically and could be very costly.

In spite of the government’s rhetoric recognising the climate change problem and the need to implement aggressive policies designed to drastically reduce GHG emissions, studies show that the state government has made very little progress. Ecology recognises the consequences of its inaction:

- Largely, in response to the urgency of the climate crisis and sovereign governments’ inability to implement policies to stem the tide of climate change using the traditional legal paradigm, University of Oregon School of Law Professor Mary Wood developed a legal theory known as Atmospheric Trust Litigation. The theory is based upon the public trust doctrine, an ancient legal doctrine that secures for future generations of citizen beneficiaries a healthful and pleasant environment, and thereby imposes an affirmative and mandatory duty on the state to prevent substantial impairment to the state’s essential natural resources. The public trust doctrine is an expression of fundamental constitutional rights and sovereign obligations. Armed with this legal theory and the support of Our Children’s Trust, eight young Washingtonians aged 10–14 (now 12–16) filed a petition with Ecology asking the agency to use its existing statutory authority to cap and regulate carbon dioxide emissions using best available science.

The youth are supported in their efforts for science-based GHG emission reductions by several world-renowned climate scientists, including Dr James Hansen.
and his team of experts who have developed a “scientific prescription” for the planet (i.e., an emissions reduction pathway). According to Dr Hansen:

Unless action is undertaken without further delay, so as to return the atmospheric concentration of CO$_2$ to 350 ppm by 2100, Earth’s climate system will be pressed toward and past points of no return with ever-worsening climate-related impacts in the meantime.

The goal of the youth is to secure a Climate Recovery Plan mandating GHG emission reductions targeted to achieving global atmospheric carbon dioxide concentrations of 350 parts per million (ppm) by the end of the century.

After Ecology summarily denied the youth’s petition, the youth took the agency to court to vindicate their rights. After nearly 1 year of litigation, a Washington State Court endorsed the value of pursuing atmospheric trust litigation, in spite of the novel nature of the youth’s legal argument.

... current science makes clear that global warming is impacting the acidification of the oceans to alarming and dangerous levels, thus endangering the bounty of our navigable waters. ... The navigable waters and the atmosphere are intertwined and to argue a separation of the two, or to argue that GHG emissions do not affect navigable waters is nonsensical. Therefore, the Public Trust Doctrine mandates that the State act through its designated agency to protect what it holds in trust.

The court recognised that “the State has a constitutional obligation to protect the public’s interest in natural resources held in trust for the common benefit of the people of the State”. Most significantly, the court acknowledged that the youth have legal rights, protected by the state constitution, that are being implicated by climate change:

Ecology’s enabling statute states, “[I]t is a fundamental and [in]alienable right of the people of the State of Washington to live in a healthful and pleasant environment.” RCW 43.21A.010. Although, a statutory duty cannot be created from the words of the enabling statute, this language does evidence the legislature’s view as to rights retained under Article I, Section 30 [of the Washington Constitution]. If ever there were a time to recognize through action this right to preservation of a healthful and pleasant atmosphere, the time is now.

The court did not order Ecology to undertake additional actions to implement these legal findings, instead relying upon Ecology’s assurance it would comply with the governor’s directive to promulgate a Clean Air Rule capping and regulating carbon dioxide emissions pursuant to the state’s Clean Air Act. Notably, the governor issued this directive a mere 2 weeks after he met with the youth, who asked him to direct Ecology to use their existing statutory authority to regulate carbon dioxide emissions.

But after Ecology withdrew its proposed Clean Air Rule a few months later, a process originally found by the court to remedy the youth’s atmospheric trust claims, the youth went back to court and received a second order directing the agency to promulgate the rule by the end of the year, a form of relief never before issued by an American court of law. In doing so, the court made several notable findings, including:

The effect of climate change on water supplies, public health, coastal and storm damage, wildfires and other impacts will be costly unless additional actions are taken to reduce greenhouse gases.

... current science establishes that rapidly increasing global warming causes an unprecedented risk to the earth including land, sea and atmosphere and all living plants and creatures. ... Washington faces serious economic and environmental disruptions from the effects of climate change.

In response to this order, Ecology has recently issued a revised version of the Clean Air Rule which fails to fulfil the agency’s duty to protect the fundamental, constitutional rights of young people because it mandates a modest amount of GHG emission reductions and legalises dangerous levels of carbon dioxide emissions. The youth and their team of scientific experts have submitted detailed comments on Ecology’s proposed rule and are continuing their quest to obtain science-based climate action in Washington state.

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Footnotes
1. The Washington legislature created the Department of Ecology “to establish a single state agency with the authority to manage and develop our air and water resources in an orderly, efficient, and effective manner and to carry out a coordinated program of pollution control involving these and related land resources”: Revised Code of Washington RCW 43.21A.020.
3. Above n 2, p 5.

7. Above n 5, p 18.


10. Citizens for Responsible Wildlife Mgmt v State 124 Wn.App. 566, 103 P.3d 203 (2004) (Quinn-Brintall CJ concurring): “But the sovereign’s duty to manage its natural resources recognized in the public trust doctrine is not time limited, and the primary beneficiaries of the sovereign’s exercise of its public trust are those who have not yet been born or who are too young to vote. Thus, the sovereign authority to regulate natural resources is circumscribed by its duty to manage natural resources well for the benefit of future generations. And when the sovereign exercises this authority, by executive order, legislative enactment or public initiative, the tenets of the public trust doctrine must be satisfied.”

11. Our Children’s Trust is a non-profit organisation based in Eugene, Oregon that coordinates youth all over the world and leads a “game-changing, youth-driven, global climate recovery campaign to secure the legal right to a stable climate and healthy atmosphere”. For more details, see Our Children’s Trust at www.ourchildrenstrust.org/.

12. One of the scientists who has provided expert testimony on behalf of the youth in Washington is Dr Ove Hoegh-Guldberg, Professor of Marine Studies and the Director of the Global Change Institute at the University of Queensland and Deputy Director of the Australian Research Council (ARC) Centre of Excellence for Coral Reef Studies. Dr Hoegh-Guldberg is one of the world’s leading experts on ocean warming and acidification.


14. Courts in the US have traditionally applied the Public Trust Doctrine to protect public rights to use and enjoy navigable waters, which makes sense since water was the first common natural resource over access to which was limited by scarcity and overuse. See for example Illinois Central Railroad Co v Illinois above n 9. That being said, many acknowledge that the principles underlying the Public Trust Doctrine can be traced to the Code of Justinian in ancient Roman law that acknowledged the common ownership of all essential natural resources including air and water. See also Caminiti v Boyle, above n 9; Rettkowski v Department of Ecology 122 Wn.2d 219, 858 P.2d 232 (1993) (Guy J dissenting) (“The Institutes of Justinian, a compilation and restatement of the Roman law first published in 533 AD, states: ‘The following things are by natural law common to all — the air, running water, the sea and consequently the sea-shore.’”). More recently, courts have returned to the original roots of the doctrine and applied it to protect public interests such as “navigation, commerce, fisheries, recreation, and environmental quality”: Weden v San Juan County 135 Wn.2d 678, 958 P.2d 273 (1998) (quoting R W Johnson et al in The Public Trust Doctrine and Coastal Zone Management in Washington State 67 Wash. L. Rev. 521, 524 (1992)). In addition, “courts have applied the trust doctrine well beyond its traditional scope to assets such as groundwater, wetlands, dry sand beaches, parks, non-navigable waterways, and most recently, air and atmosphere”. See also M C Wood and C W Woodward IV “Atmospheric trust litigation and the constitutional right to a healthy climate system: judicial recognition at last” (2016) Washington Journal of Environmental Law and Policy 634.

15. See the Order Affirming the Department of Ecology’s Denial for Rule Making: Foster, et al v Washington Department of Ecology King County Super Court No 14–2–25295–1 SEA at 8.

16. Above n 15, at 8.

17. “Article I, Section 30 of the Washington State Constitution states, ‘[t]he enumeration of certain rights shall not be construed to deny others retained by the people.’” Above n 15, at 9.


19. Above n 15.

20. In its original decision, the court found that the Department of Ecology was not violating its legal obligations “given that it is engaging in rule-making under the directive to establish standards for greenhouse gas emissions”. Above n 15, at 7.

21. “The reason I’m doing this is because this is an urgent situation. This is not a situation that these children can wait on. Polar bears can’t wait, the people of Bangladesh can’t wait. I don’t have jurisdiction over their needs in this matter, but I do have jurisdiction in this court, and for that reason I’m taking this action.” See the Transcript of Hearing and Bench Ruling, Foster, et al v Washington Department of Ecology No 14–2–25295–1, p 20 available at http://westernlaw.org/sites/default/files/2016.04.29-WA%20ATL%20Final%20Decision%20Bench%20Ruling%20Transcript.pdf.

22. Above n 21, pp 18–19.


Information Commissioner directs release of information on seal and dolphin deaths

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A series of recent decisions by Acting Australian Information Commissioner Timothy Pilgrim (Information Commissioner) considered requests made under the Freedom of Information Act 1982 (Cth) (FOI Act) by Greens Senator Peter Whish-Wilson1 and the Australian Broadcasting Corp (ABC).2 Both requests were for documents, photographs and video footage relating to interactions between trawler vessel, the FV Geelong Star, and marine mammals. The requests followed the reported deaths of a number of seals and dolphins caught in the trawler nets during its first 6 months of operation in the Small Pelagic Fishery.

The review proceedings followed extensive negotiations regarding the scope of the freedom of information (FOI) requests between the applicants, the Australian Fisheries Management Authority (AFMA), the trawler operator, Seafish Tasmania Pty Ltd (Seafish), and the manufacturer of the seal excluder device used on the vessel, Maritiem BV (Maritiem).

The Information Commissioner determined that almost all of the documents requested should be disclosed, emphasising the FOI Act’s objective of public scrutiny of government decision-making and the public interest in ensuring sustainable management of natural resources.

The FOI requests

Whish-Wilson request

Senator Whish-Wilson applied to AFMA for access to all documents relating to the recently reported deaths of marine mammals. Seafish objected to the disclosure of the requested information on the grounds that its release would adversely affect Seafish’s business affairs3 and reveal trade secrets, being the technical details of the seal excluder devices used in the trawler nets.4

In August 2015, AFMA agreed to release a number of documents in full or in part, but refused to release 10 documents comprising images and video footage, relying on the trade secrets, personal privacy5 and business affairs exemptions. Senator Whish-Wilson requested review of the decision by the Information Commissioner, and revised the scope of his original request to include only those 10 documents.

On 5 February 2016, AFMA made a revised decision, agreeing to release the images and footage provided they were edited to obscure individual faces and features of the net, including the seal excluder devices. Senator Whish-Wilson agreed to the qualified release of the documents, excluding the need for AFMA to continue to rely on the personal privacy exemption.

On 7 March 2016, Seafish sought review by the Information Commissioner of this revised decision, contending that the documents were exempt in full under the “certain operations of agencies” exemption6 or the business affairs exemption. AFMA subsequently made a submission supporting Seafish’s argument that the images and footage, even if edited, were exempt under the certain operations of agencies exemption.

ABC request

Following negotiations with AFMA, the ABC’s request sought:

• underwater camera vision and photographs showing the reported deaths of dolphins and seals (largely identical to the documents requested by Senator Whish-Wilson);
• documents, emails, reports, briefs and meeting minutes analysing and discussing the collection and review of underwater vision, including proposed changes to collection methods; and
• documents, emails, reports, briefs and meeting minutes in relation to flaws in the performance of the seal excluder devices.

AFMA refused to release 11 documents relying on the trade secrets, personal privacy and business affairs exemptions, but agreed to release three documents in full and 21 documents in part. After an internal review upheld AFMA’s original decision, the ABC sought review by the Information Commissioner.

The ABC revised the scope of its request to exclude the names and contact information that had attracted the personal privacy exemption. It confirmed that it was not concerned with general fishing operations, including information exempt under the business affairs exemption, but only documents relating to the performance of
the seal excluder device, the effectiveness of the e-monitoring system, and images and footage recording the marine mammal deaths. Relevant documents included observer reports, wildlife interaction reports, bycatch evaluation reports and related emails, and images and footage of marine mammal mortalities.

Consideration of the exemptions

Certain operations of agencies

AFMA’s submissions to the Information Commissioner claimed that disclosure of the footage “could reasonably be expected to have a substantial adverse effect on the proper and efficient operations of AFMA, and ... would be contrary to the public interest.”

On the evidence before him, the Information Commissioner was not satisfied that disclosure of the documents would substantially and adversely affect the operations of AFMA, particularly given that the original decision-maker and the internal reviewer had not sought to rely on that exemption. The Information Commissioner held that the documents were not conditionally exempt under s 47E(d) of the FOI Act, and there was no need to consider whether their release would be contrary to the public interest.

He was critical of AFMA’s late reliance on this exemption, effectively seeking to make exempt documents that it had previously agreed to release. While s 55G of the FOI Act contemplates an agency varying the operations of AFMA, particularly given that the original decision-maker and the internal reviewer had not sought to rely on that exemption. The Information Commissioner held that the documents were not conditionally exempt under s 47E(d) of the FOI Act, and there was no need to consider whether their release would be contrary to the public interest.

Trade secrets and commercially valuable information

Maritiem and AFMA contended that various documents requested by ABC contained detailed specifications regarding the design and operation of the seal excluder devices that, if disclosed, would reveal trade secrets and harm Maritiem’s commercial interests.

While accepting that disclosure of technical design details to a competitor could affect Maritiem’s competitive advantage, the Information Commissioner was not satisfied that the net or excluder device design was a “trade secret” for the purposes of s 47(1)(a).

In reaching that conclusion, the Information Commissioner held that a company relying on the trade secret exemption must have “at least not encourage[d] widespread dissemination or publication” of the relevant design. The Information Commissioner distinguished a previous decision that BP’s oil exploration locations — actively kept secret even from its employees — were a trade secret, on the basis that the design and operation of Maritiem’s excluder device was readily observable by any person who worked with the nets or in their production.

There are two considerations in applying the lower-threshold test of disclosing commercially valuable information under s 47(1)(b):

- whether the information confers a competitive advantage on the person to whom it relates; or
- whether a genuine arms-length buyer would be prepared to pay to obtain the information.

AFMA claimed that documents requested by the ABC revealed information about unique net modifications — designed to maximise effective fishing using the seal excluder devices and conferring a competitive advantage on both Maritiem and Seafish — and it was likely other operators would pay to access that information. AFMA further argued that disclosing the documents would reduce Maritiem’s ability to rely on intellectual property laws. Maritiem made similar submissions regarding the commercial sensitivity of the design information.

The Information Commissioner held that general, non-technical information in three documents and in the video footage was not exempt. However, he was satisfied that nine documents contained precise, specific technical information that could be characterised as information for which a competitor was likely to be willing to pay. As the value of that information would be diminished by disclosure, those documents were held to be exempt under s 47(1)(b).

Business affairs

A document will be conditionally exempt under s 47G(1)(a) if it discloses information that could reasonably be expected to “unreasonably affect the organisation in respect of its lawful business, commercial or financial affairs.” Expected adverse effects and the broader public interest should be considered in assing whether harm to a business is unreasonable.

The Information Commissioner summarised concerns raised by Seafish in confidential submissions as relating to reputational damage and the risk that the footage may drive “environmentalists to take actions against it”. While noting that “public interest” does not simply mean “of interest to the public”, the Information Commissioner was satisfied that the number of media reports detailing the seal and dolphin deaths demonstrated a strong public interest in the operation of the FV Geelong Star and, specifically, the environmental impacts of its activities.

The Information Commissioner was satisfied that the public interest in disclosure outweighed any likely
impacts on Seafish’s private interests, and accorded only “moderate weight” to the risk of harm to Seafish’s employees and shareholders.\textsuperscript{15}

The Information Commissioner held that, in considering what is “reasonably practicable” for the purposes of s 22(2) of the FOI Act, the obligation on an agency is to “make only the minimal deletions required to render the footage [non-exempt]”.\textsuperscript{16} The Information Commissioner noted that the necessary editing software was readily and cheaply available, and rejected AFMA’s assertion that it would encounter “technical difficulties” pixelating the video to obscure exempt information such that editing the footage would not be reasonably practicable.\textsuperscript{17}

As a result, the Information Commissioner held that the footage requested by Senator Whish-Wilson and the ABC was not conditionally exempt under s 47G. Even if the conditional exemption had applied, he was satisfied that the exemption was outweighed by the public interest in disclosure. In reaching that conclusion, the Information Commissioner gave “substantial weight” to his view that releasing the edited footage would inform debate on a matter of public importance.\textsuperscript{18}

Conclusion

With the exception of several documents containing Maritiem’s commercially sensitive technical design information, the Information Commissioner was satisfied that the documents requested by Senator Whish-Wilson and the ABC were not exempt, conditionally or otherwise. He considered that the general public interest in scrutiny of government decisions, and the specific public interest in the operations of the \textit{FV Geelong Star} outweighed any claimed disadvantage that Seafish or AFMA may experience as a result of disclosure.

The Information Commissioner’s decisions adopt a narrow approach to the construction of exemptions, and demonstrate the need for those seeking to rely on exemptions to provide clear evidence of potential harm. Where exemptions do apply, consideration must be given to options for partial or conditional disclosure (such as edited footage) to maximise the scope of information able to be made available.

The decisions also reveal the considerable lengths of time that can be taken to resolve requests for information, often reducing the utility of the FOI Act as a mechanism for improved transparency.

Note

Each of the three decisions has been appealed to the Administrative Appeals Tribunal, with hearings currently scheduled for later in 2016.

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Footnotes
1. Peter Whish-Wilson and Australian Fisheries Management Authority [2016] AICmr 29 (Whish-Wilson decision). Seafish Tasmania’s review of the Australian Fisheries Management Authority’s (AFMA) original disclosure decision in response to Senator Whish-Wilson’s request was determined in Seafish Tasmania Pty Ltd and Australian Fisheries Management Authority [2016] AICmr 30 (Seafish decision).
3. Freedom of Information Act 1982 (Cth) (FOI Act), s 47G.
4. FOI Act, s 47(1).
5. FOI Act, s 47F.
6. FOI Act, s 47E.
7. Whish-Wilson decision, above n 1, at [18].
8. See also Thomson and Australian Federal Police [2013] AICmr 83. The Information Commissioner characterised AFMA’s approach as “asking that I make a revised decision for it”: Whish-Wilson decision, above n 1, at [22].
9. ABC decision, above n 2, at [27].
10. See ‘HN’ and Department of the Environment [2015] AICmr 76.
12. See Seafish decision, above n 1, at [12]; and ABC decision, above n 2, at [42].
13. See Bell and Secretary, Dept of Health, Re [2015] AATA 494; BC201580479.
14. Seafish decision, above n 1, at [14].
15. Seafish decision, above n 1, at [25].
17. Whish-Wilson decision, above n 1, at [27] and [30], citing Patrick Healy and Australia Post [2016] AICmr 23.
18. Seafish decision, above n 2 at [12]–[28].
The International Arbitration Act 1974
A commentary
Malcolm Holmes and Chester Brown

TABLE OF CONTENTS

- Part I – Preliminary
- Part II – Enforcement of foreign awards
- Part III – International Commercial Arbitration
- Part IV – Application of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States
- Part V – General matters
- Schedule 3 - Convention on the Settlement of Investment Disputes Between States and Nationals of Other States

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Case note: People for the Plains Inc v Santos NSW (Eastern) Pty Ltd

John Zorzetto LAND AND ENVIRONMENT COURT OF NSW

Introduction

In People for the Plains Inc v Santos NSW (Eastern) Pty Ltd (People for the Plains Inc), Moore J dismissed two judicial review proceedings challenging the possibility of building a water treatment facility (WTF) that was related to coal seam gas (CSG) exploration activities in Narrabri in north-western NSW. Central to this decision was the legal finding characterising the use of the WTF as being for the purpose of petroleum exploration because, under the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (NSW) (Petroleum SEPP), development for the purpose of petroleum exploration does not require development consent.

The proceedings were commenced against Santos NSW (Eastern) Pty Ltd, Santos NSW Pty Ltd and EnergyAustralia Narrabri Gas Pty Ltd (collectively, Santos), as well as the secretary of the NSW Department of Industry (the Secretary). They effectively constituted a challenge to CSG exploration in the Narrabri region. From this perspective, the proceedings may be viewed as an iteration of the community resistance to CSG which has been a divisive issue in the areas where exploration licences have been granted.

Factual background

Santos held three titles under the Petroleum (Onshore) Act 1991 (NSW) (Petroleum Act):

- a petroleum exploration licence (PEL 238);
- a petroleum production licence (PPL 3); and
- a petroleum assessment lease (PAL 2),

granted respectively under ss 28C, 42 and 32A of the Petroleum Act (collectively, the licences). The land which comprised PEL 238 had an area of approximately 9500 km², while the areas which comprised PPL 3 and PAL 2 were wholly contained in, but significantly were excised from, the land comprising PEL 238. Santos proposed to undertake CSG exploration and associated actions on the land covered by the licences.

In broad terms, the proposed CSG exploration involved drilling to test for hydrocarbons, a process which produced a significant volume of ground water (or, produced water). The produced water then required treatment, and Santos proposed to do this at the WTF to be built on the land the subject of PAL 2. At the WTF, the produced water, estimated to be 1.5 mega litres per day, would be treated and separated into brine, anticipated to be 450–525 kilolitres per day, and near-drinking-quality water, anticipated to be 975–1050 kilolitres per day. The brine would be stored at the facility, while the near-drinking-quality water was proposed to be pumped to a 98 ha area that formed part of PAL 2 where it would be used to irrigate lucerne crops.

The characterisation issue

Central to the proceeding was a determination as to whether the WTF fell within the operation of cl 6(d) of the Petroleum SEPP, which provided that “development for any of the following purposes may be carried out without development consent: … (d) petroleum exploration”. Under the Petroleum SEPP, “petroleum exploration” is relevantly defined as “prospecting pursuant to an exploration licence, assessment lease or production lease under the Petroleum (Onshore) Act 1991”.

It is not clear whether the applicant advanced an argument that the WTF was not being used for the purpose of prospecting, that is “testing the quality and quantity of petroleum”, being a use permitted without consent, or whether the applicant argued that properly characterised, the WTF was being used to treat produced water, which being a separate use to prospecting required consent in circumstances where none had been obtained.

Nevertheless, the use of the WTF, apart from those aspects relating to the irrigation of lucerne, was characterised as being for the purpose of prospecting.

Moore J began by noting that “in planning law, a use must be for a purpose”, and proceeded to set out the
following passages from the seminal decision in Chamwell Pty Ltd v Strathfield Council:

The fact that the nature of the uses of different components or parts of the development may vary is not necessarily of importance. … However, the nature of the use needs to be distinguished from the purpose of the use. Uses of different natures can still be seen to serve the same purpose.7

While the nature of the use of the WTF may be characterised as treating produced water, it was held that the purpose of the WTF was associated with prospecting. This was because the produced water to be treated at the WTF was water that physically resulted from the activity of prospecting, that is, it was the necessary by-product of prospecting.8

The elements of the development which related to the irrigation of lucerne were held not to serve the purpose of prospecting, despite the beneficial re-use of the near-drinking-quality water being a condition of the licences. This was because the condition did not specify the manner in which this was to occur and therefore was an irrelevant consideration to the legal task of characterising a use of land.9 That is, given that the condition did not specify how the near-drinking-quality water was to be re-used, or even who was to re-use it, the decision of Santos to use the near-drinking-quality water itself to irrigate a lucerne crop was partially discretionary on the part of Santos, and consequently, the condition had no work to do in respect of the characterisation of the use of that part of land the subject of PAL 2.

Whether the WTF had to be situated “on the land” the subject of the licence or lease

People for the Plains submitted that building a WTF on the land the subject of PAL 2 to treat produced water from the land the subject of both PAL 2 and PEL 238 was impermissible. This was because, pursuant to ss 29 and 33 of the Petroleum Act, the licences only permitted prospecting “on the land” the subject either of the licence or the lease, and therefore, the prospecting permitted pursuant to either that licence or lease could not be carried out on land that was not the subject of that licence or lease. Thus, produced water from land the subject of PEL 238 could not be treated at the WTF proposed to be built on PAL 2 given that this land had been excised from PEL 238. Rather, Santos would have to build two WTFs to treat the produced water.

A literal interpretation of ss 29 and 33 would have upheld this submission. However, Moore J held that such a construction was unreasonable and that a purposive approach was required. His Honour therefore held that it was appropriate to imply words into the statute.10

The Secretary submitted that the right to prospect on the land the subject of the licence or lease should, by implication, also permit prospecting on “any other

petroleum title that permits prospecting or assessment held by the holder”.11 This approach was rejected as too expansive, potentially permitting the aggregation of unrelated licences or leases. The appropriate construction was to expand, in s 33, the right to prospect on the land to include “on the land of any exploration license from which the lease has been excised”.12 The effect of reading these words into s 33 of the Petroleum Act was to permit produced water from land the subject of PEL 238 to be treated at the WTF situated on land the subject of PAL 2.

In arriving at this conclusion, Moore J quoted a number of passages from Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth),13 including the following from the joint judgment of Mason and Wilson JJ:

Generally speaking, mere inconvenience of result in itself is not a ground for departing from the natural and ordinary sense of the language read in its context. But there are cases in which inconvenience of result or improbability of result assists the court in concluding that an alternative construction which is reasonably open is to be preferred to the literal meaning because the alternative interpretation more closely conforms to the legislative intent discernible from other provisions in the statute.14

His Honour also quoted Gageler and Keane JJ in Taylor v The Owners — Strata Plan No 11564:

Context more often reveals statutory text to be capable of a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural. The choice between alternative meanings then turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies.15

The decision to read in additional words to expand the operation of s 33 clearly avoided what would otherwise have resulted in an unreasonable and capricious outcome. However, a more fulsome interrogation of the statute, its purpose and operation may perhaps have been of assistance to explain the determination of the court.

Whether the irrigation of lucerne required development consent

Finally, People of the Plains challenged the validity of Santos using the land for the purpose of lucerne crops. As set out earlier, the court held that the land the subject of irrigated lucerne cropping could not be characterised as being for the purpose of prospecting. Further, having regard to the intensity and commercial extent of the lucerne cropping, it held that the lucerne cropping was not ancillary or subordinate to the use of the land for the purpose of prospecting, but rather, was to be regarded as being used for a separate and distinct purpose, namely, commercial agriculture.16
Because of this characterisation, Moore J held that it was not necessary to consider the Petroleum Act, the Petroleum SEPP or the State Environmental Planning Policy (Infrastructure) 2007 (NSW). Rather, this challenge could simply be dealt with under the rubric of the Environmental Planning and Assessment Act 1979 (NSW) (EPAA) and relevant environmental planning instruments.

Under the Narrabri Local Environment Plan 2012 (NSW), the land zoning of the land the subject of PAL 2 permitted, without consent, using land for the purpose of “extensive agriculture”, which was defined as including “the production of crops”. Accordingly, his Honour held that no consent was needed for Santos to carry out this use on land the subject of PAL 2.

**Conclusion**

The challenge by People for the Plains rested upon a particular characterisation of the WTF, and a particular reading of the Petroleum Act, both of which were ultimately unsuccessful. In a press release, the Environmental Defenders Office NSW, the solicitors representing People for the Plains, stated: “This is a complex area of the law, and we’ll be looking very closely at the judgment to explore our client’s options for appeal.” It is fair to say that this statement is tacit acknowledgment of the difficulty involved in challenging such decisions.

Indeed, it is arguable that parliament is a better forum for the political change ultimately sought by People for the Plains, stated: “This is a complex area of the law, and we’ll be looking very closely at the judgment to explore our client’s options for appeal.” It is fair to say that this statement is tacit acknowledgment of the difficulty involved in challenging such decisions. Indeed, it is arguable that parliament is a better forum for the political change ultimately sought by People for the Plains.

CSG exploration has been a divisive issue in the community, and the last 12 months have seen a number of developments in this area. Three are worth highlighting.

First, the NSW Government’s buy-back of petroleum exploration licences pursuant to the NSW Gas Plan, commenced in December 2014, was extended to October 2015. Under the NSW Gas Plan, 17 petroleum exploration licences (PELs) have been bought back.

Second, in February 2016, AGL Energy Ltd announced that CSG exploration would “no longer be a core business for the company due to the volatility of commodity prices and long development lead times”, a decision welcomed by CSG opponents, especially opponents of AGL’s Gloucester Gas Project. This decision has left Santos as the only company in NSW with a petroleum production lease for CSG.

Third, in March 2016, the NSW Parliament passed the Inclosed Lands, Crimes and Law Enforcement Amendment (Interference) Act 2016 (NSW), which amended the Inclosed Lands Protection Act 1901 (NSW) and Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), respectively creating a new offence of “aggravated unlawful entry on inclosed lands” and granting additional search and seizure powers to police to deal with people who intend to “lock-on” to equipment or structures for the purpose of interfering with a business, in a way that poses a serious risk to the safety of any person. An aim of the amendments is to deter illegal protests in relation to CSG, although it is worth noting that the amendments apply broadly to all mining and petroleum workplaces.

These three developments, rather than present a clear direction for the future of CSG in NSW, are perhaps demonstrative of both a government and market grappling with community and environmental concerns about unconventional gas mining, and attempting to balance these concerns against the need to secure gas supplies for the state.

Against this backdrop, the decision in *People for the Plains Inc* demonstrates the limited, albeit important, role of the court to ensure that CSG exploration proceeds according to law.

**Update**

On 29 August 2016, the Environmental Defenders Office lodged an appeal of this decision with the NSW Court of Appeal.

**John Zorzetto**

Tipstaff to the Hon Justice Rachel Pepper

**Land and Environment Court of NSW**

**Footnotes**

2. PPL 3 was ultimately not relevant to these proceedings given the uncontested evidence that PPL 3 did not contain a well capable of producing water from a coal seam and that no water from the wells within PPL 3 had or were proposed to be transferred for treatment; see above n 1, at [32]–[33].
5. Above n 1, at [46].
6. Above n 1, at [39].
7. Chamwell Pty Ltd v Strathfield Council [2007] NSWLEC 114; BC200701388, at [33]–[34].
8. Above n 1, at [43]–[44].
9. Above n 1, at [48]–[50] and [85].
10. Above n 1, at [72].
11. Above n 1, at [69].
12. Above n 1, at [68]–[74].


16. Above n 1, at [90].


24. Inclosed Lands Protection Act 1901 (NSW), s 4B.

Case note: Australian Conservation Foundation Inc v Minister for the Environment

Mark Slaven LAND AND ENVIRONMENT COURT OF NSW

On 29 August 2016, Griffiths J of the Federal Court of Australia handed down his decision in Australian Conservation Foundation Inc v Minister for the Environment. His Honour found for the respondents, dismissing an appeal brought by the Australian Conservation Foundation Inc (ACF) on the grounds that the Minister had breached his obligations under the Environmental Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act) when he approved construction of a coal mine at Moray Downs by Adani Mining Pty Ltd (Adani).

Background

Moray Downs is a former cattle station in Central Queensland that is part of the site of the proposed Adani Carmichael Coal Mine. The proposal documents predict that construction and operation of the mine will create approximately 86 million tCO$_2$-e (tonnes of carbon dioxide equivalent) in direct emissions, but produce sufficient coal that, if burned, would release approximately 4.7 billion tCO$_2$-e in indirect emissions.$^2$

The mine was first proposed by Adani in 2010. On 6 January 2011, the Minister determined that the construction and operation of the mine (an “action” under s 523 of the EPBC Act) should be subject to a number of controlling conditions pursuant to s 75 of the EPBC Act.$^3$ The presently relevant controlling conditions relate primarily to protecting the Great Barrier Reef (GBR).

Approval for the action was first given by the Hon Greg Hunt MP, the then Minister for the Environment, on 24 July 2014. This was challenged by the Mackay Conservation Group, who alleged, among other things, that the Minister had failed to consider the impact of burning the coal that was to be produced at the proposed mine. On 4 August 2015, the parties entered consent orders to set aside the approval.$^4$

The Minister then proceeded to re-approve the action on 14 October 2015. The Minister produced a statement of reasons for his decision, explicitly stating that he had considered the impact the action would have on climate change, and noting that the action would “not have an unacceptable impact” on the GBR.$^5$ Of particular relevance, the Minister noted that it was “speculative” to estimate what impact any indirect emissions originating from mine would have on global carbon levels, given that it was not clear whether the mine would add to or simply displace other coal that would otherwise be in the market.$^6$ Because no relationship could be established, there was therefore no need to take preventative steps.$^2$

It is this second approval that was challenged in judicial review proceedings brought by the ACF.

Allegations

The ACF alleged that the Minister had erred in the following three ways in approving the action:

- the Minister had failed to consider the likely impact of allowing the coal to be mined, exported and burnt, particularly on the GBR in contravention of both ss 136(2)(e) and 527E of the EPBC Act;$^8$
- the Minister had failed to consider the precautionary principle in contravention of ss 136(2)(a) and 391 of the EPBC Act;$^9$ and
- the Minister failed to act consistently with Australia’s obligations under the World Heritage Convention$^{10}$ (WHC) and the Australian World Heritage management principles in contravention of s 137 of the EPBC Act.$^{11}$

Findings

His Honour found against the ACF on all three grounds.

Prior to giving reasons on each point, Griffiths J considered the approach that the court should take when a minister provides a detailed statement of reasons. Citing the High Court in Minister for Immigration and Ethnic Affairs v Wu Shang Liang$^{12}$ as the seminal authority on this topic, his Honour considered that an overzealous approach to interpretation that punishes the Minister’s loose use of language was inappropriate.$^{14}$ The statement of reasons was provided to inform stakeholders, rather than be examined minutely,$^{15}$ and that to interpret it literally may stray into merits rather than judicial review.$^{16}$ Instead, his Honour opined where
there are two equally available constructions of a term or phrase that are the subject of judicial review, the court should accept a "beneficial construction" in favour of the decision-maker.17

With this in mind, his Honour then continued to examine each of the three grounds of appeal in turn. 

Impact of emissions

Under s 136(2)(e) of the EPBC Act, the Minister is obliged to consider any other information available to him relevant to the "impacts" of the action. The question before the court was whether indirect emissions constituted an impact of the action.

Section 527E of the EPBC Act relevantly states that where:

• one person takes an action (such as mining and selling coal);
• this action allows a second person to take another action (such as burning that coal); and
• this secondary action directly causes an event or circumstance (such as an increase in emissions that cause ocean acidification),

then this event or circumstance is an impact of the initial action.

The Minister addressed the potential impact of the action on indirect emissions in the statement of reasons. He stated that it was “speculative” whether the mine would have any such impact, and that it would be difficult to establish a relationship between the action and increased global emissions for the reasons noted above.18 His Honour therefore found that the Minister could not determine whether the mine would be a substantial cause of global warming.19

It did not matter that the Minister had not made explicit reference to s 527E of the EPBC Act. Rather, the Minister’s repeated references to the weak relationship between the direct consequence of the action (the operation of the mine) and the secondary consequence (the increased burning of coal), meant that the Minister had applied the test in any event, and had made a finding of fact that the two actions were not sufficiently related.20

Similar logic was used in relation to s 82 of the EPBC Act, which related to "relevant impacts".21

His Honour therefore found that the Minister had complied with his obligations under s 136(2)(e) of the EPBC Act and dismissed the first ground of appeal.

The precautionary principle

Under ss 3A, 136(2)(a) and 391 of the EPBC Act, 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. This principle is otherwise known as "the precautionary principle".

Referring to the judgment of Preston CJ in *Telstra Corp Ltd v Hornsby Shire Council*22 (as approved by the NSW Court of Appeal in *Minister for Planning v Walker*23), Griffiths J stated that there were two conditions precedent before the precautionary principle could be applied:

• a threat of serious or irreversible damage to the environment; and
• scientific uncertainty as to the nature and scope of the environmental damage.24

Again referring to the judgment of Preston CJ,25 his Honour emphasised that this analysis was done sequentially — it must be established that there is a threat of serious or irreversible damage before there is an examination of whether there is uncertainty about that damage.26

His Honour found that the Minister, while considering the precautionary principle generally, did not consider the principle in relation to indirect emissions and the damage they may cause.27 However, in the context of the Minister’s wider reasoning, his Honour found that the Minister did not make any finding as to whether there was a threat of environmental harm as a result of indirect emissions, due to the speculative nature of any such enquiry as outlined above.28 Because a necessary precondition had not been met, his Honour found that the precautionary principle could not be applied.

In obiter, his Honour also noted that s 391(1) of the EPBC Act only imposes an obligation to consider the precautionary principle insofar as the Minister can do so under the EPBC Act. Given that s 527E of the EPBC Act would not include indirect emissions as outlined above, it was possible that s 391(1) would not be enlivened in any event.29

World Heritage obligations

Because the proposed development is a controlled action, s 137 of the EPBC Act obliges the Minister to not act in a manner that is inconsistent with Australia’s obligations under the WHC and the Australian World Heritage management principles. This includes a duty under Art 4 of the WHC "to do all it can” to protect and conserve the GBR, a World Heritage site, for future generations.30

ACF submitted that the court should construe this article as placing actual obligations on the Minister.31 Griffiths J, however, found this was inappropriate.32 Referring to the judgment of McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority*,33 the various judgments in *Commonwealth v Tasmania (Dam Case)* (Dam/Franklin Dam/Tasmanian Dam case)34 (Tasmanian Dam Case) and Art 31 of the Vienna Convention on the Law of Treaties 1969, his Honour took the view that treaties
such as the WHC do not necessarily place obligations on states party, but rather provide aspirations. His Honour found that Art 5 of the WHC, which stated that states party “shall endeavour, in so far as possible, and as appropriate for each country”, qualified the duty in Art 4 of the WHC and provided considerable latitude to the Australian Government to determine how best to implement their “obligations”. As such, the Minister had a prerogative to determine what steps should be taken to meet the “obligations” under Art 4 of the WHC, which his Honour found had been considered in his statement of reasons. As such, there was no breached s 137 of the EPBC Act.

Orders
The court ordered that the application for judicial review be dismissed, and that the parties seek to agree proposed orders as to costs.

Comment
While this case did not involve a novel application of the law, it did allow Griffiths J to provide a succinct and useful summary of established judicial review principles in the context of a detailed statement of reasons. In particular, it allowed his Honour to remind parties seeking to challenge executive decisions that they are not able to challenge the merits of a decision, but that they are limited to appealing the legality of such a decision.

From a non-legal perspective, however, this case represents a setback for environmentalist groups campaigning against climate change. His Honour’s reasoning in relation to the precautionary principle is particularly difficult for environmental groups. His Honour found that the first precondition to its application was not met because the Minister had made no finding as to whether indirect emissions from the proposed mine represented a serious or irreversible threat to the environment, because it was unclear whether the mine would actually lead to increased global emissions. This arguably provides precedent for decision-makers to simply make no finding as to whether an action poses a serious or irreversible threat if they wish to avoid invoking the precautionary principle.

Mark Slaven
Tipstaff to the Hon Justice John Robson
Land and Environment Court of NSW

Footnotes
2. Above n 1, at [58].
3. Above n 1, at [15].
4. Above n 1, at [50].
5. Above n 1, at [58].
6. Above n 1, at [58].
7. Above n 1, at [58].
8. Above n 1, at [63].
9. Above n 1, at [64].
11. Above n 1, at [65].
13. Above n 1, at [141].
14. Above n 1, at [143].
15. Above n 1, at [144].
16. Above n 1, at [147].
17. Above n 1, at [146].
18. Above n 1, at [58].
19. Above n 1, at [160].
20. Above n 1, at [162].
21. Above n 1, at [171].
24. Above n 1, at [178] and [183].
25. Above n 22, at [137].
26. Above n 1, at [182].
27. Above n 1, at [175].
28. Above n 1, at [184].
29. Above n 1, at [185].
30. Above n 1, at [37].
31. Above n 1, at [85].
32. Above n 1, at [197].
34. Commonwealth v Tasmanian (Dam Case) (Dam/Franklin Dam/ Tasmanian Dam case) (1983) 158 CLR 1 at 91–92 (Gibbs CJ), 190 (Wilson J), 225–26 (Brennan J), 261 (Deane J) and 310 (Dawson J).
35. Above n 1, at [199].
36. Above n 1, at [201].
37. Above n 1, at [202] and [204].
38. Above n 1, at [205].
39. Above n 1, at [206].
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