JAPANESE AND AUSTRALIAN ENVIRONMENTAL LAW – SOME POINTS OF COMPARISON[1]

Introduction

1. This paper outlines some differences and similarities between Australian and Japanese environmental law. Environmental law is the body of law aiming to protect the environment. The comparative law method allows techniques from one legal system directed to addressing common environmental problems to be identified and consideration given to applying them in the other system: Marjan Peeters, *Elgar Encyclopaedia of Comparative Law*, 20.

Australian Environmental Law

2. Modern Australian environmental law relies heavily on statutory enactment within the common law system. Common law torts, in particular the tort of private nuisance, are also important in regulating the use of land and addressing excessive or unreasonable environmental impacts, although the capacity of such private law causes of action to grant relief based on a holistic assessment of environmental problems is routinely questioned by commentators: Lyster et al, *Environmental & Planning Law in New South Wales*, Federation Press, 2.

3. Statutory enactments in the area of environmental law in the Australian system are, as is generally the case with traditional statutory enactments in common law systems, quite specific and rule based rather than instruments containing statements of general principle: Common Law, Equity and Statute, A Complex Entangled System, Leeming, 11.

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[1] Clifford Ireland, Barrister, 13 Wentworth Chambers, Phillip St, Sydney. Paper delivered to CPE Conference, 20 February 2026, Niseko, Japan.

4. The principal Commonwealth environmental legislation is the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**). The EPBC Act relies on the determination by the Federal Minister for the Environment under s75 of the EPBC Act that certain actions (generally development projects) are controlled actions which affect a number of identified matters of national environmental significance (**NES**) such as threatened species and communities, water resources or Commonwealth areas.

The Japanese Legal System

5. Since the adoption of the new Japanese Constitution in 1946, the Courts were given jurisdiction over administrative cases in a similar way to the United States common law system. The judicial power of Japan under the constitution exists entirely in the Supreme Court and the lower courts established by the Constitution, however, there are administrative commissions including the Environmental Dispute Coordination Commission that operate beneath the Courts. They are similar to agencies or self-regulating bodies in the United States. Decisions of the Environmental Dispute Coordination Commission are the subject of judicial review. The Constitution provides the Supreme Court may determine the constitutionality of any law, ordinance or administrative decision (Article 81). Similar to the common law system, judicial review is only available in Japan when it is necessary to render judgment on a specific case: page 55, Oda, *Japanese Law*.

6. Japan operates pursuant to a civil law system notwithstanding the post-World War 2 reforms introducing certain principles drawn from the United States common law system. Originally, the statute on judicial matters of 1872 was strongly influenced by French law and the 1889 Constitution by Prussian civil law: page 53, Oda, *Japanese Law*. A feature of the civil law system, in contrast with the common law, is that the Courts often expressly accept the views of law professors: page 52, Oda, *Japanese Law*. Local regulations made by a local government are significant in relation to Japanese environmental law. Local authorities may enact regulations on matters listed in the law on local self-administration, including protection of the environment: page 50, Oda,

Japanese Law. There is thus a significant element of decentralisation in political and legal power in Japan that has particularly come to the fore since the second world war.

7. The status of court judgments as a source of law in Japan is open to debate. There is no express provision in the law providing for the status of judicial precedent in Japan, and the Constitution does not refer to court judgments. The prevailing view is that court judgments are sources of law, but in a supplementary and subsidiary way. There is no doctrine of *stare decisis* or precedent in Japanese law, however, lower courts occasionally defer to precedents of the Supreme Court: page 43, Oda, *Japanese Law*. There is a *de facto* rule of precedent as lower courts do not wish their judgments to be overturned by the Supreme Court. There is no distinction between *ratio decidendi* and *obiter dicta* as there is in the common law system of precedent: page 44, Oda, *Japanese Law*. Paradoxically, it follows that this may have the result that general expressions or guidelines given by the Supreme Court are often treated in practice as having a level of *de facto* precedential value by later courts that would not be the case with similar general judicial statements in common law systems, which would be distinguished.

8. The supreme and only law-making body of the State is the legislature called the Diet (Article 41, Constitution).

9. Japanese law is primarily based on codified laws, and unlike in the common law system, statutory law plays the primary or prevailing role: page 27, Oda, *Japanese Law*. However, in relation to an area such as environmental law, the distinction between the relative importance of statute as distinct from case law is less so than in other areas, e.g. tort law or criminal law.

10. The Constitution expressly guarantees due process of law and provides that no person is to be deprived of life, liberty or subject to the imposition of criminal penalty except in accordance with procedure established by law (Article 31). This is interpreted by the Japanese courts as covering substantive as well as procedural due process: page 26, Oda, *Japanese Law*.

Common Principles

11. It is generally recognised that there are various common principles of environmental law that are commonly adopted by legal systems globally as part of systems of domestic law. The precautionary principle, affording procedural rights to participate to the public, and the resolution of contested questions of environmental impact by scientific evidence or analysis: Peeters, *ibid*, 21.

12. There are two limbs to the precautionary principle. The first requires identification of a risk of serious or irreversible harm arising from the environmental impact or issue in question. The second is that scientific uncertainty as to that risk is not to be used as a reason for postponing measures to address that environmental impact: see *Gelorup Corridor Inc. v Minister for the Environment and Water (No 2)* [2022] FCA 1554, accepting the statement of the precautionary principle of Preston CJ of LEC in *Telstra Corporation Ltd v Hornsby Shire Council* [2006] NSWLEC 133; 67 NSWLR 256.

13. There are several significant international treaties or conference declarations on the environment that inform both Japanese and Australian environmental law.

14. These are the 1972 Stockholm Declaration, the 1987 Brundtland Report (establishing the concept of sustainable development), the 1992 Rio Declaration which adopted the United Nations Framework Convention on Climate Change, and the Convention on Biodiversity, and 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. Japan and Australia are both Annex I parties to the Kyoto Protocol and the later Paris Agreement and have introduced domestic GHG reduction policies.

15. The EPBC Act (Cth) protects matters of National Environmental Significance, and requires the Minister to consider the principles of ecologically sustainable development: s136(2). Matters of National Environmental Significance (**NES**) include World Heritage Properties, Ramsar Wetlands, listed migratory species etc. An action (such as a development project) may be listed as a controlled action by the Minister due to its impact on these NES matters There is no "climate change trigger".

16. Japan has a system of environmental impact assessment (**EIA**) that allows the assessment of the likely effects of proposed activities or projects on the environment. This was enacted in 1997: Chapter 3, *Handbook of Japan's Environmental Law, Policy and Politics*, Hiroshi Ohta.

17. EIA involves the evaluation of the likely effects of a proposed activity or project on the environment.

18. During the 1960s there was severe environmental pollution in Japan: page 38, *Handbook of Japan's Environmental Law, Policy and Politics*, Ohta. In 1972 the Cabinet agreed that when the central government or governmental organisations intended to implement public works, they should assess environmental matters. In the 1970s individual laws dealing with certain kinds of EIA emerged. Since the mid-1970s the Environment Agency has made efforts to establishing EIA at a national level and the Environment Impact Assessment Implementation Outline was introduced by a Cabinet decision rather than law.

19. In the mid-1990s EIA was conducted under individual laws, individual guidelines and ministries, local EIA ordinances and guidelines, in addition to the Cabinet Outline. In 1993 there was enacted the *Basic Act on the Environment* (Act No 91 of 1993 as amended by Act No 36 of 2021), also called the Basic Environmental Law, which provided impetus for the establishment of a national EIA law, and finally, the *Environmental Impact Assessment Act* was enacted in 1997 and entered into force in 1999. The EIAA has been central to the EIA system in Japan: page 39, *Handbook of Japan's Environmental Law,*

Policy and Politics, Ohta. The object of the Act is to ensure that there is EIA for projects that are large-scale and likely to have a serious impact on the environment and that due consideration is given to environmental protection to contribute to the healthy and cultured living of the people, both at present and in the future.

20. EIA is defined as meaning "conducting survey, forecast and evaluation" of the likely effects of the environment caused by the implementation of a project with regard to each of the items concerning components of the environment. A project is defined as a series of changes in the shape of the land and new construction, extension and reconstruction of structures conducted for a specific purpose: Article 2(1). The likely effects on the environment to be considered due to the implementation of a project include not only those caused by the project implementation, but also those caused by the activities on the land or constructions after that if they were within the purposes of the project.

21. The proponent must select the terms of the EIA and the methods of survey, forecast and evaluation concerning the project in accordance with the relevant guidelines, having regard to submissions made by the public or government in relation to the project.

22. A proponent of a target project who issued a public notice of an EIA must prepare a report at a certain time after the project commenced on the following measures undertaken in the project implementation: namely, certain environmental protection measures whose effects are uncertain, the survey to comprehend the environmental conditions after the project commencement and the environmental protection measures in response to the survey results. It must send the report to the competent authority and make it public.

23. The EIAA is regarded as a strong act, but with specific limitations. The types and scale of projects covered are limited, compared to, for example, those under the EUEIA directive which include projects in a broad range of industries. Additionally, the EIA procedures only apply to large-scale projects under the EIAA, and as a result, not many projects have undergone the procedures of the

EIAA. The scope of evaluation of projects in EIAs is typically limited. The role the EIA has in affecting the decision of competent authorities in relation to projects is also uncertain as it merely requires due consideration to environmental protection to be given, whereas a competent authority has a broad discretion in reviewing the results of the EIA.

24. Ohta criticises Japanese environmental law for not having a broad law requiring strategic environmental assessment (**SEA**), for example, of environmental policies. In this, Japan's legal system is similar to Australia's. Australia does not have such a national law either. Neither are there State laws that in general deal with this matter of strategic environmental assessment.

25. Japan's EIA law in the EIAA reflects the United Nations Environmental Program goals and principles of EIA (1997) and the 1992 Rio Declaration on the Environment and Development, and also, as with Australian EIA law, the longstanding influence of the *National Environmental Policy Act* of the United States enacted by Congress in 1969. A nationwide EIA law was not passed in Japan until 1997, although prior to this there had been such requirements applying at a local level for a long period of time.

26. A series of environment plans have been adopted in Japan since 1994, with the fourth environment plan adopted on 27 April 2012 representing a significant revision of energy policy and climate change policy consequential upon the Great East Japan Earthquake of 11 March 2011. The plan included the objectives of pursuing a sustainable society that achieves a low carbon society, a sound material-cycle society in harmony with nature, while ensuring security and safety, promotion of actions at a local level, strengthening strategic policy measures to appropriately respond to the current international situation, and also implemented policy measures for recovery and decontamination of radioactive materials consequential upon the earthquake, tsunami and nuclear power accident: Nakanishi, *Contemporary Issues in Environmental Law*, The EU and Japan, Vol 5, Springer, 2016 at 9.

Recent significant environmental law cases – Australia

27. There has been much recent litigation in Australia under the EPBC Act, particularly concerning the topic of climate change. Two recent cases concerning this topic are referenced here.

28. An example of judicial review litigation challenging a decision of the Minister that a proposed extension of underground coal mining operations and an open-cut extraction area were controlled actions but did not have the result of harm or significant harm being caused to matters of national environmental significance is *Environment Council of Central Queensland Inc. v Minister for the Environment and Water (No 2)* [2023] FCA 1208.

29. The Minister in relation to each of these controlled actions was not satisfied that the relevant proposed action would cause any net increase in greenhouse gas emissions, or alternatively was satisfied that even if this is was so, the likely increase in global greenhouse gas emissions would be very small such that the proposed action would not be a substantial cause of adverse impacts on the world heritage values of declared world heritage properties.

30. One aspect of the Minister's decision which was found to be not unreasonable by McElwaine J of the Federal Court of Australia was that even though coal would be produced and combusted as a result of the proposed development, countries including Japan to which it was exported each had nationally determined contributions under the Paris Agreement to reduce emissions and to adapt to the impacts of climate change. McElwaine J concluded that the Minister in not revoking the controlled action decision was not contrary to the requirement under s391 of the EPBC Act that the precautionary principle be considered. The Court reasoned that the applicant had failed to demonstrate that 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 evidence or intelligible justification.

31. A judicial review challenged based on the grounds of unreasonableness was rejected and the Court accepted that the Minister had not misapplied the concept of significance by reasoning that the net increase in global greenhouse gas emissions in global average temperatures without market substitution due to the projects was approximately 0.00024°C which was "very small" and would not be a substantial cause of any identified physical effects that climate change may have.

32. Another recent decision concerning the EPBC Act was that of *Minister for the Environment v Sharma* [2022] FCAFC 35 (Allsop CJ, Beech and Wheelahan JJ) which upheld an appeal against a decision of Bromberg J in the Federal Court which had identified a duty of care in negligence owed to a group of young persons by the Minister in deciding whether or not to approve a coal mining project. That decision on appeal hinged upon the application of the principles for the identification of a novel duty of care in the common law tort of negligence providing example in the common law system of the intimate relationship between statutory enactment and common law principle and method, in the area of environmental law.

33. In *Denman Aberdeen Muswellbrook Scone Healthy Environment Group v MACH Energy Australia* [2025] NSWCA 163, the NSW Court of Appeal upheld an administrative law challenge in relation to a decision of the Independent Planning Commission extending the life of the Mt Pleasant Coal Mine in the Hunter Valley by around 22 years. It was held that the IPC was required to take into account the "likely impacts of the [mine extension], including environmental impacts on both the natural and built environments, and social and economic impacts in the locality" under the EP & A Act (s4.15), which required it to consider the causal connection between the [mine extension] and its impacts on the environment in the locality. There was nothing in the IPC's reasons to indicate that having accepted that the Scope 3 emissions would contribute to global climate change, went on to consider the impact of climate

change on the locality. While the absence of reference to a matter will not necessarily mean that the matter was not considered, the combination of the statement that the effects of climate change will still be "felt globally" and the absence of reference to the impact of this on the locality specifically is a powerful indicator that the Commission did not consider the impact of climate change on the locality. There is a pending application to the High Court of Australia in relation to this decision, special leave to appeal having been granted.

Recent significant environmental law cases - Japan

34. All the climate change cases in Japan are focused on attempting to stop construction of coal fired power plants using arguments founded on what are termed personal rights and the right to a peaceful life[2]. Japan is one of the world's five largest emitters of CO_2 and as in Australia, the country largely depends on coal for electric power generation. Around Forty-six percent of Australia's electricity generation comes from coal. Around 30% is the figure for Japan. The share of coal as a source of electricity generation has increased by around 5% post Fukashima. Fossil fuel dependency (considering gas, and oil, as well as coal) for electricity generation is significantly greater than in Australia having risen from around 81% pre-Fukashima in 2010 to 85.5% in 2018[3]. The equivalent Australian figure is around 60%.

35. Japan has declared its intention to reduce its GHG emissions by 46% from 2013 levels by 2030 and to achieve net zero by 2050[4]. Australia also has a net zero emissions target for 2050 pursuant to the *Climate Change Act* 2022 (Cth).

36. The first climate change case in Japan was brought by citizens in Sendai in north east Japan seeking an injunction restraining the operation of a newly established coal fired power plant, the Sendai Power Station. The plant started

[2] Nishikawa, *Japanese Climate Litigation and the Development of Personal Rights,* Chinese Journal of Environmental Law 7 (2023) 214-226, 14 December 2023.
[3] Nishikawa, *ibid*, 217.
[4] *Ibidem*.

operation in 2017. The challenge was based on tort law claims based on personal rights to life, health, and bodily integrity, the right to a peaceful life and the right to biodiversity. Ultimately the grounds based on GHG emissions and a right to biodiversity were withdrawn as the District Court stated that the right to biodiversity was not an established right. Ultimately, the claim based on air pollution and the alleged requirement to consider GHG emissions was rejected by the Sendai District Court and the Sendai High Court[5].

37. In the *Yokosuka Climate Case*, the plaintiffs had commenced legal proceedings against the Japanese Minister of Economy, Trade and Industry seeking the cancellation of the notice of finalisation of the environmental impact assessment for the construction of two new coal-fired generating units in the Yokosuka Power Plant. This was an administrative law claim rather than a tort law claim. The plaintiffs alleged that the operator improperly exploited a streamlined assessment process for replacements or upgrades that the Japanese government created after the Fukushima nuclear accident.

38. On 23 October 2024 the Supreme Court upheld the judgment of the Tokyo High Court, stating that it did not find grounds for a final appeal under Article 312 of the Code of Civil Procedure. No specific reasons were given.

39. The decision of the Tokyo High Court on 22 February 2024 dismissed the plaintiffs' (citizens) appeals from the earlier decision of the District Court dismissing the challenge. However, the Court acknowledged the danger of climate change as a matter of fact, citing the IPCC's 5th Assessment Report and IPCC Special Report on the Impacts of Global Warming 1.5°C. In relation to the standing of the plaintiffs, the Court concluded that the regulations governing CO_2 emissions did not include the intent to protect individual interests of each person and stated that "the interest to not suffer damage caused by global warming due to CO_2 cannot be legally protected as concrete individual interests that are not absorbed by general public interests" and that as a result

[5] Ibid at 218; see also the website of the Sabin Center for Climate Change Law; http://climatecasechart.com/non-us-case/sendai-citizens-v-sendai-power-station/.

the power plant was not considered to particularly increase the threat of damage in relation to a specific range of individuals. Concerning the fact that carbon dioxide had not been selected as a consideration factor at the planning phase, the Court reasoned that:

> "The annual emissions of CO_2 from the operation of the new power plant (approximately 7.26 million tonnes of CO_2/year) are only about one-five thousandth of the global CO_2 emissions in 2015 and about 0.64% of Japan's total CO_2 emissions in 2006. The CO_2 emitted by the thermal power plant does not itself directly affect the environment. It may cause climate change on a global scale in combination with emissions from other sources to materialise natural disasters resulting in various types of damage, but it was difficult to conclude that the CO_2 emissions from the new power plant along would significantly increase the scale or frequency of damage caused by disasters due to global warming."

40. The Court noted that the Environmental Impact Assessment Guideline for Power Plants stated that CO_2 is not an item that was expected to have a significant environmental impact in a typical project. Consequently, the Court found that it was not contrary to law not to assess CO_2 as a consideration factor at the planning stage.[6]

41. In an earlier decision also being an administrative law case filed in Kobe in 2018 being *Citizens' Committee on the Kobe Coal-Fired Power Plant v Japan*, the plaintiffs were found not to have standing because their interest in not suffering damage from climate change was not considered to be an individual interest protected by law. The challenge was based on traditional tort claims based on personal rights to life, health, and bodily integrity as well as novel grounds being the right to a peaceful life and right to a stable climate[7].

42. At the time of writing there were two pending climate cases in Japan, namely, *Youth Climate Change Case Japan for Tomorrow* and *Citizens' Committee on*

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[6] See for the translated discussion of this judgment the Columbia Law School web page wwo.climatecasechart.com

[7] *Ibid*, 219.

the Kobe Coal-Fired Power Plan v Kobe Steel Ltd et al filed in 2024 and 2018 respectively.

43. The latter is an appeal judgment in relation to the *Kobe* case. The case was heard before the Osaka High Court in October 2024.

44. The other pending case brought by 16 young Japanese people *Youth Climate Case Japan for Tomorrow* against ten thermal power companies claiming a violation of Articles 709 and 719 of the Civil Code, relying on the scientific grounds for climate change and risks it poses in relation to the worsening of extreme weather events and the contribution to health problems has similarities to the *Sharma* litigation Australia and the Dutch case *Milieudefensie et al v Royal Dutch Shell PLC*[8].

45. In the *Kobe* civil case in April 2024 the Osaka High Court dismissed the plaintiffs' appeal. In relation to the plaintiffs' claim for an injunction based on personal rights in the context of climate change (being the right to live in a healthy and safe life in a world without temperature increase and more than 1.5°C), the Court acknowledged that the effects of climate change on life and health are not merely a matter of concern, however, it held that the relationship is indirect and abstract and that such legal interests cannot be incorporated into moral rights because there is no concrete harm which could justify restricting the actions of others. In relation to causation, the Court denied the legal causation between climate harm claimed by the appellants and emissions from the defendant's plants because of the weakness and uncertainty in attributing liability to injure their social and economic activities. The case is currently

[8] This case was a class action in which the plaintiffs claimed that a failure by Shell to reduce its Scope 1, 2 and 3 emissions by 25-45% before 2030 was an unlawful act towards them. The Hague Court of Appeals on 12 November 2024 overturned the District Court's decision which had identified a duty to the plaintiffs based on a multifactorial assessment of circumstances such as the proposition that climate change affected and threatened the human rights in Articles 6 and 17 of the International Covenant on Civil and Political Rights, and held that Shell had no social standard of care to reduce its emissions by 45% or any other amount while recognising a duty to limit emissions to counter "dangerous climate change": *Gerectshof Den Haag, Royal Dutch Shell Plc v Milieudefensie and Ors*, Judgment of the Court of Appeal, 12 November 2024.

before the Nagoya District Court. There is a sixth court date scheduled for 20 April 2026.

The Concept of Personal Rights in Japanese Law

46. The concept of personal rights are derived from article 11[9] and 13[10] of the Constitution and protect various rights and interests including life, bodily integrity, health, freedom, reputation and privacy, and personal rights have been recognised in a variety of environmental law cases. Nagoya District Court recognised personal rights as a legal basis for tort claims related to air pollution while rejecting claims based on the right to environment. While the right to environment has been claimed in several cases, based on Articles 13 and 25[11] of the Constitution, it has not been accepted by the judiciary. This is why recent climate change cases in Japan base their claims on traditional personal rights and also the right to a peaceful life.[12]

Standing

47. An important topic in any system of environmental law is that of standing. There is open standing under much Australian environmental legislation, such as the NSW *Environmental Planning and Assessment Act* 1979 (but not under the EPBC Act (Cth)). At common law, *South East Forest Rescue Inc v Forestry Corporation of New South Wales (No 2)* [2024] NSWCA 113 at [34][13] reasoned

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[9] Article 11 provides "The people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights."
[10] Article 13 provides "All of the people shall be respected as individuals. Their right to life, liberty , and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs."
[11] Article 25 provides "(1) All people shall have the right to maintain the minimum standard of wholesome and cultured living; (2) In all spheres of life, the State shall use its endeavours to promote and extend social welfare and security, and to ensure public health."
[12] Nishikawa, *ibid*, at 221-222.
[13] In *Forestry Corporation of New South Wales v South East Forest Rescue Incorporated* [2025] HCA 15 (2025) 99 ALJR 794, appeal dismissed, the High Court accepted this statement of principle as correct in observing as follows (omitting citations):

> 8 In Boyce v Paddington Borough Council Buckley J held that, without a relator proceeding, a person could bring proceedings regarding an interference with a public

that “[t]he test now accepted as identifying the criterion for a person to commence proceedings in accordance with the general law is variously described as the existence of ‘special damage’, a ‘special interest’ or a ‘sufficient interest’.” Lodgement of such a submission provides standing to apply for judicial review of a decision to quash it for error of law: *R v Liquor Commission (NT); Ex parte Pitjantjatjara Council Inc* (1984) 31 NTR 13.

48. In Japan, the law relating to standing appears significantly more restrictive in its application to environmental challenges to Governmental decisions. There is no general open standing to seek administrative review of governmental decisions impacting the environment. Breaches of EIA requirements generally come before the Courts in Japan in cases concerning to challenges to permit revocation decisions, and the EIAA law provides that in such cases, a person who has a legal interest has standing in such cases: Article 9, para 1. In 2004, paragraph 2 of Article 9 was amended to add an expanded definition of legal interest, but there is no clearcut pathway for environmental groups of concerned members of the public to join or commence such litigation (Nakanishi (Ed), *Contemporary Issues in Environmental Law*, at 57), unlike in Australian law.

49. Generally, the courts in Japan have taken the position that issues related to climate change are considered matters of public interest and cannot be claimed by individuals[14]. For example, in the *Citizens Committee on the Kobe Coal-Fired Power Plant v Japan*, the Osaka District Court and Osaka High Court ruled that the citizens did not have standing.

50. The environment is also generally regarded by the Japanese courts as common property, not owned by anyone and which therefore cannot be protected by anyone[15]. The plaintiffs in the Kobe civil case argued that because of the

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right or to enforce a public duty where either their private rights are interfered with ("the first limb") or they suffer some special damage peculiar to themselves ("the second limb"). Through a series of cases this Court has reformulated the second limb of that test so that it is satisfied where the person has a "special", "sufficient" or "real" interest in the subject matter of the proceedings such as to warrant the grant of the relief sought.

[14] Nishikawa, *ibid*, at 220.

[15] In US, UK and Australian environmental law this has generally been a concern, labelled the “Tragedy of the Commons” (after Hardin, G who coined this term for the issue in this context in 1968

environment being common property, anyone should be able to obtain relief protecting it[16].

Key Legislation – Climate Change

51. The Japanese *Climate Change Adaptation Act* of 2018 had as its object to "promote climate change adaptation through establishing necessary measures such as formulating plans for climate change adaptation, providing information on the climate change impact and climate change adaptation and promoting heat illness countermeasures, thereby contributing to the health and cultural life of the people both at present and in the future, considering the impact that global warming (meaning global warming as stipulated in Article 2, paragraph (1) of the Act on Promotion of Global Warming Countermeasures (Act No. 117 of 1998)) and other climate changes (referred to below as "climate change") has on daily life, society, economy, and the natural environment, and the risk that this impact will increase over a long term".

52. This reflects the position taken by the World Health Organisation (**WHO**), which has stated (WHO 2018)):

> Overall, climate change is projected to have substantial adverse impacts on future mortality, even considering only a subset of the expected health effects, under optimistic scenarios of future socioeconomic development and with adaptation.

53. The Japanese *Act on Promotion of Global Warming Countermeasures* provided in its Article 1:

> "In view of the fact that global warming could have a serious impact on the environment of the entire planet, and that it is a challenge common

in his article of the same name in *Science*) that has been a factor providing impetus to the liberalisation of standing for environmental causes and groups.

[16] *Ibidem*, 222.

to humankind to prevent global warming by stabilizing greenhouse gas concentrations in the atmosphere at levels that do not constitute dangerous anthropogenic interference to climate systems, and that it is important for all human beings to autonomously and actively address this challenge, the purpose of this Act is to promote global warming countermeasures by formulating a Plan for Global Warming Countermeasures and taking measures to promote the reduction, etc. of the amount of greenhouse gas emissions arising from socioeconomic and other activities concerning global warming countermeasures, thereby help ensure healthy and cultured lives for the present and future generations of the citizens, as well as contribute to the welfare of humankind".

54. In New South Wales, the *Climate Change (Net Zero Future) Act 2023* (NSW), 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.

55. The *Climate Change Act* 2022 (Cth) sets legally binding emissions reduction targets including net zero emissions by 2050. This Act requires the Minister to table an annual climate change statement and sets up the Climate Change Authority.

56. In 2023, Australia introduced the safeguard mechanism. This is administered by the Clean Energy Regulator. The safeguard mechanism covers around 215-220 facilities emitting over 100,000 tonnes of CO_2 annually including mining and industrial facilities and each facility receives a declining emissions baseline declining by 4.9% each year to promote achievement of the 43% emissions reduction on 2005 levels by 2030. If these targets are not achieved there is the

requirement to surrender carbon credits being an Australian Carbon Credit Unit or Safeguard Mechanism Credit. Exceeding the targets generates SMCs that can be traded.

57. The Australian law is the *National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule* 2015 which has been made under the *National Greenhouse and Energy Reporting Act* 2007 (Cth). The scheme is based on emissions intensity determinations for industrial and mining facilities. For example, coal mining.

58. The legislative objects are heavily focused on achieving Australia's Paris commitments largely to the exclusion of consideration of productivity growth in economic terms in the facilities administered pursuant to the safeguard mechanism. This can be seen from the objects of the NGER Act in s3 of that statute:

> ***Objects***
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> *(1) The first object of this Act is to introduce a single national reporting framework for the reporting and dissemination of information related to greenhouse gas emissions, … to:*
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> *(b) inform government policy formulation and the Australian public; and*
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> *(c) meet Australia's international reporting obligations; and*
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> *(d) assist Commonwealth, State and Territory government programs and activities; and*
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> *…*
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> *(2) The second object of this Act is to contribute to the achievement of Australia's greenhouse gas emissions reduction targets by ensuring that each of the following outcomes (the **safeguard outcomes**) are achieved:*
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> *(a) net covered emissions of greenhouse gases from the operation of a designated large facility do not exceed the baseline applicable to the facility;*
>
> *(b) total net safeguard emissions for all of the financial years between 1 July 2020 and 30 June 2030 do not exceed a total of 1,233 million tonnes of carbon dioxide equivalence;*

(c) net safeguard emissions decline to:

(i) no more than 100 million tonnes of carbon dioxide equivalence for the financial year beginning on 1 July 2029; and

(ii) zero for any financial year to begin after 30 June 2049;

(d) the 5 - year rolling average safeguard emissions for each financial year that begins after 30 June 2024 are lower than the past 5 - year rolling average safeguard emissions for that financial year;

(e) the responsible emitter for each designated large facility has a material incentive to invest in reducing covered emissions from the operation of the facility;

(f) the competitiveness of trade - exposed industries is appropriately supported as Australia and its regions seize the opportunities of the move to a global net zero economy.

59. The scheme proceeds by way of calculating a facilities baseline emissions that produces an emissions intensity per production variable, such as a tonne of coal. Emissions in subsequent years are then greater or less than the baseline. The facility-specific emissions intensity number, which is essentially the number of tonnes of carbon dioxide equivalence of covered emissions associated with a production variable at the facility in the past divided by the total quantity of that production variable (e.g. tonnes of coal at a coal mine). Effectively, the figure is a rate of CO_2 equivalent emission at the facility.

60. A requirement of a facility to purchase credits or the allocation of credits to a facility is calculated accordingly.

61. Japan's GHG emissions in 2020 were 1.15 billion tons[17] and in 2025, 1017 million tonnes. Australia's GHG emissions in 2024 were less than half this figure at 446 million tonnes. Notwithstanding this, Japan lacks an equivalent to

[17] Nishikawa, *ibid*, 216.

the safeguard mechanism and instead relies on voluntary reductions intended to transition to an emissions trading system this calendar year. The Japanese "GX Promotion" or Green Transformation policy in the latest strategic energy plan introduces a national cap and trade system for 300-400 major firms emitting more than 100,000 tonnes per annum like steel, energy and chemicals. It is a system of allocation of credits and caps, allowance trading and penalties rather than the Australian mandatory surrender of credits system for over-emission. In general, Japan's system emphasises investment incentives for emissions reduction rather than the more punitive Australian laws. The Japanese Ministry of Economy, Trade and Industry explains the policy as follows:

> The Plan states that from the perspective of simultaneously achieving a stable supply of energy and decarbonization, Japan will promote the maximum introduction of renewable energy as a major power source, and also aim to create a well-balanced power source mix without overly relying on any specific power source or fuel source[18].

Conclusion

62. Notwithstanding the fundamentally different legal systems applying in Japan and Australia, there is some evidence of convergence of principles of environmental law due to the implementation of principles of international environmental law, in particular concerning EIA. The system of environmental EIA under the EIAA in Japan bears similar features to the EPBC Act (Cth).

63. The restrained approach of the Japanese courts in relation to climate change litigation is more restrictive to successful challenges in both the civil and administrative law spheres than the prevailing approach in Australia. While several administrative law challenges to new coal mines have failed in

[18] https://www.enecho.meti.go.jp/en/category/special/article/detail_209.html.

Australia, there have been successful challenges over many years[19], and recently in the MACH Energy case, and there have been indications in Australia that a more radical approach may be taken on occasions to various issues: e.g. see the Bromberg J decision of first instance in the *Sharma* litigation. This approach was, however, displaced on appeal in the Full Federal Court in *Sharma*.

64. At present, all decisions of the Japanese courts have declined to stop new coal fired power plants. In Australia, there appears to be a self-imposed moratorium on the construction of new coal fired power plants at a political or governmental level, and most climate litigation environmental has concerned challenges to coal mining. A significant number of such challenges have been successful, apparently reflecting a more generous approach of the Australian courts to the arguments of challengers in climate change cases, but also reflecting, no doubt, the differences in legal principles as between the two jurisdictions.

65. There are obvious similarities between the developing body of legislation concerning climate change as between Australia and Japan, although Japan's emissions reduction targets are not as large as Australia's legislated targets, for example Japan has no net zero target. Japan lacks a coal phase out date. Overall, Japanese environmental law and policy appears to give materially greater emphasis to balancing economic and industrial interests against greenhouse gas emission measures than Australian law.

CLIFFORD IRELAND

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[19] *Gloucester Resources Ltd v Minister for Planning* [2019] NSWLEC 7, a merits appeal decision for the Land and Environment Court of NSW refusing approval for a new open cut cold mine including on climate change grounds. Australia has the second highest number of documented climate change related cases after the US: Joanna Setzer and Catherine Higham, *"Global trends in climate change litigation:2023 snapshot*", Grantham Research Institute on Climate Change and the Environment.