AN IN DEPTH LOOK AT FOUR RECENT CLIMATE CHANGE LITIGATION CASES

Introduction

Upon being asked to write about climate change law, the *obiter* remarks of Basten JA doubting the concept of a "planning matter" as a legal criterion in *Randall v Willoughby City Council* [2005] NSWCA 205 came to mind. Climate change law is similarly not a reference to a separate jurisprudential stream in our law, but to a collection of decided cases and legislation drawing on many areas of the law sharing climate change as a common subject matter.

It is nonetheless worthwhile to consider the recent application of legal principle to a subject that has gained such prominence in the national and global consciousness. That consideration reveals the flexibility and adaptability of the common law method to the extra-legal context presented to the Courts by society and science; and in the case of climate change, by the environment.

As Oliver Wendell Holmes Jr commented in "*The Path of the Law*" (Harvard Law Review, Vol 10, 1897 pp.457-68), "[w]e do not realize how large a part of our law is open to reconsideration upon and slight change in the habit of the public mind" and "The fallacy to which I refer is the notion that the only force at work in the development of the law is logic". The path of the law is not logic but experience.

The point was further isolated by HLA Hart in "*The Concept of Law*" (Oxford University Press, 1961, p199): "The law … shows a thousand points the influence of both the accepted social morality and wider moral ideals. These influences enter into law either abruptly and avowedly through legislation, or silently and piecemeal through the judicial process."

This paper considers four recent Australian cases. They all concern different areas of legal discourse and principle, but all concern the topic of climate change.

The scientific and social context

The environmental need to manage GHG emissions which contribute to global warming is regarded as a matter of scientific fact, and of pre-eminent social and political concern. To an extent, at the present time, it is a matter of judicial notice or common knowledge as well as expert evidence. There are of course debates within the relevant areas of science, which are resolved on a case-by-case basis using the judicial method of the common law. The cases I discuss below demonstrate the application of this method. In this sense, of course, the area of "climate change law" is not unique, in a jurisprudential sense, from any other area of the law, notwithstanding its preeminent social and environmental importance.

Public Policy

Legislative public policy influences the path of the common law. The recently enacted *Climate Change (Net Zero Future) Act 2023* (NSW), (**Climate Change Act**) emphatically records the current policy of the legislature in NSW, and s.3 of that Act provides *inter alia* that its purpose is to give effect to the international commitment established through the 2015 Paris Agreement to hold the increase in the global average temperature to well below 2°C pre-industrial levels and pursue efforts to limit the temperate increase to 1.5° above those levels. Section 3(2) records that the Parliament of NSW recognises there is a scientific consensus that human activity is causing abnormal changes to climate and action is urgently required to reduce greenhouse and to address the impacts of climate change.

The Act contains a usefully broad definition of "climate change":

> "Means a change of climate that is directly or indirectly attributable to human activity that alters the composition of the atmosphere and in addition to natural climate variability over comparable time periods."

The enactment of this legislation may encourage the development of judge-made law recognising the increasing significance of climate change and measures to address (or seek to address) it. Given the emphatic nature of its object and purpose

to promote and implement the Paris Agreement, this legislation could be seen as an example of Parliament choosing to encourage or provide directional impetus to the development of the common law : see the discussion at pp.124-125 “The gravitational pull of statutes” in Common Law, Equity and Statute – A complex Entangled System, Leeming M, The Federation Press, 2023.

Four recent cases

Case one: *Bushfire Survivors for Climate Action Inc. v Environment Protection Authority* [2021] NSWLEC 92

These proceedings were judicial review proceedings seeking orders in the nature of *mandamus* for breach of a public statutory duty. They were brought by a climate action group which sought to compel the NSW environmental regulatory agency, the Environment Protection Authority (EPA), to perform a statutory duty to develop environmental quality objectives, guidelines and policies to ensure the protection of the environment from climate change. The duty was imposed by s9(1)(a) of the *Protection of the Environment Administration Act 1991* (NSW) (**POEA**) which required the EPA to develop environmental quality objectives, guidelines and policies to ensure environment protection. The applicant contended that the duty had specific content, namely not only developing instruments to ensure protection of the environment from climate change, but to do so in ways that are consistent with limiting global temperate rise to 1.5 degrees Celsius above pre-industrial levels. The applicant sought an order compelling the EPA to perform its duty to develop environmental quality objectives.

The EPA defended the action and contended that the duty under s.9(1)(a) was to develop environmental quality objectives to protect the environment generally, not specifically concerning climate change. It also contended that it had developed instruments to regulate greenhouse gas emissions and a regulatory strategy identifying climate change as a regulatory challenge for the EPA, which satisfied any duty.

The policy nub of the argument in this case is set out (as addressed by the applicant) at [11]:

> "…having regard to the gravity of the threat posed by climate change, with the EPA being charged to ensure environmental protection there is no evident or intelligible justification for the EPA not having developed a policy addressing climate change and its causes and consequences."

Justice Preston, CJ of the NSW Land and Environment Court (**LEC**), found that the duty under s9(1)(a) of the POEA Act to develop environmental quality objectives, guidelines and policies to ensure environment protection in current circumstances includes a duty to develop instruments of the kind described to ensure the protection of the environment in NSW from climate change, although the Court found that the public duty did not require the further specific context contended for such as limiting global temperature rise to 1.5°C above pre-industrial levels.

With the more recent enactment of the Climate Change Act, there would now be an additional argument available supporting an order extending to that context given the new (s7) of the Climate Change Act, which expressly provides that it prevails over other Acts and laws and identifies this as a specific public policy. The argument now available to the Applicant would be that it would be relevantly unreasonable given this legislative policy, for the required policies or instruments **not** to extend to the achievement of this specific temperature rise objective.

Preston CJ of LEC found that none of the instruments or policies relied on by the EPA were in fact directed to ensuring the protection of the environment from climate change. Accordingly, the Court made an order in the nature of *mandamus*, ordering the EPA to develop environmental quality objectives, guidelines and policies to ensure the protection of the environment from climate change ([18]).

In this case there was expert evidence as to the threat posed by human-induced climate change to the environment of NSW. There is a tenable argument that such expert evidence (in cases argued and decided from now on) will not be necessary to demonstrate this fact. This is because of the legislative statement of this fact in the *Climate Change Act* earlier referred to, which, although not expressed as a deeming provision, may reasonably be construed to have that effect. Secondly, this fact has become so notorious such that it is reasonably arguable to be a matter which may be the subject of judicial notice.

No doubt despite these two readily available arguments, it will be prudent for parties asserting such facts to adduce expert opinion as well. The Court concluded that based on the expert evidence before it, the emission of greenhouse gases is a grave

threat to the atmosphere and climate systems. The Court found the duty imposed on the EPA by s9(1)(a) was to be construed as ambulatory or always speaking and that the evidence before it established that:

> "…at the current time and in the place of New South Wales, the threat to the environment of climate change is of sufficiently great magnitude and sufficiently great impact as to be one against which the environment needs to be protected." ([69])

The evidence in this case (given by a Professor Sackett) reasoned that human-induced climate change was a fundamental, global (greenhouse gases emitted anywhere in the world affect the whole globe), comprehensively dangerous and rapid threat to the environment of New South Wales. A suite of agreed facts were agreed between the parties, including:

> "Climate change cannot meaningfully be addressed without multiple local actions to mitigate emissions by sources and remove greenhouse gas emissions by sinks "

Preston CJ of LEC found that as a matter of statutory construction (at [96]) the duty under s.9(1)(a) of the POEA Act to develop environmental quality objectives, guidelines and policies to ensure environment protection did not require instruments addressing climate change at the level of specificity asserted by the applicant. That is, the instrument must be directed towards reducing direct and indirect greenhouse gas emissions consistent with limiting global temperature rise to 1.5°C above pre-industrial levels ([96]). This was because the duty to prepare the documents left an area of discretion allowing for policy choices to be made in formulating the regulatory approaches and local actions that should be pursued to protect the environment from climate change ([97]).

In the result ([144]), the Court issued an order in the nature of *mandamus* to compel the EPA to discharge its duty under s9(1)(a) and relied on longstanding authority as precedent for this course in *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 504. This case is a demonstration of the application of established common law principle and method to the climate change problem.

Case Two: *Bushfire Survivors for Climate Action Inc. v Narrabri Coal Operations P/L* [2023] NSWLEC 69

In this case, the applicant group challenged the grant of development consent to the Narrabri Coal Mine Extension.

A declaration was sought that the decision to grant the consent was invalid as it was legally unreasonable. The claim concerned alleged impacts of the project on climate change. Her Honour Justice Duggan, sitting in the LEC, properly accepted a uncontroversial that the global climate was changing due to global warming, and that it is greenhouse gases emitted by human activities that are directing climate change. The decision to grant consent was made by the Independent Planning Commission of NSW (IPC). The argument in the case referenced the Paris Agreement and its objective of holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels.

The applicant relied on the unchallenged evidence of its expert as to the adverse impact of climate change in NSW, Australia and the world. Reference was made to a 2021 special report by the International Energy Authority specifically designed for the global energy sector as a roadmap for achieving a net zero pathway by 2050, which identified that no new coal mines or mine extensions can be approved for development.

There was no reference in the judgment to any evidence being adduced as to the extent of coal mine approvals and coal mining currently in other parts of the world. The key tenets of the unreasonableness argument against the IPC were:

(a) It asked itself the wrong question. Rather than assessing the impacts of the Extension Project on climate change, it asked who was best placed to regulate and account for GHG under international carbon accounting.

(b) It did not address Scope 3 emissions (that is, arising from the mined coal being burned wherever that occurred).

(c) It did not consider the tangible environmental impacts of the Extension Project to anthropogenic climate change and as a result, unreasonably concluded that the project was in the public interest.

The principles of unreasonableness which were applied were those in *Minister v Li* (2013) 249 CLR 332, and *ABT I7 v Minister for Immigration and Border Protection* (2020) 269 CLR 439, and the principle that unreasonableness review extends not only to why a decision is made, but how, and an avoidance of legal unreasonableness requires both an "intelligible justification" and a decision reached through an "intelligible decision-making process". The applicant contended that IPC's decision was unreasonable for not making a swathe of interim findings about the gravity of climate change impacts on NSW, Australia and the world, including:

> "The primary reason why current global policies place the world on track for about 3°C of warming is that fossil fuel production is not being curtailed fast enough."

The respondents emphasised that the test for legal unreasonableness was stringent and that a court's task on judicial review was not to assess what it thinks is reasonable and thereby conclude that any other view displays error. There was a central deficiency the Court found in the applicant's case which was the absence of any case where it was found that a decision was unreasonable based on a failure to make a series of specific findings of fact as the applicant alleged should be made in the case before her Honour.

Further, the Court observed that it was not unreasonable for the IPC not to make findings of fact in accordance with the applicant's expert's evidence as many of the opinions given intertwined both fact and policy. The following passage is important:

> "[The] international approach, endorsed by Australian governments, assumes that for many years yet there will be continued emission of

> GHGs, including as a result of consumption of substantial fossil fuels. No doubt many people including the Applicant would prefer a different policy response, involving a balance between social, economic and environmental considerations, such as a steeper path to peak global emissions, or even an immediate cessation of the consumption of fossil fuels. Some may also prefer a structurally different policy response in terms of restricting the local production of fossil fuels, presumably with a view to exerting some indirect influence on the rate of consumption in other countries…"

However, the Court noted that these were not part of the framework of the Paris Agreement which did not control the mining of products that might lead to emissions.

Neither logic nor reasonableness required the IPC to make the series of detailed findings contended for by the applicant. The Court found that the IPC did not ask the wrong question in relation to Scope 3 emissions as it observed these were more appropriately regulated and accounted for via national policies and the Paris Agreement. The Court rejected the proposition that the IPC was obliged to find that the Extension Project itself would push the global warming situation beyond 2°C of warming. The Court found, ultimately, that it had not been legally unreasonable to approve the project. The Court rejected the proposition that only one finding (refusal) was open on the public interest, reasoning that the consideration of the public interest involved weighing environmental, social and economic considerations. The weighing up of these competing factors was a matter for the discretion of the IPC.

Secondly, given the multi-faceted concept of Environmentally Sustainable Development (ESD) in the *Environmental Planning & Assessment Act* 1979 (NSW) , in assessing the merits of the proposed development, which involved a consideration of the effective integration of social, economic and environmental considerations; the need to consider ESD, did not dictate the refusal of the project. Rather, the Court found that to approve it after consideration of ESD principles, was not legally unreasonable.

In relation to the ultimate decision, the Court further found that the decision did not demonstrate that the weight given in the balancing exercise was disproportionate such that it could warrant a finding of legal unreasonableness. As with case one,

this judgment exemplifies the orthodox application of accepted common law principle to a judicial review case the subject matter of which concerned climate change.

Case Three: *Sharma by her Litigation Representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560

The applicants (a group of children, represented by a litigation representative in the litigation) in this case brought an action in the tort of negligence seeking a declaration that a duty of care is owed by the Minister in relation to an extension of the Vickery coal mine, which required approval under the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth). The facts were that if the extension were approved, an additional 33 million tonnes of coal would be extracted from Vickery's coal mine which would (assuming no equivalent emissions from coal from other sources of the extension were not approved) cause an additional 100 million tonnes of CO_2 equivalent to be emitted into the atmosphere when the coal was burned.

The Minister accepted that increases in temperature affect the environment, and that such a climate exacerbates and creates risk in relation to heatwaves, droughts, bushfires, floods and tropical cyclones.

The expert evidence before the Court was that 100 million tonnes of CO_2 equivalent attributable to the burning of coal from the project (if not offset) would likely cause a "tiny but measurable" increase to global average surface temperature.

Justice Bromberg observed that the law of negligence focuses on the foreseeability of future harm and the relationship between the person who caused the harm and the person who may be harmed. The Court found that on the evidence before it a reasonable person in the position of the Minister would foresee that, by reason of the extension project's effect on increased CO_2 in the global atmosphere and the consequential increase in global surface temperature, each of the children would be exposed to increased global surface temperatures.

There was consideration of whether coherence in the law tended against the recognition of a duty of care as cutting across the broad statutory discretion conferred on the Minister under the EPBC Act.

Both parties accepted that the development of the law of negligence when it on occasion recognised a novel duty of care proceeded by way of analogy with existing duties recognised in past decided cases.

The concept of coherence was found to be a policy consideration of the common law to assist in the development and application of the common law, primarily with respect to its interaction with statute law, but not exclusively so. Where Parliament was already in a field of law, coherence-based reasoning was driven by the need to avoid joint occupation of the field that would undermine or contradict the statute law.

The Court found that far from creating incoherence, the proposed duty of care would act comfortably with the statutory scheme of the EPBC Act, being focused as it was on the avoidance of harm to the environment and human safety. The Minister's contention that the asserted duty of care was incoherent with administrative law principles was rejected.

In conclusion, the Court found that consideration of the Minister's control, the vulnerability of the children and the concept of reliance favoured recognising the proposed duty of care, as did reasonable foreseeability. The following passage expresses the core of Bromberg J's reasoning and decision:

> "[491] That conclusion is confirmed when re-examined through the lens of the neighbourhood principle and the criteria of reasonableness fundamental to the law of negligence. By reference to contemporary social conditions and consumer standards, a reasonable Minister for the Environment ought to have the Children in contemplation when facilitating the emission of 100M+ of CO_2 into the Earth's atmosphere. It follows that the applicants have established that the Minister has a duty to take reasonable care to avoid causing personal injury to the Children when deciding under ss.130 and 133 of the EPBC Act to approve or not approve the extension project."

The Court acknowledged that the existence of such a duty of care did not require or mandate refusal of approval for the extension project, as a nuanced response of granting approval with conditions was potentially available.

The *quia timet* injunction (to restrain an apprehended breach of the law) sought by the applicants was refused as it was to be anticipated that although an approval was just as likely as a non-approval, the Minister would take the duty of care into account in making any decision under the EPBC Act. The injunction was unnecessary in these circumstances.

This decision is another example, in the context of a different area of law than the first two judicial review cases, of the common law method and its principles – the tortious duty of care and neighbourhood principle in this case being applied in a conventional manner, but to the subject matter of a dispute concerning climate change.

The recognition of the duty of care was overturned on appeal: *Minister for Environment v Sharma* [2022] FCAFC 35 (Allsop CJ, Beach and Wheelahan JJ). The Full Court summarised their decision on appeal as follows:

> "… the Minister's appeal against the imposition of a duty of care in the terms articulated and against the conclusion that human safety was an implied mandatory statutory consideration should be upheld. The latter implication cannot be derived from the EPBC Act. The primary judge's conclusions in this respect were not sought to be supported by the respondents. The imposition of the duty should be rejected. First, the posited duty throws up for consideration at the point of breach matters that are core policy questions unsuitable in their nature and character for judicial determination. Secondly, the posited duty is inconsistent and incoherent with the EPBC Act. Thirdly, considerations of indeterminacy, lack of special vulnerability and of control, taken together in the context of the EPBC Act and the nature of the governmental policy considerations necessarily arising at the point of assessing breach make the relationship inappropriate for the imposition of the duty. These conclusions reflect differences of view that I have with the evaluative judgments of the primary judge in a field of contention, the imposition of a duty of care in novel circumstances, that is not without difficulty. The primary judge considered and dealt with the arguments of the respondents and the Minister in a careful, thorough and clear body of reasons.

Case Four: *Environment Council of Central Queensland Inc. v Minister for the Environment and Water (No 2)* [2023] FCA 1208

In this case, Justice McElwaine considered an application for judicial review of a ministerial decision to confirm, rather than revoke, a controlled action decision under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EBPC Act). The applicant alleged that the Minister had misdirected herself, and "engaged in impermissible probability reasoning" and misunderstood or failed to apply the precautionary principle.

The proceedings concerned decisions of the Federal Minister under s75 of the EPBC Act that proposed action by two coalmining companies was a controlled action and that the provisions of ss18 and 18A (concerning threatened species and communities) and ss24D and 24E (concerning impacts on water resource in relation to coal seam gas development and large coal mining developments) were the controlling provisions.

Under s78A, the applicant sought reconsideration, revocation and substitution of the decisions. The applicant provided the Minister with detailed submissions and documentation about the effect of greenhouse gas emissions as a contributor to climate change. There was no dispute from the Minister as to the proposition that the extraction and burning of coal has contributed to climate change with severe adverse consequences for the global climate, and nor did the Minister dispute that many Matters of National Environmental Significance have been or will be affected by climate change and its effects.

The Minister accepted that climate change has affected or will affect world heritage values of declared World Heritage properties, the National Heritage values of National Heritage places, the ecological character of declared Ramsar wetlands, listed threatened species in the critically endangered, endangered and vulnerable categories, listed threatened ecological communities in the critically endangered and endangered categories, listed threatened species and listed threatened ecological communities, listed migratory species, the environment in Commonwealth marine areas and the environment in the Great Barrier Reef Marine Park.

The Minister also accepted the linear relationship between human CO_2 equivalent emissions and increases in global temperature such that every tonne of CO_2 equivalent emissions adds to global warming and that to limit human-induced global warming, reductions in the production of CO_2 emissions and other greenhouse gas emissions are required.

As McElwaine J observed:

> "In no sense therefore is this a case about denial of climate science or the existential threat posed by climate change. Rather, it is about whether it was legally open to the Minister, having accepted these matters to not revoke [a] controlled action decision and to substitute new decisions pursuant to s.78C, by specifying a greater number of controlling provisions."

The review grounds in the judicial review application were not made out and the proceedings were dismissed. McElwaine J found it was legally open to the Minister to weigh and assess the applicant's material and submissions with an awareness of the potentially catastrophic effects of climate change on matters of national environmental significance, and that the Minister, in discharging that heavy responsibility, was not obliged to reason in the particular manner contended for by the applicant.

There were two proceedings before McElwaine J which became the subject of this one judgment. One concerned Narrabri Coal Operations and a proposed extension to the underground mining operations. This proposal or project was also the subject of Duggan J's decision in *Bushfire Survivors for Climate Action Inc. v Narrabri Coal Operations Pty Ltd* [2023] NSWLEC 69.

The second set of proceedings the subject of this judgment concerned another proposal to increase the open cut extraction area of an existing coal mine at Mount Pleasant, Bengalla in New South Wales to emit extraction of up to 21 million tonnes per annum and extend the life of the mine to 22 December 2048.

In each case, the Minister had determined that the action was a controlled action under the EPBC Act.

In each case, the Minister was not satisfied that the relevant proposed action would cause any net increase in greenhouse gas emissions. Alternatively, she was satisfied that even if this was so, the likely increase in global greenhouse gas emissions would be very small, with the result that she could not conclude that the proposed action will be a substantial cause of adverse impacts on the world heritage values of declared World Heritage properties.

The requests were made pursuant to s78A by the applicant in relation to these decision were that they be revoked and replaced with new controlled action decisions because very many matters of national environmental significance had been impacted and were likely to be impacted by climate change, and that in each case the proposed action is a substantial cause of the adverse effects of climate change on matters of national environmental significance. If that was accepted, each proposed action would require a far more detailed assessment than required by the original controlled action decisions.

Hence, the key issue in the case was whether these coal mining activities (which term I use to refer to the two projects) would have, in themselves, an impact in terms of causing a net increase in global greenhouse gas emissions or be a substantial cause of adverse impacts on matters of national environmental significance.

The Minister accepted departmental advice that the physical effects of climate change on the world heritage values of World Heritage properties are, if anything, indirect consequences of the proposed action and that they were events or circumstances removed in time and distance from the taking of the action, which is the extraction of coal. The Minister considered the indirect impact requirement in s527E and determined that the proposed actions were not a substantial cause of the stated physical effects of climate change on world heritage values of declared World Heritage properties for two reasons:

> "(a) The information does not demonstrate that the proposed action will cause any net increase in global GHG emissions and global average temperature (and so, any physical effects of climate change on world heritage values of declared World Heritage properties). I considered that whether this will happen is subject to multiple variables; and
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> (b) Even if that were demonstrated, any contribution from the proposed action to global GHG emissions would be very small. It is therefore not possible to say that the proposed action will be a substantial cause of the physical effects of climate change on world heritage values of declared World Heritage properties."

The Minister's counterfactual reasoning in support of the Minister's net increase conclusion is worthwhile referencing in detail. It turned on the proposition that the likely contribution of the proposed action towards the net increase in global greenhouse gas emissions and average temperature was "subject to a number of variables". The Minister identified the variables (see [69] of the Judgment) as:

(1) Whether generated emissions will be offset, mitigated or abated by the implementations of policies or regulations in other countries in which the prospective buyers would operate (at [109]).

(2) Those certain countries where it is anticipated that coal from the proposed action will be combusted (namely Japan, South Korea, Malaysia, Vietnam and Australia) each have nationally determined contributions under the Paris Agreement to reduce emissions and to adapt to the impacts of climate change. Taiwan, whilst not a member of the United Nations, has committed to net zero emissions by 2050.

(3) The level of greenhouse gas emissions will likely be subject to emissions reduction policies of consuming corporations. By way of example, power corporations in Japan have committed to being carbon neutral by 2050.

(4) If the proposed action does not proceed, there will not necessarily be an effect on the total global level of greenhouse gas emissions because of a range of other factors, "including the level of emissions from sources other than the proposed action".

(5) The identified factors make it very difficult to estimate the likely net increase in global GHG emissions from the proposed action, and by extension, the extension of any net increase in global average temperature and the extent to which the world heritage values of World Heritage properties will be impacted by the physical effects of climate change.

(6) It is likely that if the proposed action does not proceed, prospective buyers will purchase an equivalent amount of coal from a supplier other than the proponent with the consequence that an equivalent amount of greenhouse gas emissions will likely be emitted.

(7) If the proposed action does not proceed, then it is reasonable to assume that the market would respond by increasing the supply for alternative sources.

(8) It is open to consider substitution reasoning, despite the submissions of the applicant, that in light of the new information received, whether the proposed action is a substantial cause of the events or circumstances which are likely to impact on the world heritage values of the declared World Heritage properties.

It was the Court's consideration of whether, in effect, this reasoning was reasonably open which was the nub of the case.

McElwaine J rejected the applicant's submission that it was not open to the Minister to reason in this way and rejected the further submission that the Minister was required to reason differently and prescriptively, as contended by the applicant.

The Judge noted that the primary difficulty for the applicant's claim was that there was no express requirement in the legislation compelling the Minister to reason in any particular way in order to be satisfied that the revocation and substitution of a controlled action decision is warranted by the availability of substantial new information about the impacts of the proposed action. Rather, the statutory scheme requires the Minister to undertake a factual enquiry; the limits of which are determined by the relevance of considerations particular to the proposed action and

the event or circumstance that is taken to be an indirect consequence if the action is a substantial cause of that event or circumstance.

McElwaine J referred to the decision of Gleeson CJ in *NEAT Domestic Trading Pty Ltd v AWB Ltd* [2003] HCA 35; 216 CLR 277 at [20], namely, that the question is what, if anything, the Act requires or permits or forbids the Minister from taking into account.

McElwaine J found that the implication which the applicant's argument requires (i.e. excluding substitution reasoning) cannot be reconciled with the express text of the Act, and there is nothing in the statutory context or purpose that supports it. Parliament did not intend to prescribe how the Minister was to undertake the relevant assessment.

McElwaine J noted that the Minister was satisfied that the effects of climate change on a global scale were of such a magnitude that the matters of national environmental significance were adversely affected, however, the Minister found it was very difficult to estimate the likely net increase in global greenhouse gas emissions from the proposed action and the extent to which the emissions may increase global average temperature, and hence the extent of likely impact on the world heritage values of World Heritage properties. Accordingly, the Minister was not satisfied that the proposed action was a substantial cause.

It was accepted that consideration of the environmental impacts of a proposal necessarily required the consideration of counterfactuals to assess the impacts of the action if it proceeds. This is because the relevant impact must be the difference between the position if the action occurs and the position if it does not, notwithstanding the express reference to this mode of reasoning in the Act.

The applicant argued that the Minister had to be satisfied that there was no real possibility of the project constituting a substantial cause of the relevant impact, whereas the language of the statute used the term "likely". The issue here turned on interpreting the adjective "likely" by placing on it one or more of the applicant's variations of the statutory language, which distracted from a relatively straightforward

factual inquiry. The Court found that the Minister was not restricted to proceeding by considering only scenarios based on the assumption that the action will be taken.

The Minister was aware that the need to assess the likelihood that any net increase in greenhouse gas emissions from the proposed action and the likelihood that if the proposed action did not proceed, prospective buyers will acquire an equivalent amount of coal from other sources. The Minister was not satisfied that the proposed action was likely to result in a net increase in greenhouse gas emissions or affect the extent to which world heritage values of World Heritage properties will be impacted.

One ground of review alleged a failure to consider the precautionary principle. As the Court noted, there were two limbs to the principle. The Minister was satisfied as to the first, namely, that there was a risk of serious or irreversible harm arising from climate change. The applicant's argument was that the Minister misapplied the second and failed to take the principle into account or on the likely impact question when deciding whether to substitute the controlled action decision. The applicant said it was putting the cart before the horse by reaching conclusions about likely impacts before deploying the precautionary principle.

The Court noted that the precautionary principle had recently been authoritatively considered in the case of *Gelorup Corridor Inc. v Minister for the Environment and Water (No 2)* [2022] FCA 1554. In this decision, the Court accepted the statement of the precautionary principle of Preston CJ of the LEC in *Telstra Corporation Ltd v Hornsby Shire Council* [2006] NSWLEC 133; 67 NSWLR 256 as authoritative.

In the present case, the Minister also reasoned consistently with the approach in *Gelorup,* that her decision was not concerned with postponing a measure to prevent environmental degradation. The applicant argued that the Minister had failed to apply the second limb as an evidentiary rule in her evidential fact-finding as to whether the proposed action would be a substantial cause of likely adverse impacts on matters of national environmental significance. It was submitted that the concept of "likely" had to be construed conformably with the precautionary principle.

However, McElwaine J reasoned that the Minister had considered the precautionary principle, in the required sense. The Minister accepted that scientific certainty about the extent of future impacts from anthropogenic sources of greenhouse gas emissions leading to climate change existed. But the Minister was then not satisfied that the proposed action was likely to result in a net increase of emissions or affect the extent to which values of declared world heritage properties will be impacted.

The Minister's reasons expressly had regard to the precautionary principle as a decision-making rule. This was consistent with the nature of the precautionary principle as articulated by the joint judgment in *Gelorup* noting that the precautionary principle was not a mandatory consideration to be brought to bear in deciding what is the correct or preferable decision.

The Minister did not decide to revoke the controlled action because of the precautionary principle as she was not satisfied the emissions would be likely to cause relevant impacts on matters of national environmental significance.

It was argued that the precautionary principle had not been applied to the concept of likelihood in effect as a distinct step in the Minister's reasoning. However, as explained in *Gelorup* (at [93]), the principle did not require a distinct identifiable step in the reasoning involving consideration of whether the principle applies. McElwaine J concluded that the Minister had acted consistently with s391 which required the precautionary principle to be taken into account to the extent that it could be done consistently with the other provisions of the Act.

The Court then considered the challenge based on legal unreasonableness and was careful to identify that descent into merits review needed to be avoided. In substance, the submission of the applicant appeared to be as follows:

> "The Minister's reasoning was irrational because it made a probabilistic finding as to the future with the mine and future without the mine, whereas there was only a spectrum of really possible futures in which the action is taken, and the spectrum of really possible futures in which the action is not taken with no way of rationally determining which scenario on either spectrum is more or less likely to occur than any other."

The Court rejected this ground of challenge on the basis that it misunderstood the Minister's reasoning process which involved an acceptance in accordance with departmental advice that there were a range of factors including the level of emissions from other sources that affect the total level of CO_2 in the atmosphere and that variables make it very difficult to estimate the likely net increase in global greenhouse gas emissions from the proposed action because, if the proposed action does not proceed, prospective purchasers will acquire equivalent amounts of coal from other sources, and therefore it could not be concluded that the proposed action is likely to result in a net increase.

The Court reasoned that this ground was an invitation to engage in a detailed factual analysis of the merits of the Minister's reasoning and conclusions and was an argument that the Minister adopted a reasoning pathway of which the applicant strongly disapproved.

However, this was not a basis for concluding that the Minister's reasoning was illogical or irrational, and indeed the evidence as to coal market substitution that was before the Minister and the advice of her department indicated there was a rational basis for the Minister's findings and it was not the case that only one conclusion, which was not the Minister's conclusion, was open or reasonably open. A critical step in McElwaine J's conclusion on this unreasonableness ground may be set out as follows:

> "144. The Minister's no net increase reasons are intelligible and explained. They are not lacking in common sense, particularly once it is accepted that the statutory scheme, as I have explained, did not require the Minister to reason in a particular way but did require her to undertake an evaluative assessment to reach the state of satisfaction required by s.78(1)(a).
>
> 145. Fifthly, the Minister did not engage in the probability reasoning that the applicant criticises. What is clear from the reasons at [113] and [117] is that the Minister was not satisfied on the material that the proposed action is likely to contribute to a net increase in total global greenhouse gas emissions or affect the values of the declared World Heritage properties because there

> are many variables, including but not limited to those identified at [109]-[116]."

The Court observed that the applicant failed to demonstrate why the Minister's reasoning by reference to the international market for coal resulting in coal market substitution for any amount not mined if the mine extensions were not approved was lacking in evident or intelligible justification.

Finally, the challenge to the Minister's reasoning on grounds of unreasonableness failed. The applicant alleged that the Minister had misapplied the concept of significance by reasoning that the net increase in global greenhouse gas emissions and global average temperatures, without market substitution, was approximately 0.00024°C, which was "very small" and would not be a substantial cause of the identified physical effects of climate change. Such a conclusion was reasonably open to the Minister and revealed no error in misunderstanding the substantial cause requirement in s527E. The Minister did not in her reasons equate that substantial cause requirement with large or numerical significance.

This judgment, also, exhibits the power of the common law judicial method, the grounds being addressed in the context of established common law principle.

Conclusion

The selection of recent jurisprudence in climate change law that I have discussed in this paper reveals the robustness and flexibility of the common law judicial method and the existing principles of that body of law as a vehicle for practical outcomes reflecting the scientific and community recognition of climate change as an urgent environmental issue of paramount importance. These overarching legal principles do not entail that every legal challenge brought on climate change grounds is either upheld or dismissed, but rather provide for a principled decision-making process which is appropriately responsive to, but not overborne or uprooted by, the public

policy concerns of the climate change problem. This is consistent with the essence of the common law and its abiding methodology.

Clifford Ireland
13 Wentworth Chambers

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