Welcome to the latest edition of the Australian Environmental Law Digest.

Subscribe to the Digest for a quarterly selection of quality analysis of environment and climate change law developments around the country.

To contribute articles, please contact us at review@nela.org.au

SUBSCRIBE

EDITORIAL

After a chaotic and exhausting year in environmental law and policy, the last month has been defined by the unexpectedly promising outcomes of the Paris Climate conference. Emily Gerrard attended the conference and she and Andrew Mansour share their insights regarding the final agreement and the next steps necessary to give effect to its aspirational goals.

How can environmental law, and environmental lawyers, best respond to the challenges presented by a changing climate, international expectations and a transition to a low carbon economy?

The success of climate change litigation by Dutch climate group, Urgenda, has caused many advocates to consider the prospects of litigation to progress climate change activity at local and national levels. Mark Baker-Jones and Emilie Barton question whether the “voguishness” of climate litigation distracts from other, more practical approaches.

The Australian Panel of Experts on Environmental Law introductory paper canvasses a wide range of issues, seeking feedback from the public and the legal profession regarding the legal settings needed to effectively protect, restore and sustainably manage our environment. An extract from the chapter addressing climate and energy governance is included in this edition, and we urge anyone working in this field to contribute to the discussion about the next generation of environmental laws.

Another theme of the recent NELA conference was the importance of clear planning rules in securing environmental outcomes. Sarah Wilson looks at the regulatory backdrop to the Tasmanian government’s current assessment of tourism proposals in Tasmania’s parks and reserves and grapples with the ongoing debate about which planning laws will apply.

Whatever role you’ve played in developing, implementing, analysing, studying, teaching or challenging environmental law and policy in 2015, the National Environmental Law Association would like to wish you a safe, happy and restful festive season and a chance to recharge your batteries.
IN THIS ISSUE

COP21 and the Paris Agreement
Emily Gerrard and Andrew Mansour, Allens Linklaters 3

Why Thinking like a Lawyer Might Mean Less Time Litigating and More Time Adapting
Mark Baker-Jones and Emilie Barton, Dibbs Barker 6

The Next Generation of Environmental Laws: Climate Laws
Professor Jacqueline Peel, Australian Panel of Experts on Environmental Law 10

The Assessment of Ecotourism Developments in Tasmania
Sarah Wilson, Page Seager Lawyers 13

Join the National Environmental Law Association

NELA is Australia’s leading national environmental law organisation that promotes public debate and understanding of national environment and climate change laws. We hold national and state events to provide information about key legal issues, publish a range of resources, promote critical analysis through our annual student essay competition and provide opportunities to share environmental law research outcomes through our new academic colloquium.

NELA encourages input from members on law reform topics and make submissions to public inquiries. We are developing policy working groups to identify priority reform issues and harness the expertise of our members to help contribute to debate around effective and efficient environmental regulation. For more information, visit our submissions page.

Why join?

NELA membership offers the opportunity to work with leading lawyers, academics, judges, consultants and policy makers who want to improve the way we manage Australia’s natural resources and cultural heritage.

Other membership benefits include:

- a monthly eBulletin packed with updates on case law, legislation, inquiries, events and job opportunities
- contributing to NELA policy submissions on national environment and resources laws
- shaping the programs of NELA events and contributing to our publications
- networking opportunities with environmental and planning law practitioners, policy makers, students and judges
- discounts to NELA events and the events of partner organisations
- the right to refer to your NELA membership on your website and in publications

NELA is a not for profit company that relies on membership fees for income to administer its activities and the pro bono support of our members to provide quality content.

To get involved with our work, become a member today.
COP21 and the Paris Agreement

Originally published on 14 December 2015

Emily Gerrard1 and Andrew Mansour2

In brief: On 12 December 2015 in Paris, two weeks of negotiations culminated in the adoption by parties to the United Nations Framework Convention on Climate Change of a conference decision and Paris Agreement to address climate change. The combined Paris Outcome commits parties to limit global temperature rise to 'well below 2°C' with an aspirational target of a 1.5°C limit.

How Does It Affect You?

- The Paris Agreement commits parties to hold the increase in global average temperature to 'well below 2°C above pre-industrial levels'.
- The Agreement includes a mechanism for parties to review their nationally determined contributions every five years, with increasing ambition.
- The Paris Outcome includes a work program and measures for enhanced action prior to 2020, as well as recognition of the importance of non-state actors, including business and sub-national governments in addressing climate change.
- The Paris Outcome along with the series of innovation announcements and commitments made during COP21 will increase focus on clean energy technology, energy efficiency and renewable energy in the coming years.

Background

At the 2011 Durban conference of the parties (COP) to the United Nations Framework Convention on Climate Change (the UNFCCC), countries agreed to negotiate a new climate agreement by the end of 2015. The Durban mandate set out the principles and parameters within which this new agreement should be negotiated and established the 'Ad Hoc Working Group on the Durban Platform for Enhanced Action' (otherwise known as the ADP). The work of the ADP continued through to the end of the first week of negotiations in Paris, when the draft Paris Outcome text was presented to the French COP21 Presidency for further negotiation and refinement in the second week.

In the lead-up to COP21, it was widely acknowledged that achieving a new agreement, with an aim of keeping average global warming to a temperature well below 2°C above pre-industrial levels, would require broad country participation and a flexible regime acceptable to all parties that can evolve over time.

In Paris on Saturday afternoon, parties to the UNFCCC adopted a new 'Paris Agreement' and Decision of the COP, together the 'Paris Outcome'. The Paris Outcome represents the first binding agreement under which all countries have reached agreement on action to address climate change. It also reflects the more flexible agreement structure anticipated in the lead-up to COP21 – the binding and relatively fixed Agreement, which will now need to be ratified, and the more flexible Decision, which may be modified or updated over time by subsequent decisions.

The pathway to this Agreement necessarily involved compromise and, while historic, is broadly framed and focuses on 'carrots' rather than 'sticks'. However, in practice, it is anticipated to facilitate significant domestic action by parties over time, as well as boost existing investment trends and support advances in clean energy technology.

A summary of key aspects of the Paris Outcome is provided below.

1 Senior Associate, Co-head Climate Change, Melbourne. Contact Emily at Emily.Gerrard@allens.com.au
2 Partner, Sector Leader, Power & Utilities and Co-head Climate Change, Sydney. Contact Andrew at Andrew.Mansour@allens.com.au
The Paris Outcome

The Decision of the COP confirms that the parties decide to adopt the Paris Agreement under the UNFCCC as appended to the COP decision. Importantly it also sets key work programs and actions for the period pre-2020 and provides greater context or detail for content in the Agreement. The Decision also establishes the Ad Hoc Working Group on the Paris Agreement, a body charged with undertaking a number of pre-2020 tasks and reports, including to:

- develop further guidance on features of the nationally determined contributions (NDCs);
- provide guidance for accounting principles for Party NDCs in a manner that ensures that Parties account for emissions and removals in accordance with methodologies and common metrics assessed by the Intergovernmental Panel on Climate Change (IPCC) and that there is consistency in methods (including baselines) which aim to include all categories of emissions or removals (sources or sinks);
- develop recommendations for procedures and guidelines for transparency framework for 'action and support' under the Paris Agreement, which includes clarity and tracking of progress toward achieving NDCs and adaptation action plans and with respect to finance received by developing country parties;
- identify the sources of input for the 'global stocktake' of collective action toward achieving the purpose of the Paris Agreement, including information on the overall effect of NDCs, the state of adaptation actions, the mobilisation of support, latest reports of the IPCC and reports of the subsidiary bodies; and
- to develop the procedures for the effective operation of the committee established under the Agreement to facilitate implementation and promote compliance with the Agreement.

The Agreement and Decision both reflect the flexibility needed for developing country parties, a key aspect in overcoming a negotiation sticking point relating to the UNFCCC principle on 'common but differentiated responsibility'.

Key aspects of the Paris Agreement include:

- the clear purpose to hold the increase in global average temperature to 'well below 2°C above pre-industrial levels' and the requirement for parties to communicate NDCs which represent a progression over time to achieving this purpose;
- the aim for parties to reach global peaking of greenhouse gas emissions as soon as possible and to undertake rapid reductions after this peak, so as to achieve a balance between human generated emissions sources and sinks of greenhouse gases in the second half of this century;
- submission of country NDCs every five years, steadily increasing their ambition over time starting with dialogue in 2018 to review collective efforts against the long term goal of peaking emissions as soon as possible and achieving a balance between emissions sources and sinks. Concern is noted in the Decision that current Intended Nationally Determined Contributions (INDCs) do not meet the Agreement purpose and that greater reduction efforts will be needed;
- encouragement for parties to implement and support conservation and enhancement of greenhouse gas emission sinks and reservoirs, such as forests, including through results-based payment frameworks such as reduced emissions from deforestation and forest degradation (or REDD);
- preservation of a voluntary mechanism for the international transfer of mitigation outcomes and the ability to use these outcomes in achieving NDCs (a market mechanism) and also the recognition of non-market approaches being available to assist with the implementation of NDCs;
- provision for adaption planning, including in relation to vulnerable people, places and ecosystems and the reporting of adaptation efforts;
- finance to assist with the transition of developing economies to green energy and assist resilience efforts and adaptation in relation to climate change impacts. The key obligation to provide financial resources rests with developed economies, however other parties are encouraged to provide support voluntarily;
• cooperation on climate-safe technology development and transfer and building capacity in the developing countries to address climate change;

• an enhanced transparency framework which builds on arrangements under the UNFCCC and provides clarity and tracking of progress under NDCs, as well as clarity in relation to adaptation actions and support, technology and capacity building efforts and financial support;

• a ‘Global stocktake’ - the periodic review of the implementation of the Agreement and assessment of collective progress against its purpose and long-term goals. The first stocktake will be undertaken in 2023 and occur every five years thereafter, unless agreed otherwise by the parties; and

• the creation of an expert committee to facilitate implementation and promote compliance with the Agreement in a transparent and non-punitive way.

The agreement will enter into force after 55 countries that account for at least 55 per cent of global emissions have provided their instruments of ratification, approval or accession.

The Paris Outcome also expressly refers to, and welcomes, climate action by sub-national governments, cities, businesses, investors and non-government organisations. The Decision encourages engagement with non-party stakeholders, including with respect to further voluntary actions under the Lima-Paris Action Agenda (LPAA).

The LPAA Non-State Actor Zone for Climate Action (NAZCA) drew climate action pledges from over 7000 cities from over 100 countries, over 5000 companies together representing the majority of market capital and close to 500 investors managing assets totalling over $25 trillion. The Allens climate change blog reported on a number of business and investor initiatives over the two week COP21 negotiation period, as well as opportunities for the private sector.

What Does This Mean For Australia?

The Paris Outcome alone is unlikely to precipitate a significant change in policy in Australia in the short term. However the combination of the Paris Outcome, a Federal election in 2016 and the review of the Emissions Reduction Fund Safeguard mechanism by 30 June 2017 is likely to lead to shifts in greenhouse gas emissions mitigation policy.

The Australian Government has indicated it is set to achieve its current INDC (26-28 per cent reduction in greenhouse gas emissions below 2005 levels by 2030). However, with the Paris Outcome proposed dialogue on collective effort set for 2018, and request for parties who submitted INDCs out to 2030 (such as Australia) to communicate or update their contribution by 2020, there will be international pressure for all countries, including Australia to revise their ambitions for the period post 2020. Australia, along with other parties, will also be invited to provide its 2050 long-term low greenhouse gas emissions development strategy by 2020. In this way, there are likely to be material changes to climate policy in Australia over the medium term. The Paris Outcome sets a net zero greenhouse gas emissions trajectory.

Coupled with an innovation agenda, changes to Clean Energy Finance Corporation investment policy and State and local government action, COP21 in Paris and its outcomes have certainly signalled a turning point for governments as well as non-government, business and investment action on climate change.

There will be a number of opportunities and issues facing different sectors over the coming years.

Why ‘thinking like a lawyer’ might mean less time litigating and more time adapting

Mark Baker-Jones and Emilie Barton

Abstract

In the last few years, some jurists have anticipated litigation’s emergence as a potent device in the fight against climate change. In recent months, it has even attained a voguishness in the broader vocabulary of climate change activism. To some extent those jurists were right. Litigation has given rise to a number of key developments in the area – a June 2015 Netherlands decision and a November 2015 Washington Department of Ecology decision are two recent cases in point. While litigation has undoubtedly been important in facilitating a global awareness of the impacts of climate change, this article will nevertheless argue that litigation, which is often employed as a reactive response to climate change inaction, should not necessarily be seen as the first, and certainly not the only, option for those seeking to encourage climate change adaptation. Rather, this article argues, jurists should be called upon to use their acquired legal skills to enable the adoption of a more proactive approach; specifically, by educating decision-makers at local, regional, state and even global levels to recognise and address climate legal risk through informed decision-making.

This article is based on a recent speech presented at Queensland University of Technology’s (QUT) International Law and Governance Climate Change Litigation Symposium, and seeks to expand the concept of ‘climate legal risk’ and the benefits that can be gained from ‘thinking like a lawyer’ when confronted with climate change challenges. This article will outline firstly, growing developments in climate change law, such as the application of ‘open norms’ and the public trust doctrine. It will then consider the underlying weaknesses in commencing litigation as the primary means of addressing climate change impacts. Ultimately, it will be argued that, while litigation is undoubtedly effective in creating public awareness and asserting pressure on government to address climate change impacts, it does not provide the necessary guidance decision-makers need to actually give effect to climate change adaptation; that is, it does not drive the institutional shift in thinking required to achieve an active, long-term response to climate change.

Developments in climate change law

In order to provide some context to the notions of ‘climate legal risk’ and ‘thinking like a lawyer’, it is necessary firstly to consider what is meant by ‘climate change law’. Although potentially a multitude of characterisations exist, for the purposes of this article, ‘climate change law’ refers only to developments or changes in legal doctrines and principles brought about by climate change-related litigation. Conventional tortious or administrative law actions that fail to add to the body of climate change jurisprudence fall outside the definition.
One of the most notable developments in climate change law has been the expansion of the principle of ‘open norms’; that is, the law’s capacity to change over time, in line with societal values. The term has thus far received little consideration in Australia, and has been confined largely to European legal systems, patent, or contract law where, because the law is not flexible in itself, courts have adopted inventive methods in creating legal space by introducing an open norm into the system. Specifically, academics have oft considered open norms alongside the contractual principle of good faith, with Elior Rosenwasser decrying that although the term is “impossible to precisely define, [it] simply confers on judges and arbitrators a measure of discretion, authorizing and dictating them to search for a fair solution.” When applied to copyright and patent law, scholars have considered the potential for courts to apply a system of open norms, which would allow judges to decide whether certain uses of copyright protected material are permissible, rather than explicitly defining them as such in legislation. Fittingly, a holistic adoption of an open norm in any area of law would ultimately, as was argued by Hawthorne, “require infusion with the values of human dignity, freedom and equality.”

One of the most interesting applications of an open norm in respect of climate change, and perhaps even the first in that respect, was found in the June 2015 decision of the Hague District Court. In arriving at its finding that the Dutch government must reduce its greenhouse gas emissions to 25% below 1990 levels by 2020, the court found the duty of care held by the government was to be characterised as an open norm. Rather than breach the separation of powers doctrine and ‘invent’ policy — a counter-argument often utilised by Australian and United States courts for not ruling in favour of climate change action — the Hague District Court required compliance with obligations previously recognised by the state. The ratification by the Dutch government of a number of treaties verifying climate change science meant the need for action was an already accepted norm in the Netherlands, and one, according to the court, the state ought to respect.

This decision provides an important example of developments in climate change law arising from litigation, as it is arguably one of the first times in which there has been a manifest change to the law’s application. While there have been a number of actions brought under tort with respect to climate change, this appears to be the first time there has been such a degree of flexibility applied in the interpretation of the law. Nonetheless, this application of the open norm principle is noteworthy, not because it was the introduction of a new principle, but rather; because it was a novel application of an existing principle.

A development in a similar, albeit administrative law, vein is the recent decision of the Supreme Court of the State of Washington, which confirmed that, in accordance with existing provisions of the Clean Air Act and the Washington State Constitution, the state has a mandatory duty to “preserve, protect, and enhance the air quality for the current and future generations.” Though important in recognising the need to respond to climate change impacts, this reasoning is not in itself particularly useful, as it represents merely an interpretation of existing duties and perhaps only highlights that, had the Act been implemented as it was supposed to have been, the issue would not necessarily be before the court. Rather, the court’s finding that the public trust doctrine - the provision that “certain natural resources cannot be owned privately and

---

8 Felicity Nelson, Dutch climate champion brings ‘case for hope’ to Australia (24 July 2015) Lawyers Weekly
12 Quirin Schiermeier, Landmark court ruling tells Dutch government to do more on climate change (24 June 2015) Nature
13 Nelson, above n 2.
15 Nelson, above n 5.
should instead be protected by the government for the use of all" 17 – is equally an atmospheric and oceanic issue, is of principal importance. In providing that "[t]he navigable waters and the atmosphere are intertwined and to argue a separation of the two, or to argue that GHG emissions do not affect navigable waters is nonsensical" 18, the court essentially extends the existing doctrine (enshrined in the Washington State Constitution) to the atmosphere. Although the expressions of principles and general truths in the judgement are certainly very interesting, the action was an appeal from a judicial review of a decision of the state department and as such, it is not obvious how it could be applied more generally to encourage or enable climate change adaptation.

The developments in application of the open norm principle and clarification of the public trust doctrine fall alongside recent discussions by expert panels – one being the International Bar Association – calling for the establishment of an International Court of the Environment to assist poorer communities in seeking ‘climate change justice’. 19 Proposals for the court have been presented at the recent UNFCCC Conference of the Parties (COP21) in Paris, with arguments based largely on the idea that “developed countries owe developing countries a ‘debt’ over climate change, and must provide financial aid in addition to taking major steps toward cutting damaging emissions”. 20 Such a step, together with further progress in the development of climate change law, would be decisive in focusing global attention on the need for climate change action. With respect to achieving actual and practical adaptation to climate change however, it is difficult at this time to appreciate what real impact these developments will have, at least in the short term.

**Short-comings in a litigious approach**

Despite the developments in climate change law that have arisen as a result of litigation, it is important that practitioners remain focused on achieving practical outcomes. In evaluating the effectiveness of legal action, practitioners should bear in mind that while development of climate change jurisprudence is important, it is not the only factor in determining the effectiveness of an action. The substantive achievement of climate change law is measured through the achievement of adaptation objectives and primarily, implementation of those objectives. This includes ensuring that those at the frontline of the action are best equipped to deal with the climate legal risks with which they are presented.

There are inherent limitations in adopting a litigious approach, such as the potential absence of clear, long-term adaptive goals, not to mention issues with the process of litigating itself being prolonged and expensive and, arguably, favouring better resourced parties. It is further arguable that litigation may serve as little more than a ‘slap on the wrist’ for decision-makers because, as can be the case, it may provide negligible incentive to change established patterns of thinking, instead only building resentment. Litigation in such circumstances may be little more than a temporary means of reproof, with minimal impact on future actions, and does little to effect broader societal change.

The Honourable Justice Brian Preston, Chief Justice of the NSW Land and Environment Court, while recognising a number of advantages to adversarial approaches, in a 2009 paper noted:

> While litigation might eventually force governments to take some action, it might also mean that the results would be piecemeal. Ultimately, litigation is unlikely to have a great overall effect on climate change. 21

---


21 The Hon. Justice Brian Preston, *Climate change litigation – a conspectus* (Paper delivered to ‘Climate Change Governance after Copenhagen’, The University of Hong Kong and University College London, 4 November 2010) 1.
Justice Preston’s paper supported the need for a broader shift in the perception of environmental values, noting that courts hold no function that directly requires climate change adaptation or mitigation.\textsuperscript{22} Any role the court will have, his Honour noted, will not be with respect to addressing policy concerns, but rather “as a consequence of exercising functions vested in them to adjudicate disputes before them.”\textsuperscript{23} The powers of the court will therefore be limited in respect of climate change adaptation until there is a fully established, perhaps even codified, body of climate change adaptation law. This argument has been recognised similarly by environmental law academic, Jacqueline Peel, who has posited in respect of emission reductions, that while litigation can be important, “a strong national-level regulatory response is still required to generate the necessary behavioural change ...”.\textsuperscript{24} Consequently, it seems evident that litigation should not be the first step, nor should it be considered the only step, on the road to effective adaptation.

**Thinking about climate change ‘like a lawyer’**

While there are risks in relying on litigation as the primary method to effect responses to climate change, there is a place for legal practitioners to assist in developing proactive methods to deal with climate change. A more proactive, and often more practicable, approach that legal practitioners can take to climate change adaptation is to educate decision-makers to ‘think like lawyers’ and, ultimately, minimise their climate legal risk.

Climate legal risk refers to the risk that accompanies a decision that is either affected by climate change, or a decision that will affect climate change. It specifically concerns the risk arising from legal duties and obligations as they relate to matters of climate change. The risk is typically measured in terms of probability. In the broadest sense, it is the effect of uncertainty on achieving a decision-maker’s objective. This means that, where an outcome is expected and some element of uncertainty is introduced; the risk is that the outcome will not be what was expected. It encompasses elements of both factual and legal uncertainty. Educating decision-makers to ‘think like lawyers’ will enable decision-makers to attempt to decrease the uncertainty or, at the very least; to recognise when a legal issue may arise, to analyse the magnitude of the risk, and to determine what steps to take next. Such an approach does not aim to equip decision-makers with skills akin to legal practitioners, but rather; provides the skills necessary for the decision-maker to confidently assess whether a risk is manageable and decide how best to proceed. This approach has already proven successful, and demonstrates the ability of informed decision-makers to engage in meaningful institutional change. Claude Frédéric Bastiat, the classical liberal theorist, noted that the law can be a powerful instrument in achieving equalisation\textsuperscript{25}. By informing decision-makers on how to minimise their climate legal risk through sound legal reasoning, practitioners will enable practical adaptation and facilitate access to justice for all sectors of society.

**Conclusion**

Legal practitioners are placed in a unique position to effect positive, and operative, responses to climate change impacts. Increasingly however, their skills are inefficiently directed towards litigation, at a high cost and with little apparent practical gain in terms of actual climate change adaptation. Practitioners have other alternatives for proactively enabling and encouraging the implementation of effective adaptation measures. Though litigation will always be an important mechanism in bringing attention to climate change, it is not always the most efficient means to achieve climate change adaptation. An institutional shift in thinking among decision-makers is required to achieve active, long-term responses to climate change. Climate change will not, and legal practitioners should not, tolerate unsustainable solutions.

\textsuperscript{22} Ibid 2.  
\textsuperscript{23} The Hon. Justice Brian Preston, above n 18, 2.  
\textsuperscript{25} Frédéric Bastiat, *The Law* (the Ludwig von Mises Institute, 2007) 21.
Next Generation Environmental Laws: Climate law and policy


Professor Jacqueline Peel26

This is an extract from the Introductory Paper for the Australian Panel of Experts on Environmental Law project to develop the Next Generation of Environmental Laws. The full Introductory Paper, addressing issues ranging from governance and environmental democracy to land-based conservation and the impact of business practices on environmental performance, is available on the APEEL website.

An updated version of this Chapter will be published in early 2016 to reflect changing international policy settings following the Paris Climate Agreement.

Introduction

Australia faces unprecedented ecological challenges. These include invasive species impacting on our native biodiversity, water scarcity, looming extinctions of many endemic plants and animals, plastic pollution and other threats to our oceans, significant impact of mining and gas extraction on health and water, and the effects of climate change.

It is apparent that in order to take care of our unique country for the benefit of all of us, we need an improved system of environmental management. At the heart of that system, we need laws that will effectively protect, restore and sustainably manage our natural and cultural heritage.

We each expect governments and companies to do their best to look after our magnificent natural and cultural assets. Australia has a strong history of acting to protect natural and cultural wonders – the Great Barrier Reef, the Franklin River and Kakadu, for example. But many of these successes were responses to crises. On a day-to-day basis, our current environmental laws often fail to achieve positive environmental outcomes. Too often environmental goals are overridden by development and economic considerations. Environmental monitoring and compliance action is inadequate. Environmental damage is being regulated but it is not being halted or reversed. As a result, the state of our environment is in decline.

Before we make our recommendations, we are looking at the design and implementation of current environmental law, reviewing options for their reform, engaging in conversations with a wide range of people and taking into considering how we might to integrate varying perspectives. We invite you to become part of a national conversation about what the next generation of environmental laws could look like.

... THE EMISSIONS CHALLENGE

On our current trajectory, the world is moving inexorably towards dangerous climate change and a world of extreme climate events in which sustainable development goals, and in some places human survival itself, are threatened. According to the science, deep cuts in carbon emissions have to be made in the relatively near future if this dire situation is to be turned around. Most countries, including Australia, have made laws to assist the process of reducing emissions. An entire body of climate law has emerged in recent years. These laws are generally closely integrated with more general environmental laws.

Climate change law today consists of a dense network of measures stretching from the international to the local level and involving a multitude of different actors. From an Australian perspective, key elements include

26 Professor Peel is the principal author of the Chapter extract, with introductory and editorial contributions from the Places You Love Team – Jess Dorney, Basha Stasak and Glen Klatovsky.
international treaties, in particular the *UN Framework Convention on Climate Change*, Australian federal legislation such as that establishing the Emissions Reduction Fund, state legislation, and other initiatives and measures that interact with these laws. These range from voluntary and private carbon markets to renewable energy schemes, court actions raising climate change issues, consumer action, and mass activism on climate issues.

Australia’s record on climate law is, to say the least, mixed. Commonwealth governments have established and then repealed clean energy laws. They have baulked at ambitious national targets on emissions reductions. At the same time, there has been a major grassroots movement to embrace renewable energy and energy efficiency. There is also considerable potential to link biodiversity conservation and ecological restoration with climate change mitigation efforts.

**Responding to the emissions challenge**

Challenges and gaps exist at both the international and domestic levels of climate law and policy relating to greenhouse gas reduction. These challenges are outlined below, along with possible areas where reforms might be considered.

**Ambition of emissions reduction targets**

A key area of concern both internationally and in Australia has been the adequacy of current emissions reduction targets. International targets are being formulated with the intention of keeping global warming below 2°C, although it is recognised that this will be insufficient to prevent climate-related harms to ecosystems such as the Great Barrier Reef and vulnerable communities such as those resident in low-lying island states. Domestically, Australia’s target is to cut emissions by 26–28% from 2005 levels by 2030. This target sits at the lower end of developed country targets and is well below international scientific recommendations.

*Key question:* What is our country’s ‘fair share’ of the global emissions reduction effort and how should that be reflected in domestic climate law?

**Effective legal measures to achieve targets**

Targets are ineffectual without clear measures to implement them and deliver the promised emissions reductions. The current government’s Emissions Reduction Fund is designed to subsidise emissions reductions through grants. This approach has been widely criticised as inadequate to achieve even Australia’s weak 2030 target, given problems in scaling it up to deliver deeper emissions cuts in a cost-effective fashion.

Options to strengthen implementation measures for emissions reduction include: direct regulation of emissions (for example, carbon pollution standards for power plants and industry as in the United States); a market-based emissions trading scheme as in the European Union; or strengthening of the existing Direct Action/Emissions Reduction Fund approach by introducing stringent safeguard measures to limit the amount of emissions polluters are able to produce. To exceed these limits, polluters would need to buy credits from other businesses that have reduced their emissions or from international carbon credit programs.

**Complementary measures**

To be effective, national measures for emissions reduction should ideally complement those taken in other countries and by other levels of government in Australia. Before its repeal, it was envisaged that Australia’s carbon pricing mechanism could be linked to overseas schemes, such as that in the European Union, to increase its reach, cost-effectiveness and scope to contribute to global emissions reduction. It would be difficult to link the Emissions Reduction Fund in its current form to other emissions reduction programs internationally. National measures in Australia should also operate in a complementary fashion with state and local initiatives. There is a role for federal, state and local measures to deliver emissions reductions in ways tailored to their different circumstances.
Role of sub-national and non-governmental actors

While national governments remain responsible at the international and domestic level for determining emissions reduction targets, they are not the only actors that can contribute to emissions reduction and the development of effective legal measures for climate change mitigation. Around the world, many effective climate mitigation programs have been initiated by local governments and cities, for instance, by promoting energy efficiency measures or increasing use of renewable energy.

Non-governmental organisations – from indigenous communities to environmental groups – have also been active in the sphere of climate change mitigation. These organisations have lobbied governments to improve emissions reduction policies, developed local and voluntary programs for encouraging low carbon practices, pressured businesses to reduce their carbon footprint and taken governments to court to oppose carbon intensive developments like the Adani Carmichael coal mine. As Chapter 5 of the Introductory Paper: “Business, Law and Environmental Performance” discusses further, businesses and the private sector also have an important role to play in reducing emissions and contributing to climate change mitigation; a role increasingly recognised in practices of corporate social responsibility and socially responsible investing though less formally in legal structures.

Key questions: What is the best package of climate change mitigation laws to meet the emissions targets needed? What should be the roles of the private sector, government and the nongovernmental sector in achieving ambitious targets and effective implementation measures?

Take part in the conversation

Share your ideas about how our environmental laws and institutions could be improved with APEEL. Your feedback will help the panel to identify key issues and gaps, and form specific recommendations.

To contribute, join the discussion through social media or the APEEL website, or attend face-to-face forums and workshops planned for 2016. Check the APEEL website for details.

---

The assessment of ecotourism developments in Tasmania

Sarah Wilson

Tasmania’s beautiful natural environment hosts world renowned tourism. In 2014, the State government invited Expressions of Interest (EOI) for ecotourism developments in Tasmania’s national parks and reserve areas through a non-statutory process. This raised an interesting legal issue that has not previously been thoroughly explored: to what extent does the planning regime apply to Tasmanian’s protected areas?

Development activities in Tasmania’s parks and reserves have often been controversial and drawn national and international attention. The ecotourism developments progressed through the EoI process will provide an interesting case study on how these projects will be assessed.

Ecotourism in Tasmania

There has been an unprecedented recent increase in tourism in Tasmania, with just over 1 million tourists visiting the island state during the year ending June 2015. The tourism industry is aiming to increase this number to 1.5 million visitors per annum by 2020.

A boost in proposed tourism developments has been spurred by the State Government’s expressions of interest process, with 37 projects submitted as part of this non-statutory process. However, one of the main criticisms about the EOI process is how little detail has been made publicly available.

The EOI Assessment Panel completed its Stage 1 assessment in January 2015 and the Minister invited 25 participants recommended by the Panel to proceed to Stage 2. Many of these developments have been proposed in some of Tasmania’s most iconic and unique areas including the Tasmanian Wilderness World Heritage Area, Freycinet National Park and the Tarkine. The developments range from low-impact guided walks to the construction of high-end ecotourism accommodation.

Statutory approval process

As at 20 December 2015, the Minister for Parks and Environment, Matthew Groom, has announced a total of 13 projects which have been accepted through the EOI process and will now proceed to the statutory approval stage. However, there is considerable uncertainty regarding what the ‘statutory approval’ stage entails.

Although the Minister had previously stated that proposals selected for further consideration would be subject to the required Commonwealth and State planning and approval processes, none of the projects have yet reached the stage where they need to apply for planning approval or be referred for consideration under the Environment Protection and Biodiversity Conservation Act 1999. Therefore, the extent to which the government believes that planning approval is, in fact, ‘required’ remains unclear.

This has reinvigorated debate as to whether the Land Use Planning and Approvals Act 1993 (LUPAA) applies to developments in reserve areas. Although this uncertainty has been an issue for well over a decade, the


29 Limited details regarding the assessment process are set out on the Coordinator-General’s website: www.cg.tas.gov.au/?a=106818


32 In 2001 Stage Designs Pty Ltd was granted approval to construct a tourism development in the Southwest National Park at Cockle Creek. There was debate about the requirement to seek planning approval.
issue remains largely unresolved. It is acknowledged that many of the projects would not be classified as ‘development’ in any event, for example the guided bush walks. What is yet to be clarified is whether the projects which will involve use and development regulated under local planning schemes will go through the statutory approval process.

**Do you need a planning permit in reserve areas?**

Generally speaking, tourism ‘developments’ within a national park or reserve area are treated as requiring assessment in accordance with the local planning scheme pursuant to LUPAA. Reserve land is defined as all land declared as such under the *Nature Conservation Act 2002* and includes national parks, the World Heritage area and other protected areas throughout Tasmania.

Section 4(2) of LUPAA provides that the Act applies to all parts of the State except such parts as may be excluded from the operation of the Act by regulation. There are currently no areas excluded under the *Land Use Planning and Approvals Regulation 2014*. The Resource Management and Planning Appeal Tribunal (the Tribunal) has narrowly interpreted the scope of this power.

In *Bates v Minister for Transport and Works*, the Tribunal examined the objectives of LUPAA and noted that the power to exclude the application of LUPAA should be restricted to land which was subject to a separate planning regime consistent with the RMPS objectives. The Tribunal observed:

To simply remove, by regulation, a part of the State from the provisions of the *Land Use Planning and Approvals Act 1993*, without more, irrespective of motive, would appear to be invalid... To adopt such a course would be to add a new and different means of carrying out the purpose of the Act and would be departing from or varying the plan which the legislature had adopted to obtain its ends. To do so would seem to be either or both beyond what is reasonable necessary or desirable for the achievement of the legitimate objects sought to be obtained by the Act, causing the adverse consequence of the removal of public involvement in the planning process, and beyond the ambit of the regulation making power by providing a new and different means of carrying out the purpose of the Act.

However, section 35 of the *National Parks and Reserves Management Act 2002* provides a limitation on the exercise of other statutory powers in specific reserve areas, including national parks, State reserves, nature reserves, historic sites or game reserves:

- a statutory power may not be exercised in relation to any land in a national park, State reserve, nature reserve, historic site or game reserve

  (a) except where the exercise of the power is authorised by the management plan for that land...” [emphasis added]

One interpretation of this provision is that it excludes the exercise of statutory powers (such as regulatory powers under LUPAA) within national parks, State reserves, historic sites or game reserves unless that power is explicitly authorised by the Management Plan. This provision creates a degree of confusion as to whether LUPAA automatically applies, or whether it may only apply if specifically allowed for in the management plan.

This provision should be read in conjunction with sections 27(2) and (6) of the *National Parks and Reserves Management Act 2002* which regulate the content of management plans for reserve areas. Section 27(2) states that management plans may make provision for the use or development of the land and may authorise the exercise in relation to that land, of any statutory power, such as LUPAA. Section 27(6) allows the management plan to explicitly prohibit the application of any statutory power in certain reserve areas. These powers give considerable scope for management plans to include or exclude a statutory power and

---

33 Tasmania, Second Reading Speech for *National Parks and Reserve Management Parks Act 2002*, House of Assembly, Thursday 21 November 2002 (Mr GREEN, Member for Braddon - Minister for Primary Industries, Water and Environment). In the parliamentary debate that followed the second reading speech, there was considerable debate about the management of reserve areas to ensure the primary focus be on protecting the values of these areas and not encouraging tourism.


35 Statutory power is defined in section 3 of the *National Parks and Reserves Management Act 2002* to include “the carrying out of any works or other operations on any such land”.

---
seem to support an interpretation of s.35 in which the management plan determines whether and how LUPAA applies.

Interestingly, the Courts seem hesitant to exclude the application of LUPAA in the absence of explicit wording. In *Tasman Quest Pty Ltd v Evans*\(^\text{36}\) the Court held that the application of LUPAA could be suspended with explicit wording. During the introduction of the *Crown Lands (Shack Sites) Bill 1997* the Minister responsible at the time, Mr Peter Hodgman, stated:

> The State Coastal Policy and the *Land Use Planning and Approvals Act 1993* and Part 3 of the *Local Government (Building and Miscellaneous Provisions) Act 1993* will be suspended from operation while these sites are being determined.

The Court placed considerable weight on the second reading speech in considering whether the regulation of shack sites should sit outside the scope of the Resource Management and Planning System.

Against this, the uncertainty is further amplified by the fact that many of the interim planning scheme maps cover areas classified as reserve areas.\(^\text{37}\) Many schemes provide that use and development on reserved land will be permitted provided a reserve area management plan applies to the area or a satisfactory Reserve Activity Assessment\(^\text{38}\) has been completed.\(^\text{39}\) The inclusion of these activities in the planning scheme indicates an assumption on the part of local planning authorities that LUPAA applies and that they have jurisdiction to regulate the activities.\(^\text{40}\)

**Management plans**

The most recent set of projects to be accepted through the EOI process will require amendments to a number of management plans before they can lawfully proceed.

One of the management plans to be amended is the *Narawntapu National Park, Hawley Nature Reserve Management Plan 2000*. The amendments proposed\(^\text{41}\) seek to extend the allowable activities to facilitate a proposed horse riding operation. The amendments do not seek to exclude LUPAA. In fact, the management plan states that the proponent must “ensure all applicable statutory requirements and approvals are met or obtained”.\(^\text{42}\)

Amendments have also been advertised for the *Freycinet National Park Management Plan* (allowing for the expansion of the Freycinet Lodge). Substantial amendments are also anticipated to the *Tasman National Park Management Plan*.

Of particular interest is how proposed activities within the World Heritage Area will be assessed. Presumably proposals will be assessed under the management plan in effect at the time of approval. The *Draft Tasmanian Wilderness World Heritage Area Management Plan 2014 (TWWHA draft plan)* has been proposed to replace the *Tasmanian Wilderness World Heritage Area Management Plan 1999*. Unlike the current plan, which sets out a process for assessment of major projects, the TWWHA draft plan simply defers to the assessment processes under existing legislation and the Reserve Activity Assessment process. A recent World Heritage Committee decision specifically referred to the need for the TWWHA draft plan to include a clear, rigorous process for assessment of tourist developments.\(^\text{43}\)

---


\(^{37}\) Glamorgan Spring Bay Interim Planning Scheme 2015

\(^{38}\) The Reserve Activity Assessment (RAA) is the Parks and Wildlife Service assessment process for activities on reserved land that could have a potential impact on reserve values. This is also a non-statutory process.

\(^{39}\) For example, see Huon Valley Draft Interim Planning Scheme 2014 and Tasman Interim Planning Scheme 2015.

\(^{40}\) All planning schemes undergo a rigorous approval process including assessment by the Tasmanian Planning Commission, and approval by the Minister which arguably indicates a State level policy that schemes apply to reserve areas.

\(^{41}\) The amendments have been incorporated into the new management plan - *Narawntapu National Park, Hawley Nature Reserve Draft Management Plan 2015*.


The TWWHA draft plan also alludes to future amendments to the *National Parks and Reserves Management Act 2002* to allow the Director to exclude the application of statutory powers (including LUPAA). 44 To date, no Amendment Bill has been introduced, so the detail of what is proposed remains unclear. Any such amendment would need to pass both Houses of Parliament and is likely be subject to considerable scrutiny. 45

**Does LUPAA apply?**

Currently, developments within reserve areas are generally treated as requiring planning permits. Advice to the contrary would be open to legal challenge.

Given the diversity of projects proposed through the EOI process, it is understandable that uncertainty exists regarding approval requirements. The projects that have progressed through the EOI process to date are those they were unlikely to require a planning permit in any event. However, a number of projects submitted as part of the EOI process will involve substantial works and would certainly fall within the LUPAA definition of ‘development’. We are likely to see how the State Government will assess these projects in the coming months.

**The risk of excluding LUPAA**

The restriction of the application of LUPAA to developments within reserve areas is likely to hit a few hurdles. The risk is that projects that do not seek planning approval where required to by LUPAA may be subject to legal proceedings by those opposed to the project, including civil enforcement proceedings under LUPAA alleging that the permits were in fact required.

Given the sensitive nature of reserve areas and previous Tribunal decisions, any attempt by the government to exclude the application of LUPAA through legislative amendments would require explicit wording and may not protect projects from judicial review proceedings.

**What are the implications of LUPAA not applying?**

Changes to the enforcement powers under LUPAA came into effect on 2 February 2015. 46 These amendments provide planning authorities (i.e. Councils) with increased enforcement powers to address planning contraventions. These powers allow authorities to issue infringement notices and enforcement notices and to cancel permits for contraventions of LUPAA.

If LUPAA doesn’t apply to reserve areas, issues around enforcement and compliance for non-adherence to development requirements and conditions will arise.

**Conclusion**

It is normal practice for developments to be subject to concurrent assessment processes at a local, state and Federal level. Project proponents should independently consider the application of the legislative framework to their project to determine what approvals will be required.

In the absence of explicit wording, the Courts and the Tribunal seem hesitant to exclude the application of LUPAA, citing the importance of consistency and certainty to both proponents and the broader community. In that context, it is difficult to predict the outcome of any legal challenge.

Given the history of projects in Tasmania’s sensitive natural areas resulting in considerable community backlash, proponents would be wise to consider whether assuming that LUPAA does not apply would be more hassle than it’s worth.

---

44 Section 3.4 Draft Tasmanian Wilderness World Heritage Area Management Plan 2014, page 79.

45 It now seems that the government is not proceeding with that amendment, although they have not yet formally abandoned the proposal and the intention is still contained within the TWWHA draft plan.

46 See *Land Use Planning and Approvals Amendment Bill 2013*