Judicial Review and the Principles of Ecological Sustainable Development: Where are we Going?

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> *Effective environmental governance systems hold government decision makers accountable for making decisions grounded in science and law, thereby ensuring confidence in the impartiality and public purpose of their actions.*
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> *…*
>
> *The judiciary … plays a vital role as the guarantor of the protective benefits of environmental law.*[2]

Introduction

In Europe, the term 'judicial review' means all or any review by a court, including both statutory appeals and reviews, in the old prerogative writ sense. In Australia the term is one of art, applying generally to applications for orders in the form of the former prerogative writ remedies.

In this paper I propose to briefly canvass the grounds of and developments in the access to judicial review. Given the current Australian government's perception of the significance of science and perceived desire to limit access to the courts for matters pertaining to the environment, I will contrast the present access to judicial review in Australia with recent developments in the United Kingdom.

The paper will review the development of the concept of ecologically sustainable development in Australia and critique the predominant judicial approach to the application of the precautionary principle before describing the recently developed principle of non-regression in environmental law and questioning its utility in the courts.

Judicial Review – the grounds

Under the rule of law, judicial review enables the courts, in their supervisory capacity, to check on the lawfulness of the decision or action of a government authority, at the request of an applicant.

In the **United Kingdom** the three main grounds of challenge are the following:

- Illegality – a decision or action made other than in accordance with the law
- Irrationality - a decision or action that did not take into account all relevant factors or one that no reasonable person could have taken
- Procedural unfairness – a failure to consult properly or act in accordance with natural justice or the relevant procedural rules[3]

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[1] Paper presented at NELA Conference 2014: *Transformation or Train Wreck? Environmental and Climate Change Law at the Crossroads*.
[2] Scott Fulton and Justice Antonio Herman Benjamin, "Foundations of Sustainability", *Advancing Justice, Governance and Law for Environmental Sustainability*, Rio+20 and the World Congress of Chief Justices, Attorneys General and Auditors General 2012, Nairobi (UNEP)
[3] Ministry of Justice (UK), *Judicial Review: Proposals for Further Reform* (September 2013)

In Australia, approaches to judicial review have developed differently from other common law countries, by virtue of the constitutional separation of powers and the protection of the supervisory role of the High Court[4] by section 75(v) of the *Constitution*, which arguably extends to protect this role of, and the limitations upon, the State Supreme Courts,[5] and s39B of the *Judiciary Act 1909* (Cth) which grants the Federal Court the same power as the High Court with respect to applications for orders in the nature of mandamus and prohibition and injunctions.[6]

Until recently the errors that constituted grounds for judicial review applications for orders in the nature of the old prerogative remedies, were considered generally to fall within the overarching ground of jurisdictional error. However, it now arguably appears that the overarching ground of judicial review of an administrative decision is now legal unreasonableness (which may or may not be a subspecies of jurisdictional error), where a decision lacks an evident and intelligible justification in the context of the power.[7] The 'unreasonableness' of a decision might be found by a conclusion that errors such as bad faith or having regard to irrelevant considerations tainted the decision, or that the decision was a seemingly disproportionate response in all the circumstances, or that the decision that lacks an evident and intelligible justification.[8]

In addition, the grounds for judicial review of administrative action by the Federal Court of decisions taken under much Australian federal legislation are codified by statute, namely the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ***ADJR Act***). These grounds are generally said to be included in the grounds considered to constitute jurisdictional error at common law in Australia. They are:

(a) a breach of the rules of natural justice;

(b) procedures that were required by law to be observed were not observed;

(c) the decision maker did not have jurisdiction to make the decision;

(d) the decision was not authorized by the relevant legislation;

(e) the making of the decision was an improper exercise of the power conferred;

(f) the decision involved an error of law, whether or not the error appears on the record;

(g) the decision was induced or affected by fraud;

(h) there was no evidence or other material to justify the making of the decision;

(j) the decision was otherwise contrary to law.[9]

The legislation provides guidance on the meaning of 'improper purpose'; it includes the following:

(a) taking an irrelevant consideration into account;

(b) failing to take a relevant consideration into account;

(c) the exercise of a power for an ulterior purpose;

(d) the exercise of a discretionary power in bad faith;

(e) the exercise of a personal discretionary power under direction;

[4] In addition to limiting its jurisdiction.
[5] *Kirk v Industrial Relations Commission of New South Wales* [2010] HCA 1
[6] S 75(v) of the Constitution confers on the High Court original jurisdiction in all matters 'in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'.
[7] *Minister for Immigration and Citizenship v Li* [2013] HCA 18
[8] ibid; per the reasons of Hayne, Kiefel and Bell JJ
[9] *Administrative Decisions (Judicial Review) Act 1977* (Cth) s5(1)

(f) the exercise of a discretionary power in accordance with a rule or policy without regard to the merits;

(g) the exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;

(h) the exercise of a power such that the outcome is uncertain; and

(j) any other exercise of a power in a way that constitutes abuse of the power.[10]

The *ADJR Act* has been the subject of a report comprising a review and recommendations, by the Administrative Review Council (ARC).[11] Its recommendations "focus on restoring the *ADJR Act* to a central place in the federal judicial review system".[12] A key conclusion of the ARC was that the two routes to judicial review (constitutional and statutory) should be brought together – under the ADJR Act – in the interests of greater accessibility and clearer guidance for decision makers.[13] There was also a minority report that favoured a different approach, namely to abandon the ADJR Act and to bring all judicial review within the constitutional judicial review path, with legislation specifying the jurisdictional limits of decision makers in a code or charter.

As far as I am aware, there has been no formal response to the Report or action on any of the recommendations of the ARC.

Access to Judicial Review in environmental matters

It seemed useful to set the picture of developments in Australia against those eventuating elsewhere in relation to judicial review. I have chosen to consider the United Kingdom.

United Kingdom

In the UK, the government has sought to limit the use of judicial review, ostensibly on the basis of concerns that it has developed far beyond the original intentions of the remedy and by reference to the astronomical growth in the numbers of applications for judicial review of the decisions of public authorities particularly since 1998.[14] The fact was that as a result of the increase in applications (predominantly migration matters), matters were slow to disposal and used significant resources.

The first stage of judicial review reforms introduced in the United Kingdom by the current government, following the release of a consultation paper[15] in December 2012, included the following:

- A reduction of the time limits for bringing judicial review in planning cases from 3 months to 6 weeks (implemented 1 July 2013)
- The removal of the right to an oral reconsideration of a refusal of permission where the case has been assessed by a judge as totally without merit (implemented 1 July 2013)
- The introduction of a new fee for oral renewal of a permission hearing (implemented 7 October 2013)
- The establishment of a Planning Fast Track (PFT), using specialist judges, in the Administrative Court, to hear challenges to major infrastructure and planning cases, within set time limits (implemented July 2013)

[10] ibid s5(2)
[11] Administrative Review Council, *Federal Judicial Review in Australia*, Report No. 50 (2012)
[12] ibid at p9
[13] ibid at p12
[14] see: Ministry of Justice (UK), *Judicial Review: Proposals for Reform* (December 2012)
[15] Ministry of Justice (UK), *Judicial Review: Proposals for Reform* (December 2012)

In September 2013, the UK Government followed up with *Judicial Review – Proposals for Further Reform*[16], in which the Lord Chancellor non-controversially said the following:

> Judicial review is a critical check on the power of the State, providing an effective mechanism for challenging the decisions, acts or omissions of public bodies to ensure that they are lawful. The government will ensure that judicial review continues to retain its crucial role.

However the foreword to the *Further Reform* consultation paper set out a political justification for limiting judicial review:

> We need to think of the impact these (weak) judicial reviews are having on the country as a whole. We need dynamism and growth, not delay and expense. We owe it to taxpayers, we owe it to industry and we owe it to those in search of work. Using court time and public money to object to a lawful policy of an elected government or to generate publicity is not acceptable.[17]

As a prelude to proposing further reforms to judicial review, the Lord Chancellor added:

> The Government is … concerned about the use of unmeritorious reviews to cause delay, generate publicity and frustrate proper decision making. This is bad for the economy and bad for the taxpayer.

The 'delay' referenced was a perceived delay in resolving challenges to the grant of planning permission to 'vital infrastructure projects' and 'projects that matter to the economy in local areas'. It was perceived as 'unmeritorious' and resulted in 'repeated challenges' that affected the financial viability 'of the projects themselves and the growth and economic recovery they should stimulate'.[18]

The 'publicity' amounted to a concern by the Government 'that judicial reviews are being used as a means of generating publicity and prolonging campaigns after all proper decisions have been made'[19], while it was also concerned in the interests of proper decision making 'by the use of unmeritorious applications for judicial review to delay, frustrate or discourage legitimate executive action'.[20]

The Government responded to the submissions on the consultation paper in 2014. The response included a decision to develop the PFT into a specialist Planning Court in the High Court, with:

- a separate list under the supervision of a specialist judge; and
- time limits for case progression for judicial review applications in relation to planning and major infrastructure cases.[21]

In the event, the Government decided not to pursue its proposal to amend standing to restrict the class of persons who may bring a judicial review application.

However, the Government chose ultimately to deter 'misuse' of judicial review through a package of financial reforms[22] designed to limit weak claims and by raising the threshold test where the judicial review application concerns a procedural defect, so that the court may refuse permission to proceed where the alleged defect was highly unlikely to have made a difference to the original outcome.

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[16] Ministry of Justice (UK) (n2)
[17] ibid, at p3.
[18] ibid, at para 7 i)
[19] ibid, at para 7 ii)
[20] ibid, at para 7 iii)
[21] ibid, at para 21
[22] ibid, paras 41-66. The measures include: costs to be awarded against unsuccessful applicant at oral permission hearing; improve effectiveness of wasted costs orders; limits on protective costs orders (except environmental cases); interveners bear costs of their intervention; obligation to identify funding by non-parties.

Environmental cases

With respect to environmental matters the Government is prevented from reducing access under the provisions of the *Aarhus Convention*[23], by which it is bound. In the European Union generally, the Convention and its EU implementing provisions are causing a slow but steady change towards more effective access to justice.[24] Under article 9(2), a person with a sufficient interest[25] has a right to challenge the substantive and procedural lawfulness of a decision.[26] Parties must determine what constitutes "a sufficient interest" consistently with giving the public concerned a wide access to justice.[27] By article 9(3), Parties are required to provide access to administrative or judicial review procedures "to challenge acts and omissions by … public authorities which breach laws relating to the environment", with standing to be determined by national law. The remedies available through these procedures must be "adequate and effective" and "be fair, equitable, timely and not prohibitively expensive".[28]

On the matter of costs, a person must have access to administrative or judicial review procedures that are fair, equitable, timely and not prohibitively expensive.[29] In addition, the UK (and every other Party to the Convention) "must consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice",[30] and persons "should not be prevented from seeking, or pursuing a claim for, a review by the courts … by reason of the financial burden that might arise as a result."[31]

In fact, the courts have the power to cap costs early in the proceedings, and in considering whether to utilize the power a court should take into account both the interest of the applicant and the public interest in the protection of the protection of the environment and a number of other factors including whether the availability of legal aid or a costs protection regime. The Court of Justice of the EU was aware of the high cost of judicial proceedings in the UK and observed that the UK system does not afford an applicant reasonable predictability either about the quantum of costs or where the costs burden might fall.[32]

Australia

Access to the courts for judicial review varies between the State jurisdictions. There is a statutory right to judicial review of administrative decisions, exercisable to the Federal Court (or Federal Circuit Court in specified matters) within 28 days of the decision, available under Commonwealth *ADJR Act*, but only for persons aggrieved by a decision, conduct or failure to make a decision.[33] That this category, as with that of 'having a special interest' at common law, may be too restrictive was articulated by the ARC in its 2012 report:

> 8.7 Representative organisations, as opposed to individuals, may have an interest in the proceeding, but have trouble establishing standing. Associate Professor Matthew Groves has observed that, 'although standing rules have relaxed in recent times, representative associations often still struggle to establish

[23] *The UNECE Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters*, adopted 25 June 1998, in force since 30 October 2001
[24] Prof Dr Luc Lavrysen, "Access to Environmental Matters: Perspectives from the European Union Forum of Judges for the Environment", *Global Symposium on the Environmental Rule of Law*, 24 June 2014, Nairobi
[25] includes environmental organisations meeting the requirements of article 2 para 5
[26] including a decision with respect to an application for a permit for a specific activity: the Aarhus Convention Compliance Committee, cited in Lavrysen (n 23) p 5
[27] CJEU, 16 July 2009, *Commission of the European Communities v Ireland* (Case C-182/10) (the *Irish Costs* case), cited in Lavrysen (n 23) p10
[28] *The Aarhus Convention* article 9(4)
[29] ibid art 9(4)
[30] ibid art 9(5)
[31] CJEU, 11 April 2013, *David Edwards, Lillian Pallikaropoulos v Environment Agency, First Secretary of State, Secretary of State for Environment, Food and Rural Affairs* (Case C 260/11) (the *Edwards* case) cited in Lavrysen (n 23) at p11
[32] Lavrysen (n 23) at p11.
[33] *ADJR Act* ss 5-7

standing'. Groves argues that the requirement of the current judicial review standing rules—for a complainant to show a special interest or be aggrieved by a decision—does not equate with even the strong views or commitments of representative groups, and these restrictive elements make it difficult for representative groups to challenge government decisions. He considers this has led to uneven results in environmental cases. The problem arises because of the common law principle that the objects of a particular representative organisation are not alone sufficient to demonstrate an interest in proceedings which can give an organisation standing. Groves notes that cases on the standing of representative associations have been inconsistent and at this stage the matter remains unresolved by the High Court.[34]

However, not all decisions are brought within the *ADJR Act,* nor does the ADJR Act derogate from existing rights, and thus the original jurisdiction of the High Court and that of the Federal Court,[35] operate to facilitate constitutional judicial review of decisions not within the ambit of the *ADJR Act*. The federal judicial review system has been described as comprising "two distinct but overlapping systems of judicial review".[36]

Among the ARC recommendations in Report No. 50 were the following:

Recommendation 1

The Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act) should provide that, subject to limited exceptions, a person who otherwise would be able to initiate a proceeding in the High Court under s 75(v) of the Australian Constitution may apply for an order of review under the ADJR Act. Sections 5, 6, 7 and 13 of the ADJR Act would not apply in those proceedings, but other provisions of the ADJR Act would apply subject to some modifications.

The objective of this recommendation is to avoid duplication of proceedings and bring all judicial review applications under the ADJR Act.

Recommendation 2

The application of the ADJR Act to reports and recommendations should be dealt with in the following way:

(a) A report or recommendation that is made in the exercise of a power conferred by an enactment, prior to the making of a decision under that enactment, should be a decision to which the Act applies, as currently required by s 3(3) of the Act.

(b) A schedule to the Act that can be amended by regulation should list other reports and recommendations that are decisions to which the Act applies.

The objective here is to enable the review of a report or recommendation made in the exercise of power under legislation prior to a decision under that legislation.

Recommendation 10

The ADJR Act should be amended to align the test for standing for representative organisations with that in subsection 27(2) of the Administrative Appeals Tribunal Act 1975 (Cth).

The objective of the recommendation is to allow to access to the courts by representative organisations or associations to commence proceedings if the decision complained of (made after their formation) relates to a matter in the objects or purposes of the organization or association, and to align the standing rules for merits and judicial review.

Presently standing for constitutional judicial review is restricted in general to those persons who have a special interest in the subject of the decision or would be adversely affected by the outcome. Under the *ADJR Act* a person must be aggrieved by a decision, conduct or the failure to make a decision; a not dissimilar test in practice.[37]

[34] ARC Report at p147 (references omitted)
[35] *Judiciary Act 1903* (Cth) s 39B(1)
[36] Justice Melissa Perry, "The Administrative Review Council report on judicial review: renaissance of the ADJR Act?" (FCA) [2013] *FedJSchol* 37, summarising the *ARC Report*, p72
[37] see *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport* (1986) 71 ALR 73, 81 per Gummow J.

Recommendation 15

The ADJR Act should provide that, unless the court orders otherwise, parties to a judicial review proceeding should bear their own costs.

The objective here is to minimise the deterrence factor for public interest litigants, particularly representative organisations or associations, and the ARC considered this approach to be in line with an approach 'now routinely applied in the administrative law context'.[38]

The existing *Federal Court Rules 2011* establish the power of the Federal Court in advance of the trial, to make an order capping the costs that may be recovered on a party-party basis. At least in one court - the Land and Environment Court, New South Wales - a similar provision in the Rules[39] has been used successfully to cap costs in proceedings brought by a representative organisation.[40]

We await further developments from the Australian Federal Government.

I do not propose to consider here the position in each of the states and territories, except to observe the following[41]:

1. Legislation similar to the ADJR Act exists in Queensland (*Judicial Review Act 1991*(Qld)), Tasmania (*Judicial Review Act 2000* (Tas)) and the ACT (*Administrative Decisions (Judicial Review) Act 1989* (ACT)).
2. In Queensland "statutory review" is available to a person aggrieved by the decision under challenge.[42] The prescribed grounds are identical to those established by the *ADJR Act*.
3. In statutory judicial review proceedings in the Land and Environment Court (Class 4 proceedings), the Court has the power to decide not to make an order for costs against an unsuccessful applicant if it is satisfied that proceedings were brought in the public interest.[43]
4. In Victoria, a person whose rights will or may be affected, directly or indirectly, may apply under the *Administrative Law Act 1978* (Vic) to the Supreme Court for an order for review on the ground of failure to observe a rule of natural justice. Alternatively, a person may apply to the Supreme Court for judicial review within 60 days of the date when grounds for the relief or remedy claimed first arose.[44]
5. In the other states and territory, an application for judicial review for an order in the nature of certiorari, mandamus, prohibition or habeas corpus lies to the Supreme Court and the procedure is established in Rules of Court. The rules governing proceedings vary between jurisdictions.

Although the withdrawal of funding to environmental defenders offices suggests that the current Australian government might wish to limit access to the courts for review of the administrative decisions of the executive, along the lines of the reforms implemented in the UK, that is unlikely to happen. Australians are fortunate that unlike the citizens of the UK, they have the benefit of constitutional protection of judicial review by virtue of the separation of powers and section 75(v), at least with respect to decisions of the federal Executive, and arguably extending to protect the ancient jurisdiction of State Supreme Courts.

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[38] ibid at p 191
[39] *Uniform Civil Procedure Rules 2005* (NSW) R 42.4
[40] the orders of Pain J in the LEC were upheld in the Court of Appeal in *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263
[41] may be an incomplete summary
[42] Ss 20,26
[43] *Land and Environment Court Rules 2007* R4.2 (the *LECR* prevail over R42.1 of the *Uniform Civil Procedure Rules 2005* (NSW) (*UCPR*) to the extent of any inconsistency: see the *Civil Procedure Act 2005* s 11 and the *UCPR* schedule 2); *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd and Minister for Mineral Resources (No 3)* 2010 NSWLEC 59
[44] *Supreme Court Rules 2005* (Vic), R 56.02

In contrast, UK citizens have the benefit of the *Aarhus Convention* in relation to environmental matters; a situation Australians concerned for the protection of threatened ecosystems, about increased emissions into the atmosphere, for the continued viability of species and habitats might find highly desirable. It is time to seriously consider the adoption of the recommendations of the ARC Report No 50 that have been addressed in this paper, to provide appropriate access to judicial review in the interests of ecologically sustainable development.

Ecologically Sustainable Development in Australian legislation

As we all recall, the original concept of sustainable development (***ESD***) was defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[45]

In May 1992, just prior to the UN Conference on the Environment and Development in Rio de Janeiro (***UNCED***), the Commonwealth, State[46] and Territory governments and a representative of local government signed the *Intergovernmental Agreement on the Environment* (IGAE), developed over the previous 18 months. The IGAE, inter alia, recognised the important role of the Commonwealth and the States in relation to the environment, that environmental impacts respect neither physical nor political boundaries, and that the concept of ESD provides potential for the integration of environmental and economic considerations into decision making and for balancing the interests of current and future generations.[47] The document set out the responsibilities of the various parties and in section 3, stated the agreed "Principles of Environmental Policy" that should inform policy making and program implementation, including:

- the precautionary principle
- the principle of intergenerational equity
- the principle of conservation of biological diversity and ecological integrity
- the principle of improved valuation, pricing and incentive mechanisms.

In the formulation of a strategy in Australia following UNCED, the concept became ecologically sustainable development, enshrined in the *National Strategy for Ecologically Sustainable Development* (***NSESD***)[48]; the goal and the core objectives of which were expressed to be as follows:

> The Goal
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> Development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends
>
> The Core Objectives
>
> - to enhance individual and community well-being and welfare by following a path of economic development that safeguards the welfare of future generations
> - to provide for equity within and between generations
> - to protect biological diversity and maintain essential ecological processes and life-support systems

The "Guiding Principles" included the principles of sustainable development, such as the precautionary principle and the principle of inter- and intra-generational equity.

In the intervening 22 years, how far has Australia progressed towards the goal set out in the *NSESD*? That is not the topic of this paper, but others have addressed the topic, suggesting that since the disbandment of the Resources Assessment Commission (established by the Hawke Labor

[45] WCED, *Our Common Future*, 1987, p44
[46] Western Australia entered into the IGAE at a later date.
[47] *Intergovernmental Agreement on the Environment,* 1992, accessed at: http://www.environment.gov.au
[48] *The National Strategy for Ecologically Sustainable Development,* 1992 - last accessed 10/11/14 at http://www.environment.gov.au/about-us/esd/publications/national-esd-strategy

Government) by the Keating Government, Australia has done little more than pay lip service to the goal and the implementation of the strategy.[49] Indeed, currently, in the assessment of Professor Ian Lowe, "environmental protection is being given a lower priority than it has by any federal government since the first environmental legislation was introduced some 40 years ago".[50] In addition to this parlous state of affairs, in general cash-strapped States are keen to encourage development.

We have already seen the federal government resile from and cancel the longstanding agreements to fund environmental defenders offices (EDOs) in Australia, presumably in an effort to discourage litigation in the interests of protection of the environment or development that is ecologically sustainable. The Australian Attorney General is of the view that funding to EDOs is the use of 'public monies for reform and advocacy activities'. By way of explanation as to why EDOs will no longer receive government funding, the Minister has said that 'the Government funds legal assistance service providers to prioritise direct services to individuals'; by implication incorrectly suggesting that EDOs do not do this. The Minister has also, in his words, 'directed that the funding of legal assistance services be focused on providing front-line legal services to disadvantaged people requiring legal help', commenting that 'it is vital that vulnerable Australians receive the help they need with their legal problems'.

Beyond the rhetoric, the ESD principle has been imported into legislation, in all jurisdictions. By way of example, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (***EPBC Act***) has among its objects the following:

3 Objects of Act

(1) The objects of this Act are:

(a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and

(b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources;

and meaning is given to ecologically sustainable development, as follows:

3A Principles of ecologically sustainable development

The following principles are **principles of ecologically sustainable development**:

(a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;

(b) 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;

(c) the principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;

(d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;

(e) improved valuation, pricing and incentive mechanisms should be promoted.

[49] see, eg: Lowe, Ian, "Beyond Setting an Example: What is Australian Environmental Policy For?" in *The Conversation* 15 June 2012, last accessed 10/11/14 at http://theconversation.com/beyond-setting-an-example-what-is-australian-environmental-policy-for-7308

[50] Lowe, Ian, "Abbott's environment agenda is even harsher than he promised" in *The Conversation* 29 August 2014, last accessed 10/11/14 at http://theconversation.com/abbotts-environment-agenda-is-even-harsher-than-he-promised-30796

The *EPBC Act* requires the Environment Minister to take into account the principles of ecologically sustainable development in considering economic and social matters relevant to his or her decision as to whether to approve the taking of an action, and the conditions to be attached to any approval.[51] This appears to place economic and social matters above the ESD principles in the Minister's consideration. Indeed the Hawke Review appears to have confirmed this view in its recommendations.[52]

The Hawke Review acknowledged that while the ESD principles form an important part of the current objects of the Act, their expression needs to be made clearer, and amendments are necessary to ensure the administration of the Act better reflects the ESD principles.[53]

The Australian Judicial Approach to the Precautionary Principle

A passage in the Hawke Review summarised the operationalization of the precautionary principle by the Australian courts at 2009:

> Specialist environmental courts and tribunals in Australia have made considerable steps towards operationalising the precautionary principle – and continue to use the principle as the basis for some of their decision-making.[54]

What has been left unsaid by the Hawke Review is that many if not most of the cases in which the principle has been used, have been merits appeals where the principle is part of either the law or the policy context in which a proposed development is required to be assessed. This is positive, but given that no reference is made to state supreme or federal courts, it can be assumed that there have been very few, if any judicial review cases where the precautionary principle has been discussed.

The seminal judgement in Australia on the application of the precautionary principle is that of Preston CJ in *Telstra Corporation Ltd v Hornsby Shire Council* (the *Telstra* judgment).[55] His Honour determined that the precautionary principle was not applicable in the circumstances but in the course of his reasoning, analysed the principle and considered its application. The following guidance was provided:

> The application of the precautionary principle and the concomitant need to take precautionary measures is triggered by the satisfaction of two conditions precedent or thresholds: a threat of serious or irreversible environmental damage and scientific uncertainty as to the environmental damage. These are cumulative. Once both of these conditions or thresholds are satisfied, a precautionary measure may be taken to avert the anticipated threat of environmental damage, but it should be proportionate.[56]
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> Two points need to be noted about the first condition precedent that there be a threat of serious or irreversible environmental damage. First, it is not necessary that serious or irreversible environmental damage has actually occurred – it is the threat of such damage that is required. Secondly, the environmental damage threatened must attain the threshold of being serious or irreversible.[57]
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> The threat of environmental damage must be adequately sustained by scientific evidence.[58]

The above approach is typically legal and logical in accordance with the legal discipline. It has been followed in a number of Australian cases, such as *Environment East Gippsland Inc v VicForests,*[59] but

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[51] *Environment Protection and Biodiversity Act 1999* s 136

[52] Allan Hawke, *The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999,* Australian Government Department of the Environment, Water, Heritage and the Arts, October 2009. Accessed at: www.environment.gov.au/epbc/review

[53] Ibid at [87] – [89]

[54] Ibid at 13.20

[55] [2006] NSWLEC 133

[56] ibid at [128]

[57] ibid at [129]

[58] ibid at [134]

[59] [2010] VSC 335; and many other judgments

it is not without criticism. In an analysis of the *Telstra* case,[60] Professor Jacqueline Peel notes that the approach was distinctly legal in orientation, using the 'thresholds' concept appropriate to proof in a criminal case, despite "citing Nicolas de Sadeleer's seminal work, which … takes a consciously inter-disciplinary approach to interpretation, stressing the need for the principle to be understood against the background of growing public disillusionment with science and the rise of the 'risk society'".[61] Both conditions precedent require scientific verification for the application of the precautionary principle, according to the *Telstra* judgment. This approach overlooks that the principle is premised on the presence of scientific uncertainty and the threat (not certainty) of environmental damage, when the threats may be neither measurable nor quantifiable.[62] Science with all its attendant faults (including possibilities of error) cannot supply the necessary justification for the application of the precautionary principle.

The determination of the conditions precedent may depend on social or political attitudes or policy. Scientists provide scientific reasoning as far as science allows, but the issue of what is acceptable may rather be a sociological or political question. The level of risk that is acceptable and the scaling of the seriousness of possible consequences, to take but two examples, are not capable of being answered by science, which is perhaps why the IGAE followed the statement of the precautionary principle with the guidance set out below:

> *In the application of the precautionary principle, public and private decisions should be guided by:*
>
> *(i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and*
>
> *(ii) an assessment of the risk-weighted consequences of various options.*

The 1999 judgment of the Environment, Resources and Development Court (South Australia) in the *Tuna Farms* case[63] quoted the above statement by way of explication of the application of the precautionary principle and continued:

> The term "risk-weighted consequences" has been expressed to mean "an attempt to undertake a semi-quantitative analysis, and determine the likelihood of irreparable damage or an undesired or adverse outcome arising from a particular development or activity" (from the Glossary in Draft National Strategy for Ecologically Sustainable Development : A Discussion Paper June 1992 - The Ecologically Sustainable Development Steering Committee. The definition is of the term as it is used in the IGAE which is summarised in Chapter 1).[64]

Thus are the issues of desirability and I would add acceptability, of the outcome, considerations to be factored into the application of the precautionary principle along with the relevant science. Peel's view is that "an evaluation of the seriousness of threats may be partly based on scientific judgment but cannot be entirely so as it raises questions about what risks society is prepared to accept".[65] Further criticism of the purely scientific approach is to be found in the European case of *Pfizer*[66] with the finding that "decision makers are not always bound to follow scientific risk assessments since the experts making them 'although they have scientific legitimacy, have neither democratic legitimacy nor political responsibilities'".[67]

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[60] Jacqueline Peel, "When (Scientific) Rationality Rules: (Mis)Application of the Precautionary Principle in Australian Mobile Phone Tower Cases", (2007) 19 (1) *Journal of Environmental Law* 103-120
[61] ibid at p110
[62] ibid at p114
[63] *Conservation Council of SA Inc. v Development Assessment Commission and Tuna Boat Owners Association of SA* [1999] SAERDC 86
[64] ibid at [18]
[65] Peel (n 55) at p115 (reference omitted)
[66] *Pfizer Animal Health SA v Council of the European Union* [2002] ECR II-3305
[67] Peel (n 55) at p116 citing *Pfizer* case at [201]

Rationality is not the exclusive domain of either scientists or lawyers, and to restrict the application of the precautionary principle as suggested in the *Telstra* case is to potentially limit the scope of its possible application, and thwart the purpose underlying the principle.

I concur with Peel's thought that perhaps the greatest challenge for the appropriate application by courts of the precautionary principle lies in the nature of legal culture.[68] Lawyers need to be more receptive to forms of knowledge and understandings of risk that are not only based in science.[69] How this may be achieved remains to be seen, but that is the significant challenge for environmental lawyers and judges hearing and determining matters where the precautionary principle is under consideration.

The Principle of Non-Regression and the Role of the Judge

The sovereignty of laws and parliaments in relation to matters affecting the environment is subject to limitations as a result of the acceptance of the principles of sustainable development, in particular, the principle of inter-generational equity. That sentence succinctly states the relatively new or emerging principle of non-regression in relation to environmental laws, as identified by Prof M Prieur.[70] It is also known as the "standstill effect".[71]

It is based on the following foundations[72]:

1. Although the mutability of laws is an essential principle in general, our understanding of the environment and the concept of sustainable development compel new thinking: the repeal or diminution of progressive laws to protect the environment would contradict the principle of inter-generational equity;
2. The right to a healthy environment is recognised as a human right from which there can be no derogation;
3. A number of international environmental conventions aim to conserve, protect and improve the environment/ecosystems;
4. The Lisbon Treaty aims at a high level of protection and improvement of the quality of the European environment from which there can be no derogation, based on the theory of *acquis communautaires;*
5. The constitutions of a number of countries have eternal protection provisions which can found human rights to a healthy environment, from which derogation is not possible;
6. National environmental laws that protect the environment can be interpreted as prohibiting any retrogressive measure; and
7. The jurisprudence of various national, regional and international courts is consistent with the principle of non-regression of environmental laws.

The principle was inferentially recognised, it is argued[73], in the final document agreed at the Rio + 20 Summit *The Future We Want.* Paragraph 20 states that " In this regard, it is critical that we do not backtrack from our commitment to the outcome of the United Nations Conference on Environment

[68] ibid at p119
[69] ibid
[70] Michel Prieur, "Non-regression in environmental law", S.A.P.I.E.N.S [Online], 5.2 | 2012, Online since 12 August 2012, accessed 16 July 2014. URL: http://sapiens.revues.org/1405; also Michel Prieur 'De L'Urgente Necessite De Reconnaitre Le Principe De "Non-Regression" En Droit De L'Environnement' *IUCN Academy of Environmental Law e-Journal Issue 2011 (1)*
[71] Prof Dr L Lavrysen, "Recent Developments in Environmental Jurisprudence" *UNEP 14th Global Major Groups and Stakeholders Forum* February 2013, Nairobi-Gigiri, Kenya
[72] Prieur (n 65)
[73] Prieur (n 65)

and Development", in a reference to the outcomes of the UNCED Conference in Brazil in 1992, particularly the *Rio Declaration* and *Agenda 21*.

The *Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability*, a declaration of the World Congress on Justice, Governance and Law for Environmental Sustainability[74] declared as follows:

> **II Principles for the Advancement of Justice, Governance and Law for Environmental Sustainability**
>
> Meeting environmental objectives is part of a dynamic and integrated process in which economic, social and environmental objectives are closely intertwined.
>
> We recognize that environmental laws and policies adopted to achieve these objectives should be non-regressive.
>
> …….

At first blush this embryonic and logical based principle appears to be of relevance primarily to law and policy makers. It deserves critical attention by lawyers and those who understand that the achievement of economic objectives is dependant on the achievement of environmental and social goals; that the relationship is integrated and dynamic.

However, it is critical for judges and lawyers to keep abreast of the international developments in the field of environmental law and to understand the foundations of this new principle. While I have not embarked upon an analysis of the relevance of the foundations in the Australian context, and it is clearly apparent that some of them are not relevant, the following might provide arguments for non-regression:

- Australia is a signatory to a number of international environmental conventions that aim to protect, preserve and enhance the environment; and
- as a result of the incorporation of the principles of ESD into legislation many years ago Australians have an expectation that the government will continue to assess development against these principles.

It behoves lawyers and judges to maintain an interest in international developments in the context of ESD or sustainable development as it is known elsewhere.

Summaries: Europe and Australia

Europe has the benefit of the *Aarhus Convention,* its Compliance Committee and the EU Directives to encourage Parties in the strongest terms to facilitate access to justice in environmental matters, including for representative or non-government organisations. The UK in the course of reforming judicial review and its procedures has created a specialist planning court to streamline the progress of judicial review applications in planning matters.

In Australia at the federal level which is the only jurisdiction this paper has considered, judicial review is constitutionally protected, but the 2012 ARC Report No 50 and the consequent commentary suggests the attention of the lawmakers is required. It is not simply a question of whether judicial review is protected; the real issue is whether there is in reality access to the courts in the interests of maintaining the objective of ESD. This issue concerns standing for representative organisations and associations to bring proceedings, the prohibitory nature of costs and whether they can be capped, and a matter this paper has not touched on – orders for security for costs.

[74] Held in Rio de Janeiro, Brazil 17-20 June 2012 and attended by over 250 of the world's chief justices, heads of jurisdiction, attorneys general, auditors general, chief prosecutors and other high-ranking representatives of the judicial, legal and auditing professions

Conclusion: Where are we going?

Judicial review of administrative action is and will continue to be constitutionally available in Australia and so in principle decision makers may be held accountable for their assessments against the principles of ESD, in accordance with the law. However the withdrawal of funding to the environmental defenders offices throughout the nation means that access to judicial review, in the context of the high cost of judicial representation in Australia,[75] will rarely be available in reality for those who have been the litigants – the small, representative organisations of concerned citizens, without reform of the standing rules and those relating to costs.

The legal profession has a general responsibility; every lawyer has the potential to be a concerned citizen – concerned for the implementation of the law including the ESD principles accepted and enshrined in our laws over the past 20+ years. Those professing to be environmental lawyers and judges who do, or could be called upon to hear and determine matters in which the ESD principles may be addressed, not only need to maintain an awareness of developments internationally in environmental law and access to justice, but should be open to and thinking about novel approaches to understanding risk, social values and gauging levels of acceptability, alive to the flaws in science and scientific methods, looking at improvement of the law's historic processes and procedures for new approaches more suited to current imperatives and realities.

Where are we going? The paper has only considered judicial review of federal administrative action. My conclusion is that presently we are not going anywhere and access to judicial review for ESD has gone backwards since December 2013.

For the full set of papers and presentations from the NELA Conference 2014, go to www.nela.org.au/NELA/Events/National_Conference_2014_Presentation.aspx

[75] Not addressed in this paper, but it is common knowledge having been the subject of numerous reports