

**THE ROLE OF COURTS IN RELATION TO
ADAPTATION TO CLIMATE CHANGE**

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Introduction

I have been asked to address the role of the courts in relation to adaptation to climate change. At the outset it needs to be observed that courts have no function directly requiring societal adaptation to climate change; courts are not legislative rule-makers or general administrative policy makers. Any role courts may play in relation to adaptation to climate change must 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.

Necessarily, therefore, the role of the courts needs to be viewed through the lens of these differing court functions.

In this paper, I will focus on the role of the courts in judicial review and in merits review. The role of the courts in determining tortious actions that raise issues concerning climate change, both mitigation and adaptation, has been addressed by others and I will not revisit the topic in this paper.¹

Before I embark on a discussion of the role of the courts in judicial review and merits review in relation to adaptation to climate change, I will explain briefly the concept of adaptation to climate change.

What is adaptation in the context of climate change?

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 respect of adaptation, there is an adaptive capacity in all live 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 and altering the earth's ecosystem is greater than the rate at which adaptation can occur naturally.²

¹ See, for example, Lipman Z and Stokes R, "The implications of climate change and a changing coastline for private interests and public authorities in relation to waterfront land" (2003) 20 EPLJ 406; McDonald J, "A risky climate for decision-making: The liability of development authorities for climate change impacts" (2007) 24 EPLJ 405 and England P, "Heating up: Climate change law and the evolving responsibilities of local government" (2008) 13 LGLJ 209 and for some preliminary ideas, Preston B J, "The Environment and its Influence on the Law" (2008) 82 ALJR 180 at 185-187.

² *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* [2007] NSWLEC 59 (12 February 2007) at [70].

Definitions

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.”³

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.”⁴

In earlier literature on the topic, adaptation was described as a change in sensitivity to the modifications that will occur in the climate. Climate change was also seen as being more important to activities that were sensitive to climate and to the rate at which it changes.⁵ 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 and adaptation is referred to as adaptation to climate change impacts or adaptation to the consequences of climate change.⁶

Advantages in taking adaptive measures

Initially adaptation was refuted as a valid option in combating climate change. Many commentators expressed concern that policies anchored in adaptive measures would disregard mitigation action.⁷ This view is still held today of policies that are solely adaptive and do not include any mitigating elements.⁸

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 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.”⁹

There are great benefits in coupling adaptive policies with mitigation measures. According to the Intergovernmental Panel on Climate Change (IPCC) 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

³ *National Climate Change Adaptation Framework* (2007, COAG) at 20.

⁴ UK Treasury, *Stern Review: The economics of climate change. Full report* (2006) at 405.

⁵ Waggoner P, “Now, think of adaptation” (1992) 9(1) *Ariz J Intl & Comp L* 137 at 138-139.

⁶ England above n 1 at 209.

⁷ See Waggoner above n 5 at 146.

⁸ For a discussion of the impacts of an adaptation-only policy to deal with climate change, see Zinn M, “Adapting to Climate Change: Environmental Law in a Warmer World” (2007) 34 *Ecology L Q* 61 at 66-81.

⁹ Stern above n 4 at 405.

response of the oceans to such modifications.¹⁰ Adaptive measures, on the other hand, will have an important impact in the short term (where that is understood as the next few decades).¹¹ 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.¹² 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 Report 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”.¹³

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. Not taking any action now will have a bearing on the costs of the response.¹⁴

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 take its impacts into account at decision-making stages and integrate into their planning decisions.¹⁵

Judicial review

Scope and purpose of judicial review

In judicial review actions, the role of the courts to deal with issues of adaptation to climate change will be circumscribed by the scope and purpose of judicial review. Judicial review of administrative decisions is to ensure that powers are exercised for the purpose for which they are conferred and in the manner in which they are intended to be exercised.¹⁶ Brennan J in *Attorney-General (NSW) v Quin*¹⁷, encapsulated the role of the courts in judicial review in the following passage:

¹⁰ Working Group I of the IPCC, “Summary for Policy makers” in Solomon S, Qin D, Manning M, Chen Z, Marquis M, Averyt K B, Tignor M, Miller H L (eds) *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007) at 12.

¹¹ Pielke R, “The case for a sustainable climate policy: why costs and benefits must be temporarily balanced” (2007) 155 U Pa L Rev 1843 at 1850-1852.

¹² Waggoner above n 5 at 142-144.

¹³ Stern above n 4 at 405.

¹⁴ Waggoner above n 5 at 149.

¹⁵ McDonald above n 1 and England above n 1.

¹⁶ Spigelman J J, “The integrity branch of Government” (2004) 78 ALJ 724 at 730.

¹⁷ (1990) 170 CLR 1 at 35-36.

“The essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government. In *Victoria v The Commonwealth and Hayden*¹⁸, Gibbs J said that the duty of the courts extends to pronouncing on the validity of executive action when challenged on the ground that it exceeds constitutional power, but the duty extends to judicial review of administrative action alleged to go beyond the power conferred by statute or by the prerogative or alleged to be otherwise in disconformity with the law. The duty and the jurisdiction of the courts are expressed in the memorable words of Marshall CJ in *Marbury v Madison*¹⁹:

“It is, emphatically, the province and duty of the judicial department to say what the law is.”

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise”.²⁰

The distinction drawn by Brennan J between judicial review and merits review is a fundamental principle of Australian administrative law.²¹

Brennan J's formulation that judicial review is directed to “enforcing...the law which determines the limits and governs the exercise” of power is a widely accepted statement of the dichotomy between legality and merits.²² The law can be statutes or the common law.

The dichotomy between legality and merits “does not involve a bright line test. The boundary is porous and ill defined”.²³ Yet, the legitimacy of judicial review depends on courts policing that boundary, ensuring that judicial interference with administrative decisions and conduct only occurs in respect of the legality and not the merits of such decisions and conduct.²⁴

This distinction between legality and merits circumscribes a court's powers of judicial review of administrative decisions in the context of climate change, including adaptation to climate change. It will be the law reposing the administrative power that 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

¹⁸ (1975) 134 CLR 338 at 380.

¹⁹ (1803) 1 Cranch 137 at 177; 5 US 87 at 111.

²⁰ See further *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272; *Abebe v Commonwealth* (1999) 197 CLR 510 at 579 [195]; *Corporation of the City of Enfield v Development Assessment Commission* (1999) 199 CLR 135 at 152–153 [43]; and *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 348 [73].

²¹ Spigelman above n 16; Gleeson M, “Judicial Legitimacy” (2000) 20 *Australian Bar Review* 4 at 11.

²² Spigelman above n 16 at 732.

²³ Spigelman above n 16 at 732; see also Cane P, “Merits Review and Judicial Review – The AAT as Trojan Horse” (2000) 28 *Federal LR* 213 at 220.

²⁴ Preston B J, “Judicial review of illegality and irrationality of administrative decisions in Australia” (2006) 28 *Australian Bar Review* 17 at 17-18.

the court in judicial review must be “constantly borne in mind”²⁵. 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 judicature; 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.²⁶

With the scope and purpose of judicial review in mind, avenues in which issues of adaptation to climate change might arise will be addressed. Conceivably, issues of adaptation to 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 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, including adaptation to climate change, have arisen or might arise. There are very few cases in which administrative decisions have been challenged on grounds relating to adaptation to climate change, so it has been necessary to discuss cases raising other aspects of climate change (notably, impacts on climate change) or, more generally, the principles of ecologically sustainable development to illustrate the potential for challenge on grounds relating to adaptation to climate change.

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 powers has not been satisfied.²⁷

²⁵ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40-41.

²⁶ Sax J L, *Defending the environment: A handbook for citizen action* (Vintage Books, 1971), p xviii and p 152. See also Preston B J, “The role of public interest environmental litigation” (2006) 23 EPLJ 337 at 339.

²⁷ Examples in a planning and environmental context are: *Clifford v Wyong Shire Council* (1996) 89 LGERA 240 at 251; *Currey v Sutherland Shire Council* (1998) 100 LGERA 365 at 372, 374; *Franklins Limited v Penrith City Council and Campbells Cash & Carry Pty Limited* [1999] NSWCA 134 (13 May 1999) at [18], [23], [26]; *Manly Council v Hortis* (2001) 113 LGERA 321 at 332, 334; *Schroders Australian Property Management Ltd v Shoalhaven City Council* (1999) 110 LGERA 130 affirmed on appeal [2001] NSWCA 74 (20 April 2001).

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.²⁸ The limited review permitted by the court was summarised by Gibbs J in *Buck v Bavone*:²⁹

“Whether the decision of the authority under such a statute can be effectively reviewed by the courts will often largely depend on the nature of the matters of which the authority is required to be satisfied. In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached. In such cases the authority will be left with a very wide discretion which cannot be effectively reviewed by the courts.”³⁰

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. As Latham CJ stated in *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd*:³¹

“Thus, where the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts. If it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist. A person acting under a statutory power cannot confer power upon himself by misconstruing the statute which is the source of his power”.

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”.³²

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

²⁸ *Foley v Padley* (1984) 154 CLR 349 at 352-353, 370, 375.

²⁹ (1976) 135 CLR 110 at 118-119.

³⁰ See also *The King v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432; *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360; *The Queen v Australian Stevedoring Industry Board; ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 117; *Federal Commissioner of Taxation v Brian Hatch Timber Co (Sales) Pty Ltd* (1972) 128 CLR 28 at 57; *Minister for Immigration and Ethnic Affairs v Teo* (1995) 57 FCR 194 at 199; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 275-276; *Australian Heritage Commission v Mt Isa Mines Ltd* (1997) 187 CLR 297 at 303.

³¹ (1944) 69 CLR 407 at 430.

³² *The Queen v Australian Stevedoring Industry Board; ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 119.

inadequate, to support the opinion as to the factual requirement, a court will not interfere.³³ 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”.³⁴

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”.³⁵

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 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

³³ Ibid at 120 and *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355-356.

³⁴ Ibid at 120 and *Re Minister for Immigration and Multicultural Affairs; Ex parte applicant S20/2002* (2003) 77 ALJR 1165 at 1172 [36].

³⁵ *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 657 [145]. See also *Re Minister for Immigration and Multicultural Affairs; Ex parte applicant S20/2002* (2003) 77 ALJR 1165 at 1172 [36], [37].

weighing of the merit considerations concerning the development. Forming the requisite opinion of satisfaction enlivens the power to grant consent to the development.³⁶

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.³⁷ Any purported grant of consent without forming the requisite opinion of satisfaction that the 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 of the kind stated in *Buck v Bavone*³⁸, will be *ultra vires* and liable to be set aside by the reviewing court.

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.³⁹

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)

³⁶ See *Clifford v Wyong Shire Council* (1996) 89 LGERA 240 at 251-252; *Currey v Sutherland Shire Council* (1998) 100 LGERA 365 at 372, 374; *Franklins Ltd v Penrith City Council and Campbells Cash & Carry Pty Limited* [1999] NSWCA 134 (13 May 1999) at [18], [27], [28] and [35]; *Hortis v Manly Council* (1999) 104 LGERA 43 at 87 [167]-[172] affirmed in *Manly Council v Hortis* (2001) 113 LGERA 321 at 330 [30]-[32]; *Schroders Australia Property Management Ltd v Shoalhaven City Council* [2001] NSWCA 74 (20 April 2001) at [7]; *Coffs Harbour City Council v Arrawarra Beach Pty Limited* (2006) 148 LGERA 11 at 22 [42]-[44] and *Hub Action Group Inc v Minister for Planning and Orange City Council* [2008] NSWLEC 116 (17 March 2008) at [38], [67].

³⁷ As the Land and Environment Court concluded in *Parkes v Byron Shire Council* [2004] NSWLEC 92 (2 July 2004), Tuor C at [15], [16], [46] and [48] and *Van Haandel v Byron Shire Council* [2006] NSWLEC 394 (21 June 2006), Brown C at [9], [10], [23], [29], [30].

³⁸ (1976) 135 CLR 110.

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

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 clause 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”.

The clause has been implemented by a number of local councils in their respective local environmental plans.⁴⁰

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 clause 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”.

⁴⁰ This clause was included in the following local environmental plans: cl 32 Gosford City Centre Local Environmental Plan 2007, cl 41 Newcastle City Centre Local Environmental Plan 2008 and cl 32 Wollongong City Centre Local Environmental Plan 2007.

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...”.

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.⁴¹ 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

⁴¹ s 5(a)(vii).

South Wales to embrace ecologically sustainable development.⁴² 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.⁴³ 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 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) if the Minister has directed an inquiry be held in accordance with section 119 with respect to the project—any findings or recommendations of the Commission of Inquiry.”⁴⁴

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.⁴⁵ 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.

⁴² *Carstens v Pittwater Council* (1999) 111 LGERA 1 at 25; *BGP Properties Pty Limited v Lake Macquarie City Council* (2004) 138 LGERA 237 at [117]; *Port Stephens Pearls Pty Limited v Minister for Infrastructure and Planning* [2005] NSWLEC 426 at [54] and *Telstra Corp. Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256 at 268 [121]-[124]; 146 LGERA 10 (15 August 2005) at 38 [121]-[124].

⁴³ *Ibid.*

⁴⁴ s 75J(2)(a)-(c).

⁴⁵ s 75J(3).

*Gray v Minister for Planning*⁴⁶ concerned the Anvil Hill coal mine 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 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".

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.⁴⁷

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.⁴⁸ 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:

"[114] There is substantial case law apart from *Telstra v Hornsby*⁴⁹ 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 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.

⁴⁶ *Gray v Minister for Planning* (2006) 152 LGERA 258.

⁴⁷ *Ibid* at 276 [41]-[45], 289-290 [107].

⁴⁸ *Ibid* at 271-272 [19]-[20] and 287 [96].

⁴⁹ (2006) 67 NSWLR 256; 146 LGERA 10.

[115] While Pt 3A does not specify any limits on the discretion exercised by the Director-General in relation to the scope of the EAR 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...⁵⁰

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”.⁵¹

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:

“[126] 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 [Environmental Assessment Report] 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.

...

[133] 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 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.

...

[135] 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

⁵⁰ *Gray v Minister for Planning* (2006) 152 LGERA 258 at 291 [114]-[115].

⁵¹ *Ibid* at 291 [115].

intergenerational equity at [126] of these reasons. This was a failure to comply with a legal requirement.”⁵²

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.⁵³

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* 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 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*.⁵⁴ The Minister for Planning had approved under Part 3A of the *Environmental Planning and Assessment Act* 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% 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

⁵² Ibid at 294 [126], 296 [133], 296-297 [135].

⁵³ Ibid at 298 [143].

⁵⁴ *Drake-Brockman v Minister for Planning* (2007) 158 LGERA 349.

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.⁵⁵

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.⁵⁶

Instead, Jagot J held that the applicant, in order to succeed, had to establish that the *Environmental Planning and Assessment Act 1979*, 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).⁵⁷

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.⁵⁸ However, Jagot J held that, on a proper construction of Part 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*, 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* 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.⁵⁹ 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.⁶⁰

*Walker v Minister for Planning*⁶¹ 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*. Biscoe J's reasoning necessarily differed from that of Pain J in *Gray*, as the decisions under challenge involved the exercise of different powers.

⁵⁵ Ibid at 353 [7] and 382-383 [118].

⁵⁶ Ibid at 386 [130]-[131].

⁵⁷ Ibid at 385 [126].

⁵⁸ Ibid at 386-387 [132].

⁵⁹ Ibid at 387-388 [132].

⁶⁰ Ibid at 389 [133].

⁶¹ *Walker v Minister for Planning* (2007) 157 LGERA 124.

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* 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.⁶²

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.⁶³ 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, 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.⁶⁴

Biscoe J held that by implication from the subject matter, scope and purpose of the *Environmental Planning and Assessment Act 1979*, 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 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."⁶⁵

Accordingly, Biscoe J held that the Minister's approval of the concept plan was void.⁶⁶ The decision is under appeal to the New South Wales Court of Appeal.⁶⁷

The difficulty that arises for a challenger when relevant matters are expressed at a level of generality, rather than at a level of particularity, was also encountered in *Blue Wedges Inc v Minister for Environment, Heritage and the Arts*⁶⁸. The decision under challenge was that of the Commonwealth Minister to approve a channel deepening project in Port Phillip Bay in Victoria. The applicant brought two judicial review challenges.⁶⁹ In the second challenge, the grounds included that the Minister had failed to take into account the principles of ecologically sustainable development in two respects: first, when considering the social impacts of the channel deepening project and, secondly, by not considering each of the principles of ecologically sustainable development individually in the consideration of each of

⁶² Ibid at 189 [154].

⁶³ Ibid at 189 [155].

⁶⁴ Ibid at 190 [156].

⁶⁵ Ibid at 192 [166].

⁶⁶ Ibid at 192 [167] and 202 [205].

⁶⁷ Judgment was reserved on 27 July 2008.

⁶⁸ (2008) 157 LGERA 428.

⁶⁹ The first was *Blue Wedges Inc v Minister for Environment, Heritage and the Arts and Others* (2008) 165 FCR 211; 245 ALR 584 and the second was *Blue Wedges Inc v Minister for Environment, Heritage and Others* (2008) 157 LGERA 428.

the protected matters, economic matters and social matters.⁷⁰ The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) provides, in s 136(1), that the Minister, in deciding whether or not to approve the taking of an action, and what conditions to attach to an approval, must consider:

- “(a) matters relevant to any matter protected by a provision of Part 3⁷¹ that the Minister has decided is a controlling provision for the action;
- (b) economic and social matters”.

Section 136(2) then provides that in considering those matters, the Minister must take into account the principles of ecologically sustainable development. The principles of ecologically sustainable development are defined in s 3A.

As a matter of fact, the Minister in *Blue Wedges* did consider the principles of ecologically sustainable development in deciding to approve the channel deepening project. However, the Minister’s consideration was not at the level of particularity, and did not involve the methodological analysis, that the applicant’s challenge specified was necessary. North J rejected the applicant’s construction of s 136, the section requiring consideration of the principles of ecologically sustainable development, for three reasons.

First, s 136(2) did not require the Minister to take the principles of ecologically sustainable development into account when considering each of the matters in s 136(1) separately and independently of each other.⁷²

Secondly, the subject matter of some of the principles of ecologically sustainable development in s 3A, namely (c), (d) and (e), are not in terms applicable to social matters, and focus on environmental consequences relevant to the protected matters.⁷³

Thirdly, the Minister was not obliged by s 136(1) and (2)(a) to take into account each of the principles of ecologically sustainable development when considering each of the protected matters, economic matters or social matters. The Minister was entitled to consider the matters together and to take the principles of ecologically sustainable development globally.⁷⁴

Accordingly, the applicant’s argument failed; the statute did not require the Minister to consider the principles of ecologically sustainable development at the level of particularity and by applying the methodological analysis contended for by the applicant. Hence, even if the Minister were to have failed to consider the principles of ecologically sustainable development in the manner contended for by the applicant⁷⁵, no reviewable error was involved.

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

⁷⁰ *Blue Wedges Inc v Minister for Environment, Heritage and Others* (2008) 157 LGERA 428 at 445 [65] and 455 [108]-[110].

⁷¹ Matters protected by the provisions of Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999* are matters of national environmental significance including world heritage properties, National Heritage places, wetlands of international importance, listed threatened species and communities, listed migratory species and the marine environment.

⁷² *Blue Wedges Inc v Minister for Environment, Heritage and the Arts* (2008) 157 LGERA 428 at 447-448 [76].

⁷³ *Ibid* at 448 [77].

⁷⁴ *Ibid* at 448 [78].

⁷⁵ Such a failure was not established: *ibid* at 448 [79] – 451 [89].

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*⁷⁶, another challenge to the Anvil Hill coal mine 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.⁷⁷

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.⁷⁸ Hence, no error was involved, even if the delegate had not considered the matter (although this was also not substantiated).⁷⁹

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

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.⁸⁰ However, this general rule applies only in the absence of any statutory indication of the weight to be given to the relevant considerations.⁸¹ Similarly, it will be for the decision-maker to determine the weight or priority to be given to different objects of the statute.⁸² However, again the statute may provide an indication of the priority to be given to certain objects.

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:

⁷⁶ *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* (2007) 159 LGERA 8.

⁷⁷ *Ibid* at 20 [45].

⁷⁸ *Ibid* at 20-21 [49].

⁷⁹ *Ibid* at 20-21 [49]. 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; (2008) 158 LGERA 324.

⁸⁰ See eg *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363 at 375; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 291-292; *Abebe v Commonwealth* (1999) 197 CLR 510 at 580 [197]; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 627 [44]; *Terrace Tower Holdings Pty Ltd v Sutherland Shire Council* (2003) 129 LGERA 195 at 206 [56].

⁸¹ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41.

⁸² *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31 at 72, 74 and *Drake-Brockman v Minister for Planning* (2007) 158 LGERA 349 at 385 [127].

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

- (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”.

- (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.”

- (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”.

- (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” 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”.

- (f) 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”.

and in 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,
 - (c) protection of the natural assets of Sydney Harbour has precedence over all other interests.”⁸³

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.

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*⁸⁴, 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”.⁸⁵

The courts must not usurp the discretion of the decision-maker whom the legislature appointed to make the decision.⁸⁶

⁸³ 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 (13 June 2008). See also the Hong Kong decisions to like effect in *Society for Protection of the Harbour Ltd v Town Planning Board* [2003] 2 HKLRD 787 at 803-804 (Court of First Instance, Chu J) and *Town Planning Board v Society for the Protection of the Harbour Ltd* [2004] 1 HKLRD 396 at [32]-[39] (Court of Final Appeal) discussed in Preston B J, “Administrative law in an environmental context: An update” (2007) 15 AJ Admin L 11 at 21-22.

⁸⁴ [1986] 1 AC 484.

⁸⁵ [1986] 1 AC 484 at 518.

⁸⁶ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 37; *Botany Municipal Council v Minister for Transport* (1996) 90 LGERA 81 at 96-97; *Bruce v Cole* (1998) 45 NSWLR 163 at 184-185 and *The First Secretary of State v Hammersmatch Properties Ltd* [2005] EWCA Civ 1360 at [33], [36], [40].

The threshold of perversity required before a court can find that a decision is manifestly unreasonable is high.⁸⁷ It is not for those seeking to quash 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.⁸⁸ 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 come to.⁸⁹

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.⁹⁰

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.⁹¹ 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* 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".⁹²

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

Although 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, whilst so ever there is some logically probative material before the decision-maker evidencing a contrary view, a decision of the decision-maker preferring that contrary view, whilst it might be neither the preferable nor a sound decision, it would not necessarily be a manifestly unreasonable 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.

⁸⁷ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41–42; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36; *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31 at 42–43; *Friends of Hinchinbrook Society v Minister for Environment* (1997) 69 FCR 28 at 59–65; *Weal v Bathurst City Council* (2000) 111 LGERA 181 at 188; *R v Secretary State for the Home Department; Ex parte Hindley* [1998] QB 751 at 777; *First Secretary of State v Hammersmatch Properties Ltd* [2005] EWCA Civ 1360 at [32].

⁸⁸ *Parramatta City Council v Pestell* (1972) 128 CLR 305 at 323; *R v Secretary of State for the Home Department; Ex parte Brind* [1991] 1 AC 696 at 757–758, 764–765.

⁸⁹ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230.

⁹⁰ *ULV Pty Ltd v Scott* (1990) 19 NSWLR 190 at 204.

⁹¹ *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 400, 433 cited as an example by Kirby J in *Re Minister for Immigration and Ethnic Affairs; Ex parte applicant S20/2002* (2003) 77 ALJR 1165 at 1186 [129].

⁹² [1898] 2 QB 91 at 99.

Hence, a decision such as the one to approve the power station in *Greenpeace Australia Limited v Redbank Power Company Pty Ltd*,⁹³ notwithstanding the power station's greenhouse gas emissions, and without adequate conditions requiring complete offsetting by mandatory tree plantings⁹⁴, 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*⁹⁵ and *Mackay Conservation Group Inc v Mackay City Council*⁹⁶ could not be said necessarily to be manifestly unreasonable.

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.⁹⁷

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.⁹⁸

Many environmental statutes require environmental impact assessment of proposed developments or projects.⁹⁹ 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, including the principles of ecologically sustainable development.¹⁰⁰ Environmental impact assessments may also be required to address matters specified in a public official's environmental assessment requirements.¹⁰¹

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.

⁹³ (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.

⁹⁴ See Bonyhady T, "The new Australian climate law" in Bonyhady T and Christoff P, *Climate Law in Australia*, Federation Press, 2007, p 12.

⁹⁵ [2003] QPEC 22 (19 June 2003).

⁹⁶ [2006] QPELR 209 (28 September 2005).

⁹⁷ Preston above n 24 at 19.

⁹⁸ See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390 [93].

⁹⁹ Examples are the *Environmental Planning and Assessment Act 1979* (NSW) and *Environment Protection Biodiversity Conservation Act 1999* (Cth).

¹⁰⁰ See para 6, Sch 2, *Environmental Planning and Assessment Regulation 2000* (NSW).

¹⁰¹ Eg 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).

In *Minister for the Environment and Heritage v Queensland Conservation Council*¹⁰², a relevant impact of a controlled action under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) was broadly interpreted to mean the influence or effect of an action. The impact could readily include the indirect consequences of an action and might include the results of acts done by persons other than the principal actor.¹⁰³ Applied to the facts of that case, the relevant impacts of the proposed action of constructing the Nathan Dam on the Dawson River in Queensland could include the impacts of the use of the water impounded by the dam for growing and ginning cotton downstream of the dam.¹⁰⁴

In *Gray v Minister for Planning*¹⁰⁵, 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.¹⁰⁶

In four north American decisions, courts have held environmental impact assessments to be inadequate for failure to consider climate change impacts.

In *Border Power Plant Working Group v Department of Energy*,¹⁰⁷ 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.¹⁰⁸

In *Mid States Coalition for Progress v Surface Transportation Board*,¹⁰⁹ 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.¹¹⁰

In *Center for Biological Diversity v NHTSA*,¹¹¹ the environment impact assessment of making a rule setting 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.¹¹²

In *Pembina Institute for Appropriate Development v Attorney General of Canada*,¹¹³ 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

¹⁰² *Minister for the Environment and Heritage v Queensland Conservation Council Inc* (2004) 134 LGERA 272, Full Federal Court upholding *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463 (19 December 2003), Kiefel J.

¹⁰³ *Ibid* at 287 [53]-288 [55].

¹⁰⁴ *Ibid* at 288 [60]. See Fisher D E, "The meaning of impacts – The Nathan Dam Case on Appeal" (2004) 21 EPLJ, 325; McGrath C, "Key concepts of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)" (2005) 22 EPLJ 20 at 36; Sommer N, "Queensland Conservation Council Inc v Minister for the Environment and Heritage [2003] FCA 1463 ('Nathan Dam Case')" (2004) 9 AJNRLP 145.

¹⁰⁵ (2006) 152 LGERA 258.

¹⁰⁶ See also *Australian Conservation Foundation v Latrobe City Council* (2004) 140 LGERA 100 at 110.

¹⁰⁷ 260 F Supp 2d 997 (SD Cal 2003).

¹⁰⁸ *Ibid* at 1028-1029 [42], 1033.

¹⁰⁹ 345 F 3d 520 (8th Cir 2003).

¹¹⁰ *Ibid* at 549-550 [29].

¹¹¹ 508 F 3d 508 (9th Cir 2007).

¹¹² *Ibid* at 552 [20] – 558 [22].

¹¹³ 2008 FC 302 (5 March 2008).

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.¹¹⁴

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.

Merits review

Scope and purpose of merits review

A distinguishing feature of Australian administrative law has been the sharp distinction between judicial review and merits review and the vesting in different institutions of the different functions involved. At Commonwealth level, judicial review is undertaken by courts under Ch III of the Australian Constitution but merits review is undertaken by the Administrative Appeals Tribunal established under Ch II. This demarcation was considered necessary because of the separation of powers doctrine under the Constitution.¹¹⁵

At State level, there is no constitutional bar to vesting in the one court the different functions of judicial review and merits review. To varying degrees this has been done, especially in the field of planning and environmental law. The Land and Environment Court of New South Wales is the standout example of a court exercising both judicial review and merits review functions.

Whether the functions of judicial review and merits review are vested in one court or two, the scope and purpose of the functions remains fundamentally different. Judicial review, as noted earlier, is concerned with declaring and enforcing the law affecting the extent and exercise of administrative power. The review is of the legality, not the merits, of the exercise of power. Where the reviewing court finds material error, the court may set aside the exercise of power, but it does not substitute its own exercise of power. There is, in effect, a judicial remand to the repository of the power to re-exercise it according to law.¹¹⁶ In exercising the judicial review function, the court is exercising a truly supervisory jurisdiction.

Merits review, in contrast, involves a re-exercise of the power of the original decision-maker. It has been said that the reviewing court (or tribunal), metaphorically stands in the shoes of the original decision-maker.¹¹⁷ The shoe metaphor is a partly, but not wholly, correct description of the function.

It is true that the court, for the purposes of reviewing a decision, may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision.¹¹⁸ The court is not confined to the material that was before the original decision-maker but may receive and consider fresh evidence or evidence in addition to or in

¹¹⁴ Ibid at [73]-[75], [78], [79].

¹¹⁵ Cane P, "The making of Australian administrative law" (2003) 24 *Australian Bar Review* 114 at 123-124 and Cane above n 23 at 215, 219.

¹¹⁶ As noted by Cane above n 23 at 222-223, depending on the ground of review on which a decision is set aside, the scope left to the decision-maker may be limited. Review on grounds involving errors of law or manifest unreasonableness may leave the decision-maker no choice as to the decision to be made next time around.

¹¹⁷ *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139 at 143.

¹¹⁸ See, for example, s 43(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) and s 39(2) of the *Land and Environment Court Act 1979*.

substitution for the material that was before the original decision-maker.¹¹⁹ The decision of the court is substituted for the original decision-maker; it is deemed to be the final decision of the original decision-maker.¹²⁰ In these respects, the court is standing in the shoes of the original decision-maker.

However, there still remains a distinction between the court and the original decision-maker.

First, the court is not actually the decision-maker. To say that the court may exercise the powers and discretions of the original decision-maker is not the same as saying it *is* the decision-maker. In the development approval context, for example, the Land and Environment Court may exercise the power of a consent authority to determine a development application, but it is not a consent authority; only the original decision-makers (such as local councils or the Minister for Planning) are consent authorities.¹²¹

Secondly, the court is not within the executive; it remains external to the executive. External merits review differs from internal merits review. Internal merits review involves review by a person higher in the hierarchy of the executive than the original decision-maker. External merits review, however, involves review by a body external to, and independent, of the executive. As Cane notes:

“The shoe metaphor is appropriate to describe internal review, but not external review. The basic point of internal review is that the values, expertise, methods and procedures of the decision-making hierarchy in which it takes place should be brought to bear on the decision under review, but at a higher level in the hierarchy. By contrast, the point of external review is that the values, expertise, methods and procedures brought to bear in reviewing the decision should not be those of the decision-making hierarchy in which the decision was made, but those of the hierarchy in which it is being reviewed.”¹²²

Thirdly, the reviewer is a court (or a tribunal), a judicial (or quasi-judicial) adjudicative body. Whilst, when undertaking merits review, the court is exercising executive and not judicial functions, the manner in which it operates accords more with the judiciary than the executive. It occupies “an uneasy and ambiguous middle ground between the judicial and the executive branches of government”.¹²³

Fourthly, the means by which the decision comes before the court (or tribunal) is an “appeal”. The appeal is to be by way of “rehearing”.¹²⁴ Nevertheless, the focus is on a review of the decision at first instance. This sets parameters for the re-exercise of the power.

Decision is to be the correct or preferable one

The court in merits review determines what decision is “the correct or preferable one on the material before” the court.¹²⁵ Where the statute reposing the power, the exercise of which is under review, imposes limits on the exercise of the power, such as that the power is only enlivened if certain circumstances exist, or may only be exercised in a particular way if

¹¹⁹ See s 39(3) of the *Land and Environment Court Act 1979* and *Drake v Minister for Immigration and Ethnic Affairs (No 1)* (1979) 24 ALR 577 at 589.

¹²⁰ See s 39(5) of the *Land and Environment Court Act 1979*.

¹²¹ See definition of consent authority in s 4(1) of the *Environmental Planning and Assessment Act 1979*.

¹²² Cane above n 23 at 225.

¹²³ Cane above n 23 at 224.

¹²⁴ s 39(3) of the *Land and Environment Court Act 1979*.

¹²⁵ *Drake v Minister for Immigration and Ethnic Affairs (No 1)* (1979) 24 ALR 577 at 589.

certain circumstances exist, the court must determine whether the limits on the power are satisfied. There may be only one decision reasonably available on the evidence and that decision will therefore be the correct decision. Where there are a range of decisions reasonably open, all of which would be correct, the court chooses, on the evidence before it, what it considers to be the preferable decision.

Constraints on merits review

Merits review by a court operates within a constrained environment. First, fact-finding is performed in the context of the evidence on the appeal. The court in determining what is the correct or preferable decision can embark on fact-finding far more reaching than that which is permissible in judicial review. Judicial review is largely confined to reviewing findings of fact that are decisions in themselves.¹²⁶ The court in merits review can make jurisdictional and non-jurisdictional findings of fact and findings of fact that are not decisions in themselves. It can do so without being limited to the evidentiary material before the original decision-maker. It can also do so on what it considers are the preferable findings and inferences of fact to be drawn from the evidentiary material before it.

However, this fact-finding is done within the confines of the appeal the court is determining; it is not at large. It is also to be done on the evidence adduced in the appeal. The scope for the court to avail itself of its own knowledge is confined by the duty to act judicially, including to afford procedural fairness to the parties.¹²⁷

A recent example of this constraint on merits review is the *Xstrata* litigation. *Xstrata Coal Queensland Pty Ltd* and others had applied to the Land and Resources Tribunal of Queensland for the grant of an additional surface area for a coal mine. Conservation groups had objected to the application. They claimed the mine would have adverse environmental effects unless conditions were imposed to avoid, reduce or offset the greenhouse gas emissions that are likely to result from the mining, transport and use of the coal from the mine. The Tribunal made orders recommending to the Minister for Mines and Energy that *Xstrata's* application be granted in whole without any of the conditions sought by the objectors.¹²⁸

In doing so, the Tribunal took into account a critique it had found in its own research that put in issue the fact, accepted by all parties at the hearing, that anthropogenic greenhouse gas emissions contributed to global warming. Conservation groups appealed against the Tribunal's decision on the ground of a denial of natural justice. The Queensland Court of Appeal upheld their appeal, holding that the Tribunal did not make clear to the conservation groups that it intended to use the critique in the way it ultimately did and did not give them a fair opportunity to test or refute the critique by other information or submissions.¹²⁹

Other courts have similarly required courts or tribunals undertaking merits review to afford procedural fairness when dealing with evidentiary material.¹³⁰

Secondly, the court must make its decision within the confines of the legislative framework governing the exercise of the power. The statute reposing the power, the exercise of which

¹²⁶ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 340-341, 343.

¹²⁷ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589.

¹²⁸ *Re Xstrata Coal Queensland Pty Ltd* [2007] QLRT 33 (15 February 2007) at [24].

¹²⁹ *Queensland Conservation Council Inc v Xstrata Coal Queensland Pty Ltd* (2007) 155 LGERA 322 at 340 [56], 341 [58] and [59], 343 [68].

¹³⁰ See *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 165, 166 and *Francis v First Secretary of State and the London Borough of Greenwich* [2008] JPL 794; [2007] EWHC 2749 (Admin).

is under review, may set parameters governing its exercise. It may prescribe, expressly or by necessary implication from the subject matter, scope and purpose of the statute, the matters which must be considered in the exercise of the power, or the matters which must be ignored, or the purposes for which the power may be exercised or may not be exercised. In short, the court, in re-exercising the power, is subject to the same constraints to which the original decision-maker was subject.¹³¹

In the planning or environmental context, the legislation and subordinate instruments made thereunder, such as environmental planning instruments, operate to fix parameters within which any decision of the court must be made. Furthermore, there can be quasi-legislative policy documents which constrain the decision-maker. Whilst a decision-maker may not be bound to apply the terms of such quasi-legislative policy, the legislation may nevertheless require it to be considered in the exercise of the power.

Development control plans are examples of quasi-legislative policy documents which consent authorities are required to consider when determining development applications.¹³² Such development control plans have to be considered as fundamental elements in or focal points of the decision-making process.¹³³ This obligation rests equally on a consent authority as it does on a court undertaking merits review of the decision of a consent authority.¹³⁴

Thirdly, constraints may arise from general administrative policies adopted by the original decision-maker of relevance to the exercise of the discretionary power the subject of the merits review.

On one view, the court's duty to make the correct or preferable decision in each case on the material before it, and the independence of the court from the executive, affords it liberty to adopt whatever policy it chooses, or no policy at all, in fulfilling its statutory function. It is free to adopt reasoning entirely different from the reasoning which led to the making of the decision under review, or it can adopt that reasoning. Of course, it cannot adopt an unlawful policy or reasoning, for to do so would vitiate the court's consequential decision.¹³⁵

However, this liberty of a court undertaking merits review in relation to policy is not as unfettered as it appears. Other factors operate to confine it.

The first confining factor is that there ought to be consistency in decision-making. Promotion of consistency furthers justice. As Brennan J said in *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)*:

"Inconsistency is not merely inelegant: it brings the process of deciding into disrepute, suggesting an arbitrariness which is incompatible with commonly accepted notions of justice".¹³⁶

One of the ways in which decision-makers can promote consistency is by adoption and application of an administrative policy. The policy assists in structuring the exercise of open-textured, discretionary power.¹³⁷ Just as the original decision-maker in the executive may promote consistency by application of a policy in the exercise of the discretionary power

¹³¹ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589.

¹³² See s 79C(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979*.

¹³³ *Zhang v Canterbury City Council* (2001) 115 LGERA 373 at 387 [75]. See also *Stockland Development Pty Ltd v Manly Council* (2004) 136 LGERA 254 at 271 [86]-272 [87].

¹³⁴ *North Sydney Council v Ligon 302 Pty Ltd* (1995) 87 LGERA 435 at 442-443.

¹³⁵ *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 642-643.

¹³⁶ *Ibid* at 639.

¹³⁷ *Ibid* at 642 and Galligan DJ, "The Nature and Function of Policies within Discretionary Power" (1976) *Public Law* 332.

(although not a blind application of the policy without regard to the individual circumstances of the particular case¹³⁸), so too a court undertaking merits review of such a decision can promote consistency by also applying the same policy. Promotion of consistency with other decisions in comparable cases is one of the factors that may be considered by the court in arriving at the preferable decision in a particular case.¹³⁹

It must be remembered that the decisions of the original decision-maker in the executive and the decisions of the court undertaking merits review which are decreed by statute to be the final decision of the original decision-maker, together form the corpus of decisions on the exercise of the relevant power. In all instances, the decisions of the court undertaking merits review form a tiny fraction of the corpus of decisions involving the exercise of the power.¹⁴⁰ In New South Wales, for example, only just under 1% of all decisions determining development applications under the *Environmental Planning and Assessment Act 1979* ever are appealed to the Land and Environment Court. There are sound policy reasons for promoting consistency and, conversely, for preventing inconsistency, between decisions of the court and decisions of the executive. The decisions which are reviewed by the court should not reveal different standards and values from those which are not reviewed.¹⁴¹

A second confining factor is that the court undertaking merits review is concerned to do individual justice in the particular case under review. The rationale for merits review is founded in notions of natural justice. The rights, liberties and obligations of citizens should not be unduly dependent on administrative decisions which are not subject to review on the merits. The court is, therefore, concerned to balance generality and consistency against specificity and individual justice. Cane summarises the point in this way, referring to merits review by the Administrative Appeals Tribunal (AAT) but his comments are equally applicable to other courts or tribunals undertaking merits review:

“The general point is this: fair administrative decision-making requires a balance to be struck between generality and consistency on the one hand, and specificity and individualisation on the other. Rules, principles and guidelines facilitate consistency; and the power to depart from such rules, principles or guidelines, and to apply them flexibly, facilitates individualised justice. This is recognised by the Federal Court in *Drake (No 1)*, and in what I have identified as the *ratio* of *Drake (No 2)*. Some of the more unguarded statements of Brennan J in *Drake (No 2)* should be read in the light of this general truth. The Tribunal’s legal obligation is to make decisions that balance the requirements of consistency and individual justice. It follows that the only ground on which it is legally entitled to refuse to apply a lawful quasi-legislative rule, which the original decision-maker applied is that the application of the rule would cause injustice to the individual. It also follows that the only ground on which the Tribunal is legally entitled to “adopt” a quasi-legislative rule of its own making is that this is necessary in the interests of consistency or individual justice. These propositions are implications of the fact that the AAT is a review body, not an original decision-maker. There is a fundamental difference between standing in the decision-maker’s shoes and being the decision-maker. In performing its functions, the Tribunal should be

¹³⁸ See *R v Port of London Authority; Ex parte Kynoch Ltd* [1919] 1 KB 176 at 184 and *British Oxygen Co Ltd v Minister for Technology* [1971] AC 610 at 625 and *Sagnata Investments Ltd v Norwich Corporation* [1971] 2 QB 614 at 626-627 and ss 5(2)(f) and 6(2)(f) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

¹³⁹ *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 643. See also *North Wiltshire District Council v Secretary of State for the Environment and Clover* (1992) 65 P & CR 137 at 145; [1992] JPL 955 at 959; *R (on the application of Chisnell) v London Borough of Richmond upon Thames and Dillon* [2005] EWHC 134 at [18]-[20]; *Dunster Properties Ltd v First Secretary of State* [2007] JPL 1464; [2007] EWCA Civ 236 at [12]-[13] and *Oxford City Council v Secretary of State for Communities and Local Government and One Folly Bridge Ltd* [2007] EWHC 769 (Admin) at [28], [30]. However, a subsequent decision-maker is not obliged to ensure consistency with prior decisions: *Segal v Waverley Council* (2005) 64 NSWLR 177 at 192 [56].

¹⁴⁰ *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 644-645.

¹⁴¹ *Ibid* at 645.

careful not to encroach further into the rule-making province of the executive and the legislature than is necessary to do justice to the individual before it. And it should avoid political controversy as much as possible.”¹⁴²

A third confining factor is the inability and inappropriateness of a court formulating general administrative policy. The formulation of general administrative policy is the function of the executive. It involves the weighing of competing standards and values. It involves legislative rule-making, that is making rules without reference to an individual case. It involves knowledge and skills that the court, hearing only a particular appeal, does not possess. Again, Cane succinctly summarises this point:

“There is a third important strand of reasoning in *Drake (No 2)*. It utilises the distinction, well recognised in United States administrative law, between “legislative” rule-making and rule-making by adjudication. The former involves making rules without reference to any individual case, whereas the latter involves generalising from an individual case. The common law is a rule-system generated entirely by adjudication; and as a result, common law rules are, in an important sense, always provisional. When an adjudicative body is faced with a dispute over the application of a “legislative” rule, it may generate a rule to deal with the dispute; and this adjudicative rule will modify the operation of the “legislative” rule. A fundamental aspect of constitutional doctrines, such as responsible government and the separation of powers, is that “legislative” rule-making falls within the province of the legislative and executive branches of government and not within the province of adjudicative institutions of government in their capacity as such. The AAT is an adjudicative institution.”¹⁴³

It is, therefore, desirable and beneficial for the court undertaking merits review ordinarily to apply any general administrative policy that the original decision-maker has adopted. The weight to be accorded to the policy depends on a number of factors. In a planning context, McClellan CJ in *Stockland Developments Pty Ltd v Manly Council*¹⁴⁴, summarised these factors as follows:

“[92] To my mind, the matters which are relevant when determining the weight to be given to a planning policy adopted by a council are as follows:

- the extent, if any, of research and public consultation undertaken when creating the policy;
- the time during which the policy has been in force and the extent of any review of its effectiveness;
- the extent to which the policy has been departed from in prior decisions;
- the compatibility of the policy with the objectives and provisions of relevant environmental planning instruments and development control plans;
- the compatibility of the policy with other policies adopted by a council or by any other relevant government agency;

¹⁴² Cane above n 23 at 236-237.

¹⁴³ Cane above n 23 at 237.

¹⁴⁴ *Stockland Developments Pty Ltd v Manly Council* (2004) 136 LGERA 254.

- whether the policy contains any significant flaws when assessed against conventional planning outcomes accepted as appropriate for the site or area affected by it.”¹⁴⁵

Merits review of decisions involving issues of climate change

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.

Thus, in *Charles & Howard Pty Ltd v Redland Shire Council*¹⁴⁶, 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...”¹⁴⁷

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.¹⁴⁸

Similarly, in *Northcape Properties Pty Ltd v District Council of Yorke Peninsula*¹⁴⁹, 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 frontage¹⁵⁰ and of an erosion buffer¹⁵¹ 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

¹⁴⁵ Ibid at 273 [92].

¹⁴⁶ *Charles & Howard Pty Ltd v Redland Shire Council* [2007] QCA 200 (15 June 2007).

¹⁴⁷ Ibid at [26].

¹⁴⁸ Ibid at [28].

¹⁴⁹ *Northcape Properties Pty Ltd v District Council of Yorke Peninsula* [2008] SASC 57 (4 March 2008).

¹⁵⁰ Ibid at 3[12].

¹⁵¹ Principle 31 – Principles of Development Control for Coastal Development, ibid at 6[13].

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:

“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”.¹⁵²

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”.¹⁵³

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.¹⁵⁴ 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.¹⁵⁵ 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*¹⁵⁶, 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.¹⁵⁷

In 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.

Thus, in *Daikyo (North Queensland) Pty Ltd v Cairns City Council*,¹⁵⁸ the Planning and Environment Court of Queensland upheld a condition imposed by the Council, and declined

¹⁵² Objective 2 of the Yorke Peninsula Development Plan – Coastal Development, *ibid* at 4[13].

¹⁵³ *Ibid* at 5[13].

¹⁵⁴ *Ibid* at 8[19]-9[20].

¹⁵⁵ *Ibid* at 9[20] and 11[27]-[28]. The case is also cited with approval (although in obiter dicta) in *Tamarix Poultry Farm Pty Ltd v Casey CC* [2008] VCAT 668 (21 April 2008) at [37].

¹⁵⁶ *Van Haandel v Byron Shire Council* [2006] NSWLEC 394 (21 June 2006).

¹⁵⁷ *Ibid* at [23], [25], [28], [29].

¹⁵⁸ *Daikyo (North Queensland) Pty Ltd v Cairns City Council* [2003] QPEC 22 (19 June 2003).

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:

"[22] 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].

[23] 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.

[24] ...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."¹⁵⁹

In a subsequent case, *Mackay Conservation Group Inc v Mackay City Council*,¹⁶⁰ 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 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".¹⁶¹

These cases highlight the critical role the executive plays in establishing policies that ensure, first, that proposed developments prevent or mitigate impacts on climate change and, secondly, the taking into account the impacts climate change might have on proposed developments, and then in revising such policies as the science and knowledge about

¹⁵⁹ Ibid at [22]-[24].

¹⁶⁰ *Mackay Conservation Group Inc v Mackay City Council* [2006] QPELR 209 (28 September 2005).

¹⁶¹ Ibid at [67].

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 earlier discussed.

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.¹⁶² 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.¹⁶³

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 appeals¹⁶⁴ and tree dispute principles in tree applications.¹⁶⁵

The Court describes a planning principle to be:

“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.”¹⁶⁶

The Court has developed 42 planning principles to date,¹⁶⁷ including two relating to ecologically sustainable development.¹⁶⁸ Tree dispute principles are similar in nature to

¹⁶² Creyke R, “The special place of tribunals in the system of justice: How can tribunals make a difference?” (2004) 15 PLR 220 at 234.

¹⁶³ *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 640.

¹⁶⁴ Against decisions under the *Environmental Planning and Assessment Act 1979* (NSW).

¹⁶⁵ Under the *Trees (Disputes Between Neighbours) Act 2006* (NSW).

¹⁶⁶ Land and Environment Court of New South Wales, *Annual Review 2007*, p 22 and see the Court's website at www.lawlink.nsw.gov.au/lawlink/lec/ll lec.nsf/pages/LEC_planningprinciples. For a discussion of the Land and Environment Court's planning principles, see Williams P, “The Land and Environment Court's Planning Principles: Relationship with planning theory and practice” (2005) 22 EPLJ 401 at Ireland, C, “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 Scharf D, “Not Just Individual Merits” [2006] JPL 939.

planning principles but are more specific in addressing aspects of tree disputes under the *Trees (Disputes Between Neighbours) Act 2006*.¹⁶⁹

There is, therefore, a capacity for courts undertaking merits review of decisions raising issues concerning climate change to extrapolate principles from the cases, which principles 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 and Ors*,¹⁷⁰ 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 of climate change,¹⁷¹ 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:

- [46] 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.
- [47] 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.
- [48] 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..”

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.

¹⁶⁷ See the list of planning principles on the Court's website at

www.lawlink.nsw.gov.au/lawlink/lec/ll_ Lec.nsf/pages/LEC_planningprinciples.

¹⁶⁸ Ecologically sustainable development generally in *BGP Properties Pty Ltd v Lake Macquarie City Council* (2004) 138 LGERA 237; [2004] NSWLEC 399 and ecologically sustainable development and the precautionary principle in *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 146 LGERA 10; [2006] NSWLEC 133

¹⁶⁹ See the Court's website at www.lawlink.nsw.gov.au/lawlink/lec/ll_ Lec.nsf/pages/LEC_tree_dispute_principles.

¹⁷⁰ [2008] VCAT 1545 (29 July 2008).

¹⁷¹ *Ibid* at [35].

In *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd*,¹⁷² 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.¹⁷³ The Court noted that increasing the supply of renewable energy involved promoting sustainable development, including intergenerational equity.¹⁷⁴ On balance, the Court concluded that “the overall public benefits outweigh any private disbenefits either to the Taralga community or specific landowners”.¹⁷⁵

In a similar case, *Perry and others v Hepburn Shire Council and others*,¹⁷⁶ 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”.¹⁷⁷

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 the challenges. The extent to which and the manner by 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 within 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.

¹⁷² [2007] NSWLEC 59 (12 February 2007).

¹⁷³ *Ibid* at [3].

¹⁷⁴ *Ibid* at [73] and [74].

¹⁷⁵ *Ibid* at [352].

¹⁷⁶ (2007) 154 LGERA 182.

¹⁷⁷ *Ibid* at 189 [27].