

CLIMATE CHANGE IN THE COURTS*

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Climate change issues are increasingly being raised in the courts. To date in Australia, climate change issues have been litigated in judicial review, civil enforcement and merits review proceedings. The article provides a synopsis of this litigation.

I INTRODUCTION

In its latest assessment report, the Intergovernmental Panel on Climate Change found that climate patterns have changed significantly in the 20th century, and that the second half of the century brought the warmest years on record.¹ The causes of climate change are largely anthropogenic, leading many environmental groups to call on governments to tackle these causes. As some effects of climate change are already noticeable, such as increased coastal hazards, adaptive measures are also needed.

A comprehensive and action-forcing international treaty, ratified by all the major contributors to global warming, is regarded as the preferable choice to address the global warming phenomenon, as collective action taken by all nation states is what is required in order to meaningfully combat climate change.² However, international negotiations in this field are protracted and uncertain to produce a result, hence presenting litigation as an attractive path, despite some drawbacks. While litigation might eventually force governments to take some action,³ it might also mean that the results would be piecemeal. Ultimately, litigation is unlikely to have a great overall effect on climate change.⁴ Despite this assessment of litigation, environmental groups and affected individuals and groups have nonetheless taken up the challenge and brought climate change-related actions before the courts. Around the world these lawsuits have mainly, but not solely, targeted unresponsive governments, through their agencies or departments,⁵

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1 Intergovernmental Panel on Climate Change ('IPCC'), United Nations Environment Programme and World Meteorological Organisation, *Climate Change 2007 Synthesis Report: Summary for Policymakers* (2007) [2].

2 Eric A Posner, 'Climate Change and International Human Rights Litigation: A Critical Appraisal' (2007) 155 *University of Pennsylvania Law Review* 1925, 1925.

3 Joseph L Sax, *Defending the Environment: A Handbook for Citizen Action* (1971) 152.

4 Posner, above n 2, 1925–6. See also Robert Meltz, 'Report for Congress: Climate Change Litigation: A Growing Phenomenon' (2007) *Congressional Research Service* 33; Anna Huggins, 'Is Climate Change Litigation an Effective Strategy for Promoting Greater Action to Address Climate Change? What Other Legal Mechanisms Might be Appropriate?' (2008) 13 *Local Government Law Journal* 184.

5 *Massachusetts v EPA*, 549 US 1 (2007); *Walker v Minister for Planning* (2007) 157 LGERA 124.

or companies that are major greenhouse gas ('GHG') emitters, such as car manufacturers or power plants.⁶

Climate change litigation is a fairly new phenomenon. The first significant US court decision relating to climate change dates from 1990,⁷ and the first Australian one from 1994.⁸ Since then there has been an increase in the number of cases where issues relating to climate change are being litigated, more or less successfully. It is only in recent years that climate change as a phenomenon has been more widely accepted by the courts,⁹ though there are still cases where the science of climate change is challenged.¹⁰ Taking climate change into account when deciding upon the merits of a development proposal, is similarly a new development.¹¹

Plaintiffs have used the legal avenues available to them to bring climate change-related actions before the courts, from actions based on the law of torts to domestic statutes and international conventions. These actions are not always based on environmental legislation, but also other laws applicable nationally or internationally. This explains the variety of both causes of action which have been employed and fora which have heard climate change or air pollution actions.

At the outset it needs to be observed that courts have no function directly requiring societal adaptation to climate change or mitigation of its impacts; courts are not legislative rule-makers or general administrative policy makers. Any role courts may play in relation to climate change will be indirect and as a consequence of exercising functions vested in them to adjudicate disputes before them. Different disputes involve different functions.

Actions at common law, such as in nuisance or negligence, are to be resolved by applying the settled elements of the relevant cause of action. Challenges to the exercise of public power, such as decisions to approve projects that might impact on or be impacted by climate change, are to be resolved by applying the principles of administrative law, whether at common law or under statute. Appeals against administrative decisions involving merits review are of a different nature, involving a re-exercise of the power of the executive, but still operate within limits set by the statute in which the power being re-exercised is found as well as by the statute establishing the court that undertakes the appeal.

6 *Connecticut v American Electric Power*, 406 F Supp.2d 265 (2005); *Genesis Power Ltd v Greenpeace New Zealand Inc* [2008] 1 NZLR 803.

7 See *City of Los Angeles v National Highway Traffic Safety Administration*, 912 F 3d 478 (1990) in Meltz, above n 4, 15.

8 See *Greenpeace Australia v Redbank Power Company* (1994) 86 LGERA 143. See also, Tim Bonyhady, 'The New Australian Climate Law' in Tim Bonyhady and Peter Christoff (eds), *Climate Law in Australia* (2007) 11.

9 See *Environmental Defence Society Inc v Auckland Regional Council and Contact Energy Ltd* [2002] NZRMA 492; *Gray v Minister for Planning* (2006) 152 LGERA 258; *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* (2007) 161 LGERA 1; *Walker v Minister for Planning* (2007) 157 LGERA 124.

10 *Re Xstrata Coal Queensland Pty Ltd* [2007] QLRT 33 (Unreported, Koppenol P, 15 February 2007).

11 *Walker v Minister for Planning* (2007) 157 LGERA 124; *Gray v Minister for Planning* (2006) 152 LGERA 258.

Necessarily, therefore, the role of the courts needs to be viewed through the lens of these differing court functions, as a reactive response to increased scientific evidence and public awareness of climate change and its effects.

In this article, I will focus on the decisions of courts in judicial review, civil enforcement and merits review proceedings, particularly decisions of the Land and Environment Court of New South Wales. I will also refer to decisions of other courts and tribunals in Australia and overseas where they illustrate or better illustrate a type of challenge. The role of the courts in determining tortious actions that raise issues concerning climate change, both mitigation and adaptation, has been addressed elsewhere.¹²

Before I embark on a discussion of the climate change-related cases heard by courts, I will set out briefly the concepts of mitigation and adaptation.

II CLIMATE CHANGE — MITIGATION AND ADAPTATION

According to most scientific studies, climate change is real and it is happening. To a significant extent, the causes are anthropogenic. Many groups in civil society are calling for urgent action. Both in terms of policy choice and of public debate, two avenues to counteract climate change are ordinarily put forward: mitigation of those factors that contribute to climate change, and adaptation to the effects of climate change.

In earlier literature on the topic, climate change was seen as being more important to activities that were sensitive to climate and to the rate at which it changes.¹³ In a sense, this view denotes a narrower understanding of the level of impact climate change might have on the biosphere and, implicitly, on human activity. Today, it is accepted that climate change affects all aspects of life as we know it.

Mitigation of the effects of climate change involves taking steps to reduce the underlying causes of global warming. Action to mitigate climate change involves two main categories: reduction in anthropogenic greenhouse gas emissions by sources and removal of greenhouse gases by sinks.

Reduction in greenhouse gas emissions can be achieved both on the supply side and on the demand side. On the supply side, the two main measures are the substitution of energy sources that result in less greenhouse gas emissions (such as wind and solar energy) for energy sources that result in more greenhouse gas

12 See Zada Lipman and Robert Stokes, 'The Implications of Climate Change and a Changing Coastline for Private Interests and Public Authorities in Relation to Waterfront Land' (2003) 20 *Environmental and Planning Law Journal* 406; Jan McDonald, 'A Risky Climate for Decision-Making: The Liability of Development Authorities for Climate Change Impacts' (2007) 24 *Environmental and Planning Law Journal* 405; Phillippa England, 'Heating Up: Climate Change Law and the Evolving Responsibilities of Local Government' (2008) 13 *Local Government Law Journal* 209; Justice Brian J Preston, 'The Environment and its Influence on the Law' (2008) 82 *Australian Law Journal* 180, 185–7; Justice Brian J Preston, 'Climate Change Litigation' (2009) 26 *Environmental and Planning Law Journal* 169.

13 Paul E Waggoner, 'Now, Think of Adaptation' (1992) 9 *Arizona Journal of International and Comparative Law* 137, 138–9.

emissions (such as fossil fuelled power), and reducing greenhouse gas emissions through regulatory or market mechanisms such as an emissions trading scheme. An emissions trading scheme is a means of causing emitters of greenhouse gases to internalise the external environmental costs of their emissions. Parties with obligations under an emissions trading scheme, such as the major sources of greenhouse gas emissions, including the mining and energy industries, determine the most cost effective means of reducing greenhouse gas emissions. Australia is still to put in place an emissions trading scheme.

On the demand side, reduction of demand for products, such as energy, that cause greenhouse gas emissions in either their production or consumption, can result in a reduction of their greenhouse gas emissions. Demand-side management and energy efficiency are, therefore, supplementary measures that can be beneficial in reducing greenhouse gas emissions.¹⁴

Removal of greenhouse gases by sinks can be achieved by various means, such as biosequestration, or sequestration of carbon by the planting and preservation of forest and vegetation stocks, which is currently the most commonly employed means of removing greenhouse gas emissions; geosequestration, which involves the capture and secure storage in geological formations of greenhouse gas emissions (notably carbon dioxide) from sources such as fossil fuelled electricity power stations; or carbon sequestration in oceans, either through natural processes or by anthropogenic means, such as ocean injection in deep oceans, or by enhancing the oceans' absorptive capacity through techniques like ocean fertilisation.¹⁵

Because of the delay between the moment when the actions which cause climate change occur and the moment when its effects start to impact people's lives, for example between the moment greenhouse gases are emitted and coastal land is lost to sea-level rise, there is a lack of consensus on how much or how little has to be achieved, and how quickly or slowly action needs to be taken for mitigation measures to have an impact.¹⁶

In respect of adaptation, there is an adaptive capacity in all living organisms to alter their structure or functions in order to survive and multiply in a changed environment. However, the rate at which climate change is currently occurring

14 See Rosemary Lyster, 'The Australian Carbon Pollution Reduction Scheme: What Role for Complementary Emissions Reduction Regulatory Measures' (2008) 14 *University of New South Wales Law Journal Forum* 31.

15 See Nicola Durrant, 'Legal Issues in Biosequestration: Carbon Sinks, Carbon Rights and Carbon Trading' (2008) 14 *University of New South Wales Law Journal Forum* 47; Rosemary Rayfuse, 'Drowning our Sorrows to Secure a Carbon Free Future? Some International Legal Considerations Relating to Sequestering Carbon by Fertilising the Oceans' (2008) 14 *University of New South Wales Law Journal Forum* 54.

16 For examples of the various economic approaches to mitigation of the effects of climate change, see Simon Dietz, 'The Impacts of Climate Change: Perspectives from the Stern Review' (2007) 13 *Brown Journal of World Affairs* 173.

and altering the earth's ecosystem is greater than the rate at which adaptation can occur naturally.¹⁷

Adaptation is currently referred to as adaptation to climate change impacts or adaptation to the consequences of climate change,¹⁸ as opposed to what it had previously been described, namely a change in sensitivity to the modifications that will occur in the climate.

The term 'adaptation' has been defined in various ways. In the 2007 *National Climate Change Adaptation Framework*, the Council of Australian Governments defined adaptation as:

a process by which strategies to moderate, cope with, and take advantage of the consequences of climatic events are enhanced, developed and implemented. This can include strategies to increase the resilience of systems, such as reducing pollution and pests for natural ecosystems.¹⁹

The Stern Review Report has broadly defined it as:

any adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities.²⁰

III ADVANTAGES IN TAKING ADAPTIVE MEASURES

Adaptation is sometimes refuted as a valid option in combating climate change.²¹ Many commentators expressed concern that policies anchored in adaptive measures would disregard mitigation action.²² This view is still held today of policies that are solely adaptive and do not include any mitigating elements.²³

However, the world has come a long way from the days when adaptation was seen as a means of deferring mitigation. Today it has become an avenue which governments at every level are encouraged to consider in their everyday decisions, in conjunction with mitigation action, rather than just as an alternative. With some impacts of climate change having occurred already and others being likely

17 *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* (2007) 161 LGERA 1, 11 [70].

18 England, above n 12, 209.

19 Council of Australian Governments, *National Climate Change Adaptation Framework* (2007) 20.

20 Sir Nicholas Stern, *The Economics of Climate Change: The Stern Review* (2007) 458.

21 For recent examples, see David W Orr, 'Baggage: the Case for Climate Mitigation' (2009) 23 *Conservation Biology* 790; Bill McKibben, 'Surviving Climate Change through Mitigation and Adaptation' (2009) 23 *Conservation Biology* 796.

22 See Waggoner, above n 13, 146.

23 For a discussion of the impacts of an adaptation-only policy to deal with climate change, see Matthew D Zinn, 'Adapting to Climate Change: Environmental Law in a Warmer World' (2007) 34 *Ecology Law Quarterly* 61, 66–81.

to occur in the future, adapting to these modifications in the ecosystem is a 'vital part of a response to the challenge of climate change'.²⁴

There are great benefits in coupling adaptive policies with mitigation measures. According to the Intergovernmental Panel on Climate Change's ('IPCC's') Fourth Assessment Report on climate change, even if important mitigation action were to be taken now (for example by reducing the level of greenhouse gases emitted), its impact on the world's climate, and on the effects of the changes that have occurred, will not be seen in the short term given the slow response of the oceans to such modifications.²⁵ Adaptive measures, on the other hand, will have an important impact in the short term (where that is understood as the next few decades).²⁶ Adaptive measures can also be effective at local levels, and can be included in the day-to-day decision-making process by agencies dealing with planning matters.

Taking preventive action to mitigate the effects of climate change has proved, and is still proving, to be very hard.²⁷ Given the difficulty in reaching agreement at international level on mitigation measures, such as having enforceable reduction targets for the emissions of greenhouse gases, it would also, arguably, be easier to take and implement adaptive measures, as, by their sheer size (as site specific measures) they are likely to be less contentious than mitigation measures which require international agreement and cooperation.

The Stern Review stated that:

[Adaptation] is the only way to deal with the unavoidable impacts of climate change to which the world is already committed, and additionally offers an opportunity to adjust economic activity in vulnerable sectors and support sustainable development.²⁸

There are clear disadvantages in not taking any adaptive action at all. Changes in the climate will affect existing or future developments on land in sensitive areas. In Australia, the effects of climate change can readily be observed: coastal areas suffer from more frequent extreme weather events and increased soil erosion; Australia has suffered from one of the longest droughts affecting large areas of land, with effects on agriculture; increased intensity of bushfires.²⁹ Not taking any action now will have a bearing on the costs of the response.³⁰

There are other matters that could flow from the impacts of climate change on developments and land. One of them is the possibility that local governments will be held liable for losses arising from climate change, if they are unwilling to

24 Stern, above n 20, 458.

25 IPCC, above n 1, 12.

26 Roger Pielke, JR, 'The Case for a Sustainable Climate Policy: Why Costs and Benefits Must be Temporally Balanced' (2007) 155 *University of Pennsylvania Law Review* 1843, 1850–2.

27 Waggoner, above n 13, 142–4.

28 Stern, above n 20, 458.

29 IPCC, above n 1, 50.

30 Waggoner, above n 13, 149.

take its impacts into account at decision-making stages and integrate into their planning decisions.³¹

IV JUDICIAL REVIEW

A Scope and Purpose of Judicial Review

The law reposing an administrative power determines the limits and governs the exercise of the power. The court's duty is to declare and enforce that law. The court has no jurisdiction to vary or to enlarge the law, such as by imposing different or greater duties to consider or to implement policy to mitigate or to adapt to climate change. The court, in undertaking judicial review, is not a law-making organ (such as is the legislature) or a law-implementing organ (such as is the executive). The proper function of the court in judicial review must 'constantly be borne in mind'.³² Those in civil society legitimately concerned to ensure that action is taken to mitigate or to adapt to climate change, cannot expect the reviewing court to transgress the boundaries of a court's jurisdiction in judicial review.

If the legislature enacts legislation that is deficient, such as by failing to impose duties on the executive to consider or to take action to mitigate or to adapt to climate change, a court has no jurisdiction in judicial review to cure such deficiency. The court's proper function will be limited to declaring that the law does not impose such duties. If this means that an administrative decision of the executive that failed to consider or failed to take action to mitigate or to adapt to climate change is left unaffected, and hence action to mitigate or to adapt to climate change is not in fact taken, so be it. That is not the fault of the judiciary; the fault lies with the legislature that enacted the deficient legislation and, perhaps, to a lesser degree, the executive in not seeking to address the deficiency, insofar as it is able, by filling in the interstices of the legislation by executive action. The court's decision, however, may bring scrutiny to bear on the deficiencies of the law. Matters are brought to legislative attention and forced upon the agendas of parliamentary representatives. Litigation can act as a catalyst for legislative and executive action.³³

With the scope and purpose of judicial review in mind, avenues in which climate change might arise will be addressed. Conceivably, climate change might arise under many of the grounds of judicial review, however, the most likely grounds would be: under the rubric of illegality, failure of the repository of power to have a required state of mind before exercising the administrative power; under the rubric of irrationality, failure of the repository of power to consider relevant matters or making a manifestly unreasonable decision; and, under the rubric of procedural

31 McDonald, above n 12; England, above n 12.

32 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40–1.

33 Sax, above n 3, xviii, 152. See also Justice Brian J Preston, 'The Role of Public Interest Environmental Litigation' (2006) 23 *Environmental and Planning Law Journal* 337, 339.

impropriety, failure of the repository of power to comply with some procedure in the statute, such as a requirement for environmental impact assessment, or for consultation. Each of these grounds will be considered.

For each ground, I will first outline the relevant principles applicable to judicial review on the ground as these fix the parameters for the court's role. I will then canvass how issues of climate change have arisen or might arise. There are very few cases in which administrative decisions have been challenged on grounds relating to climate change, so it has been necessary to discuss not only the few cases raising aspects of climate change but also cases which refer to, more generally, the principles of ecologically sustainable development ('ESD') in order to illustrate the potential for challenge on grounds relating to climate change.

B Failure to Have Requisite State of Mind

The statute reposing power may require, as a condition precedent, that the repository of power consider the facts and form some opinion, satisfaction or belief that such facts exist. Failure to do so will entitle the court to review the decision maker's decision as being *ultra vires*. The decision maker's purported decision would be without power because the condition precedent to enliven the power has not been satisfied.³⁴

If the decision-maker considers the facts and forms the requisite opinion, satisfaction or belief that such facts exist, judicial review is still possible although it is more circumscribed. Certainly, the factual correctness of the opinion is not reviewable; the reviewing court cannot substitute the opinion it would have formed for the opinion of the administrative decision-maker.³⁵

The opinion of the decision-maker that a particular exercise of power falls within the terms of the statutory condition precedent cannot be decisive of the validity of the decision.³⁶

The circumstances in which a reviewing court may examine the factual foundation of the opinion of the decision-maker are limited. A distinction needs to be drawn

between on the one hand a mere insufficiency of evidence or other material to support a conclusion of fact when the function of finding the fact has been committed to [the decision-maker] and on the other hand the absence of any foundation in fact for the fulfilment of the conditions upon which in point of law the existence of the power depends.³⁷

34 Examples in a planning and environmental context are: *Clifford v Wyong Shire Council* [1996] 89 LGERA 240, 251; *Currey v Sutherland Shire Council* [1998] 100 LGERA 365, 372, 374; *Franklins Ltd v Penrith City Council and Campbells Cash & Carry Pty Ltd* [1999] NSWCA 134 (Unreported, Powell, Stein and Giles JJA, 13 May 1999) [18], [23], [26]; *Manly Council v Hortis* (2001) 113 LGERA 321, 332–4 [51]–[56]; *Schroders Australian Property Management Ltd v Shoalhaven City Council* (1999) 110 LGERA 130; aff'd [2001] NSWCA 74 (Unreported, Spigelman CJ, Sheller JA, Ipp AJA, 20 April 2001).

35 *Foley v Padley* (1984) 154 CLR 349, 352–3, 370, 375.

36 *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407, 430 (Latham CJ).

37 *The Queen v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100, 119.

In respect of the latter, a reviewing court may properly interfere. In respect of the former, however, the traditional view has been that, provided there is some evidence, even if inadequate, to support the opinion as to the factual requirement, a court will not interfere.³⁸ Of course, even there, the inadequacy of the factual material may support an inference that the decision-maker

is applying the wrong test or is not in reality satisfied of the requisite matters. If there are other indications that this is so or that the purpose of the function committed to [the decision-maker] is misconceived it is but a short step to the conclusion that in truth the power has not arisen because the conditions for its exercise do not exist in law and in fact.³⁹

More recently, reviewing courts have indicated a preparedness to interfere in a decision ‘where the satisfaction of the decision-maker was based on findings or inferences of fact which were not supported by some probative material or logical grounds’.⁴⁰

An example of a condition precedent to enliven power is to be found in the *Coastal Protection Act 1979* (NSW). Under s 38(1) of the Act, a public authority is prohibited, without the concurrence of the Minister, from carrying out any development in the coastal zone or granting any right or consent to a person to use or occupy, or to carry out any development in the coastal zone, if, in the opinion of the Minister, as advised from time to time by the Minister to the public authority, the development or the use or occupation may, in any way, be inconsistent with the principles of ecologically sustainable development.

The Minister is under a duty, under s 37A of the Act, in exercising functions under Part 3 of the Act, to promote the principles of ecologically sustainable development. The principles of ecologically sustainable development bear the same meaning as they do under s 6(2) of the *Protection of the Environment Administration Act 1991* (NSW). Under s 44 of the Act, the Minister, in determining whether to grant or refuse concurrence, is required to consider only three categories of matters, one of which is whether or not the development or the use or occupation in the coastal zone may, in any way, be inconsistent with the principles of ecologically sustainable development.

The Minister may form the opinion that particular development or use or occupation of land in the coastal zone is inconsistent with the principles of ecologically sustainable development because, for example, of the likelihood that the development, use or occupation of land will be adversely affected by coastal processes, such as inundation or erosion by rising sea levels as a result of climate change.

If the Minister forms the opinion, and advises the public authority, that the development or the use or occupation may in any way be inconsistent with the

38 Ibid 120; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 355–6.

39 Ibid 120; *Re Minister for Immigration and Multicultural Affairs; Ex parte applicant S20/2002* (2003) 77 ALJR 1165, 1172 [36].

40 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 657 [145]. See also *Re Minister for Immigration and Multicultural Affairs; Ex parte applicant S20/2002* (2003) 77 ALJR 1165, 1172 [36]–[37].

principles of ecologically sustainable development, the public authority has no power to carry out the development or to grant any rights or consent to a person to the use or occupation or the development, unless the concurrence of the Minister is obtained. Any purported grant of consent by the public authority in such circumstances, without obtaining the concurrence of the Minister, would be *ultra vires* and liable to be set aside by the reviewing court.

Another example is the condition precedent found in many environmental planning instruments that the consent authority cannot grant consent to development unless the consent authority forms the opinion that the carrying out of the development is consistent (or not inconsistent) with the objectives of the zone in which the development is proposed to be carried out. Such a clause establishes a pre-condition which must be satisfied before the weighing of the merit considerations concerning the development. Forming the requisite opinion of satisfaction enlivens the power to grant consent to the development.⁴¹

An illustration of this type of precondition is to be found in *Byron Local Environmental Plan 1988*. Clause 9(3) contains the precondition:

Except as otherwise provided by this plan, the Council shall not grant consent to the carrying out of development on land to which this plan applies unless the Council is of the opinion that the carrying out of the development is consistent with the objectives of the zone within which the development is proposed to be carried out.

Two of the zones in the coastal zone are Zone 7 (f1) (Coastal Land Zone) and Zone 7 (f2) (Urban Coastal Land Zone). The objectives of the Zone 7 (f1) include:

- (c) to prevent development which would adversely affect, or be adversely affected by, coastal processes.

The objectives of the Zone 7 (f2) include:

- (b) to permit urban development within the zone subject to the Council having due consideration to the intensity of that development and the likelihood of such development being adversely affected by, or adversely affecting, coastal processes.

Development of land that is highly susceptible to coastal erosion, exacerbated by climate change, may not be consistent with these zone objectives.⁴² Any purported grant of consent without forming the requisite opinion of satisfaction that the

41 See *Clifford v Wyong Shire Council* (1996) 89 LGERA 240, 251–2; *Currey v Sutherland Shire Council* (1998) 100 LGERA 365, 372, 374; *Franklins Ltd v Penrith City Council and Campbells Cash & Carry Pty Ltd* [1999] NSWCA 134 (Unreported, Powell, Stein and Giles JJA, 13 May 1999) [18], [27], [28], [35]; *Hortis v Manly Council* (1999) 104 LGERA 43, 87 [167]–[172] *aff'd* (2001) 113 LGERA 321, 330 [30]–[32]; *Schroders Australia Property Management Ltd v Shoalhaven City Council* [2001] NSWCA 74 (Unreported, Spiegelman CJ, Sheller JA and Ipp AJA, 20 April 2001) [7]; *Coffs Harbour City Council v Arrawarra Beach Pty Limited* (2006) 148 LGERA 11, 22 [42]–[44]; *Hub Action Group Inc v Minister for Planning and Orange City Council* (2008) 161 LGERA 136, 148–57 [38]–[67].

42 As the Land and Environment Court concluded in *Parkes v Byron Shire Council* [2004] NSWLEC 92 (Unreported, Tuor C, 2 July 2004) [15], [16], [46], [48]; *Van Haandel v Byron Shire Council* [2006] NSWLEC 394 (Unreported, Brown C, 21 June 2006) [9], [10], [23], [29], [30].

carrying out of development is consistent with the zone objectives, or, if such an opinion is purportedly formed, where the opinion is affected by reviewable error, will be *ultra vires* and liable to be set aside by the reviewing court.⁴³

C Failure to Consider Relevant Matters

The ground of review for failure to take into account a relevant matter will only be made out if a decision maker fails to take into account a matter which the decision maker is bound to take into account. The matters which a decision maker is bound to take into account in making the decision are determined by statutory construction of the statute conferring the discretionary power. Statutes might expressly state the matters that need to be taken into account. Otherwise, they must be determined by implication from the subject matter, scope and purpose of the statute.⁴⁴

Examples of matters which a statute expressly states must be considered are to be found in s 79C of the *Environmental Planning and Assessment Act 1979* (NSW). Section 79C(1)(a) requires a consent authority to take into consideration provisions of any environmental planning instrument that applies to the land to which the development application relates. Environmental planning instruments may specify matters that a consent authority is bound to consider in determining a development application. Recently, environmental planning instruments are specifying that the impacts of the proposed development on climate change and the impact of climate change on the proposed development are matters to be considered. Some examples are discussed below.

Pursuant to s 33A of the *Environmental Planning and Assessment Act 1979* (NSW), the Minister for Planning has made an order, the *Standard Instrument (Local Environmental Plans) Order 2006*, prescribing matters required or permitted to be included in a local environmental plan. One of the matters required to be included in local environmental plans for land in the coastal zone is cl 5.5 concerning development within the coastal zone. Clause 5.5(2) provides:

Consent must not be granted to development on land that is wholly or partly within the coastal zone unless the consent authority has considered:

- (f) the effect of coastal processes and coastal hazards and potential impacts, including sea level rise:
 - (i) on the proposed development, and
 - (ii) arising from the proposed development.

43 Such a result occurred in *Conservation of North Ocean Shores Inc v Byron Shire Council* (2009) 167 LGERA 52, 58 [19], 79 [83], 79 [86], 80 [88], although in relation to different zone objectives.

44 *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24, 39–40, 55. See also *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 228.

The clause has been implemented by a number of local councils in their respective local environmental plans.⁴⁵

Another similar clause is contained in the *Eurobodalla Urban Local Environmental Plan 1999*. Clause 60 provides:

Before granting consent to development of land subject to coastline hazard, the Council must consider the following:

- (a) the extent and nature of coastline hazard affecting the land,
- (b) whether or not the proposed development would increase the risk or severity of coastline hazard affecting other land or buildings, works or other land uses in the vicinity,
- (c) whether the risk of coastline hazard affecting the proposed development could be reasonably mitigated and whether conditions should be imposed on any consent to further the objectives of this plan,
- (d) the provisions of any coastline management plan or relevant development control plan.

‘Coastline hazards’ are defined in cl 58 as ‘detrimental impacts of coastal processes on the use, capability and amenity of the coastline. This includes such matters as ocean or tidal inundation, beach erosion, shoreline recession, sea level rise and climate change, sand drift and cliff instability’.

Botany Local Environmental Plan 1995 provides a further example. Clause 22 requires:

The Council, before granting consent to any development that the Council is satisfied is in excess of \$250,000 in value (excluding land costs), or is of a type likely to give rise to significant soil, air, or water pollution, is to have regard to a study or studies addressing the following matters:

- (a) in relation to global warming:
 - (i) possible measures which could be incorporated within the development to reduce the consumption of non-renewable forms of energy and the production of greenhouse gases which contribute to the greenhouse effect,
 - (ii) whether any measures incorporated in the development designed to improve energy efficiency, to reduce the emission of greenhouse gases, or to respond to global warming are considered appropriate and adequate, and
 - (iii) measures that have been taken to alleviate any possible adverse effects on the development as a result of climate change due to the greenhouse effect.

45 This clause was included in the following local environmental plans: *Gosford City Centre Local Environmental Plan 2007* cl 32; *Newcastle City Centre Local Environmental Plan 2008*; and *Wollongong City Centre Local Environmental Plan 2007* cl 32.

A decision of a consent authority to grant development consent to development without considering the matters expressly required to be considered by these provisions of environmental planning instruments, so far as the matters are relevant to the development, would be reviewable on the ground of failure to consider relevant matters.

Often, however, the relevant matters are expressed in generic categories, such as the likely impacts of the development on the environment, or the public interest. Such generic categories will embrace a wide range of specific matters. For judicial review purposes, the question arises as to whether the obligation to consider a generic category extends to consider specific matters falling within that generic category. This question has been critical in recent judicial review challenges on the ground of a failure to consider particular aspects of climate change, both mitigation of and adaptation to climate change. I will discuss some examples.

In relation to the power to grant consent to developments under Part 4 of the *Environmental Planning and Assessment Act 1979* (NSW), the matters that the consent authority is obliged to consider are the matters of relevance to the development the subject of the development application specified in s 79C(1). These matters are expressed at a high level of generality. None of the generic categories of matters expressly refer to the principles of ecologically sustainable development. Nevertheless, one of the categories of matters that a consent authority is required to consider is ‘the public interest’ in s 79C(1)(e). The phrase ‘the public interest’ needs to be construed having regard to the subject matter, scope and purpose of the Act. One of the express objects of the Act is to encourage ecologically sustainable development.⁴⁶ Ecologically sustainable development is defined in the same manner as it is under s 6(2) of the *Protection of the Environment Administration Act 1991* (NSW). The phrase ‘the public interest’ has been construed by the Land and Environment Court of New South Wales to embrace ecologically sustainable development.⁴⁷ Accordingly, by requiring a consent authority to have regard to the public interest, s 79C(1)(e) obliges the consent authority to have regard to the principles of ecologically sustainable development in cases where issues relevant to those principles arise.⁴⁸ The principles of ecologically sustainable development, particularly that of intergenerational equity and the precautionary principle, are themselves ample enough to enable consideration of the impacts a development might have on climate change or the impacts climate change might have on the development.

In contrast to Part 4, Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW), has an even more spare, express specification of the matters that the Minister is bound to consider in determining whether to approve an application

46 *Environmental Planning and Assessment Act 1979* (NSW) s 5(a)(vii).

47 *Carstens v Pittwater Council* (1999) 111 LGERA 1, 25 [74]; *BGP Properties Pty Ltd v Lake Macquarie City Council* (2004) 138 LGERA 237, 262–3 [117]; *Port Stephens Pearls Pty Ltd v Minister for Infrastructure and Planning* [2005] NSWLEC 426 (Unreported, Talbot J, 15 August 2005) [54]; *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256, 268 [121]–[124].

48 *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256, 268 [121]–[124], with which the NSW Court of Appeal agreed in *Minister for Planning v Walker* (2008) 161 LGERA 423, 451 [42]–[43], 455 [65]–[66].

for a project under that Part. Ascertaining the matters the Minister is bound to consider becomes even more difficult in these circumstances, as a series of recent judicial review cases has revealed. The Minister, when deciding whether or not to approve the carrying out of a project under Part 3A, is expressly required to consider only three matters:

- (a) the Director-General's report on the project and the reports, advice and recommendations (and the statement relating to compliance with environmental assessment requirements) contained in the report, and
- (b) if the proponent is a public authority-any advice provided by the Minister having portfolio responsibility for the proponent, and
- (c) any findings or recommendations of the Planning Assessment Commission following a review in respect of the project.⁴⁹

In addition, the Minister may, but is not required to, take into account the provisions of any environmental planning instrument that would not (because of s 75R) apply to the project if approved.⁵⁰ Because the Minister is not bound to take into account such provisions, a failure to consider them will not involve reviewable error.

Any other matters will only be relevant matters if, on a proper construction of the power to determine an application for approval under s 75J, having regard to the subject matter, scope and purpose of the Act, there is to be discerned by implication, an obligation to consider the matters. This includes the principles of ecologically sustainable development and, even more specifically, the impacts a project might have on climate change (such as by directly or indirectly causing greenhouse gas emissions) or the impacts climate change might have on the project (such as sea level rise or increased flooding).

Any judicial review challenge to an approval granted by the Minister on the ground of failure to consider the principles of ecologically sustainable development as they apply to the project or some specific aspect of the principles, must first establish that the matter alleged not to have been considered was a matter that the statute expressly or impliedly obliged the Minister to consider. The success or failure of the challenge, therefore, turns on this question of construction of the statute and application of that construction to the matter in question allegedly not considered. Recent cases provide illustrations.

*Gray v Minister for Planning*⁵¹ ('Gray') concerned the Anvil Hill coalmine project in the Hunter Valley of New South Wales, capable of producing 10.5 million tonnes of coal per year for a period of 21 years. The majority of the coal was destined for export, to be burnt overseas. The decision under challenge was that of the Director-General under s 75H to accept that the environmental assessment prepared by the

49 *Environmental Planning and Assessment Act 1979* (NSW) s 75J(2)(a)–(c).

50 *Environmental Planning and Assessment Act 1979* (NSW) s 75J(3).

51 *Gray v Minister for Planning* (2006) 152 LGERA 258.

proponent adequately addressed the environmental assessment requirements of the Director-General notified under s 75F. One of the Director-General's requirements for environmental assessment was for a 'detailed greenhouse gas assessment'.⁵²

The applicant submitted in *Gray* that, although there were no matters expressly stated in s 76H or elsewhere in Part 3A, which the Director-General was bound to take into account when exercising the discretion under s 76H as to whether to accept the environmental assessment as having adequately addressed the environmental assessment requirements, nevertheless by implication from the subject matter, scope and purpose of the Act, the Director-General was bound to consider the principles of ecologically sustainable development. The applicant submitted that the Director-General must take into account the public interest and that consideration of the public interest meant that the principles of ecologically sustainable development must be considered. The two most relevant of these principles were the precautionary principle and intergenerational equity.⁵³

Next, the applicant submitted that consideration of the principles of ecologically sustainable development required the environmental assessment to consider the greenhouse gas emissions not only from sources owned or controlled by the coal miner (Scope 1: direct greenhouse gas emissions) and from the generation of purchased electricity consumed by the coal miner (Scope 2: electricity indirect greenhouse gas emissions) but also from sources not owned or controlled by the coal miner as a consequence of the activities of the coal miner (Scope 3: other indirect greenhouse gas emissions). In that case, scope 3 emissions could include potential greenhouse gas emissions from the burning of coal originating from the coal mine by third parties (mostly overseas) outside the control of the coal miner. The coal miner's environmental assessment report included a study of scope 1 and scope 2, but not scope 3 greenhouse gas emissions.⁵⁴ Hence, the applicant submitted that the environmental assessment failed to address the Director-General's environmental assessment requirements. So too the Director-General, in deciding to accept the environmental assessment, failed to take into account the principles of ecologically sustainable development.

Pain J of the Land and Environment Court held that, notwithstanding that Part 3A did not contain a list of matters including the public interest and the principles of ecologically sustainable development that must be taken into account by decision-makers under Part 3A, nevertheless there is an implied obligation to do so:

There is substantial case law apart from *Telstra v Hornsby*⁵⁵ suggesting that all decisions under the EP&A Act require that ESD principles be considered in any event. *Telstra v Hornsby* is a substantial judicial pronouncement on precisely what that obligation on decision makers under the EP&A Act entails. I consider that must include decisions made under Pt 3A. It is not required that the ESD principles be referred to explicitly

52 *Environmental Planning and Assessment Act 1979* (NSW) s 75F.

53 *Ibid* 276 [41]–[45], 289–90 [107].

54 *Ibid* 271–2 [19]–[20], 287[96].

55 (2006) 67 NSWLR 256.

by a decision maker. In this case the decision under challenge is that of the Director-General in relation to an environmental impact assessment process under that Part.

While Pt 3A does not specify any limits on the discretion exercised by the Director-General in relation to the scope of the EAR [Environmental Assessment Report] and how these are applied in an environmental assessment I consider that he must exercise that broad discretion in accordance with the objects of the Act which includes the encouragement of ESD principles including those referred to by the applicant. Essentially I agree with the arguments of the applicant.⁵⁶

Pain J then addressed the additional issue of whether that conclusion:

means scope 3 emissions should have been included in the environmental assessment because ESD principles do not refer to a particular environmental issue, as they are broad principles, in circumstances where there is recognition by the Director-General as seen in the departmental Minute dated 13 September 2006 that climate change/global warming is a global environmental issue to which the coal won from the project will contribute.⁵⁷

Pain J held that at least two of the principles of ecologically sustainable development, intergenerational equity and the precautionary principle, in their application to the facts of the case at hand, required assessment of scope 3 emissions:

While the Court has a limited role in judicial review proceedings in that it is not to intrude on the merits of the administrative decision under challenge (see [102]-[104] of these reasons) it is apparent that there is a failure to take the principle of intergenerational equity into account by a requirement for a detailed GHG [Greenhouse Gas Emissions] assessment in the EAR if the major component of GHG which results from the use of the coal, namely scope 3 emissions, is not required to be assessed. That is a failure of a legal requirement to take into account the principle of intergenerational equity. It is clear from the evidence that this failure occurred on the Director-General's part and that the Applicant is able to discharge its onus in that regard. While that conclusion is shortly stated I will return to the scope of environmental impact assessment as it relates to intergenerational equity again later in the judgment.

As this case focuses on the environmental assessment stage not the final decision whether the project should be approved, the extent to which the precautionary principle applies is as yet undetermined. What is required is that the Director-General ensure that there is sufficient information

56 *Gray v Minister for Planning* (2006) 152 LGERA 258, 291 [114]-[115]. In a subsequent case, the NSW Court of Appeal disagreed with the view that a failure to consider one of the objects of the Act, being encouragement of ESD, renders void a Minister's decision: see *Minister for Planning v Walker* (2008) 161 LGERA 423, 454 [55].

57 *Ibid* 291 [115].

before the Minister to enable his consideration of all relevant matters so that if there is serious or irreversible environmental damage from climate change/global warming and there is scientific uncertainty about the impact he can determine if there are measures he should consider to prevent environmental degradation in relation to this project.

I also conclude that the Director-General failed to take into account the precautionary principle when he decided that the environmental assessment of Centennial was adequate, as already found in relation to intergenerational equity (at [126] of these reasons). This was a failure to comply with a legal requirement.⁵⁸

Pain J held, therefore, that the Director-General's decision to accept the coal miner's environmental assessment as adequately addressing the environmental assessment requirements of the Director-General was vitiated by reason of a failure to take into account the relevant matters of the precautionary principle and intergenerational equity.⁵⁹

Following the decision in *Gray*, the Minister issued a new *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* which requires that climate change impacts, including impacts of downstream emissions, be considered in determining development applications under Part 4 of the *Environmental Planning and Assessment Act 1979* (NSW) for development for the purposes of mining, petroleum production or extractive industries. Clause 14 provides in part:

- (1) Before granting consent for development for the purposes of mining, petroleum production or extractive industry, the consent authority must consider whether or not the consent should be issued subject to conditions aimed at ensuring that the development is undertaken in an environmentally responsible manner, including conditions to ensure the following:
 - (c) that greenhouse gas emissions are minimised to the greatest extent practicable.
- (2) Without limiting subclause (1), in determining a development application for development for the purposes of mining, petroleum production or extractive industry, the consent authority must consider an assessment of the greenhouse gas emissions (including downstream emissions) of the development, and must do so having regard to any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions.

Unlike other environmental planning instruments, State environmental planning policies can apply to projects under Part 3A (see s 75R(3)). However, the application in any particular case would depend on the terms of the policy. The Court has not

58 Ibid 294 [126], 296 [133], 296–7 [135].

59 Ibid 298 [143].

yet determined whether the new State environmental planning policy applies to projects under Part 3A.

The decision in *Gray* was relied on by the applicant in *Drake-Brockman v Minister for Planning*⁶⁰ ('*Drake*'). The Minister for Planning had approved under Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW) a concept plan for a large redevelopment of the former Carlton United Breweries site at Chippendale, an inner suburb of Sydney. The applicant alleged that the Minister had failed to consider the principles of ecologically sustainable development, including the precautionary principle and intergenerational equity, when granting the approval. The applicant's evidence was that greenhouse gas emissions from the project would be substantial and equivalent to 0.45 per cent of the total emissions from the City of Sydney local government area. The Minister, however, did not obtain or consider quantitative information of this kind about emissions from the embodied energy in connection with the construction of the development, total annual emissions from the operation of the development, the relative significance of these emissions or options to ameliorate them. The applicant submitted that the Minister was obliged to obtain and consider such information at this level of particularity and his failure to do so meant that he had failed to consider relevant matters. The applicant relied on *Gray* as establishing the need for such specific consideration.⁶¹

Jagot J of the Land and Environment Court distinguished the decision in *Gray*. The decision under challenge in *Drake-Brockman*, namely the Minister's decision to approve a concept plan under s 75O, was different to and occurred later in the approval process to the decision challenged in *Gray*, namely, the Director-General's decision under s 75H to accept the proponent's environmental assessment. The applicant in *Drake-Brockman* made no complaint about the Director-General's acceptance of the proponent's environmental assessment. The grounds of challenge in *Drake-Brockman* did not include, as appeared to have been critical in *Gray*, any alleged disjunction between what the Director-General had required and what the Director-General had accepted as adequate.⁶²

Instead, Jagot J held that the applicant, in order to succeed, had to establish that the *Environmental Planning and Assessment Act 1979* (NSW), by necessary implication, bound the Minister to consider, in exercising the power under s 75O, one aspect of the complex of matters that might inform the concept of ecologically sustainable development (greenhouse gas emissions) in the particular manner and to the particular extent alleged by the applicant (a quantitative analysis of greenhouse gas emissions of the project).⁶³

Jagot J was prepared to assume that Part 3A obliged the Minister to consider the principles of ecologically sustainable development where relevant to the particular project.⁶⁴ However, Jagot J held that, on a proper construction of Part

60 (2007) 158 LGERA 349.

61 Ibid 353 [7], 382–3 [118].

62 Ibid 386 [130]–[131].

63 Ibid 385 [126].

64 Ibid 386–7 [132].

3A, the relevant matters of the principles of ecologically sustainable development could not be defined at the level of particularity argued by the applicant or that consideration of the principles required the type of analysis argued by the applicant. Jagot J held that Parliament, in enacting the *Environmental Planning and Assessment Act 1979* (NSW), did not subordinate all other considerations to ecologically sustainable development; the definition of ecologically sustainable development does not mandate any particular method or analysis of a potentially relevant subject matter or outcome in any case; the *Environmental Planning and Assessment Act 1979* (NSW) did not dictate that the content of any assessment under Part 3A of that Act must include a quantitative analysis of greenhouse gas emissions; and the statutory scheme does not support the idea that the Minister can only consider ecologically sustainable development by considering a quantitative analysis of greenhouse gas emissions.⁶⁵ Jagot J further held that, as a matter of fact, the applicant had not established that the Minister failed to consider ecologically sustainable development including the precautionary principle and intergenerational equity.⁶⁶

*Walker v Minister for Planning*⁶⁷ involved another challenge to the Minister's approval of a concept plan, this time for a subdivision and residential development on coastal land at Sandon Point on the Illawarra coast of New South Wales. Biscoe J of the Land and Environment Court held that the principles of ecologically sustainable development were relevant matters to be considered by the Minister in approving a concept plan under Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW). Biscoe J's reasoning necessarily differed from that of Pain J in *Gray*, as the decisions under challenge involved the exercise of different powers.

Biscoe J noted that s 75O of the Act mandates that the Minister must consider, when approving a concept plan, the Director-General's report on the project and the reports and recommendations contained in the report. Clause 8B of the *Environmental Planning and Assessment Regulation 2000* (NSW) requires the Director-General to include in the report 'any aspect of the public interest that the Director-General considers relevant to the project'. Biscoe J held the reference to 'public interest' in cl 8B includes the principles of ecologically sustainable development. This is consistent with the cases that have held that the principles were relevant matters to be considered under the head of 'public interest' in s 79C in Part 4 of the Act.⁶⁸

Biscoe J then turned to the question of whether, in the circumstances, the Minister has an implied obligation to consider the principles of ecologically sustainable development at the level of particularity alleged by the applicant.⁶⁹ The particular complaint by this applicant was that the Minister failed to consider whether the impacts of the project would be compounded by climate change, in particular,

65 Ibid 387–8 [132].

66 Ibid 389 [133].

67 *Walker v Minister for Planning* (2007) 157 LGERA 124.

68 Ibid 189 [154].

69 Ibid 189 [155].

whether changed weather patterns as a result of climate change would lead to an increased flood risk where flooding was identified as a major constraint on the coastal plain project.⁷⁰

Biscoe J held that by implication from the subject matter, scope and purpose of the *Environmental Planning and Assessment Act 1979* (NSW), the Minister was bound to consider the climate change flood risk relevant to the constrained coastal plain project:

In my opinion, having regard to the subject matter, scope and purpose of the *EPA Act* and the gravity of the well-known potential consequences of climate change, in circumstances where neither the Director-General's report nor any other document before the Minister appeared to have considered whether climate change flood risk was relevant to this flood constrained coastal plain project, the Minister was under an implied obligation to consider whether it was relevant and, if so, to take it into consideration when deciding whether to approve the concept plan. The Minister did not discharge that function.⁷¹

Accordingly, Biscoe J held that the Minister's approval of the concept plan was void.⁷²

On appeal, the NSW Court of Appeal reversed the result, but upheld certain aspects of the reasoning of Biscoe J.⁷³ Hodgson JA (with whom Campbell and Bell JJA agreed) held that it is a condition of validity of the exercise of powers under the *Environmental Planning and Assessment Act 1979* (NSW) that the Minister consider the public interest. Although that requirement is not explicitly stated in the Act, it is so central to the task of a Minister fulfilling functions under the Act that it goes without saying. Any attempt to exercise powers in which a Minister did not have regard to the public interest could not be a *bona fide* attempt to exercise the powers.⁷⁴ Confirmation is to be found in cl 8B of the *Environmental Planning and Assessment Regulation 2000* (NSW).⁷⁵ That regulation bore on the construction of the legislation because Part 3A of the Act and Part 1A of the Regulation (containing cl 8B) constituted a single scheme and were introduced together.⁷⁶ Confirmation is also to be found in s 79C of the Act, 'dealing with development consents by consent authorities, which specifies the public interest as a factor to be taken into account'.⁷⁷ Hodgson JA agreed with the earlier decisions of the Land and Environment Court, summarised in *Telstra Corporation Ltd v Hornsby Shire Council*,⁷⁸ that 'in respect of a consent authority making a decision in accordance with s 79C of the ... Act, and a court hearing a

70 Ibid 190 [156].

71 Ibid 192 [166].

72 Ibid 192 [167], 202 [205].

73 *Minister for Planning v Walker* (2008) 161 LGERA 423.

74 Ibid 450 [39].

75 Ibid 450 [40].

76 Ibid 450 [36]–[37].

77 Ibid 450 [40].

78 (2006) 67 NSWLR 256, 268 [121]–[124].

merits appeal from such a decision, consideration of the public interest embraces ESD.⁷⁹ Hodgson JA then held that:

the principles of ESD are likely to come to be seen as so plainly an element of the public interest, in relation to most if not all decisions, that failure to consider them will become strong evidence of failure to consider the public interest and/or to act *bona fide* in the exercise of powers granted to the Minister, and thus become capable of avoiding decisions.⁸⁰

However, because this was not already the situation at the time when the Minister made his decision to approve the concept plan in that case some years before, the decision could not be avoided on that basis. Hence, the Court of Appeal allowed the appeal and set aside the orders of Biscoe J.⁸¹

In *Aldous v Greater Taree City Council*,⁸² the Land and Environment Court dismissed a challenge to the validity of a development consent granted by the local council for the construction of a new dwelling on a beachfront property at Old Bar, near Taree. One of the arguments put forward by the applicant was that the council failed to take into account the principles of ecologically sustainable development, in particular the council failed to take into account or assess climate change induced coastal erosion.

Biscoe J first considered whether the council had an obligation to take into account the principles of ecologically sustainable development when it considered and determined the development application. The application was made under Part 4 of the *Environmental Planning and Assessment Act 1979* (NSW). Section 79C of the Act mandates that a council take into account the public interest when determining whether to grant development consent.⁸³ Given the decisions in *Walker v Minister for Planning*⁸⁴ ('Walker'), and the appeal decision *Minister for Planning v Walker*,⁸⁵ as well as international and national case law dealing with this point, Biscoe J concluded that public interest includes the principles of ecologically sustainable development.⁸⁶ Biscoe J considered that the issue raised by the Court of Appeal in its decision in *Walker* was one of timing: at the time of the Minister's approval of the concept plan in 2006, not taking ecologically sustainable development into account did not affect the validity of the decision. However, this would not be the case today: due to the growing public perception of ecologically sustainable development, it is plainly an element of the public interest.⁸⁷

79 *Minister for Planning v Walker* (2008) 161 LGERA 423, 451 [42]–[43].

80 *Ibid* 454 [56].

81 *Ibid* 454–5 [56]–[64].

82 (2009) 167 LGERA 13.

83 *Ibid* 24–5 [24].

84 (2007) 157 LGERA 124.

85 (2009) 161 LGERA 423.

86 *Aldous v Greater Taree City Council* (2009) 167 LGERA 13, 24–5 [24].

87 *Ibid* 27 [28].

After concluding that the principles of ecologically sustainable development were a relevant consideration in the council reaching its decision, Biscoe J considered whether the council did in fact take ecologically sustainable development into account when granting consent for this development. Biscoe J concluded that the council did take coastal erosion and its inducement by climate change into account when reaching its decision. This conclusion was based on, among other things: the fact that the council had a Coastal Management Plan adopted in 1996; that it had sought advice from the Department of Land and Water Conservation on whether the 1996 advice from the Department, that the 100 year coastal line included a best estimate provision for climate change, should be reassessed and had been advised that the advice was still applicable; and that the council had taken steps to prepare a coastal zone management plan for the Old Bar where the property was located.⁸⁸ Therefore, this ground of challenge was rejected.⁸⁹

If the statute reposing the power, the exercise of which is challenged, does not oblige the repository of power, either expressly or by implication, to consider the matter allegedly not considered, the challenge must fail; there is no reviewable error warranting intervention by the court.

This was the situation in *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources*,⁹⁰ another challenge to the Anvil Hill coalmine project, this time in the Federal Court. The applicant challenged the decision of the delegate of the Commonwealth Minister that the project was not a controlled action under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), and hence would not require approval. One of the grounds of challenge was that the delegate failed to take into account that the greenhouse gas emissions resulting from the coal mine would contribute to 'loss of climatic habitat caused by anthropogenic emissions of greenhouse gas', which is a key threatening process included in the list under s 183 of the Act.⁹¹

Stone J held, however, that such a matter was not a relevant consideration the Minister was bound to take into account in making a determination under s 75 of the Act about whether the action is a controlled action.⁹² Hence, no error was involved, even if the delegate had not considered the matter (although this was also not substantiated).⁹³

It can be seen, therefore, that any obligation on a decision-maker to consider the impacts that climate change might have on a proposed development or project, and the adaptive measures that might be taken in response, will turn on the proper construction of the statute reposing the power on the decision-maker.

88 Ibid 42 [76]–[77].

89 Ibid 42 [78].

90 (2007) 159 LGERA 8.

91 Ibid 20 [45].

92 Ibid 20–1 [49].

93 Ibid. The appeal did not challenge this aspect of the decision of Stone J and, in any event, was dismissed: *Anvil Hill Project Watch Association Inc v Minister for Environment and Water Resources* (2008) 166 FCR 54.

The court's role is circumscribed by the terms of the statute and the principles of statutory construction.

D Weight to Be Attributed to Relevant Matters

It is well settled that it is generally for the administrative decision-maker, and not a reviewing court, to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising a discretionary statutory power.⁹⁴ However, this general rule applies only in the absence of any statutory indication of the weight to be given to the relevant considerations.⁹⁵ Similarly, it will be for the decision-maker to determine the weight or priority to be given to different objects of the statute.⁹⁶ However, again the statute may provide an indication of the priority to be given to certain objects.⁹⁷

In the environmental context, statutes are increasingly providing an indication of the weight that a decision-maker is required to give to certain relevant considerations or the priority to be given to certain objects. In the particular case of ecologically sustainable development, some illustrations are:

- (a) the *Coastal Protection Act 1979* (NSW), s 37A provides that:

In exercising functions under this Part [Part 3 - Use of the coastal zone], the Minister is to promote the principles of ecologically sustainable development.⁹⁸

- (b) the *National Parks and Wildlife Act 1974* (NSW), s 2A(1) states the objects of the Act, including the conservation of nature (including biological diversity), then provides in s 2A(2) and (3):

(2) The objects of this Act are to be achieved by applying the principles of ecologically sustainable development.

(3) In carrying out functions under this Act, the Minister, the Director-General and the Service are to give effect to the following:

- (a) the objects of this Act,
- (b) the public interest in the protection of the values for which land is reserved under this Act and the appropriate management of those lands.⁹⁹

94 See *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363, 375; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 41; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 291–2; *Abebe v Commonwealth* (1999) 197 CLR 510, 580 [197]; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 627 [44]; *Terrace Tower Holdings Pty Ltd v Sutherland Shire Council* (2003) 129 LGERA 195, 206 [56].

95 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 41.

96 *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31, 72, 74; *Drake-Brockman v Minister for Planning* (2007) 158 LGERA 349, 385 [127]; *Minister for Planning v Walker* (2008) 161 LGERA 423, 452 [50].

97 *Carr v Western Australia* (2007) 232 CLR 138, 143 [5]–[7].

98 *Coastal Protection Act 1979* (NSW) s 37A.

99 *National Parks and Wildlife Act 1974* (NSW) s 2A(2), (3).

- (c) the *Water Management Act 2000* (NSW), s 9(1) provides:
- It is the duty of all persons exercising functions under this Act:
- (a) to take all reasonable steps to do so in accordance with, and so as to promote, the water management principles of this Act, and
 - (b) as between the principles for water sharing set out in section 5(3) to give priority to those principles in the order in which they are set out in that subsection.¹⁰⁰
- (d) the *Fisheries Management Act 1994* (NSW), s 3(2) states that objects of the Act include, primarily, three specified objects relating to environmental protection (the third of which is ‘to promote ecologically sustainable development, including the conservation of biological diversity’) and then four other specified objects relating to economic and other use of resources ‘consistently with those objects’.¹⁰¹
- (e) the *Fisheries Management Act 1991* (Cth), s 3(1) requires that certain specified objectives ‘must be pursued by the Minister in the administration of this Act and by AFMA in the performance of its functions’¹⁰² but s 3(2) then specifies the different requirement in relation to other specified objectives that ‘the Minister [and] AFMA...are to have regard to the objectives’.¹⁰³
- (f) the *Environment Protection Act 1993* (SA), s 10 states the objects of the Act, as well as a requirement for persons involved in the administration of the Act to have regard to and further these objects:
- (1) The objects of this Act are—
 - (a) to promote the following principles (*principles of ecologically sustainable development*):
 - (i) that the use, development and protection of the environment should be managed in a way, and at a rate, that will enable people and communities to provide for their economic, social and physical well-being and for their health and safety while—
 - (A) sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; and
 - (B) safeguarding the life-supporting capacity of air, water, land and ecosystems; and
 - (C) avoiding, remedying or mitigating any adverse effects of activities on the environment;

100 *Water Management Act 2000* (NSW) s 9(1).

101 *Fisheries Management Act 1994* (NSW) s 3(2).

102 *Fisheries Management Act 1991* (Cth) s 3(1)

103 *Fisheries Management Act 1991* (Cth) s 3(2).

- (ii) that proper weight should be given to both long and short term economic, environmental, social and equity considerations in deciding all matters relating to environmental protection, restoration and enhancement; and
- (b) to ensure that all reasonable and practicable measures are taken to protect, restore and enhance the quality of the environment having regard to the principles of ecologically sustainable development.¹⁰⁴

The section then goes on to provide details of the measures to be taken. It then continues:

- (2) The Minister, the Authority and all other administering agencies and persons involved in the administration of this Act must have regard to, and seek to further, the objects of this Act.¹⁰⁵
- (g) *Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005*, cl 2(1) states the aims of the plan with respect to the Sydney Harbour Catchment, including:
 - (a) to ensure that the catchment, foreshores, waterways and islands of Sydney Harbour are recognised, protected, enhanced and maintained:
 - (i) as an outstanding natural asset, and
 - (ii) as a public asset of national and heritage significance, for existing and future generations.¹⁰⁶

and cl 2(2) states that:

- (2) For the purpose of enabling these aims to be achieved in relation to the Foreshores and Waterways Area, this plan adopts the following principles:
 - (a) Sydney Harbour is to be recognised as a public resource, owned by the public, to be protected for the public good,
 - (b) the public good has precedence over the private good whenever and whatever change is proposed for Sydney Harbour or its foreshores,

¹⁰⁴ *Environment Protection Act 1993* (SA) s 10(1).

¹⁰⁵ *Environment Protection Act 1993* (SA) s 10(2).

¹⁰⁶ *Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005* (NSW) cl 2(1).

- (c) protection of the natural assets of Sydney Harbour has precedence over all other interests.¹⁰⁷

Where the statute does indicate the weight to be given to a relevant matter or the priority that should be given a certain object, a reviewing court could intervene to set aside a decision if the decision-maker fails to accord the required weight or priority.

E Manifest Unreasonableness in Result

If the result of an exercise of a discretionary power is so unreasonable that no reasonable decision-maker could have made it, a reviewing court can interfere. However, because this comes closest to trespassing into the forbidden field of the merits of the decision, courts have been careful to circumscribe the ground.

The legislature has reposed the discretionary power in the administrative decision-maker to choose among courses of action upon which reasonable minds may differ. In *Puhlhofer v Hillingdon London Borough Council*,¹⁰⁸ Lord Brightman said:

Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely.¹⁰⁹

The courts must not usurp the discretion of the decision-maker whom the legislature appointed to make the decision.¹¹⁰

The threshold of perversity required before a court can find that a decision is manifestly unreasonable is high.¹¹¹ It is not for those seeking to quash

107 *Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005* (NSW) cl 2(2). Priority was given to these aims in determining to refuse consent to a marina extension at Rose Bay in Sydney Harbour in *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC 190 (Unreported, Biscoe J, 13 June 2008). See also the Hong Kong decisions to like effect: *Society for Protection of the Harbour Ltd v Town Planning Board* [2003] 2 HKLRD 787, 803–4 (Court of First Instance, Chu J) and *Town Planning Board v Society for the Protection of the Harbour Ltd* [2004] 1 HKLRD 396, 406–8 [32]–[39] (Court of Final Appeal) discussed in Justice Brian J Preston, ‘Administrative Law in an Environmental Context: An Update’ (2007) 15 *Australian Journal of Administrative Law* 11, 21–2.

108 [1986] 1 AC 484.

109 [1986] 1 AC 484, 518.

110 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36; *Botany Municipal Council v Minister for Transport* (1996) 90 LGERA 81, 96–7; *Bruce v Cole* (1998) 45 NSWLR 163, 184–5; *The First Secretary of State v Hammersmatch Properties Ltd* [2005] EWCA Civ 1360 (Unreported, Pill, Smith LJJ and Sir Staughton, 16 November 2005) [33], [36], [40].

111 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 41–2; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36; *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31, 42–3; *Friends of Hinchinbrook Society v Minister for Environment (No 2)* (1997) 69 FCR 28, 59–65; *Weal v Bathurst City Council* (2000) 111 LGERA 181, 188 [34]; *R v Secretary of State for the Home Department; Ex parte Hindley* [1998] QB 751, 777; *First Secretary of State v Hammersmatch Properties Ltd* [2005] EWCA Civ 1360 (Unreported, Pill, Smith LJJ and Sir Staughton, 16 November 2005) [32].

administrative decisions to challenge the soundness of the decision. Whether it is sound or not is not a question for decision by the reviewing court.¹¹² Moreover, manifest unreasonableness does not depend on the court's own subjective notions of unreasonableness. What a court may consider unreasonable is a very different thing from the requirement for 'something overwhelming' such that the decision is one that no reasonable body could have reached.¹¹³

In reviewing a decision on the grounds of manifest unreasonableness, the court can only have regard to the material that was before the administrative decision-maker at the time it made its decision. This is why the expression 'manifest unreasonableness' is sometimes used. The unreasonableness of the decision must be manifest having regard to its terms and the material upon which it was based.¹¹⁴

Cases in which courts have found manifest unreasonableness in result are rare. One example is where all the evidence points in one direction, and a decision-maker, for no given or identifiable reason, decides the other way.¹¹⁵ Another example is where a power is exercised discriminatively without justification, such as where benefit or detriment is distributed unequally amongst members of a class who are equally deserving. Lord Russell CJ in *Kruse v Johnson*¹¹⁶ described by-laws to be unreasonable in this sense if 'they were found to be partial and unequal in their operation as between different classes'.¹¹⁷

In the context of climate change, successful challenges on the ground of manifest unreasonableness may be similarly rare.

The preponderance of credible scientific opinion favours the view that climate change is real and happening, and that the causes are, to a significant extent, anthropogenic. However, if there is some logically probative material before the decision-maker evidencing a contrary view, a decision of the decision-maker preferring that contrary view would not necessarily be a manifestly unreasonable decision, although it might be neither the preferable nor a sound decision. Similarly, a decision to approve a development but not to require the taking of all measures that might mitigate the development's contribution to climate change (such as offset vegetation planting) or its adaptation to climate change, again, might not be the preferable or a sound decision, but it would not necessarily be a manifestly unreasonable one. The decision may have involved a weighing of factors, including environmental, economic and social factors. Absent a legislative mandate to afford priority to the mitigation of or adaptation to climate change, the weight to be given to factors would be within the discretion of the decision-maker. No error is involved in misattribution of weight between relevant matters.

112 *Parramatta City Council v Pestell* (1972) 128 CLR 305, 323; *R v Secretary of State for the Home Department; Ex parte Brind* [1991] 1 AC 696, 757–8, 764–5.

113 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 230.

114 *ULV Pty Ltd v Scott* (1990) 19 NSWLR 190, 204.

115 *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 400, 433 cited as an example by Kirby J in *Re Minister for Immigration and Multicultural Affairs; Ex parte applicant S20/2002* (2003) 77 ALJR 1165, 1186 [129].

116 [1898] 2 QB 91.

117 *Ibid* 99.

Hence, a decision such as the one to approve the power station in *Greenpeace Australia Ltd v Redbank Power Company Pty Ltd*,¹¹⁸ notwithstanding the power station's greenhouse gas emissions, and without adequate conditions requiring complete offsetting by mandatory tree plantings,¹¹⁹ could not be said necessarily to be manifestly unreasonable. Similarly, decisions such as those to approve the developments in the coastal zone subject to an increased intensity and frequency of cyclones caused by climate change in *Daikyo (North Queensland) Pty Ltd v Cairns City Council*¹²⁰ ('Daikyo') and *Mackay Conservation Group Inc v Mackay City Council*¹²¹ could not be said necessarily to be manifestly unreasonable.

F Non-compliance with Procedural Requirements

Many statutes require, as a pre-condition to the exercise of power to approve a development or project, compliance with certain procedures. The procedures may include environmental impact assessment of the development or project, public notification and comment, or consultation with certain persons or bodies. Judicial review on grounds of procedural impropriety is available.

Reviewing courts more readily intervene in decisions involving procedural impropriety because in doing so they are not interfering with the substance or the merits of the decision, only the process by which that decision has been reached.¹²²

Establishing procedural impropriety involves: first, construction of the statute to determine the content of the procedural obligation; secondly, ascertaining whether on the facts there has been a contravention of the procedural obligation; and thirdly, ascertaining the legislative intention as to what ought to be the consequences of contravention of the procedural obligation.¹²³

Many environmental statutes require environmental impact assessment of proposed developments or projects.¹²⁴ The content of the environmental impact assessment will depend on the statute. Some statutes require consideration of the principles of ecologically sustainable development. The *Environmental Planning and Assessment Act 1979* (NSW) and the *Environmental Planning and Assessment Regulation 2000* (NSW) require environmental impact statements to include the reasons justifying the carrying out of the development or activity in the manner proposed, having regard to biophysical, economic and social considerations,

118 (1995) 86 LGERA 143. The Land and Environment Court of New South Wales was in fact undertaking merits review of the relevant local council's decision to approve the power station, in a third party appeal by the objector, Greenpeace Australia Ltd.

119 See Bonyhady, above n 8, 12.

120 [2003] QPEC 22 (Unreported, Skoien SJDC, 19 June 2003).

121 [2006] QPELR 209.

122 Justice Brian J Preston, 'Judicial Review of Illegality and Irrationality of Administrative Decision in Australia' (2006) 28 *Australian Bar Review* 17, 19.

123 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 390 [93].

124 Examples are the *Environmental Planning and Assessment Act 1979* (NSW) and *Environment Protection Biodiversity Conservation Act 1999* (Cth).

including the principles of ecologically sustainable development.¹²⁵ Environmental impact assessments may also be required to address matters specified in a public official's environmental assessment requirements.¹²⁶

The courts will construe these content requirements to determine what matters are expressly and by implication required to be included in the assessment required by the statute.

In *Australian Conservation Foundation v Latrobe City Council*,¹²⁷ the Victorian Civil and Administrative Tribunal held that the environmental effects of GHG emissions that were likely to be produced by use of the Hazelwood Power Station were relevant to the proposed amendment to the planning scheme to facilitate mining coalfields to supply coal for the power station.¹²⁸

In *Gray v Minister for Planning*,¹²⁹ Pain J held that both direct and indirect effects of mining and subsequent use of the coal from the proposed coal mine were required to be considered in the environmental assessment.

Four North American decisions also provide further examples of courts holding environmental impact assessments to be inadequate for failure to consider climate change impacts.

In *Border Power Plant Working Group v Department of Energy*,¹³⁰ the environmental impact assessment for proposed electricity transmission lines was held inadequate for failure to discuss the CO₂ emissions from new power plants in Mexico, which would be connected by the proposed electricity transmission lines with the power grid in southern California.¹³¹

In *Mid States Coalition for Progress v Surface Transportation Board*,¹³² the environmental impact assessment was for a proposed rail line. The line would provide a less expensive route by which low-sulphur coal could reach electricity power plants and hence it would likely be utilised more than other routes. This would increase the supply of coal to the power plants and hence their consumption of coal. Greater consumption of coal by the power plants would increase the adverse effects of burning coal, including greenhouse gas emissions and climate change. The court held the environmental impact assessment to be inadequate for failure to consider the possible effects of an increase in coal consumption.¹³³

In *Center for Biological Diversity v National Highway Traffic Safety Administration*,¹³⁴ the environment impact assessment of making a rule setting

125 See *Environmental Planning and Assessment Regulation 2000* (NSW) Para 6, Sch 2.

126 For example, under cl 73 and cl 231 of the *Environmental Planning and Assessment Regulation 2000* (NSW) and s 75F of the *Environmental Planning and Assessment Act 1979* (NSW).

127 *Australian Conservation Foundation v Latrobe City Council* (2004) 140 LGERA 100.

128 *Ibid* 109–10 [43]–[47].

129 (2006) 152 LGERA 258.

130 260 F Supp 2d 997 (SD Cal 2003).

131 *Ibid* 1028–9 [42], 1033.

132 345 F 3d 520 (8th Cir 2003).

133 *Ibid* 549–50 [29].

134 508 F 3d 508 (9th Cir 2007).

the corporate average fuel economy standard for light-duty trucks was held inadequate for failure to consider the effect of greenhouse gas emissions from light duty trucks on climate change.¹³⁵

In *Pembina Institute for Appropriate Development v Attorney General of Canada*,¹³⁶ the Federal Court of Canada upheld a judicial review challenge to a Joint Review Panel's report on the environmental impact assessment of the Kearl oil sands mine in northern Alberta. The court held that the Panel failed to explain in its report why the potential impacts of greenhouse gas emissions of the project will be insignificant and also failed to provide any rationale as to why the intensity based mitigation proposed to be adopted would be effective to reduce greenhouse gas emissions, equivalent to 800 000 passenger vehicles, to a level of insignificance.¹³⁷

Although these cases concern the adequacy of environmental impact assessment for a proposed development's impact on climate change, the same principles would apply to reviewing the adequacy of environmental impact assessment of the impacts climate change might have on a proposed development.

V CIVIL ENFORCEMENT

Climate change issues can also arise in civil proceedings to enforce compliance with environmental statutes.

In the *Vaughan v Byron Shire Council* cases,¹³⁸ the owners of a beachfront lot on Belongil Spit at Byron Bay attempted to rebuild an interim sandbag wall constructed by the local council which had been destroyed by strong storms and elevated ocean water levels. The interim wall protected the Vaughans' property from coastal erosion. The intention was to rebuild the wall using rocks. The council sought an interlocutory injunction against the Vaughans to restrain them from rebuilding the wall.¹³⁹ The council argued that since 1988 it had had a policy of planned retreat.¹⁴⁰ The policy consisted of restricting development in some coastal areas within certain distances of the erosion escarpment and requiring that development be relocatable so that it could be removed as erosion moves landward, rather than preventing development altogether.¹⁴¹ The council also relied on expert evidence that the structure will cause damage to other properties it had not protected by exacerbating existing down drift erosion impact, and that the structure would also impede access to the beach.¹⁴²

135 Ibid 552–8 [20]–[22].

136 [2008] FC 302.

137 Ibid [73]–[75], [78], [79].

138 *Byron Shire Council v Vaughan* [2009] NSWLEC 88 (Unreported, Pain J, 29 May 2009); *Byron Shire Council v Vaughan (No 2)* [2009] NSWLEC 110 (Unreported, Biscoe J, 30 June 2009).

139 *Byron Shire Council v Vaughan* [2009] NSWLEC 88 (Unreported, Pain J, 29 May 2009) [1].

140 Ibid [4].

141 Ibid [4].

142 Ibid [6].

The Vaughans, in turn, sought orders against the council to enforce the development consent that the council had issued to itself in 2001 to build the interim sandbag wall.

Pain J upheld the council's action and granted an interlocutory injunction that the Vaughans cease rebuilding the interim wall.¹⁴³ The parties later agreed to vary the interlocutory injunction, allowing the Vaughans to rebuild the wall using geobags and sand.¹⁴⁴

In July 2009, two members of an environmental activist group, Rising Tide, commenced proceedings in the Land and Environment Court against Macquarie Generation, the owner of Bayswater Power Station in the Upper Hunter Valley.¹⁴⁵ The plaintiffs sought a declaration that the defendant negligently disposed of waste by way of emissions of carbon dioxide into the atmosphere in a manner that harmed or was likely to harm the environment, in contravention of s 115(1) of the *Protection of the Environment Operations Act 1997* (NSW). The plaintiffs also sought an order that the defendant cease disposing of waste through the emissions of carbon dioxide into the atmosphere in contravention of s 115(1) of the *Protection of the Environment Operations Act 1997* (NSW). Macquarie Generation applied to Court for the proceedings to be summarily dismissed and Pain J partially upheld that application.¹⁴⁶

VI MERITS REVIEW

Merits review involves a court (or tribunal) re-exercising the power of the original decision-maker. The court is not confined to the evidentiary material that was before the original decision-maker but may receive and consider fresh evidence in addition to or substitution of the original material.

The constraints that flow from the nature of merits review by a court, the necessity to apply the relevant legislation, subordinate instruments and quasi-legislative policy, and the desirability to apply any relevant general administrative policy can be seen to operate in the context of merits review of decisions involving issues of climate change.

Where the executive has adopted subordinate instruments or quasi-legislative policies that take cognisance of climate change and fix parameters for decision-making, it is proper that the court undertaking merits review implement the provisions and policy of these documents.

Illustrations are to be found in decisions of planning and environment courts and tribunals throughout Australia.

143 Ibid [18].

144 Noted in *Byron Shire Council v Vaughan (No 2)* [2009] NSWLEC 110 (Unreported, Biscoe J, 30 June 2009) [6], [16].

145 *Gray and Hodgson v Macquarie Generation* (NSWLEC, matter no 40500 of 2009, filed 27 July 2009).

146 *Gray v Macquarie Generation* [2010] NSWLEC 34 (Unreported, Pain J, 22 March 2010).

In *Charles & Howard Pty Ltd v Redland Shire Council*,¹⁴⁷ the Queensland Court of Appeal upheld the decision of the primary judge in the Planning and Environment Court of Queensland to have regard to climate change impacts on the proposed site in dismissing the appeal against the Council's conditional approval. The applicant had sought an approval to build a dwelling on flood prone land. This meant that filling works had to be undertaken in order to bring the land to the minimum height required by the local planning provisions. The Council had granted approval for a dwelling to be built, but imposed a condition: that the building be erected on a different location on the subject land, being an area less prone to tidal inundation. The applicant contended that the condition was not reasonable. In reaching a decision in the merits review, the primary judge took into account a clause in the Council's 1998 Strategic Plan, which stated:

At the time urban development is proposed in these adjacent areas [including the land the subject of this application], it will be necessary to establish the appropriate width of land to be retained in its natural state along the coastline so as to comply with the requirements of the *Coastal Protection Act* and any associated planning documents to take into consideration sea level changes which may result from changes in climatic conditions.¹⁴⁸

The Queensland Court of Appeal found that the primary judge was entitled to take into account, by way of the Strategic Plan, the impact of climate change on sea levels for the area proposed to be filled and to hear expert opinions on whether the applicant's proposed site may be vulnerable to rising sea levels as a result of climate change.¹⁴⁹

Similarly, in *Northcape Properties Pty Ltd v District Council of Yorke Peninsula*,¹⁵⁰ an appeal from a decision of a Commissioner of the Environment Resources and Development Court of South Australia refusing development consent for a coastal land subdivision was dismissed. The Supreme Court of South Australia found that the development would not conform to the prescribed planning provisions. Planning provisions required the provision of a reserve along the sea frontage¹⁵¹ and of an erosion buffer¹⁵² to ensure public access to the coast and protection of the development from coastal hazards. However, if changes in flood patterns and sea levels brought about by global warming were taken into account, the development would not conform with these two requirements. In time, the erosion buffer would be lost to coastal erosion and then the coastal reserve will become the erosion buffer, meaning a loss to the community of their access to the coast.

The planning provisions in the Development Plan for Coastal Development provided that one of their objectives, Objective 2, was to:

147 *Charles & Howard Pty Ltd v Redland Shire Council* (2007) 159 LGERA 349.

148 *Ibid* 358–9 [26].

149 *Ibid* 359 [28].

150 *Northcape Properties Pty Ltd v District Council of Yorke Peninsula* [2008] SASC 57 (Unreported, DeBelle J, 4 March 2008).

151 *Ibid* [12].

152 *Ibid* [13] citing Principle 31 of the *Principles of Development Control for Coastal Development*.

promote development which recognises and allows for hazards to coastal development such as inundation by storm tides or combined storm tides and stormwater, coastal erosion and sand drift; including an allowance for changes in sea level due to natural subsidence and predicted climate change during the first 100 years of the development.¹⁵³

Objective 11 was worded as follows:

To encourage development that is located and designed to allow for changes in sea level due to natural subsidence and probable climate change during the first 100 years of the development. This change to be based on the historic and currently observed rate of sea level rise for South Australia with an allowance for the nationally agreed most-likely predicted additional rise due to global climate change.¹⁵⁴

Expert evidence stated that the foreshore line would shift inland 35-40 metres over the next 100 years, which made the Commissioner conclude that the coastal reserve would in time be lost, being required as an erosion buffer.¹⁵⁵ The Supreme Court upheld the Commissioner's reasoning and decision, that such a result was inconsistent with the planning controls in place and did not warrant the approval of the development.¹⁵⁶ Importantly, the planning principles applicable in the District of the Yorke Peninsula allowed the Supreme Court to reach this decision.

In *Van Haandel v Byron Shire Council*,¹⁵⁷ a Commissioner of the Land and Environment Court of New South Wales upheld the Council's decision to refuse an application for construction of a dwelling on Belongil Spit, which is highly susceptible to coastal erosion. The relevant environmental planning instruments, both local and regional, and development control plan required consideration of the likelihood of proposed development adversely affecting or being adversely affected by coastal processes. The Council had adopted a policy of planned retreat to address the coastline hazard. The Commissioner upheld the Council's policy and the planning instruments and refused consent.¹⁵⁸

In each of these cases, the court's decision furthers the objective of responding appropriately to the impact that climate change might cause on the proposed development because the applicable subordinate instruments and quasi-legislative policies applied by the court implemented such a policy. Where, however, the subordinate instruments or quasi-legislative policies do not further that objective, but compromise it, the result of the court applying such instruments or policies will also be to compromise the objective.

153 Ibid [13] citing Objective 2 of the *Yorke Peninsula Development Plan – Coastal Development*.

154 Ibid [13].

155 Ibid [19]–[20].

156 Ibid [20], [27]–[28]. The case is also cited with approval (although in obiter dicta) in *Tamarix Poultry Farm Pty Ltd v Casey City Council* [2008] VCAT 668 (Unreported, Presiding Member JA Bennett and Member Hewet, 21 April 2008) [37].

157 [2006] NSWLEC 394 (Unreported, Brown C, 21 June 2006).

158 Ibid [23], [25], [28], [29].

Thus, in *Daikyo*,¹⁵⁹ the Planning and Environment Court of Queensland upheld a condition imposed by the Council, and declined to impose a more onerous condition contended for by an objector to the appeal, concerning the habitable floor levels of all buildings in the development to deal with marine inundation. The development involved residential housing, tourist accommodation and commercial development in Palm Cove on the far north coast of Queensland. The site is at risk of cyclones. The Council's planning scheme provided for floor levels to be at a specified level to deal with flood and marine inundation. The Council imposed a condition consistent with its planning scheme. The objector contended that the level was too low, and that a higher level ought to be imposed. The Court rejected the objector's proposed standard, stating that to adopt it would involve the court in general standard setting which it was not in a position to do:

The prevailing philosophy, based on sound common sense, is to balance risk and economics. The Council has undertaken that balancing exercise in setting the standard reproduced in this condition (as well as others). The Court is not the planning authority and it is not the Court's responsibility to set the standard: see *Grosser v Gold Coast City Council* (2001) 117 LGERA 153 at para [38] and *Telstra Corporation Ltd v Pine Rivers Shire Council* [2001] QPELR 350 at paras [117]-[120].

Dr Nott is, in effect, asking the Court to substitute a standard devised by him for the Council's adopted standard. He proffers no balanced explanation for doing that. The Council's standard takes into account emergency planning measures of the kind referred to by Mr Collins and the loss to the community in keeping land free from development. That is the sort of practical approach which a Council is required, in practice, to adopt. While Dr Nott is understandably passionate about his research, that does not warrant the Court's intervention, or the Court assuming the role of the arbiter of the appropriate standard.

...A responsible Council, in making land use planning decisions, takes into account other factors such as risk acceptance, emergency planning measures and community economics. This Court is not charged with that type of, or degree of, planning.¹⁶⁰

In a subsequent case, *Mackay Conservation Group Inc v Mackay City Council*,¹⁶¹ the Planning and Environment Court of Queensland again considered the appropriateness of departing from the standards set by the planning authorities for development subject to coastal hazards. The proposed development involved a residential and tourism development at East Point, Mackay. This was also an area at risk of cyclones and inundation by cyclonic wave effects. The Council had granted preliminary approval subject to conditions including those fixing the location and levels of buildings consistent with the planning schemes. The objectors argued these conditions were inappropriate to accommodate the intense cyclones which

159 *Daikyo (North Queensland) Pty Ltd v Cairns City Council* [2003] QPEC 22 (Unreported, Skoien SJDC, 19 June 2003).

160 *Ibid* [22]-[24].

161 *Mackay Conservation Group Inc v Mackay City Council* [2006] QPELR 209.

will come and different standards should be set. The Court followed the decision in *Daikyo* that ‘it is for the planning authority (which is not the Court) to undertake the balancing exercises involved in setting standards for building levels and the like’ and that ‘it is not the Court’s responsibility to set the standard’.¹⁶²

These cases highlight the critical role the executive plays in: first, establishing policies that ensure that proposed developments prevent or mitigate impacts on climate change and that decision-makers take into account the impacts climate change might have on proposed developments; and secondly, revising such policies as the science and knowledge about climate change and its impacts changes. The objector in each of the North Queensland cases highlighted that the executive’s policies, the local council’s adopted standards, were outdated and inappropriate having regard to recent research on climate change and its effects, particularly inundation of coastal areas. The court undertaking merits review in each of those two cases, however, was not the appropriate organ of government to revise the policy — the standards — that had already been set by the executive (the local councils). Any such revision needed to be undertaken by the executive that set the policy in the first place. This approach accords with the nature and constraints on merits review by a court discussed earlier.

Where, however, the executive has not adopted an administrative policy relevant to the exercise of the discretionary power or, if it has, such a policy does not address a particular issue or issues relevant to the merits review being undertaken by the court, there might be greater scope for the reviewing court to formulate and apply principles. The principles derive from the case at hand, but can be of more general applicability. This involves rule-making by adjudication and is distinguishable from legislative rule-making. Courts undertaking merits review can by rule-making add value to administrative decision-making by extrapolating principles from the cases that come before them and publicising these to the target audience, who can apply them in future administrative decision-making.¹⁶³ The benefits of adopting principles are similar to the benefits of adopting a guiding policy. Decision-making is facilitated by the guidance given by the principles. The integrity of decision-making in particular cases is better assured if decisions can be tested against the principles. Application of the principles can diminish inconsistency and ‘enhance the sense of satisfaction with the fairness and continuity of the administrative process’.¹⁶⁴

The Land and Environment Court of New South Wales has recognised the value-adding benefits of principles in merits review and has encouraged, in appropriate cases, the formulation and dissemination of planning principles in planning appeals¹⁶⁵ and tree dispute principles in tree applications.¹⁶⁶

The Court describes a planning principle as:

162 Ibid [67].

163 Robin Creyke, ‘The Special Place of Tribunals in the System of Justice: How Can Tribunals Make a Difference?’ (2004) 15 *Public Law Review* 220, 234.

164 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 640.

165 *Against decisions under the Environmental Planning and Assessment Act 1979* (NSW).

166 *Under the Trees (Disputes Between Neighbours) Act 2006* (NSW).

A planning principle is a statement of a desirable outcome from, a chain of reasoning aimed at reaching, or a list of appropriate matters to be considered in making a planning decision. While planning principles are stated in general terms, they may be applied to particular cases to promote consistency. Planning principles are not legally binding and they do not prevail over environmental planning instruments and development control plans ...

Planning principles assist when making a planning decision including where there is a void in policy, or where policies expressed in qualitative terms allow for more than one interpretation, or where policies lack clarity.¹⁶⁷

The Court has developed 42 planning principles to date,¹⁶⁸ including two relating to ecologically sustainable development.¹⁶⁹ Tree dispute principles are similar in nature to planning principles but are more specific in addressing aspects of tree disputes under the *Trees (Disputes Between Neighbours) Act 2006*.¹⁷⁰

There is, therefore, a capacity for courts undertaking merits review of decisions raising issues concerning climate change to extrapolate principles from the cases, which are capable of adding value to agency decision-making in future matters involving climate change issues.

There have been some decisions of courts and tribunals in cases raising climate change issues which, although not formulating principles, nevertheless provide reasons which are capable of general application and hence of adding value to future administrative decision-making.

In *Gippsland Coastal Board v South Gippsland Shire Council (No 2)*,¹⁷¹ the Victorian Civil and Administrative Tribunal refused six permit applications for dwellings on coastal land. One of the reasons for refusal was that the development would be at risk of inundation due to possible rises in sea levels because of global warming. The relevant Victorian planning provisions did not contain specific consideration of sea level rises, coastal inundation and the effects

167 Land and Environment Court of New South Wales, *Annual Review 2007*, 22. Also see *Planning Principles*, Land and Environment Court <www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_planningprinciples> at 22 December 2009. For a discussion of the Land and Environment Court's planning principles, see Peter Williams, 'The Land and Environment Court's Planning Principles: Relationship with Planning Theory and Practice' (2005) 22 *Environmental and Planning Law Journal* 401; Clifford Ireland, 'Planning Merits Review and the Doctrine of Precedent' (2006) 27 *Australian Bar Review* 231. As to the benefit of promoting consistency in planning decisions, see Daniel Scharf, 'Not Just Individual Merits' [2006] *Journal of Planning and Environment Law* 939.

168 See the list of planning principles on the Court's website: *Planning Principles* (2009) Land and Environment Court <www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_planningprinciples> at 22 December 2009.

169 For ecologically sustainable development generally, see *BGP Properties Pty Ltd v Lake Macquarie City Council* (2004) 138 LGERA 237. For a discussion on ecologically sustainable development and the precautionary principle see *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256.

170 See *Tree Dispute Principles Published by the Court* (2009) Land and Environment Court <http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_tree_dispute_principles> at 22 December 2009.

171 [2008] VCAT 1545 (Unreported, Deputy President Gibson and Member Potts, 29 July 2008).

of climate change,¹⁷² unlike the situation that prevailed in the South Australian and Queensland cases discussed above where the applicable plans or policies did specifically address these matters. There was therefore a policy vacuum, a circumstance where it is appropriate for a court or tribunal undertaking merits review to provide guidance through the articulation of a principle.

The Tribunal held that:

We conclude that sea level rise and risk of coastal inundation are relevant matters to consider in appropriate circumstances. We accept the general consensus that some level of climate change will result in extreme weather conditions beyond the historical record that planners and others rely on in assessing future potential impact.

The relevance of climate change to the planning decision making process is still in an evolutionary phase. Each case concerning the possible impacts of climate change will turn on its own facts and circumstances.

In the present case, we have applied the precautionary principle. We consider that increases in the severity of storm events coupled with rising sea levels create a reasonably foreseeable risk of inundation of the subject land and the proposed dwellings, which is unacceptable. This risk strengthens our conclusion that this land and land in the Grip Road area generally is unsuitable for residential development.¹⁷³

In the *Myers v South Gippsland Shire Council*¹⁷⁴ cases, the applicant sought approval for the subdivision of coastal land in a residential area into two lots. The land was within the primary dune area and susceptible to coastal hazards.¹⁷⁵ In the first case, the Victorian Civil and Administrative Tribunal, not having been provided with an assessment of the impact of climate change on the proposed development,¹⁷⁶ held that it could not reach a decision as to the proposal without such an assessment.¹⁷⁷ The Tribunal gave an interim decision requiring the applicant to prepare a coastal hazard vulnerability assessment to ‘consider factors such as potential sea level rise, storm tide and surge, coastal processes, local topography and geology and how these factors affect the proposal’.¹⁷⁸

In its follow-on decision, after the coastal hazard vulnerability assessment had been prepared, the Tribunal held that the impact of climate change on coastal communities cannot be ignored and left for future generations to sort out.¹⁷⁹

172 Ibid [35].

173 Ibid [46]–[49].

174 *Myers v South Gippsland Shire Council* [2009] VCAT 1022 (Unreported, Member Bilston-McGillen, 22 June 2009); *Myers v South Gippsland Shire Council (No 2)* [2009] VCAT 2414 (Unreported, Presiding-Member Bilston-McGillen and Member Potts, 19 November 2009).

175 *Myers v South Gippsland Shire Council* [2009] VCAT 1022 (Unreported, Member Bilston-McGillen, 22 June 2009) [17].

176 Ibid [12].

177 Ibid [17]–[21], [30]–[32].

178 Ibid [32].

179 *Myers v South Gippsland Shire Council (No 2)* [2009] VCAT 2414 (Unreported, Member Bilston-McGillen and Member Potts, 19 November 2009) [9].

Based on the evidence before them, the Tribunal found that ‘without mitigation measures [being implemented], there will be no dune, no road and the subject site will be inundated by sea water and otherwise lost to its purpose of a residential lot’.¹⁸⁰ While the applicant submitted that the problem would affect the whole of Waratah Bay and not just the subject site,¹⁸¹ the Tribunal held that at some point developments need to be stopped as ‘there is a cumulative effect of single subdivisions or development proposals on the environment’.¹⁸² Granting a permit in the circumstances of the case would mean reaching ‘a poor planning outcome that would unnecessarily burden future generations’.¹⁸³ Adopting the precautionary approach,¹⁸⁴ the Tribunal held that it could not ‘support a subdivision in the knowledge that without mitigation works, there will be no dune, no road, no access to the site and the site is likely to be inundated with sea water’.¹⁸⁵

The Tribunal’s first decision in *Myers v South Gippsland Shire Council* was followed by the Tribunal in *Ronchi v Wellington Shire Council*¹⁸⁶ and *Owen v Casey City Council*.¹⁸⁷

In a different context, courts in planning appeals have weighed in the balance the public interest in addressing climate change against narrower private interests, both in carrying out development or objecting to development.

In *Taralga Landscape Guardians Inc v Minister for Planning*,¹⁸⁸ the Land and Environment Court of New South Wales approved a large wind farm. Local residents of a nearby village, Taralga, and its surrounds had objected to the proposed wind farm on a variety of grounds, including visual impact and noise. The wind farm was, however, beneficial in providing renewable energy with no greenhouse gas emissions, which could be substituted in part for non-renewable, fossil fuel energy with greenhouse gas emissions. The conflict was ‘between the geographically narrower concerns of the residents and the broader public good of increasing the supply of renewable energy’.¹⁸⁹ The Court noted that increasing the supply of renewable energy involved promoting sustainable development, including intergenerational equity.¹⁹⁰ On balance, the Court concluded that ‘the overall public benefits outweigh any private disbenefits either to the Taralga community or specific landowners’.¹⁹¹

180 Ibid [20].

181 Ibid [27]–[28].

182 Ibid [30].

183 Ibid [31].

184 Ibid [32].

185 Ibid [33].

186 [2009] VCAT 1206 (Unreported, Senior Member Baird, 16 July 2009) [21].

187 [2009] VCAT 1946 (Unreported, Senior Member Baird, 25 September 2009) [9].

188 (2007) 161 LGERA 1.

189 Ibid 3 [3].

190 Ibid 12 [73]–[74].

191 Ibid 41 [352].

In a similar case, *Perry v Hepburn Shire Council*,¹⁹² the Victorian Civil and Administrative Tribunal also approved a wind farm. The Tribunal took into account ‘the benefits to the broader community of renewable energy generation as well as the contribution of the proposal to reducing greenhouse gas emissions’.¹⁹³

VII CONCLUSION

The challenges of climate change will become only more pressing in the years to come. All branches of government — the legislature, executive and judiciary — will need to address these challenges. The extent to which and the manner in which each branch of government can properly address the challenges will, however, necessarily vary.

The judiciary has neither the jurisdiction nor the capacity to respond to the extent or in the manner that the legislature and executive can respond. The extent and manner of the judiciary’s response will be framed by the cases that invoke its jurisdiction and the functions that are involved in the determination of those cases. Nevertheless, even within the constraints in which judicial review and merits review are conducted, there is generally scope for courts to be more or less interventionist. The impacts of climate change are of such seriousness, magnitude and extent that courts would be justified in taking a more interventionist approach (but staying within the permissible parameters of the type of review involved).

Furthermore, although the extent and manner of the judiciary’s response will be less than those of the legislature and executive, the status of the judiciary and its institutional habit of public, reasoned decision-making may result in its response having meaningful effects, including a catalytic effect on the legislature and executive to take their own action to mitigate or adapt to climate change.

192 (2007) 154 LGERA 182.

193 Ibid 189 [27].

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