This special edition of the Australian Environment Law Digest comprises selected papers presented at the 2014 national conference of the National Environmental Law Association, held in Sydney on 21 November 2014.

The conference title, Transformation or train wreck? Environmental and Climate Change Law at the cross roads, reflects that 2014 has been a big year for environment and climate change law. At state and federal level we’ve seen many amendments to laws, many public inquiries and the courts have been kept busy, too.

The G20 Leaders summit in Brisbane on 15 November and the IUCN World Parks Congress in Sydney during November gave impetus to more hopeful developments globally.

This year NELA partnered with Legalwise Seminars to present the conference and we believe it’s proven to be a great partnership that truly plays to both of our strengths.

The papers selected for this special edition reflect different perspectives on environment and climate change regulation and litigation – the public sector executive, the former judge, the academic, the litigators and public interest groups.

Terry Bailey, CEO Office of Environment and Heritage NSW, provides an overview of new approaches to biodiversity conservation in NSW, while Christine Trenorden draws on her experience as a former Senior Judge of the Environment, Resources and Development Court of South Australia to reflect on where we are headed in the judicial application of the principles of ecologically sustainable development.

A range of experts with litigation experience, Greg McIntyre SC, Dr Peter Cashman and Jo Bragg, consider the changing face of environmental litigation and offer some great insights into new challenges and strategies.

We hope to see you at the 2015 NELA national conference. In the meantime, please enjoy these thought-provoking and informative papers.

Amanda Cornwall
National Environmental Law Association
Emerging approaches to improving biodiversity in NSW

Terry Bailey, CEO, Office of Environment and Heritage NSW

Introduction

I have been asked to talk about current biodiversity challenges facing New South Wales – and emerging approaches the government is using to address these. In thinking about this I’m reminded of Aldo Leopold, who in the early 1900s said:

One of the penalties of an ecological education is that one lives alone in a world of wounds. Much of the damage inflicted on land is quite invisible to laymen.

We’ll come back to this.

National parks alone are not enough

New South Wales has a strong history in national parks. Sydney’s Royal National Park was established in 1879 – as the second national park to be declared in the world – after Yellowstone in the United States. We now have over 867 national parks and reserves, covering over 7 million hectares – or nearly 9 percent of NSW.

And over the last week, we successfully hosted the IUCN’s sixth World Parks Congress – a one-in-ten-year event that brings together expertise from around the world to plan, inspire and innovate for the next decade of biodiversity conservation.

It all sounds very rosy, however:

- We still have nearly 1,000 species at risk of extinction (that we know of)
- There are key threatening processes that we have not controlled – feral cats, foxes, myrtle rust, chytrid fungus
- We continue to face erosion, salinity and water quality issues

National parks are only part of the solution. They are absolutely essential, but national parks alone will not solve our biodiversity challenges. Experts, such as Professor Michael Archer, have been saying this since the 1980s.

The need for conservation on private land in addition to the parks system is essential to conserving threatened species. Professor Archer has noted that, without a landscape-scale approach to conservation, protected areas are “islands within a sea of alienated land”. However, while we have known of the need for whole of landscape approaches for over thirty years, we have not yet implemented the complete solution.

Whole of catchment or landscape level effort requires the involvement of a variety of land tenures and all types of owners – from the private sector, to Aboriginal Land Councils, to individual landowners and NGOs.

The challenge remains: How do we prioritise private land conservation in a strategic way that compliments the reserve system, is cost-effective and has strong land owner support – from all sectors?

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We have learnt a few more things over the past thirty years (other than the need for landscape approaches):

- We know public concerns follow the issue of the day – According to the recent “Who Cares about the Environment?” survey, people currently cared about air pollution until largely fixed, water in drought and climate change.
- New information is emerging around the challenges of dealing with a changing climate and intensification of weather events, including fire regimes, climate refuges and corridors.
- We also know the population of New South Wales is predicted to grow by at least another 50% by 2060.

**Current government priorities**

In that context, I will outline some of the priorities and current work of the NSW Government.

**Responding to loss and fragmentation**

These issues are not going away. NSW will continue to grow, there will be new needs for housing, food, energy, infrastructure.

We need to be smart about how we balance these increasing needs with impacts on biodiversity. We need to continue to protect and enhance our national parks.

But, as I mentioned earlier, we need to look at consolidation and connection of the landscape outside of the parks system.

**Biodiversity Offsets Policy**

We recently introduced a new Biodiversity Offsets Policy in NSW. While the focus of this policy is on offsetting for major projects, it provides some new directions that are relevant to biodiversity conservation more broadly.

The policy promotes the use of stewardship payments to private landowners as a form of offsetting. This is achieved through the legislative tool of a biobanking agreement.

Biobanking agreements allow developers to effectively pay landowners to manage their own land. The landowner receives an annual income stream in return for managing and improving the condition of biodiversity on their land. These exchanges between landowners and developers are quantified using biodiversity credits.

At present, developers often buy land to create biodiversity offsets that they manage themselves. This is not their core business and creates difficulties when the land is sold, or unstrategic ‘proposed’ additions to the protected area estate.

Using biodiversity credits to transfer biodiversity values and involve private landowners in offsetting provides the potential for real integration of biodiversity conservation across landscapes. It also moves some way towards realising an economic and market value for biodiversity.

What is also required, however, is some strategic vision in the location of offsets in the landscape. NSW Government intends to achieve this through development of a biodiversity offsets fund, which we are currently working on. The idea is developers pay money and the fund consolidates offset requirements and locates them in a more strategic manner.


**Saving Our Species**

Like national parks, biodiversity offsets are not the whole solution. NSW Government is also responding at the threatened species level. What has become clear since implementation of the *Threatened Species Conservation Act* is that protecting threatened species is not straight-forward. Nor is it cheap.

When the Act was introduced in 1995, recovery planning was tagged as “a very cost-effective and cooperative approach to rescuing species from extinction” (Pam Allan, Minister for the Environment, second reading speech, December 1995). However, by 2004 – when around 60 recovery plans had been approved and 900 were needed – it was clear this process was not rescuing species from extinction. The planning of recovery actions was not keeping up with the listings – leaving the actual undertaking of actions well behind.

It was at this time NSW moved towards the idea of prioritising recovery planning. Since then, a process of rethinking the way we approach species recovery has culminated in the launch of the NSW Saving Our Species program last year. This program has a clear and realistic goal of maximising the number of species retained in the wild for the next 100 years.

Prioritisation of actions and investment is based on the likelihood of success and the total cost of implementing the project. This prioritisation is a pragmatic recognition that threatened species recovery is expensive and we cannot try to do it all at once.

The program also makes the actions required more accessible and tangible to encourage real community and private sector participation. Actions include:

- breeding programs for species such as the brush tailed rock wallaby
- establishment of artificial areas that are disease-free for the corroboree frog

With the help of public-private partnerships, other actions include the reintroduction of species that have become extinct in NSW into predator-free areas of national parks – including numbats, bilbies and golden bandicoots.

**Responding to pest plants and animals**

Again, saving species is still not the whole picture. In addition to a species focus, we need to address the threatening processes that contribute to the decline of many species and ecosystems. Significantly, this includes pest animals. We have not yet won the battle against foxes, feral cats, rabbits, goats, pigs, toads and the rest.

We are investing in the science of pest animals and looking towards new techniques to maximise efficiencies.

**Responding to climate change**

All this work will be to no avail if we do not account for changing environments and make the mistake of thinking everything will remain as it currently is. It is therefore important to start building flexibility into our programs that recognise the potential impacts of changing climate on our biodiversity in NSW.

We have established the NSW Adaptation Research Hub, which is a collaboration between leading NSW universities and experts in climate change impacts and adaptation science. Its focus includes:

- risk assessment under future climates
- translocation of species
- identifying climate refugia and corridors
- assessing vulnerability of certain species.
Further directions – the environment and economic dilemma

I see the key to future environmental conservation is in recognising the social dilemma – society’s values determine the environmental and economic outcomes.

There is opportunity in this that I do not believe governments have yet been able to fully realise. There are so many aspects of the environment that provide multiple benefits to society – soils, water quality, species and biodiversity, carbon capture and storing... not to mention tourism, recreation and well-being.

We are starting to acknowledge some of these multiple benefits through the biodiversity offsets policy, with the creation of tradable biodiversity values that realise economic value in biodiversity for private landowners.

We have an opportunity to acknowledge more of these benefits by rethinking how we define the role of government.

Classic public policy says ‘government intervenes where there is a market failure’. In conservation, there has long been an assumption of complete market failure, causing all conservation to fall back on government. However, what government needs to do is work out how best to create public value.

We need to allow multiple values in the environment to be recognised and be able to be realised. This will allow the environment to be more integrated into the public value system. I think that only then will we be able to truly integrate biodiversity protection across landscapes.

Next steps

Much of the recent work by NSW Government towards more holistic biodiversity conservation has not required legislative change. It has been undertaken in the ‘policies and programs’ space.

While we have gradually built on biodiversity legislation over the past 20 years, it has become increasingly clear that the legislation is lagging somewhat behind the practice of conserving biodiversity.

We have our National Parks and Wildlife Act that focusses on the protected area system. We have the Threatened Species Conservation Act to list, protect and recover threatened species. We have the Native Vegetation Act to regulate native vegetation on rural land. And we have many other pieces of legislation that are related to biodiversity, such as the planning legislation in NSW.

While all these Acts focus on valid biodiversity issues and needs, they have each been implemented at very different points in time and then separately amended many times over the years.

Together, they do not necessarily provide a clear and holistic picture of biodiversity conservation in NSW. And their interactions with each other can be described, at best, as clunky and often duplicative.

I believe this is the right time to take a step back and look at how we are approaching biodiversity in a holistic way.

We have come a long way in terms of furthering our understanding of the outcomes we are seeking and the tools we need. So now, perhaps we are in a position to take a further step towards true whole-of-landscape biodiversity conservation.

As many of you would know, a review of NSW biodiversity legislation is currently underway, with an independent panel now preparing a report for government. I don’t want to give the impression that, just because the timing is right, I think this will be easy. These issues are complex. And, while we have progressed significantly in our understanding of biodiversity needs, we still don’t have all the answers.
I do, however, believe this is a significant opportunity to have our laws truly compliment where we have come in terms of our approaches to biodiversity conservation in practice – and to also be able to accommodate some of our forward-thinking. This is also an opportunity for government to work towards recognition of the real public value in biodiversity conservation.

What gives me a lot of optimism is:

- The Australian landscape is in most part resilient – although I do note caution on how far the tipping point might be
- Socially we, the public, business and government are not complacent
- We are today world class in our environmental management, the recent IUCN Congress helps confirm this.

Given all of this, I believe a landscape-scale and holistic approach to biodiversity conservation is not far off.

In returning to Leopold, we must reach a landscape scale and holistic approach to give us the greatest chance of providing a healthy, strong, vibrant environment that supports community endeavours and is not just a world of wonders that are invisible to the layman.

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ENVIRONMENTAL LAW SEMINAR SERIES – March 2015

Legalwise has released details of upcoming Environmental and Planning Law Conferences, to be held in the locations listed below. Early bird prices are available to those who register before Tuesday 23 December. NELA members also receive a 10% discount.

Amidst the myriad of current and proposed environmental legislative and regulatory reform in Australia, it is no wonder that practicing in this area can be at times like ‘walking a tight rope’. These helpful and informative seminars, given by notable experts in each state, will explore some of the most topical issues arising for practitioners in this area.

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Tuesday 10 March 2015 2.00pm – 5.15pm $460
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Wednesday 11 March 2015 9.00am – 5.15pm $810
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Thursday 12 March 2015 9.00am – 5.15pm $810
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ENVIRONMENTAL AND PLANNING LAW CONFERENCE – Brisbane
Wednesday 11 March 2015 9.00am – 5.15pm $810
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Judicial Review and the Principles of Ecological Sustainable Development: Where are we Going?

Christine Trenorden, UCL Australia, School of Energy and Resources
Former Senior Judge, Environment Resources and Development Court, SA

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.

... The judiciary ... plays a vital role as the guarantor of the protective benefits of environmental law.3

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 rules4

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4 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\(^5\) by section 75(v) of the *Constitution*, which arguably extends to protect this role of, and the limitations upon, the State Supreme Courts,\(^6\) 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.\(^7\)

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.\(^8\) 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.\(^9\)

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;
\((i)\) the decision was otherwise contrary to law.\(^{10}\)

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;

\(^{5}\) In addition to limiting its jurisdiction.
\(^{6}\) *Kirk v Industrial Relations Commission of New South Wales* [2010] HCA 1
\(^{7}\) 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’.
\(^{8}\) *Minister for Immigration and Citizenship v Li* [2013] HCA 18
\(^{9}\) ibid; per the reasons of Hayne, Kiefel and Bell JJ
\(^{10}\) *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.¹¹

The ADJR Act has been the subject of a report comprising a review and recommendations, by the Administrative Review Council (ARC).¹² Its recommendations “focus on restoring the ADJR Act to a central place in the federal judicial review system”.¹³ 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.¹⁴ 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 1998.¹⁵ 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 paper¹⁶ 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)

¹¹ ibid s5(2)
¹³ ibid at p9
¹⁴ ibid at p12
¹⁵ see: Ministry of Justice (UK), Judicial Review: Proposals for Reform (December 2012)
¹⁶ 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*\(^{17}\), 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.\(^{18}\)

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’.\(^{19}\)

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’\(^{20}\), 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’.\(^{21}\)

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.\(^{22}\)

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\(^{23}\) 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.

\(^{17}\) Ministry of Justice (UK) (n2)

\(^{18}\) ibid, at p3.

\(^{19}\) ibid, at para 7 i)

\(^{20}\) ibid, at para 7 ii)

\(^{21}\) ibid, at para 7 iii)

\(^{22}\) ibid, at para 21

\(^{23}\) 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, 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. Under article 9(2), a person with a sufficient interest has a right to challenge the substantive and procedural lawfulness of a decision. Parties must determine what constitutes “a sufficient interest” consistently with giving the public concerned a wide access to justice. 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”.

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. 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”, 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.”

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.

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 ADIR Act, but only for persons aggrieved by a decision, conduct or failure to make a decision. 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

26 includes environmental organisations meeting the requirements of article 2 para 5
27 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
28 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
29 The Aarhus Convention article 9(4)
30 ibid art 9(4)
31 ibid art 9(5)
32 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
33 Lavrysen (n 23) at p11.
34 ADIR 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.\(^{35}\)

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,\(^{36}\) 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”.\(^{37}\)

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.\(^{38}\)

\(^{35}\) ARC Report at p147 (references omitted)

\(^{36}\) *Judiciary Act 1903* (Cth) s 398(1)


\(^{38}\) 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 deterrent 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’. 39

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 40 has been used successfully to cap costs in proceedings brought by a representative organisation. 41

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 42:

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. 43 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. 44

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. 45

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.

39 ibid at p 191
40 Uniform Civil Procedure Rules 2005 (NSW) R 42.4
41 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
42 may be an incomplete summary
43 sS 20,26
44 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
45 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”.

In May 1992, just prior to the UN Conference on the Environment and Development in Rio de Janeiro (*UNCED*), the Commonwealth, State 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. 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* (*NSES*D)*59*, the goal and the core objectives of which were expressed to be as follows:

**The Goal**

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 *NSES*D? 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

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46 WCED, *Our Common Future*, 1987, p44
47 Western Australia entered into the IGAE at a later date.
Government) by the Keating Government, Australia has done little more than pay lip service to the goal and the implementation of the strategy.50 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”.51 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.

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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. 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.

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.

**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.

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). 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.57

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.58

The threat of environmental damage must be adequately sustained by scientific evidence.59

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*, but

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52 Environment Protection and Biodiversity Act 1999 s 136
54 Ibid at [87] – [89]
55 Ibid at 13.20
56 [2006] NSWLEC 133
57 Ibid at [128]
58 Ibid at [129]
59 Ibid at [134]
60 [2010] VSC 335; and many other judgments
it is not without criticism. In an analysis of the Telstra case,61 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’”.62 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.63 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 case64 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).65

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”.66 Further criticism of the purely scientific approach is to be found in the European case of Pfizer67 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’”.68

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62 ibid at p110
63 ibid at p114
64 Conservation Council of SA Inc. v Development Assessment Commission and Tuna Boat Owners Association of SA [1999] SAERDC 86
65 ibid at [18]
66 Peel (n 55) at p115 (reference omitted)
68 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.69 Lawyers need to be more receptive to forms of knowledge and understandings of risk that are not only based in science.70 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.71 It is also known as the “standstill effect”.72

It is based on the following foundations73:

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 argued74, 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

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69 ibid at p119
70 ibid
72 Prof Dr L Lavrysen, “Recent Developments in Environmental Jurisprudence” *UNEP 14th Global Major Groups and Stakeholders Forum* February 2013, Nairobi-Gigiri, Kenya
73 Prieur (n 65)
74 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 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.

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75 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,76 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.

76 Not addressed in this paper, but it is common knowledge having been the subject of numerous reports
International Law Protecting the Great Barrier Reef

Greg McIntyre SC, Barrister, John Toohey Chambers

Introduction

There has been much public comment about a decision by the Minister for the Environment, Greg Hunt and his delegate, to approve dredging and dumping on the Great Barrier Reef. Dr Christopher Ward, Chair of the Australian International Law Association is reported as saying that “It is strongly arguable that Australia is not in full compliance with its obligations” under the World Heritage Convention. He adds that –

The failures have the potential to lead to the Great Barrier Reef being placed on the heritage in danger list.

International law and Australian law enacted to implement Australia’s international law obligations have much to say about Australia’s obligations when making decisions which affect World Heritage areas.

Port expansion approval

The Commonwealth Minister for the Environment on 10 December 2013 decided to permit expansion of the Coal Port at Abbot Point and on 20 December 2013 approved the Galilee Coal and Rail Project, allowing for six new mines and a railway from the mine sites 400 km inland from Abbott Point. The Minister’s decision to approve the expansion of the port mandated that the dumping of spoil occur offshore.

The Minister’s decision approving dredging and dumping of dredge spoil by North Queensland Bulk Ports Corporation Limited (NQBPC) for 3 terminals at the Abbot Point Port was made pursuant to the EPBC Act, sections 130(1) and 133. The Minister attached conditions to the approval in accordance with his power under section 134 to attach a condition “if satisfied that the condition is necessary or convenient for protecting ...or mitigating damage to a matter protected”, which, under s 34, includes “the world heritage values of a declared World Heritage property”.

The approval decision recites that it is an approval under the following provisions of the EPBC Act:

- World Heritage properties, sections 12 and 15A;
- National Heritage places, sections 15B and 15C;
- Listed threatened species and communities, sections 18 and 18A;
- Listed migratory species, sections 20 and 20A;
- Commonwealth marine areas, sections 23 and 24A; and
- Great Barrier Marine Park, section 24B and 24C.

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78 Convention Concerning the Protection of the World Cultural and Natural Heritage.

Pre-conditions

Among the conditions imposed by the Minister, when giving approval, were several conditions precedent to dredging and disposal activities:

1. Submission to the Minister for approval of a Dredging and Spoil Disposal Management Plan (DSDMP) (condition 7) which includes –
   a. engineering and operational controls endorsed by a Technical Advice Panel (TAP) (condition 7(a));
   b. adaptive management measures advised on by the TAP (condition 7(f) and 9); and
   c. a methodology for taking into account the GBRMPA water quality guidelines (condition 7(c));
2. Submission to the Minister for approval of an Abbot Point Ecosystem Research and Monitoring Program (APERMP) after consultation and review by the TAP (conditions 14 to 18);
3. Submission to the Minister for approval of a Disposal Site Analysis Plan (DSAP) prior to the submission of the DSDMP and APERMP (condition 20);
4. Approval by the Australian Government Department responsible for administration of the EPBC Act of the membership of the TAP,\(^80\) in consultation with the GBRMPA, and prior to the development and submission of the DSDMP, APERMP and Offsets Plan (conditions 23-24);
5. Provision to the Minister of all advice and recommendations of the TAP and explanations of the response to the advice and recommendations at the same time as the submission of the DSDMP, APERMP and Offsets Plan (condition26);
6. Submission to the Minister for approval of an Offsets Plan addressing loss of seagrass from the dredge area and dredge plume extent and outlining “the process to undertake actions that will result in a net benefit outcome for the World Heritage Area”(condition 31(b); with an obligatory “target” of “150% of the total amount of fine sediments, potentially available for re-suspension into the marine environment...offset by a reduction in the load of the fine sediments entering into the marine environment from the Burdekin and Don catchments (conditions 31(d)).

Unless and until those pre-conditions are met, there is no approval of dredging and disposal activities. The conditions require a great deal of complex work to be done, much of which may be difficult or close to impossible to accomplish in strict compliance with the terms of the conditions.

What must be considered is whether the conditions attached to the proposal are sufficient to ensure compliance with Australia’s obligations under the World Heritage Convention and the Biodiversity Convention.

Sea-dumping approval

Because the Minister had specified that the dumping was to occur at sea, rather than on land, a further permit was required under s.19(5)(b) of the Environment Protection (Sea Dumping) Act 1981 (Cth) (EPSD Act) to dump the spoil at sea. A delegate of the Minister on 31 January 2014 granted an application by the North Queensland Bulk Ports Corporation to dump three million cubic metres of spoil into the waters of the Great Barrier Reef as part of the expansion of a coal terminal at Abbot Point, between Townsville and Bowen on the Queensland coast. The spoil will be dumped in the vicinity of seagrass meadows and the coral reefs of Camp Reef, Horseshoe Bay, Cape Upstart, Nares rock and Holbourne Island.

\(^80\) The TAP must include at least two independent scientific experts with expertise in water quality and marine ecology, and an independent dredging technical advisor (condition 24).
A condition of the permit granted is that “the dumping activities are managed in accordance with the approval granted under section 133 of the Environment Protection and Biodiversity Conservation Act 1999” (condition 4 – relating to composition of the TAP - NO).

In addition there are pre-conditions which require that, prior to any dumping activities, the NQBPC must–

(a) submit to the GBRMPA an APERMP;
(b) establish a TAP, membership of which is approved by GBRMPA; and
(c) establish a Management Response Group (MRG).

World Heritage obligations and the Great Barrier Reef

Australia ratified the World Heritage Convention on 22 August 1974. Under Article 11 of that Convention the World Heritage Committee maintains a list of World Heritage Properties. The Great Barrier Reef was placed on that list by the World Heritage Committee in 1981.

The Great Barrier Reef was listed because the World Heritage Committee found that it met the criteria for natural heritage under Article 2 of the Convention. Article 2 provides that –

For the purposes of this Convention, the following shall be considered as "natural heritage":

natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;

geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;

natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

The World Heritage Committee assessed the Reef as meeting all four of the criteria which the Committee had established at the time of the listing, by its Operational Guidelines of October 1980, paragraph 21, being that it –

1. was an outstanding example representing the major stages of the earth’s evolutionary history;
2. was an outstanding example representing significant ongoing geological processes, biological evolution and man’s interaction with his natural environment;
3. contained superlative natural phenomena, formations or features or areas of exceptional natural beauty; and
4. contained the most important and significant natural habitats where threatened species of animals or plants of outstanding universal value from the point of view of science or conservation survive.

The Minister in his Statement of Reasons for Approval under the EPBC Act, at [36], noted that –

The Great Barrier Reef is the world’s most complex expanse of coral reefs, containing some 400 species of corals in 60 genera. There are also large ecologically important inter-reefal areas. The shallower marine areas support half the world’s diversity of mangroves and many seagrass species. The waters also provide major feeding grounds for one of the world’s largest populations of the listed migratory dugong. At least 30 species of whales and dolphins occur, and it is a significant area for humpback whale calving. Six of the world’s seven species of marine turtle occur in the Great Barrier Reef.
World Heritage Convention obligations

The World Heritage listing of the Great Barrier Reef imposed the following obligations on the Australian Government, as a signatory to the World Heritage Convention:

**Article 4**

Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.

**Article 5**

To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavor, in so far as possible, and as appropriate for each country:

(a) to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes;

(b) to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions;

(c) to develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage;

(d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and

(e) to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field.

**Article 6**

1. Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage mentioned in Articles 1 and 2 is situated, and without prejudice to property rights provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate.

2. The States Parties undertake, in accordance with the provisions of this Convention, to give their help in the identification, protection, conservation and presentation of the cultural and natural heritage referred to in paragraphs 2 and 4 of Article 11 if the States on whose territory it is situated so request.

The GBRMPA is the Commonwealth government authority set up, pursuant to Australia’s obligation under Article 5(b) of the World Heritage Convention with responsibility for the implementation of Australia’s obligations under the World Heritage Convention in relation to the Great Barrier Reef.

**Biodiversity Convention**

Australia on 5 May 1992 signed the *Convention on Biodiversity Conservation*. It was ratified by Australia on 18 June 1993 and came into force on 29 December 1993. It provides *inter alia*, as follows:

**Article 6. General Measures for Conservation and Sustainable Use**

Each Contracting Party shall, in accordance with its particular conditions and capabilities:
(a) Develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, inter alia, the measures set out in this Convention relevant to the Contracting Party concerned; ...

**Article 8. In-situ Conservation**

Each Contracting Party shall, as far as possible and as appropriate:

(a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity; [and]...

(k) Develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations; ...

**EPBC Act**

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) was enacted pursuant to Australia’s obligations under the *Convention on Biodiversity Conservation*.

The EPBC Act prohibits action likely to have a “significant impact on the environment” in relation to:

- World Heritage properties, sections 12 and 15A;
- National Heritage places, sections 15B and 15C;
- Listed threatened species and communities, sections 18 and 18A;
- Listed migratory species, sections 20 and 20A;
- Commonwealth marine areas, sections 23 and 24A; and
- the Great Barrier Marine Park, section 24B and 24C.

Those prohibitions do not apply to actions approved under Part 9 of the EPBC Act. Part 9 includes section 137, which relates to World Heritage areas.

Under section 137(a) of the EPBC Act the Minister “must not act inconsistently with –

(a) Australia’s obligations under the World Heritage Convention; or

(b) the Australian World Heritage management principles; or

(c) a plan that has been prepared for the management of a declared World Heritage property under section 316 or as described in section 321.”

**EPBC Regulations**

Pursuant to its obligations under World Heritage Convention, Australia has, under the EPBC Act, made the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) which, in Schedule 5, set out the Australian World Heritage Management Principles (*AWHMP*). Relevant principles are the following:

1.01 The primary purpose of management of natural heritage and cultural heritage of a declared World Heritage property must be, in accordance with Australia’s obligations under the World Heritage Convention, to identify, protect, conserve, present, transmit to future generations and, if appropriate, rehabilitate the World Heritage values of the property.

3.04 An action should not be approved if it would be inconsistent with the protection, conservation, presentation or transmission to future generations of the World Heritage values of the property.

3.05 Approval of the action should be subject to conditions that are necessary to ensure protection, conservation, presentation or transmission to future generations of the World Heritage values of the property.
The Minister for the Environment and the GBRMPA are obliged to comply with those principles in making a decision approving dredging and dumping of spoil within the area of the Great Barrier Reef.

Offsets

The EPBC Act Offsets Policy defines “environmental offsets” as “measures that compensate for the residual adverse impacts of an action on the environment”.81 The Policy notes that –

Offsets provide environmental benefits to counterbalance the impacts that remain after avoidance and mitigation measures. These remaining, unavoidable impacts are termed ‘residual impacts’. For assessments under the EPBC Act, offsets are only required if residual impacts are significant.82

Condition 32 of the Minister’s approval of dredging and dumping obliges the NQBPC to implement the Offsets Plan. In relation to condition 31(b), requiring that offsets ensure a “net benefit” to the Great Barrier Reef, it will be difficult to identify or measure compliance where there is no clear meaning identified as attributable to the term “net benefit” or any method suggested as to how to measure a “net benefit”.

The measurement of “net benefit” must, by inference from the conditions, involve taking into account the compulsory offset at condition 31(d), i.e., the obligation to reduce the fine sediments entering the marine environment from the Burdekin and Don catchments by the equivalent of 150% of the total amount of the fine sediments potentially available for re-suspension into the marine environment from the dredging and disposal activities; whatever that condition means and however it could be implemented.

The Minister, in his Statement of Reasons for Approval under the EPBC Act, at [106], stated that he had found that the offsets proposed by the proponent met the requirements of the EPBC Offsets Policy and “that the offsets will provide an overall environmental gain to … the world heritage values of [the Great Barrier Reef as] a declared World Heritage Property”. It is surprising that the Minister could reach that conclusion when the topic of offsets is discussed in very indefinite terms in the proponent’s ‘Appendix C – Offsets Discussion Paper’ and the size and nature of the offsets are incapable of being ascertained until after the Project is commenced.

The fact that there is a requirement for offsets is an effective admission by the Minister that there will be residual adverse impacts and a breach of the World Heritage Convention obligation not to deliberately cause damage to the World Heritage site.

Sea Dumping Act and Protocol

The decision of the Delegate of the Minister to grant a sea dumping permit was made under the ESD Act s 19(5)(b). Section 19(5) provides that –

(5) Subject to subsection (7) [which relates to an emergency unacceptably risking human health, safety or marine life], a permit for dumping or loading for dumping:

(a) may only be granted for controlled material that is within Annex 1 to the Protocol; and

(b) may only be granted in accordance with Annex 2 to the Protocol.


Annex 2 to the London Protocol provides that -

14 An analysis of each disposal option should be considered in the light of a comparative assessment of the following concerns: human health risks, environmental costs, hazards (including accidents), economics and exclusion of future uses. If this assessment reveals that adequate information is not available to determine the likely effects of the proposed disposal option then this option should not be considered further. In addition, if the interpretation of the comparative assessment shows the dumping option to be less preferable, a permit for dumping should not be given.

17 A decision to issue a permit should only be made if all impact evaluations are completed and the monitoring requirements are determined. (emphasis added)

The Minister had an obligation to comply with these provisions of the London Protocol in deciding whether or not to grant a sea dumping permit.

It is difficult to imagine how these provisions of the London Protocol could have been complied with when making the decision, in circumstances where the DSDMP, APERMP and Offsets Plan, required as pre-conditions to the Ministers’ consent to the dredging, have not yet been developed or submitted for approval to the Minister for the Environment; and the APERMP, the TPB approved by the GBRMPA and the MRG have not been established in compliance with the pre-conditions to the decision under the EPSP Act. The present state of circumstances is that adequate information is not available to determine the likely effects of the proposed disposal option. Given that situation, compliance with Annex 2 would result in the option not being considered further, but that is not what has occurred.

World Heritage in Danger

Paragraph 80 of the Operational Guidelines of the World Heritage Committee provides that the World Heritage Committee may include a property on the list of World Heritage in Danger if a World Heritage listed property is threatened by 'serious and specific danger'.

Concerns have been expressed by scientists83 that the Great Barrier Reef is in a degraded state due to various adverse effects and has a reduced resilience to new adverse effects.

Australia reported in February 2014 to the World Heritage Committee about what it is doing in response to these concerns.

On 25 June 2014 the World Heritage Committee considered whether to add the Great Barrier Reef to the list of "World Heritage in Danger" list because of the "cumulative" impacts of climate change, coastal urban development and port expansions such as the Abbott Point project, on the Outstanding Universal Value of the Property. The Committee added 3 areas to that list, but the Great Barrier Reef was not among them.

Conservation litigation

The decisions of the Minister and his delegate have provoked legal challenges from community groups and tourism operators affected.

The Mackay Conservation Group Inc has commenced proceedings in the Federal Court against the Minister for the Environment challenging his decision pursuant to the Administrative Decisions and Judicial Review Act 1977 (Cth), seeking declarations that the decision is inconsistent with Australia’s obligations to protect world heritage for future generations under Articles 4 or 5 of the World Heritage Convention and clauses 1.01, 3.04 and 3.05 of the AWHMP, and is in breach of the prohibitions in sections 137(a) of (b) of the EPBC Act against acting inconsistently with obligations

under the World Heritage Convention, Australian World Heritage Management Principles and a plan of management.

In addition, the North Queensland Conservation Council Inc has made an application to the Administrative Appeals Tribunal seeking a review of the decision under the EPSD Act on the basis that it is not made in accordance with the London Protocol, because adequate information is not available to determine the likely effects of the proposed disposal option. The application also alleges that inadequate attention was paid to opportunities to avoid sea dumping in favour of environmentally preferable alternatives; and pollution impacts from the proposed sea dumping were not adequately assessed.

The Association of Marine Park Tourism Operators Limited has also commenced proceedings against the GBRMPA, focussing on the GBRMPA obligations under s 7(3) of the Great Barrier Reef Marine Park Authority Act 1975 to perform its functions having regard to the values of the Great Barrier Reef World Heritage Area and its obligations under the GBRMP Regulations 88Q(a) and 88R(g), in granting any permit, to consider the impact on the heritage values of the Marine Park and the World Heritage Convention.

Conclusion

There certainly appear to be arguments to support the view of Dr Ward that Australia may not be in compliance with its obligations under the World Heritage Convention to protect world heritage for future generations in relation to the Great Barrier Reef and by proceeding without adequate information of the effects of disposal, in circumstances where the Reef is already in a degraded state and has reduced resilience.

The legal proceedings commenced by conservation groups and the tourism industry in the Federal Court and AAT focussed on obtaining definitive rulings on whether or not that is so.

However, the current situation in relation to the litigation is that the EDO Qld raised the issue of uncertainty created by the possibility of land based disposal methods being considered. 84 Minister Hunt’s 10 December 2013 approval of the dredging and dumping under the Environmental Protection and Biodiversity Conservation Act 1999 required NQBP to investigate and report on any alternative dump site with equivalent or lesser environmental impacts than the site already approved. As a consequence of this, on 3 October 2014 the Queensland Government lodged fresh referrals for dredging and spoil management at Abbot Point. The litigation appears to have had the impact of causing a backward step in the approval process. EDO Queensland has pledged to scrutinise the new plans85, so it is a case of ‘watch this space’.

Note: An alternative version of this paper setting out the current situation regarding the World Heritage Committees’ consideration is available at www.linkedin.com/pulse/article/20141124015525-136812794-world-heritage-in-danger-international-law-and-the-barrier-reef?trk=prof-post

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85 EDO Qld LawAlert! 8/10/14.
The Changing Face of Environmental Litigation

Jo Bragg, CEO / Solicitor, Environmental Defenders Office Qld

Introduction
This paper looks at the removal of Commonwealth government funding to Environmental Defenders Offices (EDOs), and at a few key legislative changes in Queensland relating to mining and planning that will affect public interest environmental litigation in Queensland.

Paradoxically, this is at a time when there are a record seven public interest proceedings pertaining to mining in Queensland and protection of the Great Barrier Reef, with the Environmental Defenders Office Queensland (EDO Qld) on the record in various Courts as well as the Administrative Appeals Tribunal.

Defunding of Environmental Defenders Offices
If members of community groups cannot obtain legal support then they cannot effectively participate in Court processes, be they merit appeals or enforcement actions. It is well established that to run public interest litigation, the ingredients almost always necessary include open legal standing rights, costs rules sympathetic to the public interest, legal resources and a well-based legal case. EDOs are community legal centres which have helped in part to overcome the imbalance of resources for the community compared to government and developers. EDOs have provided professional representation in scores of public interest cases over the years to those seeking to protect the environment.

On 17 December 2013, the new Commonwealth Attorney-General the Hon. George Brandis QC wrote to each EDO advising that their Federal funding, increased under Attorney-General Mark Dreyfus QC, would cease. This has meant that EDOs have struggled with varied success to obtain replacement private funds to continue to provide services, while still providing some much needed services to communities affected by development, coal seam gas and mining proposals. EDO Qld was defunded by the new Queensland Government in 2012. Novel funding types such as crowd funding are being explored but are not a satisfactory substitute for consistent government funding.

Certainly, the mining industry lobbied against continued funding of EDOs. This year, the industry also successfully lobbied to cut most long standing public rights to object to the Queensland Land Court against mining leases and environmental authorities for mining.

Reductions in public objection rights to the Queensland Land Court
This year, the Queensland Government removed most long established rights for any person or group to make a formal objection to the environmental authority and mining lease for any proposed mine to the Queensland Land Court. Those changes are set out in the Mineral and Energy (Common Provisions) Act 2014 (Qld). Not all of those provisions have yet commenced operation.

It is established knowledge that mining projects and infrastructure pose grave risks to the environment, and it is in the public interest that there is the widest possible community scrutiny of such proposals to identify and properly consider such serious potential impacts. Public objection
rights enable the costs and benefits of proposed mines to be debated openly and transparently in the Land Court, and are a valuable deterrent to government and corporate corruption.

This public right has been overtly disregarded by the Queensland Government, which has justified its actions by talking-up the benefits of streamlining mining approvals and alleging that individuals and groups have been deliberately lodging objections to delay or obstruct mining projects, rather than for valid relevant grounds under law. EDO Qld and indeed the Queensland Parliamentary library’s research during the Parliamentary Committee hearing into the reforms in 2014, found there was no evidence of such deliberate delay or disruption by community group objectors using the Land Court mining objection process.

In fact, Land Court objectors have traditionally been hardworking, honest and responsible people concerned about the array of potential impacts of mining on the environment.

**Alpha Coal Mine case**

A prime example of the importance in maintaining third-party objection rights is the Alpha Coal case in which groundwater issues were not adequately addressed by the Queensland Coordinator-General during the State government assessment process. The case concerned a massive proposed coal mine for the Galilee Basin, Queensland.

The case was heard in the Land Court in 2013 and the objectors included local landholders – the Andersons, the Curries and Paola Cassoni – concerned citizen Katheryn Kelly and conservation group Coast and Country Association of Queensland (this last group represented by solicitors EDO Qld). These objectors raised legitimate, immensely important and professionally presented issues, including the potential impact of the massive coal mine on local economies and regional groundwater, as well as contribute to climate change.

On 8 March, this year the Land Court agreed with the objectors that:

“... there is insufficient hard data to have a sufficient level of confidence that groundwater impacts will be as predicted by the model (groundwater modelling as set by Hancock).”

That Land Court decision is subject to two judicial review actions in the Queensland Supreme Court.

The withdrawal of public notification and most objection rights set out in the *Mineral and Energy (Common Provisions) Act 2014* (Qld) means that local communities – including Natural Resource Management groups, community groups and many important stakeholders – may not be made aware of proposed mining activities in their community. If the mining project is a ‘coordinated project’ declared under the *State Development and Public Works Organisation Act 1971* (Qld) such as Alpha coal mine then in the future it is up to the Coordinator General to determine whether public objection to the Land Court apply in the case of that project.

Another significant change relevant to environmental litigation is changes to costs rules in the Queensland Planning and Environment Court.

**Cost issues in the Planning and Environment Court**

The Queensland Land Court, where the Alpha case was heard has a discretion as to costs. By contrast for over 20 years the Queensland Planning and Environment has had rules that the each side pays his or her own costs, subject to exceptions. This meant that community groups with a reasonable case could go to that Court in the public interest.

Despite a lack of evidence that these provisions were abused, by amendments to the *Sustainable Planning Act 2009* (Qld) the Court’s powers were changed to a discretion and other elements.

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87 *Hancock Coal Pty Ltd v Kelly & Ors and Development of Environment and Heritage Protection [2014] QLC 12*

88 Ibid at 193, page 87.
has created uncertainty amongst community groups who are now more reluctant to use that Court. In some cases there is no opportunity to go to Court due to special legislation.

**Special legislation to benefit particular groups**

This year, the *Electoral Reform Amendment Act 2014* (Qld) was enacted in order to reverse changes to the electoral funding system put in place by the previous Labor government in 2011. This makes it harder to scrutinise the potential impact of supporters’ donations on the legislative process and assessment of development applications by the State government.

Development and mining approvals are immensely valuable business assets. However community groups are deprived of opportunities to challenge decisions when special legislation is passed as has happened in a number of cases in Queensland recently. The fact Queensland has only one House of Parliament also means reduced scrutiny of contentious legislative reforms.

Around the 2012 Queensland election, mining company Sibelco made a large, undisclosed donation to the Liberal National Party election campaign, as well as engaging in a public relations campaign against the proposed ending of sand mining on Stradbroke Island by 2019. Subsequently, the elected Newman Government passed special legislation\(^9\) allowing the option for Sibelco to extend sand mining on Stradbroke Island to 2035, and bypassing the normal approvals process that would be required for such an extension.\(^9\)

Karreman Quarries, a large donor to the Liberal National Party, was the subject of Department of Natural Resources investigation relating to unlawful extraction of quarry material from the Brisbane River. This prosecution was sidestepped by a legislative amendment that retrospectively legalised Karreman’s activities. The amendment was secretly inserted, without general notice, into other legislative amendments relating to the *Water Act 2000* (Qld).\(^9\)

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\(^9\) [North Stradbroke Island Protection and Sustainability and Another Act Amendment Act 2013](https://www.nela.org.au) (Qld), Act No. 63 of 2013.


Litigation that Holds Government to Account
Dr Peter Cashman, Barrister and Professor of Law
University of Sydney

“The reality is that our case is overwhelming,” Barry told me. “You look at the photographs of the damage, and you say, What the heck?” (This and the following quotation are paraphrases; indignation not only raises the volume of Barry’s voice, it also makes his language unfit for print.) “Are you out of your mind? They violated the terms of their contract. They broke the law!”

The levee board couldn’t enforce the law. But Barry believed that there was one way around its impotence: It could sue every single oil and gas company that had scarred the marsh in the last century. The complexity of such a case would be daunting, baroque. Lawyers would have to determine who dug every foot of the 10,000 miles of canals and pipelines and then quantify, in dollars, the extent to which each endangered New Orleans’s flood defense. The academic centers and environmental groups Barry contacted, while sympathetic to the cause, lost interest when they estimated how many millions of dollars would have to be spent on expert witnesses and coastal surveys. “We didn’t only need legal ability,” Barry said. “We needed the resources to take on Exxon, Shell, Chevron and BP — all at once.”

He compiled a list of private lawyers who had had success bringing major environmental lawsuits….. It was a very short list.

“The Most Ambitious Environmental Law Suit Ever: A quixotic historian tries to hold oil and gas companies responsible for Louisiana’s disappearing coast.”

As a litigation lawyer and academic I have for some time been both professionally and academically interested in the extent to which litigation may serve as both a remedial and preventative tool to deal with environmental problems generally and the problem of climate change in particular.

To date, along with a number of co-authors, I have been less than optimistic about the prospect of using litigation generally, and tort law in particular, as a remedy for environmental harm and damage caused by climate change.

Legal remedies are often circumscribed by, amongst other things, restrictive rules in relation to standing, the necessity to prove individualized fault and constraints on proof of causation.

94 See e.g. Comer v Murphy Oil where proceedings for losses arising out of property damage caused by Hurricane Katrina were brought against a number of chemical and energy companies alleging that their GHG emissions had contributed to climate change and the intensity of the hurricane. There are a number of decisions: see e.g. 585 F.3d 855 (2009); 607 F.3d 1049 (2010). In 2013 a new suit, filed in 2011, alleging many of the same claims was dismissed and that decision was confirmed on appeal. In California v General Motors the State of California unsuccessfully sued leading car manufacturers alleging that the GHG emissions were a public nuisance contributing to global warming and adversely affecting the resources, infrastructure and environmental health in California. The US Court of Appeals for the 9th Circuit in Native Village of Kivalina v. Exxon Mobil Corp., found that the plaintiffs had not shown causation between global warming damage and the defendants’ actions.
As the focus of the present session is on the changing face of environmental litigation, I propose to examine two current cases.

These represent an interesting departure from other more ‘traditional’ cases which have focused on environmental assessment standards in respect of proposed projects which may have significant adverse environmental impacts, including on climate change.95

The first case examined is symptomatic of emerging climate change litigation which has sought to both hold governments to account and to reduce environmental harm from climate change rather than remediate after damage has been done.

The second is a class action being considered, closer to home, seeking compensation and damages arising out of large scale environmental pollution following the Montaro oil spill off the north coast of Australia in 2009 that lasted for 74 days.

Whilst the former case is preventative in nature and the latter remedial, both involve attempts to hold governments or government agencies responsible for environmental damage.

Preventative Litigation Strategies

As some recent developments in the United States have made clear, there are a number of areas where litigation may serve as a useful tool to require governmental or regulatory bodies to take action to reduce carbon emissions.96

In the first part of this paper I focus on current litigation, in several European countries, which seeks to hold national governments accountable for their failure to implement more effective climate change policies and to obtain court orders to require them to take more effective measures to reduce greenhouse gas emissions. This litigation has been carefully considered, is ambitious in scope and, if successful, may have far reaching international consequences.

The Urgenda climate change case against the Dutch Government

A Dutch NGO, the Urgenda Foundation97 and around 900 individual co-plaintiffs have brought proceedings in a Dutch Court in The Hague against the Dutch Government for its alleged failure to take sufficient steps to reduce greenhouse gas emissions in the Netherlands that are said to cause or contribute to dangerous climate change.98 The Plaintiffs are being represented by Attorney and ‘climate change litigator’ Roger Cox99 of the law firm Paulussen Advocaten NV in Maastricht.

The proceedings were commenced following a request for ‘crowd pleading’ through which Dutch citizens could support the case and join as co-plaintiffs.

The case is of interest for a number of reasons. It is the first case that has sought to hold a national government to account for environmental harm from climate change and to obtain orders to reduce

96 See e.g. Massachusetts v Environmental Protection Agency, 549 US 497 (2007). The Supreme Court accepted that whilst regulating motor vehicle emissions may not by itself reverse global warming, it did not follow that the Court lacked jurisdiction to decide whether the EPA has a duty of care to take steps to slow or reduce it. The Court accepted that the EPA had statutory authority to regulate automobile emissions of greenhouse gases. The steps taken by the EPA on remand and the ensuing legal challenges are beyond the scope of the present article.
97 The name is an amalgam of the words ‘Urgent Agenda’.
98 See, for an overview of the case, Roger Cox, ‘The liability of European States for Climate Change’, [2014] Journal of Planning and Environmental Law, issue 9, 961; originally published in (2014) 30 (78) Utrecht Journal of International and European Law. Other information about the climate proceedings can also be found on the website of said Dutch NGO via this link http://www.wijwillenactie.nl/?page_id=1097
99 The inspiration for the case is said to be the book by Roger Cox, Revolution Justified.
future greenhouse emissions. It is also novel in that it seeks to use human rights protections as part of the legal foundation for the case.

Similar proceedings are presently being proposed in Belgium.

*The pre-action letter of demand to the Dutch Government*

The litigation was preceded by a letter of demand to the Dutch Prime Minister in November 2012. The letter refers, inter alia, to various international treaties and agreements between countries whose purpose is to bring about a worldwide reduction of carbon emissions. The necessity for this was said to be demonstrated by scientific research and the findings of the Intergovernmental Panel on Climate Change (IPCC).

The letter contends that the Dutch Government should do all it can to reduce greenhouse emissions by 40%, relative to their 1990 levels, by 2020.

Current Dutch climate change policy is said to be unacceptable and allegedly exposes current and future inhabitants of the Netherlands to major physical and economic risks.

Per capita CO2 emissions in the Netherlands are said to be amongst the highest in the world and the Netherlands is at great risk of suffering major economic losses and environmental harm due to its low altitude.

The Government was asked to provide an assurance, in the form of a written agreement with Urgenda, that the Dutch State would take all measure necessary to ensure that by 2020 Dutch emission of greenhouse gases would be reduced by 40% relative to Dutch emissions in 1990.

In the absence of the agreement sought Urgenda threatened legal action to ask the court for orders requiring the State to take the requested measures.

Perhaps not surprisingly, no agreement was forthcoming.

On 14 November 2012 the government was called on to take all necessary measures to comply with the 2 degree target of the UNFCC and to reduce CO2 emissions before 2020 by 40% compared to 1990 levels. On 20 December 2012, six members of the Dutch Parliament voted in favor and 138 members voted against the motion.

Legal proceedings were subsequently commenced in the District Court in The Hague on 20 November 2013.

*The Proceedings commenced in the District Court in The Hague*

**The Parties**

The Plaintiffs are the Urgenda Foundation on its own behalf and as representative of all the private individuals who are listed in the Annexure to the Summons.

The Defendants to the proceedings are the Kingdom of the Netherlands (the Dutch State) and the Ministry for Infrastructure and Environment.

**Standing?**

The Dutch Civil Code, Article 3:303 provides that a person can file a complaint in a civil court only when that person has a sufficient and personal interest in the claim.

However, there is an exception to this standing requirement. A legal entity or association may file a complaint when it seeks to protect a general interest, or the collective interest of other persons,

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100 E.g. the UN Climate Treaty, 1992.
101 The following is based on the 25 June 2014 English version of the original Summons.
insofar as that interest is encompassed by the purposes of that legal entity. However, the standing to bring a proceeding only arises after the organisation has made sufficient attempts to achieve its demands through constructive dialogue with the target of its complaint.

The relevant science

The Summons sets out in some detail the relevant ‘climate science’.102

The law sought to be relied upon

The claim is based on both Dutch national law and on international law said to be directly applicable in the Dutch legal system.

Relevant provisions are said to include Articles 2 and 8 of the European Convention on Human Rights (ECHR).

International law provisions which are not binding per se on individuals in the Netherlands are said to be able to be applied by Dutch courts through the principle of ‘indicative effect’ whereby international law can be used as an interpretative source when applying national norms.

The general principle of international law that liability exists for trans-boundary pollution (the so called ‘no harm’ principle) is said to be part of customary international law.

It is contended that there is an obligation under international law to prevent significant damage from emissions from one’s own territory to the environment and habitat of other states and their inhabitants. This is said to extend to situations where ‘significant’ damage is not caused by the actions of the state, per se, but by those of private individuals or enterprises within the state.

The causes of action relied upon also appear to include claims based on Dutch involvement in and/or agreements reached at various international meetings at which resolutions were agreed upon for the purpose of reducing greenhouse gas emissions.

In relation to the ECHR it is contended that attribution to the state of violations of human rights by private individuals and enterprises may occur where the ECHR imposes a positive obligation to protect certain rights. This positive obligation is said to extend to an obligation to enact effective legislation.

Based on Articles 2 (the right to life) and 8 (the right to private and family life) of the ECHR: it is contended that the Dutch State has a positive obligation to take preventative measures against climate change, mainly by reducing Dutch emissions to an adequate level, so as to prevent the violation of the rights and freedoms incorporated in Articles 2 and 8.

Under domestic Dutch law, the causes of action relied upon include nuisance, ‘endangerment’ and principles derived from the Potash Mines litigation.103

The Dutch States is alleged to be liable for CO2 emissions on Dutch territory, including by virtue of Article 21 of the Dutch Constitution, the Environment Protection Act; Articles 2,8 7 13 of the ECHR; and the Environmental Licensing Act.

Dutch CO2 emissions at their present level are said to be ‘unlawful’ and on this basis causes of action are based on such unlawful act or tort. It is contended that a tort or unlawful act is a breach of a right, an act or omission violating a statutory duty or an act or omission in violation of a general duty of care.

102 Including at pp 6-21; 30-54.
103 Dutch growers using water partially sourced from the heavily salinised Rhine River suffered damage. The salt was due to multiple human and natural causes upstream. This included human induced pollution in several countries. Dutch agricultural companies brought proceedings against the owners of French potash mines, who were found to be in breach of their duty of care.
The Summons incorporates data on the greenhouse gas emissions of various countries. It is contended that the Netherlands 'excessively and very substantially contributes to the excessively high global CO2 concentration in the atmosphere' [357].

**Remedies sought**

The Summons seeks:

- A declaration that the Dutch State is acting unlawfully in the event that it does not take appropriate measure to reduce the magnitude of greenhouse gas emissions in the Netherlands to a level of 40%, or at least 25%, below the level of 1990, before 2020
- An order that the Dutch State limit the magnitude of greenhouse gas emissions in the Netherlands to a level of 40%, or at least 25%, below the level of 1990, before 2020
- An order that the Dutch State present to Parliament within 6 months of the judgment a program of measures with corresponding budgets, fully assessed and commented upon by the Dutch Environmental Assessment Agency, that would ensure the reduction in greenhouse gases in the Netherlands to a level of 40%, or at least 25%, below the level of 1990 before 2020

**The Position of the Dutch Government**

Although the Dutch Government allegedly accepts that there is a serious global warming problem, and agrees that there is a need for effective action, it is contended in the Summons that the 'government nevertheless refuses to commit to taking the actions that are necessary. The position of the government seems to be that they only want to act if the rest of the world agrees to do so as well' [at 387].

**The likely outcome?**

The case is fixed for hearing before the District Court in The Hague on 14 April 2015. As noted above, this novel litigation, if successful, may have far reaching consequences.

I shall leave it to others to speculate on its prospects of success.

**Remedial Litigation**

The second current matter I want to focus on arises out of the Montara oil spill off the north coast of Australia in 2009.

**The Montara Oil Spill**

Estimates of the total volume of oil released vary from 400 barrels a day (estimate by the company operating the drilling rig) to 2,000 barrels a day (Australian Department of Resources, Energy and Tourism estimate). In its 2013 Research Report the company states that the spill rate of the crude oil component of the oil spill was initially 400 barrels per day 'as a worst case estimate' (based on AMSA overflight observations of the oil slick on the surface of the water).

The company’s estimate of 400 barrels per day is equivalent to 64,000 litres. The flow rate of water from a 100 foot garden hose of ¾ inch diameter, under pressure of 60psi, is 83.3 litres per minute or 120,000 litres per day.

Some commentators have compared the volume of the spill with that arising out of the notorious *Exxon Valdez* incident in Alaska on 24 March, 1989. The Report of the Independent Commission of Inquiry into the incident concluded that the spill may have been around 1,500 barrels a day, but was critical of the failure of those involved to produce a more accurate estimate of the rate of release given the availability of techniques that could have been used for this purpose. A recently published
article estimates the oil spill at approximately 4,750 metric tons (Hunter, 2014 at 587, based on a report prepared by the Australian Maritime Safety Authority).

As the report of the Commission of Inquiry into the oil spill stated: ‘... the blowout is the worst of its kind in Australia’s offshore petroleum history’ ...

‘For a period of just over 10 weeks, oil and gas continued to flow unabated into the Timor Sea, approximately 250 kilometres off the northwest coast of Australia. Patches of sheen or weathered oil could have affected at various times an area as large as 90,000 square kilometres.’ [p 5]

As the Report notes:

‘Blowouts offshore can have major and long lasting effects - including the loss of human life; the pollution of marine and shoreline ecosystems; and substantial commercial losses by the companies directly involved and third parties affected by the spill.’

The area and people affected by the oil spill

It has been contended that oil from the spill flowed into the Indonesian ocean and Timor and Sawu Seas which surround the various islands of East Nusa Tengarra (ENT).

ENT is one of the four Indonesian provinces in the Nusa Tengarra (Southeast islands) encompassing Bali, West Nusa Tengarra, ENT and (the formerly Indonesian, but now independent) East Timor. ENT comprises 566 islands, the three main ones being Flores, Sumba and Timor.

Those living in the region apparently have low incomes, high infant mortality and an average life expectancy of 64 years. ENT is one of the poorest provinces in the Indonesian archipelago with many communities eking out a subsistence living derived from fishing in the Timor Sea and seaweed farming.

Small wooden fishing vessels are used to carry crews of up to a dozen fishermen hundreds of kilometres from shore in search of fish. Many traditional fishing grounds have been closed to Indonesian fishermen after having been declared as Australian waters. Access to health and education is apparently dependent upon small incomes from fishing and aquaculture, including seaweed cultivation and collection.

Many subsistence village communities are alleged to have experienced considerable depravation and there was reported to be widespread hunger following the loss of fish and income from aquaculture. Thousands of school children across the region were allegedly taken out of schools because their parents could not pay the fees. There have also been reported personal injuries, including death, amongst persons eating contaminated fish. Such problems were apparently experienced in both Indonesia and East Timor.

The offshore drilling operation

On 23 July 2008, Clough Thailand (part of an Australian group of companies with international subsidiaries with expertise in engineering and large scale construction) delivered the topside structure for the Montara wellhead platform, a 750 tonne structure, (‘the Wellhead’) to Coogee Resources. It was transported from Clough’s yard at Sattahip on Thailand’s eastern seaboard.

The Wellhead was installed on waiting pylons to complete the Atlas drilling rig (‘the Rig’) in the Timor Sea. The location is approximately 685 kms west of Darwin in the Northern Territory, 630 kms northeast of Broome in Western Australia and 310 kms southeast of the coast line of Indonesia and East Timor. The Indonesian island of Pulau Roti is only 250 kms from the Montara Wellhead platform.
The Rig and crew had been leased by Coogee from Atlas Drilling, an affiliate of Seadrill Management. Coogee operated it until December 2008 when the company was sold and became PTTEP Australasia (Ashmore Cartier) Pty Ltd (PTTEPAA).

The operator of the Rig at the time of the spill was the Australian company PTTEPAA.

The Houston based company, Halliburton, had been engaged to undertake cementing work in setting up the Rig. As noted below, this cementing work was critical to the blowout.

Relevant facts summarised by the Report of the Montara Commission of Inquiry (at pp 49-52) are as follows:

- In November 2008, PTTEPAA sought and was granted approval by the NT DoR to batch drill three development wells in the Montara oilfield, one of those being the H1 Well. PTTEPAA later sought approval to batch drill two additional wells. Accordingly, there were five wells at Montara -H1, H2, H3, H4, and GI.

- Between January and April 2009, the West Atlas rig (owned and operated by Atlas) was positioned over the Montara WHP, located in waters approximately 77 metres deep, for the purpose of enabling Atlas to drill the wells (as contractor) for PTTEPAA.

- On 27 February 2009, while the derrick of the West Atlas rig was positioned over the H1 Well, PTTEPAA applied to the NT DoR to change the course of the H1 Well. The process of changing the course of a well is known as sidetracking. The reason PTTEPAA sought to sidetrack the H1 Well was to enable access to a cleaner section of the reservoir into which PTTEPAA had already drilled a 12¾” hole.

- On 2 March 2009, the NT DoR granted approval to PTTEPAA to sidetrack the H1 Well. The H1 Well thereafter became known as the H1-ST1 Well but, for convenience, will continue to be referred to in this Report as the H1 Well.

- Between 2 and 7 March 2009, PTTEPAA continued to drill the H1 Well to a measured depth of 3,796 metres, as measured from the rotary table on the West Atlas rig. The total direct vertical depth of the H1 Well from the rotary table was 2,654 metres.

- On 6 and 12 March 2009, PTTEPAA sought approval from the NT DoR to suspend the H1 Well, with the foot of the 9¾” casing in the reservoir, by installing PCCCs on the 9¾” and 13¾” casing strings (instead of setting a shallow-set cement plug within the 9¾” casing string as originally planned).

- The NT DoR granted PTTEPAA approval to suspend the well in this manner.

- On 7 March 2009, PTTEPAA pumped an amount of cement into the 9¾” casing shoe (the shoe being located within the bottom-most lengths of the casing). At that point, the casing was located inside the reservoir at a point three metres (10 feet) above the oil-water contact, thereby providing a pathway for hydrocarbons to enter the well through the casing shoe. The cementing procedure was intended to set the casing shoe in the wellbore, and thereby provide a primary barrier against a blowout.

- Following pumping of the cement, pressure was held in the casing to 4,000psi. Upon release of the pressure, 16.5 barrels of fluid returned. The return of this fluid indicated that there was a problem with the float valves in the casing shoe. The 16.5 barrels of fluid were pumped back down the casing, and the top of the casing was then closed-in so as to maintain pressure in the casing whilst the cement set.

- Following so-called wait on cement (WOC), and the absence of any unwarranted further backflow of fluids, a 9¾” PCCC was installed on the H1 Well, followed by a so-called trash cap.
The derrick of the *West Atlas* rig was then moved (or skidded) from the H1 Well over to the H4 Well.

- On 21 April 2009, the *West Atlas* rig departed from the Montara WHP in order to perform drilling operations in other fields. At that point, or perhaps even earlier in March, the H1 Well was ‘suspended’. It was generally believed that a PCCC had also been installed, as required, on the 13¾” casing in the H1 Well, but it is now known that this did not in fact occur.

- On 19 August 2009, the *West Atlas* rig returned to the Montara WHP to allow PTTEPAA to (i) commence the tie-back of the casing strings of each of the five wells to the platform; and (ii) ‘complete’ the wells to the point of production.

- At 4.30am on 20 August 2009, the derrick of the *West Atlas* rig moved over the H1 Well. At 6am on the same day, the 20” trash cap was removed from the H1 Well. It then became clear to personnel from PTTEPAA and Atlas that there was no PCCC installed as required on the 13¾” casing of the H1 Well.

- As a consequence of the non-installation of the 13¾” PCCC, the threads at the top of the 13¾” casing – known as the mud line suspension (MLS) threads – had rusted or corroded. In order to tie the 13¾” casing back to the WHP on a long-term basis, PTTEPAA personnel on-rig and onshore decided that those threads should be cleaned.

- At around 11.30am, the 9¾” PCCC was then removed from the H1 Well in order to allow a tool to be run in to clean the MLS threads on the inside of the 13¾” casing. The 9¾” PCCC was not thereafter reinstalled.

- At that time, it seems to have been generally considered that there were two barriers within the H1 Well to prevent a blowout of fluids from the reservoir: the cemented casing shoe; and a column of inhibited seawater within the 9¾” casing, which was thought to have had a so-called ‘kill weight’ (being sufficient weight to counter the pressure in the reservoir). Significant work on the H1 Well was placed in temporary abeyance at that point, pending the tie-back of casings on other wells.

- At around 5pm on 20 August 2009, the derrick of the *West Atlas* rig was skidded to the G1 Well, and work was carried out on that well between about 6.30pm and midnight on 20 August 2009.

- At midnight on 20 August 2009, the derrick of the *West Atlas* rig was skidded to the H4 Well.

- At about 5.30am on 21 August 2009, workers on the WHP observed a blowout of fluid coming from the H1 Well. The volume was estimated at between 40 and 60 barrels. Gas alarms on the *West Atlas* rig were triggered and emergency response procedures were activated.

- The flow appeared to subside and the *West Atlas* rig’s OIM, Mr Trueman, gave the all clear at around 5.55am.

- At about 6am on 21 August 2009, a decision was made to skid the derrick from the H4 Well back to the H1 Well in order to set a mechanical pressure isolation device in the H1 Well to prevent further flow.

- At around 7.23am on 21 August 2009, the H1 Well ‘kicked’ again, this time blowing a column of oil and gas to the underside of the rig floor. Emergency response procedures were once again activated, and over the next hour or so senior PTTEPAA and Atlas personnel on board the rig and WHP decided to evacuate the 69 personnel. All personnel were safely evacuated.

Potential defendants in any litigation include: (1) The company responsible for the oil drilling operation, Australian company PTTEPAA, a subsidiary of the Thai company NOC PTTEP; and (2) The NT regulatory authority, the Northern Territory Department of the Environment (NT DoR) delegated by the Australian Government to approve, supervise and monitor the drilling operations.
Factual responsibility for the cause of the Blowout

The report of the Independent Commissioner, David Borthwick, dated 17 June 2010, sets out in considerable detail his findings as to the cause of the events in question.

As noted above, the Blowout was the worst of its kind in Australia’s offshore petroleum industry (p 5). Oil and gas flowed for a period of 10 weeks and ‘could have affected’ an area as large as 90,000 square kilometres (p 5).

It is clear, as he notes, that ensuring the integrity of oil and/or gas wells (and preventing blowouts) is a fundamental responsibility of the companies involved in offshore petroleum exploration and production.

At the relevant time there were well known systems and technologies available which were designed to be fail safe and with back up capability built in to prevent blow outs.

After receiving submissions and holding a public hearing the Commission of Inquiry concluded, inter alia, that:

- PTTEPAA did not observe sensible oil field practices and major shortcomings which led to the blow out were widespread and systemic;
- The regulator, the NT DoR (the delegated Designated Authority), was not sufficiently diligent in approving the Phase 1B Drilling Program for the Montara Oilfield in July 2009, given that it did not reflect ‘sensible oilfield practice’, and had adopted a ‘minimalist approach’ to its regulatory responsibilities.

The report sets out in technical detail the basis for these conclusions.

It was found that the ‘most likely’ cause of the failure was the entry of hydrocarbons into the H1 Well through the 9 and five eighth inch cemented casing shoe which then flowed up the inside of the casing.

The well control barriers did not comply with PTTEPAA’s own Well Construction Standards (nor sensible oilfield practice).

The cemented casing shoe had not been pressure tested in accordance with the company’s Well Construction Standards.

The cement in the casing shoe was likely to have been compromised as it had been substantially over-displaced by fluid, resulting in what is known as ‘wet shoe’.

None of these problems were appreciated by senior PTTEPAA personnel at the time even though the company’s contemporaneous records, such as the Daily Drilling Report, clearly indicated what had happened.

Multiple problems experienced in undertaking the cement job should have raised alarm bells.

Such problems necessitated a careful evaluation, the instigation of pressure testing and, most likely, remedial action. No such evaluation was undertaken.

The problems that had been encountered were ‘not complicated or unsolvable, and the potential remedies were well known and not costly.’ According to the Commission of Inquiry: ‘This was a failure of ‘sensible oilfield practice 101.’

The initial cementing problem was compounded by the fact that although two secondary well control barriers (pressure containing anti-corrosion caps, ‘PCCCs’) were chosen by PTTEPAA and programmed for installation, only one was ever installed.

Moreover, the one that was installed was never tested and verified in situ, as required by the Well Construction Standards.
The Inquiry found that PTTEPAA’s use of PCCCs as secondary well control barriers did not constitute sensible oil field practice.

Moreover, key personnel working for PTTEPAA, both on the rig and onshore, were under the mistaken impression that the fluid left in the casing string was overbalanced to pore pressure - and would therefore act as an additional barrier, even though the fluid was not monitored and overbalanced significantly to pore pressure as required by the Well Construction Standards in order to be regarded as a proper barrier.

The Report of the Commission on Inquiry documents other errors and omissions on the part of PTTEPAA.

Although it was accepted standard practice in the off shore drilling industry at the time to have secondary barriers against a Blowout, at the H1 Well there were no tested and verified barriers in place at the time of the Blowout.

The Report proceeds to set out, in some detail, how this perilous situation arose. It was concluded that the absence of tested barriers was the proximate cause of the Blowout but this was said to reflect ‘systemic errors of a deep seated kind within PTTEPAA’ (p9). These included:

- Inadequacies in the Management Plan and Well Construction Standards (including ambiguities and inappropriate provisions);
- The limited experience of senior PTTEPAA personnel;
- The inadequate understanding on the part of the companies personnel of the safety requirements;
- Deficiencies in decision making and judgment on the part of PTTEPAA’s senior personnel on the rig and onshore;
- Defective records and communication management;
- Systemic failure of communication between PTTEPAA and personnel with the rig operator, Atlas;
- Inadequate onshore management and governance structure and insufficient attention to mechanisms to assess and manage project risks;
- The failure to recognise risks when they should have been recognised and the failure to assess them properly when they were recognised;
- The absence of internal audit or review processes at critical milestones; and
- Manifest failures in communication and interaction with the Regulator.

The Commissioner somewhat colourfully concluded that ‘the way PTTEPAA operated the Montara Oilfield did not come within a ‘bulls roar’ of sensible oilfield practice’ (p 11).

This was said to be ‘an accident waiting to happen’. In the view of the Commissioner:

“the company’s systems and processes were so deficient and its key personnel so lacking in basic competence, that the Blowout can properly be said to have been an event waiting to occur.” (p 11)

In the course of the Inquiry PTTEPAA provided the Commissioner with an Action Plan to prevent a recurrence of the Blowout. This Plan addresses the shortcomings in PTTEPAA’s operations as identified by the Inquiry.

In a later part of the Report of the Commission of Inquiry the significant failures on the part of PTTEPAA were summarised as follows:
• both onshore and on-rig personnel from PTTEPAA were directly involved in over-displacement of cement beneath the float valves in the 9¾” casing shoe of the H1 Well on 7 March 2009. These personnel acted contrary to sensible oilfield practice in the course of that cementing operation;

• both on-rig and onshore personnel from PTTEPAA were directly involved in the use of an incorrect volume of tail cement in the course of the same cementing operation;

• both on-rig and onshore personnel from PTTEPAA failed to recognise, in the aftermath of the cementing operation on 7 March 2009, that a wet shoe had been created. These failures occurred (i) during the course of preparation of contemporaneous documents by on-rig personnel; and (ii) upon review of those documents by onshore personnel;

• on-rig and onshore personnel from PTTEPAA failed to ensure that a test of the cemented shoe was carried out. This failure was contrary to sensible oilfield practice and PTTEPAA’s own standards;

• on-rig and onshore personnel from PTTEPAA were implicated in deferment of installation of the 13¾” PCCC, contrary to sensible oilfield practice. They were also implicated in the failure to install the 13¾” PCCC as a secondary barrier against a blowout;

• on-rig and onshore personnel from PTTEPAA were directly involved in the removal and non-reinstallation of the 9¾” PCCC on 20 August 2009. Their actions in this regard were contrary to sensible oilfield practice and PTTEPAA’s own standards;

• PTTEPAA failed to carry out a sufficiently detailed risk assessment in relation to the general topic of use of PCCCs as secondary barriers against a blowout, particularly in the context of batched tie-back operations which were to occur at the Montara Oilfield;

• there was widespread misunderstanding on the part of PTTEPAA’s personnel as to the barrier status of the displacement fluid contained within the 9¾” casing in the H1 Well. On-rig and onshore personnel from PTTEPAA wrongly considered that the fluid could be relied upon as an effective barrier against a blowout. Their approach to that question was contrary to sensible oilfield practice and PTTEPAA’s own standards;

• too much weight was given by PTTEPAA personnel to the absence of detectable signs of flow prior to and immediately after removal of the 9¾” PCCC. Further, there was inadequate monitoring of the well after that removal;

• there were a large number of significant deficiencies in various PTTEPAA documents dealing with well control;

• there were significant deficiencies in PTTEPAA’s management systems for recording and communicating information within the company;

• there were significant deficiencies in the formal and informal arrangements which PTTEPAA set in place between it and Atlas with respect to risk management in the context of well control;

• there were deficiencies in PTTEPAA’s logistics management; and

• PTTEPAA did not have effective internal systems in place to achieve a high level of quality assurance with respect to well operations: first, PTTEPAA personnel were non-vigilant in the performance of day-to-day supervision of subordinates; secondly, there were no random or systematic audits undertaken in the relevant period; thirdly, PTTEPAA adopted a non-systematic approach to acquiring and maintaining levels of knowledge and expertise; and fourthly, PTTEPAA’s governance structures were non-robust. (pp 320-322).

The Report proceeds to document a number of other deficiencies in respect of all other wells operated by the company in the Montara Oilfield. Thus, the identified problems at the Montara well were symptomatic of a broader problem.
The Report also concluded that PTTEPAA’s investigations into the Blowout were manifestly deficient (p 327).

Its failure to properly investigate the Blowout was found to be irresponsible and inexcusable (p 333). Moreover, in the course of the Inquiry the company was found to have supplied ‘a good deal of false and misleading information’ (p 340).

The Inquiry also expressed concern at the possible misuse of legal professional privilege in respect of the report of an investigation by the company into the Blowout (p 341).

**The role of the Northern Territory Department of Resources**

The NT DOR was the designated authority ('DA') acting on behalf of the Commonwealth Government, with responsibility for approval for the environmental plan ('EP') for the installation and construction activities in off shore waters under the jurisdiction of the Commonwealth pursuant to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* ('OPGGS Act'). This included responsibility for approval of the EP in accordance with the OPGGS(E) Regulations.

In relation to the regulatory role of the NT DOR the Inquiry documented many significant deficiencies.

The Report notes that some of these deficiencies are unlikely to have played a causal role in the Blowout but that others did play a causal role in the lead up to the Blowout (albeit ‘indirect and non proximate’) (p 147).

The Commissioner concluded that the NT DOR should never have approved the Phase 1B Drilling Program in the first place. At the very least, it should have insisted on the installation of another secondary barrier in the H1 Well in the period between (1) scheduled removal of the nine and five eighth inch PCCC; and (ii) installation of a BOP over the well (p 148).

According to the Inquiry Report, the evidence revealed considerable and disturbing shortcomings in the way in which PTTEPAA applications were assessed by the NT DOR, both in the procedure that was adopted and the decisions that were actually made (p 198-199).

Such evidence ‘indicated that these shortcomings were systemic rather than isolated incidents’ (p 199).

The inadequacies in the regulatory assessment processes are documented in detail in the Inquiry Report. The Inquiry concluded that there had been ‘a significant failure to fulfil good contemporary regulatory practice’ (p 204).

There was also evidence before the inquiry from other Australian regulatory bodies to the effect that they would not have approved a drilling program that left a well with only one protective barrier in the present circumstances (p213).

The Inquiry concluded that the NT DOR should not have approved the drilling program in the circumstances.

Moreover, having approved the program there was no real attempt to monitor PTTEPAA’s compliance with approved programs and good oilfield practice (p 214).

Overall, the NT DOR was found to be deficient insofar as there were insufficient means of discovering inadequacies in PTTEPAA’s operations bearing upon well integrity.

Of interest are the findings relating to the regulators failure to properly satisfy itself that the company had adequate insurance cover in respect of possible claims for loss or damage (pp 204-206).
In view of the serious and systemic findings against the NT-DOR made by the Commission of Inquiry there may be good grounds for including this entity as a defendant in any proceedings.

Cases of alleged negligence arising out of ignorance, inertia or inaction are arguably different from the present case where the regulator appears to have been grossly negligent in its approval of the offshore drilling operations and its failure to consider adequately or at all various important matters such as the safety of the drilling operation and the adequacy of insurance of the drilling company. The relatively damning evidence of other Australian regulators, in evidence before the Montara Commission Inquiry, that they would not have given regulatory approval in the circumstances is indicative of a strong case in negligence against the NT DoR.

**The role of the Australian Government in the response to the blowout and oil spill**

The necessary remedial response to the blowout and oil spill was apparently beyond the capacity of PTTEPAA and thus the management of the response was handled by the Australian Maritime Safety Authority (AMSA) for a period of 10 days from 21 August until 3 December 2009. This is examined in detail in chapter 6 of the Inquiry Report.

The initial objective was the protection of Ashmore Reef but this was later amended to include protection of Cartier Island and the Western Australian coastline.

An important issue is the use of chemical dispersant to deal with the oil spill. Six types of chemical dispersant were used: Slickgone NS, Slickgone LTSW, Ardrox 6120, Tergo R40, Corexit 9500 and Corexit 9527.

Dispersants accelerate the weathering and breaking up of oil at sea but do so by moving the oil below the surface and into the upper 5 metres of the water column (p282). This reduces the exposure of sea birds to oil but may cause other environmental problems.

Dispersant operations commenced on 23 August and continued until 1 November 2009. During this time 184,000 litres of dispersant were deployed.

As the inquiry Report notes, dispersants represent a human health hazard and can cause eye, skin or respiratory irritation with prolonged exposure. Various submissions to the Inquiry questioned the use of dispersants.

The Inquiry accepted that there were valid concerns about dispersants given their impact on the environment generally and subsurface organisms such as fish larvae and coral spawn in particular.

Notwithstanding such concerns, the Inquiry concurred with the decision to use dispersants.

As part of the response to the oil spill a wildlife survey was conducted between 25 September and 4 October 2009 by three independent marine biologists. Further monitoring for a period of 5 years was recommended by them.

Both Operational Monitoring and Scientific Monitoring programs were initiated as part of the response. The Operational monitoring was found to be inadequate to assess the environmental impact of the spill. Arrangements for long term scientific monitoring were not agreed until 49 days into the response operation. A Memorandum of Understanding was eventually agreed to on 9 October 2009 providing for studies to be funded by the company for up to eight years.

However, the Inquiry concluded that the prolonged delay in undertaking Scientific Monitoring of the impact of the oil spill was unacceptable and such delay restricted the scope for assessment of the impact of the environmental damage (p 291).

In its submission to the Inquiry AIMS noted that Australia did not have legislation that requires ecological damages to be assessed and there was no statutory basis for damages to be claimed for environmental damages assessment (p 291).
As noted in the Report, the Claims Manual of the International Oil Pollution Compensation Fund 1992 provides for contributions to be paid for the cost of post spill studies to establish the nature and extent of environmental damage caused by an oil spill and to determine if reinstatement measures are necessary and feasible. However, these arrangements apparently do not extend to oil spills from offshore petroleum developments (p 293).

The Designated Authority (DA) has the power under the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth) (OPGGS) to direct the title holder to clean up or remediate the effects of the escape of petroleum (ss 574(2) and 782(1)). However, the Inquiry did not see any evidence to suggest that the use of this power was considered (p 295).

The Commission of Inquiry was of the view that the actual impact of the Blowout on wildlife and the environment will never be known given, inter alia, the vastness of the area and the lack of firm data against which pre and post spill comparisons can be made.

However, it was concluded that the extent of the pollution was significant and that both oil and oil dispersants can have a toxic effect on sea birds, marine mammals and other megafauna, corals, coral larvae and fish larvae, affecting photo synthesis, respiration and reproduction (p 306).

**The Oil Company’s Position?**

The forensic position likely to be adopted by the PTTEPAA in any legal proceedings may be apparent from recent press releases by the company and from the reports of scientific investigations undertaken by the company following the oil spill.

In summary, the company appears to take the position that there was minimal environmental impact generally and no environmental or other economic impact in Indonesia (or East Timor) because the oil spill never intruded, other than marginally, into Indonesian waters.

The scientific research initiated by the company is summarised in the report by PTTEP: Montara Environmental Monitoring Program: Report of Research (Edition 2, September 2013). The earlier first report is dated August 2012. These reports and other research reports are available on the PTTEP website.¹⁰⁴

Studies undertaken by or on behalf of the company were conducted from soon after the incident in August 2009 and were ‘mostly concluded’ in mid-2013. The studies arose out of the abovementioned agreement between PTTEP Australasia (PTTEP AA) and the Australian Government in October 2009 whereby the company agreed to fund a monitoring program to determine ‘any impacts on the environment’. Independent academic and research bodies, including the Australian Institute of Marine Science, Monash University and Charles Darwin University were involved in the research program.

**Independent scientific studies**

Ten types of study were carried out:

- Shoreline ecological assessment aerial surveys
- Assessment of fish for the presence of oil
- Olfactory analyses of Timor Sea fish fillets
- Assessment of the effects on Timor Sea fish

• Offshore banks assessment survey
• Shoreline ecological ground surveys (corals)
• Shoreline ecological ground surveys (turtles and sea snakes)
• Shoreline ecological ground surveys (seabirds and shorebirds)
• Oil fate and effects assessment-trajectory analyses
• Oil fate and effects assessment-dispersant oil monitoring

On page 4 of the abovementioned 2013 report the sampling locations for each of the abovementioned studies are shown on a regional map. Of particular significance for present purposes is the fact that none of the sampling locations are in Indonesian waters or in the Indonesian Exclusive Economic Zone to the north of the Montara oil well.

Although shoreline sampling was done on the Australian coastline no sampling was done in Indonesia or in the territory of Timor Leste.

Although over 5,000 kilometers of Australian coastline was surveyed (from Darwin to Broome) no Indonesian or Timor Leste shoreline was surveyed.

The Australian coastline surveyed for oil damage ranged from 685 kilometers to the south east of the Montara oil well (Darwin) and 630 kilometers to the south west (Broome). By way of contrast, the Indonesian island of Rote was not surveyed although it is only 250 kilometers to the north of the Montara oil well. Others parts of the Indonesian coast line (West Timor) and East Timor are just over 300 kilometers north of the Montara well.

Sampling was done at Montgomery Reef, just off the West Australian coast, some 350 kilometers south-west from the Montara oil well but none on the Indonesian coastline (e.g. the island of Rote).

The absence of research or sampling outside of Australian waters may have been due to the absence of agreement from Indonesian authorities.

Notwithstanding the limited territorial ambit of the research, the results of several of the studies (and the abovementioned 2013 report) purport to conclude that:

• The main area affected by the spill was within a 23 kilometre radius of the spill (based on trajectory modelling and real time observations)
• The slick beyond this area was predominantly a lighter waxy film and surface coverage was significantly less
• The largest single area affected at any one time was 11,183 square kilometers
• Sixty two percent of the total surface area was affected for two hours or less
• No hydrocarbons were detected in the marine environment after 94 days
• Most of the toxic elements from the oil spill were in a gaseous form and released into the atmosphere
• No oil from Montara was detected after 15 November 2009 (the well having been closed down on 3 November)
• Most of the freshly spilled oil remained within 23 kilometres of Montara. The oil which occurred outside the containment area was mostly evident as sheens or waxy films. Sheens are typically less than 10 microns or 0.01mm thick, about one seventh the thickness of a human hair. Although it could be regarded as visual pollution, a sheen is 100 times lower than the level at which it would be rated as being of environmental concern.
The assessment of the extent of the oil spill was based on aerial surveillance monitoring (130 surveillance flights) conducted by the Australian Maritime Safety Authority (AMSA), together with satellite imagery and ‘trajectory modelling’.

However, none of the aerial surveillance flights entered into Indonesian airspace.

The report concludes that no oil reached the Indonesian (or Australian) coast and that the closest recorded was 94 kilometers from Indonesia.

Some ‘patches’ of oil were said to have drifted into deep waters off the Timor Trench ‘where fast moving currents associated with the Indonesian Throughflow current carried weathered oil patches in a south westerly direction away from the Indonesian coastline’ (p 6, 2013 Report).

Given the geographical limitations of the data collection the results of a number of the abovementioned studies may be of little if any relevance to those in Indonesia or East Timor seeking compensation for losses said to be suffered by them as a result of the allegedly dramatic decline in seaweed production and fish catches.

The conclusions purportedly derived from the two studies of the oil fate and its effects, based on trajectory analyses and dispersant oil modelling, if correct, would make potential claims by persons in Indonesia or East Timor difficult if not impossible to pursue. Obviously, if the oil and/or oil dispersant combination did not in fact travel to the Indonesian/East Timorese coastline at all then the seaweed framers would have no claim and the fishermen’s claims may be problematic depending where they were fishing.

However, the purported conclusions of the studies (referred to above) carried out by or on behalf of the company, insofar as they seek to deny any significant environmental impact of the oil spill in Indonesian/East Timor waters, stand in marked contrast to the wide array of statistical data, observational evidence, scientific research data and expert opinion allegedly available in Indonesia and East Timor.

Moreover, the various analyses relied upon by the company which are derived from aerial photography and satellite imagery take no account of the fact that the application of the dispersant to the oil has the effect of transferring the oil and dispersant mixture to below the surface level of the sea.

For some time the Indonesian Government has been seeking compensation in the sum of over $US 2 billion from the oil company.

At present a legal team from two law firms is gathering further evidence from Indonesia and East Timor with a view to the possible commencement of class action proceedings in Australia on behalf of those who suffered substantial economic losses in Indonesia and East Timor.

This potential case gives rise to some challenging legal and factual questions including in relation to (a) the law applicable to events occurring in Australia’s Exclusive Economic Zone, (b) applicable causes of action, (c) proof of causation, and (d) recovery of damages for economic loss. It is not proposed to consider these questions in detail in the present paper in part because they may become the subject of controversy if legal proceedings are commenced.

Stay tuned!

Other analogous cases

The present paper has not sought to review in detail other analogous oil pollution cases, including the Exxon Valdez and Deepwater Horizon litigation.

It is however of interest to note the following two recent cases.
**Proceedings in the Netherlands against Shell**

Litigation for alleged oil pollution damage against Shell was commenced in the District Court of The Hague by Nigerian claimants and a Dutch NGO, Milieudefensie *(Oguru, Efanga & Milieudefensie v Royal Dutch Shell Plc and Shell Petroleum Development Co Nigeria Ltd No. 330891/ HA ZA 09-579 2009)*. The Court rejected Shell’s contentions that it did not have jurisdiction and that there had been an abuse of procedural law in suing the Shell companies in the Netherlands. The substantive law applicable to the causes of action is Nigerian law.

On 30 January 2013, three separate judgments were handed down by the District Court of the Hague in relation to oil spill pollution cases brought by Nigerian individuals against the Shell Petroleum Development Company of Nigeria (‘SPDC’) and Royal Dutch Shell Company (‘RDS’). Claims were brought by Akpan, Oguru and Efanga, and Dooh. They were each joined by the environmental association Vereniging Milieudefensie, which is an NGO which seeks to protect the environment worldwide.

Each claim was brought in response to oil spills in Nigeria from oil pipelines and oil facilities. A key issue was whether the oil spill pollution, caused by sabotage, could nonetheless under Nigerian law bring a claim for negligence, nuisance, trespass to chattel or the rule in *Rylands v Fletcher*?

The common issues across the judgments were the following:

- The District Court of the Hague had jurisdiction under s7 of the Dutch *Code of Civil Procedure* against the RDS and also the Nigerian legal entity SPDC.
- Under Dutch conflict of laws principles, the law to be applied was that of Nigeria.
- That under Nigerian law, each claimant was in possession of the affected land and fish ponds for which damage was sought.
- That each oil spill complained of was factually caused by sabotage.
- The parent company (RDS) did not assume any obligation to intervene in response to SPDC’s policies in the prevention and response to sabotage of oil pipelines and therefore could not be held responsible for any negligence.
- SPDC could not be held responsible for any tort of negligence against Milieudefensie in Amsterdam, as damage to third parties (whom Milieudefensive ‘represented’) could not be taken to be damage to Milieudefensie itself.
- It was not possible to claim damages from SPDC under the rule in *Rylands v Fletcher*, as codified in s11(5)(c) of the *Oil Pipelines Act 1956* (‘OPA’), as the damage was directly caused by sabotage, which was directly excluded by the rule.
- The tort of nuisance cannot be made out where the oil spill was caused by an act of sabotage by a third party.
- The tort of negligence of SPDC against Akpan in the response to the oil spills and its remediation of the oil contamination was not made out.

Ultimately, only Akpan was successful in part in his claim against Shell.

- In Akpan’s case, the court found that for legal systems based on common law (including Nigeria’s system), there is no general duty of care to prevent other parties from suffering damage as a result of the practices of third parties.
- However, Akpan could claim damages from SPDC under the tort of negligence (as codified in s11(5)(b) of the OPA) for the occurrence of the oil spills. In this case, it was foreseeable that harmful consequences could result for people living in the vicinity of the location where the oil spill originated and farming or fishing of that location. The wellhead consisted of an
aboveground “Christmas tree” valve structure which was unprotected and easily accessible to saboteurs “with a few turns of a monkey wrench” (at 4.43).

- Thus, SPDC could easily have reduced the risk of sabotage by securing the the wellhead using a concrete plug, which was actually done after proceedings commenced in 2010. SPDC violated its duty of care in respect of Akpan.

By contrast, the other claimants (Oguru and Efanga, and Dooh) were not successful in their claim for damages from SPDC for negligence for the occurrence of the oil spills. The pipelines had also been sabotaged but, unlike in Akpan’s case, the pipelines were not easily accessible and could only be accessed by digging into the soil and sawing the pipe. There were no special circumstances that would justify the imposition of a duty of care in respect of SPDC for this damage.

Proceedings in England against Shell

Proceedings are also pending in the Technology and Construction Court in the Queens Bench Division of the High Court in London against Shell brought by a Nigerian fishing community in Ogoniland for environmental damage caused by oil leaks (Bodo Community v Shell Petroleum Development Company of Nigeria Case No HQ11X01280).

A number of preliminary questions were determined at first instance ([2014] EWHC 1973 (TCC) and the plaintiffs had limited success. A further decision of Justice Akenhead on costs was handed down on 4 July 2014. The remaining issues are presently scheduled for trial in early 2015.

This is a Group Action proceeding with approximately 15,000 individual claimants who seek damages at common law and statutory compensation under the law of Nigeria in relation to oil spills from pipelines said to have been caused by Shell Petroleum Development Company of Nigeria. The claims were based on private and public nuisance, negligence, Rylands v Fletcher and under the Oil Pipelines Act 1956 (Nigerian legislation) ("OPA").

The initial judgment was in relation to the following preliminary issues:

1. Whether the Claimants are only entitled to claim compensation in respect of the 2008 spills under the OPA?
2. Whether Shell can be liable under the OPA for damage caused by oil from its pipelines, released as the result of illegal bunkering/refining?
3. Whether compensation for shock and fear, discomfort, exemplary and aggravated damages etc are recoverable under the OPA?
4. Whether the amount of compensation under the OPA will be assessed in accordance with the diminution in value of the land?
5. Whether awards of just compensation under the OPA or for general damages at common law should be valued by reference to previous awards made by the English courts or by reference to the value of land and/or the cost of living in Nigeria?
6. Whether the Court lacks jurisdiction to try some of the claims?
7. Whether pecuniary and non-pecuniary damages are recoverable in claims for damages for public nuisance?
8. Whether interest is recoverable at common law for past losses?

It was not disputed that the applicable law on all liability aspects was the law of Nigeria (at [18]).

Akenhead J in answering Issue 1 found that the OPA was designed to be the only mechanism for compensation, effectively excluding claims under the common law.
As there is no OPA equivalent in Australia, one key issue of interest is Issue 7. As stated at [167], his Honour’s decision in respect of this question was technically hypothetical, in light of his decision that the OPA replaces the common law. In any case, public nuisance was defined as ‘an act or omission which is an interference with, disturbance of, or annoyance to a person in the exercise or enjoyment of a right belonging to him as a member of the public’ (at [168]). However, damages are only recoverable where the plaintiff has suffered some direct or substantial damage over and above those sustained by the public at large (at [169]). If this is shown, damages for personal injury and pecuniary loss are recoverable (at [176]).

The claims by the Bodo Community are currently fixed for trial in the UK early next year. A further mediation is soon to take place in London.

Some concluding thoughts

Environmental lawyers have shown considerable creativity in using civil litigation as both a preventative and remedial strategy to deal with major environmental problems, including climate change.

Such strategies have sought to both utilize and adapt existing legal theories in a manner which has sometimes been beyond the capacity of the legal system to cope.

The current bold forensic attempt to hold the Dutch Government to account for its failure to implement more effective means of reducing CO2 emissions in the Netherlands represents part of the changing face of environmental litigation, with a focus on prevention rather than remedial measures once damage has been done.

However, even more traditional attempts to obtain a remedy for major identifiable environmental damage and economic loss caused by a single tortfeasor has its own legal and evidentiary challenges, as the current Montara matter demonstrates.

To return to the quoted extract at the beginning of this paper:

> He compiled a list of private lawyers who have had success bringing major environmental lawsuits..... It was a very short list.