Environmental and Planning Law in the Age of Human Rights and Climate Change

The Hon Michael Kirby AC CMG*

This article, begins by contrasting the number of cases concerning environmental and planning law reaching the High Court of Australia in earlier times and today. Developments in England caused by the increase in cases involving human rights law are then described. From this, the author turns to the issues of climate change, the significance of the Framework Convention adopted in Paris in 2015 and of the Oslo Principles on Global Climate Change Obligations of 2015, in the drafting of the last of which he participated. From these international developments, the article turns to comparative law cases on climate change. Finally, the article considers the possible duty of officers of corporations in Australia to consider climate change risks under obligations imposed by s 189 of the Corporations Act 2001 (Cth). The recent decision of the NSW Land and Environment Court in Gloucester Resources is noted.

Environmental Law and Lawyers in Australia

The index to the *Commonwealth Law Reports* shows a significant decline in the number of environmental cases coming before the High Court of Australia. Whereas in the first volume of the index to the authorised reports there were many cases, gathered under the title "Town and Country Planning",[1] in more recent years, the number has fallen away. There are two reasons for this decline. The first was the move, in 1976, to introduce the universal requirement of a grant of special leave to secure admission of an appeal to the High Court. Previously, most appeals came as of right and often because the amount at stake in the litigation was sufficient to qualify according to the prevailing statutory criteria.[2] Additionally, most (although not all) of the law governing environmental and planning disputes was the law of the State or Territory where the dispute occurred. Most of the cases now admitted to the High Court concern federal law, inferentially because of their significance to the whole nation. This is the reason why cases on contracts, wills, deeds and town and country planning law have substantially dried up.

In the Court of Appeal of New South Wales, where I presided for 12 years before appointment to the High Court, there were numerous appeals from the specialised Land and Environment Court of that State. Rare indeed were the dissents from my judgments in such cases. I believe that a number of them are still in regular use. In the High Court, during my 13 years' service, I can count the cases in the area of planning law, on the fingers of one hand.

* Justice of the High Court of Australia (1996–2009); President of the NSW Court of Appeal (1984–1996); Member of the Group of Experts in International Law, Human Rights and Environmental Law that adopted the *Oslo Principles on Climate Change Obligations*, The Hague, Netherlands (2015) (expert group). This article was delivered as the second Peter Barber Lecture, Melbourne, 28 November 2017. It has been updated.

[1] PH Lane (ed), *The Commonwealth Law Reports: An Index-Digest (1903–1982)* (LawBook, 1986) 537–538.

[2] *Judiciary Act 1903* (Cth) s 35(2) (appeals from Supreme Courts of the States) and s 35AA (appeals from Supreme Courts of a Territory). The amendment and substitution requiring special leave to appeal from State Supreme Courts was enacted by Act No 164 of 1976. As originally enacted, *Judiciary Act 1903* s 35(1) conferred appellate jurisdiction on the High Court with respect of judgments of the Supreme Court of a State … where the judgment (whether final or interlocutory) was given or pronounced in a sum in the value of £300; involved directly or indirectly any claim, demand or question respecting property or any civil right amounting to or of the value of £300 or affected the status of any person under laws relating to aliens, marriage, divorce, bankruptcy or insolvency. However, it required leave of the Supreme Court or High Court where the judgment was interlocutory. Separate provisions were made for special leave to appeal in criminal matters [s 35(1)(b)] and appeals involving the exercise of federal jurisdiction in a matter pending in the High Court. By s 35(2) it was made clear that leave of the State Court was not needed for an appeal to the High Court. Prior to 1976, increased money sums were successively substituted; but the overall design remained the same.

One such case concerned a special provision in the legislation governing litigation in the public interest in the Land and Environment Court and the cost consequences of such litigation.[3] The other was an interesting case from Western Australia on the interface of planning law and anti-discrimination law.[4]

In the latter case, *IW v The City of Perth* (*IW*),[5] the dispute concerned (among other issues) whether, for the purpose of Western Australian anti-discrimination law, a local authority supplied "services" by performing its planning functions. In England, judges[6] had held that the performance of such activities by a local government authority qualified as the "provision of services" in such a context.[7] The majority in the High Court, addressing a similar question, held that the local authority was performing a statutory function, not providing services, regarding such functions as basically different.

The Perth City Council in the *IW* case had refused to grant development approval for a drop-in centre for people living with HIV. The record of its debates revealed that the Council decision had been arguably tainted by prejudiced reasons. One judge, Toohey J, agreed with my approach.[8] His brilliant associate at the time, James Edelman, may have worked on the case. He has recently returned to the High Court, but now as a Justice. Perhaps one day the issue may return to require his own opinion on the subject. Judicial dissenters live in hope

Shortly before his retirement from the High Court, Chief Justice Robert French delivered an address that revealed a number of insights into planning law.[9] He disclosed that, as a law student in 1960, he had engaged in a debate with the astonishing title "There is too Much Sex in Town Planning".[10] His team affirmed the proposition. His opponent, who later became Minister for Town Planning in the Western Australian government, had the task of opposing the proposition. The winner of the debate is not revealed. However, the debate, and the topic, clearly did no harm to Chief Justice French's career because his fellow debater, when he became a Minster, appointed him from the Bar to be Deputy Chairman of the State Town Planning Appeal Tribunal. This was a step on the path that later led Chief Justice French to his judicial service, including at the apex of the Australian judiciary. Perhaps his very early acquaintance with planning law helped him on his way.

The appointment to the Tribunal doubtlessly brought home to Robert French the intricacies and challenges of planning law and its involvement with citizens in disputes of importance to their pocket, happiness and wellbeing.[11] Planning law requires close attention to statute law; to some common law principles; to rules of interpretation; and lately to the new body of native title law. Occasionally, it even takes the legal traveller into constitutional law. This happened in *Wurridjal v Commonwealth* (*Wurridjal*),[12] the last case that I decided in the High Court. It was a case that concerned the validity of the federal legislation on the Northern Territory "Intervention". Chief Justice French and I were in disagreement in that matter.[13] However, our difference was not about any principle of planning law.

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[3] *Oshlack v Richmond River Council* (1998) 193 CLR 72; [1998] HCA 11.

[4] *IW v The City of Perth* (1997) 191 CLR 1; see also *North Sydney Council v Ligon 302 Pty Ltd* (1996) 185 CLR 470.

[5] *IW v The City of Perth* (1997) 191 CLR 1, 11 (Brennan CJ and McHugh J), 22–24 (Dawson and Gaudron JJ).

[6] *R v Entry Clearance Officer (Bombay); Ex parte Amin* [1983] 2 AC 818 (HL), 842–843. See Lord Scarman (Lord Brandon of Oakbrook concurring) *R v Entry Clearance Officer (Bombay); Ex parte Amin* [1983] 2 AC 818, 842–843.

[7] *Savjani v Inland Revenue Commissioners* [1981] QB 458, 466, 467–468.

[8] *IW v The City of Perth* (1997) 191 CLR 1, 28–29.

[9] RS French, "Property, Planning and Human Rights" (Paper presented at Planning Institute of Australia, National Congress, Canberra, 25 March 2013).

[10] French, n 9, 5.

[11] The leading early proponent of a distinctive Australia approach to town and country planning was Mr (later Sir) John Sulman who wrote *An Introduction to the Study of Town Planning in Australia* (1921). He was famous for proposing "garden suburbs": see Z Edwards, *A Life of Purpose: Autobiography of John Sulman* (Longueville, 2017) 264, 294.

[12] *Wurridjal v Commonwealth* (2009) 237 CLR 309; [2009] HCA 2.

[13] *Wurridjal v Commonwealth* (2009) 237 CLR 309, 337 [14] (French CJ); [2009] HCA 2; compare *Wurridjal v Commonwealth* (2009) 237 CLR 309, 395 [215] (Kirby J) (dissenting); [2009] HCA 2.

Planning and environmental law necessarily often involve judicial perceptions about what the "public interest" demands in particular fact situations. That consideration, in the context of planning law, requires attention to the environmental concerns of human beings. These concerns are now increasingly being referred to, and elaborated in, international law, including in the international law of human rights. It was therefore unsurprising that, in his article, Chief Justice French should have mentioned the developing principles of universal human rights law among the contextual elements for the remarks he offered. I now intend to do the same.

Planning and Human Rights

I first learned about universal human rights in 1949. I was then attending primary school in Sydney. In December 1948, at the General Assembly of the United Nations, meeting at the time in Paris, adopted the *Universal Declaration of Human Rights* (UDHR).[14] Originally, in 1945, it had been intended that an international Bill of Rights would be incorporated in the *Charter* of the United Nations. However, the drafters ran out of time. The task of developing the UDHR was assigned to a committee chaired by Eleanor Roosevelt, widow of the wartime president of the United States. The committee's draft was adopted by the General Assembly on 10 December 1948, without a dissenting vote. All school children at public schools in Australia at the time received a copy. In Paris, it was declared adopted by the then President of the General Assembly, Dr H V Evatt of Australia, a past Justice of the High Court of Australia. Dr Evatt said that it would be a "Magna Carta" for future generations. My teacher explained that, unless human beings observed the principles contained in the UDHR, humanity would be condemned to continuing the cycle of war and destruction that had given birth to its necessity.

Since 1948, the contents of international human rights law have expanded greatly. According to one taxonomy, the "first generation" of such rights related to civil and political rights. The "second generation" related to economic, social and cultural rights. The "third generation" has related to group, community and peoples' rights: including the right to self-determination of peoples and the rights of all people to development and to a clean, safe, healthy and sustainable environment on Earth and in the biosphere. In recent times, the content of the treaty law that has followed the UDHR has, increasingly, addressed itself to environmental rights. It has identified the obligations of governments, corporations and individuals to protect and safeguard the environment.

Among the relevant individual rights contained in the UDHR was a right of "everybody" to own property, both alone and in association with others. According to this principle, no one should be arbitrarily deprived of property rights.[15] That right was subject to a qualification, recognising the need sometimes to deprive individuals and corporations of property rights because of the larger interests of the nation or of a community or group.

In Australia, where property is compulsorily acquired under federal legislation, the law authorising such acquisition must afford "just terms". It must also be limited to a purpose in respect of which the Federal Parliament has the constitutional power to make laws.[16] The Australian constitutional provision is more stringent than the equivalent guarantee in the US Constitution. Under the latter provision, the acquirer's obligation is limited to the payment of "just compensation". The significance of that distinction was a basis for the difference between Chief Justice French and myself in the *Wurridjal* case.[17] In my view "just compensation" was addressed, as such, to monetary payments. "Just terms", on the other hand, potentially included the procedures followed in the acquisition, including whether proper consultation was had; something that was contested by the Aboriginal objectors in the *Wurridjal* case.

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[14] *Universal Declaration of Human Rights to the United Nations*, GA Res 217A (III), UNGAOR 3rd sess, 183rd plen mtg, (adopted and ratified 10 December 1948) (UDHR).

[15] UDHR, Art 17.

[16] *Australian Constitution*, s 51(xxxi).

[17] *Wurridjal v Commonwealth* (2009) 237 CLR 309, 364 [44] (French CJ); [2009] HCA 2; compare *Wurridjal v Commonwealth* (2009) 237 CLR 309, 405 [307] (Kirby J); [2009] HCA 2. The differentiated language of the United States and Australian constitutions in this regard had been noted by Dixon J in *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495, 569.

In the development of international treaty law, following the UDHR, neither the *International Covenant on Civil and Political Rights* nor the *International Covenant on Economic, Social and Cultural Rights* made express provision for the right to ownership of property. At the time of the development of those treaties, the world was sharply divided between socialist and capitalist countries, making the issue politically controversial. However, in the regional treaty laws that followed the UDHR,[18] provision was generally made for the right to own property and for the protection of that right. However, a qualification was also recognised, permitting derogations from property ownership where that was necessary "in accordance with the general interest" of the community. Many cases brought before domestic courts and regional courts of human rights have explored the meaning of the right to own property and the ambit of the exception referrable to the "general interest".

In Australia, save for the requirements imposed on the federal compulsory acquisition of property, and a few other scattered such provisions, there is no general constitutional Bill of Rights. This was not because of a lack of respect in Australia for human rights generally, or for the right to own property in particular. Such rights were recognised and upheld by the common law and also by detailed statutory provisions. However, the general theory of Australian law, at the time of federation when the *Australian Constitution* was adopted, was that the imposition of restrictions on legislative power, in the name of human rights, was unnecessary. This was because the legislature, answerable to the electors in regular elections, could be relied upon to uphold such basic rights, including the right to own and enjoy property. Where accidently or otherwise a derogation from such rights arose, Australians (so it was believed) could rely on the legislatures to correct the impairment. That was the main reason why provisions for enforceable human rights, constitutional, statutory or otherwise, were generally considered not only unnecessary but also undesirable. Experience since the *Australian Constitution* was adopted has sometimes upheld the popular faith of the founders in the legal protection of basic rights by Parliament.[19] However, in many other instances, the gap in our constitutional arrangements has been manifest and can now only be regarded as a serious defect.[20]

One such instance presently relevant involved a claim against a State government for compensation following the compulsory acquisition under State law of a holding in mineral deposits.[21] There was no provision in the State Constitution or specific law, obliging the provision of "just terms" for such an acquisition. Moreover, when the electors of the Commonwealth were afforded an opportunity in 1988 to add such a requirement to the federal Constitution, they declined to do so.[22] Although sub-national human rights laws have been adopted in the Australian Capital Territory[23] and in the State of Victoria[24] and one is now in Queensland, in the *Queensland Human Rights Act 2019* (Qld), most jurisdictions of Australia still afford no enforceable general human rights law. None has been adopted in federal jurisdiction by the Federal Parliament. There were a number of earlier attempts to initiate such federal rights-based legislation; but without success.

Nevertheless, the growing number of Australian jurisdictions that have adopted human rights legislation make it relevant for Australian lawyers and environmental planners, certainly in Victoria, the Capital Territory and Queensland to increase their awareness about the way in which parallel legislation has

[18] Including the *European Convention on Human Rights*; *the Inter-American Convention on Human Rights*; the *African Convention on Human and People's Rights*.

[19] See, eg, *Migration Act 1958* (Cth) which adopted a non-racial right to seek immigration to Australia, commencing the repeal of "White Australia" laws, for example, *Pacific Island Labourers Act 1901* (Cth). But contrast *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 which invalidated the *Communist Party Dissolution Act 1950* (Cth).

[20] See, eg, *Al-Kateb v Godwin* (2004) 219 CLR 562; [2004] HCA 37 (validity of indefinite detention under federal statutory law and executive orders).

[21] *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399; [2001] HCA 7.

[22] The proposal to guarantee trial by jury, religious freedom and "just terms" for acquisition of property by the States was rejected nationally and in every State. The national vote was 30.33% (yes) and 68.19% (no): AR Blackshield and G Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 3rd ed, 2002) 1303, 1308.

[23] *Human Rights Act 2004* (ACT) s 22.

[24] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 23.

affected planning decisions in other jurisdictions. Many case decisions;[25] case analyses;[26] and legal texts[27] explore the ways in which appeals to universal principles of human rights in planning litigation have sometimes controlled, or influenced, the outcomes of such disputes.

The starting point is to understand the way that provisions in human rights law have come to interact with more familiar and specific planning law provisions, in a way that affects the outcome of the despute.[28] Thus, in the United Kingdom, which was an original signatory to the *European Convention on Human Rights*, it was not until 1998 that the substance of the Convention was incorporated into national domestic law.[29] Immediately this happened, it resulted in applications by which lawyers sought to invoke the United Kingdom equivalent to a Convention right. These cases have involved the entitlement to peaceful enjoyment of property;[30] the right to enjoy privacy and family relations in relation to it;[31] the right not to suffer immaterial discrimination in the enjoyment of legal entitlements expressed in general terms;[32] and the entitlement, in the determination of rights and obligations at law and of any criminal charge, to have a fair and public hearing by an independent and impartial tribunal.[33]

The application of the foregoing human rights principles in the United Kingdom has sometimes been controversial. In *R v Secretary of State for the Environment, Transport and the Regions; Ex parte Holding and Barnes PLC (Alcon Bury Developments Ltd)*[34] the question arose as to whether procedures under town and country planning law in the United Kingdom, for the determination of planning applications and appeals by the Secretary of State, were compatible with Art 6 of the *Human Rights Act 1998* (UK). In the English Court of Appeal, Tuckey LJ and Harrison J held that decisions on planning applications and appeals by a Minister could not be considered a determination by "an independent and impartial tribunal". This was because a Minister would necessarily appear biased in favour of his or her own polices and desired outcomes. Such bias would not be entirely cured by the availability of judicial review. However, that decision was quickly overturned by the House of Lords. Their Lordships held that the administrator's suggested lack of impartiality could be adequately cured by the provision of a right of access to an impartial judicial review. The fact that judicial review was not equivalent to a hearing on the merits was not regarded as determinative.

Appeals to human rights principles forbidding discrimination have been invoked by Roma (gypsy) applicants who had been refused planning permission for the residential use of local land so as to continue their traditional nomadic way of life. In recent years such applicants have had many disputes with planning authorities in the United Kingdom and elsewhere in Europe.[35] In the case of Roma, Art 14 of the *European Convention* is clearly relevant because it prohibits discrimination on grounds such as

[25] See, eg, *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 (HL); *R v Secretary of State for the Environment, Transport and the Regions; Ex parte Holding and Barnes plc* [2001] JPL 291; [2001] UKHRR 270.

[26] L Fisher, "Planning Law and the Human Rights Act 1998" (2001) 13(3) *Journal of Environmental Law* 349–391.

[27] D Hart, "The Impact of the European Convention on Human Rights on Planning and Environmental Law" [2000] *Journal of Planning & Environmental Law* 117; M Purdue, "Human Rights and Planning Law, the UK Experience" (2002) 10 *Asia Pacific Law Review* 195.

[28] A Ferguson, "Human Rights and Planning Law Collide" (2000) 27 *Scots Law Times* 211; S Enemark, L Hvingel and G Galland, "Land Administration, Planning and Human Rights" (2014) 13 *Planning Theory* 331; M Purdue, "The Human Rights Act 1998, Planning Law and Proportionality" (2004) 6 *Environmental Law Review* 161.

[29] *Human Rights Act 1998* (UK).

[30] *European Convention*, Art 1 (Peaceful enjoyment of property rights).

[31] *European Convention*, Art 8 (Privacy and family rights).

[32] *European Convention*, Art 14 (Freedom from discrimination in respect of protected rights).

[33] *European Convention*, Art 6 of the first Protocol to the *European Convention*; compare UNHCR, Art 19 (Freedom of opinion and expression).

[34] R *v Secretary of State for the Environment, Transport and the Regions; Ex parte Holding and Barnes PLC (Alcon Bury Developments Ltd)* [2001] 2 ER 929.

[35] Purdue, n 28, 164.

sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, birth or other status.

In *Chapman v United Kingdom*,[36] the European Court of Human Rights accepted that the Roma minority fell within the ambit of Art 14. However, in respect of claims for relief, it was pointed out that, under Art 8, a derogation was permissible where it was in accordance with law and was deemed necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. Judges dealing with such cases have pointed out that the excuse of justification for interference in the "rights of others" has to be "proportionate".[37] But if it was, it was acceptable. In the result, in many cases, the impact of the *Human Rights Act 1998* in the United Kingdom has been less dramatic in terms of the substance of the issues in dispute between the parties when compared with the impact on the procedural rights of the parties (such as the right to reasons for adverse decisions); their legal right to have relevant considerations taken into account; and the need for the decision-maker to observe the principle of "proportionality" in reaching a conclusion.

In the past under English law, challenges by way of judicial review to the rationality of the administrator's decision have had to run the gauntlet of so-called *Associated Provincial Picture Houses Ltd v Wednesbury Corp* unreasonableness.[38] To secure a court's intervention on judicial review of an adverse administrative decision upon this ground required proof to an extremely high standard, namely irrationality, such that "no rational decision-maker could have reached such a conclusion".

Derived from German law, and now entering English law by way of decisions of the European Court of Human Rights and also the European Court of Justice, the different test of "proportionality" has increasingly been accepted. Thus, under the European remit, in cases involving Roma, national courts have been obliged "at least [to] evaluate whether the balance struck by the administrator is proportionate".[39] Thus, the reviewing court has been instructed that it should "review how the decision-maker has applied the proportionality principle". Yet the courts have gone on to emphasise that a deference should be accorded to an expert decision maker:

Nevertheless, even a cursory glance at the development of planning law in the United Kingdom shows that, since the *Human Rights Act 1998*, the principles and modes of reasoning of the European courts have come to influence quite significantly the approach of UK courts. This influence of the European courts was one of the emotional arguments espoused by the supporters of Brexit, propounding the necessity to quit the "alien" European Union and sever links with such "foreign" institutions and their values.

The severance of such links may now be successful in the case of the European Court of Justice, which is an institution of the European Union. However, it is less certain that it will be successful in the case of the European Court of Human Rights, an institution of the Council of Europe. The latter has friends in the Government in the United Kingdom. The Government's majority in Parliament is wafter slim as 2019 votes a Brexit demonstrate. The prospect of the withdrawal of the United Kingdom from the *European Convention of Human Rights*, which predates the creation of the European Union, seems uncertain, at least in the immediate future, if at all. Should this prove so, the ongoing influence of the *European Convention* on the law (and thus on planning law of the United Kingdom) appears likely to continue.[40] As such, it will provide a regular stimulus, and an example, to Australian lawyers, especially

[36] *Chapman v United Kingdom* (2001) 10 BHRC 48.

[37] *R* (*on the application of Boyd) v English Nature* [2003] EWHC 1105, [19]–[20].

[38] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223. See now in Australia *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1)(e), 5(2)(g), 6(1)(e) and 6(2)(g). In England, the test was earlier expressed as "so unreasonable that it was irrational". *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410, 415. Subsequently, a test has been reformulated in terms of proportionality.

[39] (2004) 6 El Rev 167, 168; see also *R (on the application of Egan) v Department of Transport, Local Government and the Regions* [1991] AC 749. In *R v Secretary of State for the Home Department; Ex parte Brind* [1991] AC 749, [2] Lord Slynn of Hadley observed that the time had come for the principle of proportionality to be recognised as part of the English law.

[40] *R (on the application of Egan) v Secretary of State for the Environment, Transport and the Regions* [2002] EWHC 389 (Admin) (Sullivan J).

if sub-national human rights statues are adopted in still further jurisdictions of Australia to import some of the same language and concepts.

If this prediction proves accurate, it will become useful, as it has been found in the United Kingdom, to have regard to decisions of the European Court of Human Rights in environmental and planning matters coming before at least some of the courts of Australia. From a modest start, with only two such cases decided in 1966, the workload of the European Court of Human Rights has increased enormously. By 1998 some 4,000–5,000 cases were awaiting decision. That number has continued to expand. Just as the Court's jurisdiction has increased, so has the membership of the Council of Europe, which gave birth to the *European Convention of Human Rights*. From the original 10-member countries, it now has 38 members. As well, it now has a developed jurisprudence which is increasingly detailed and sophisticated.[41] Cases in the European Court of Human Rights that have been directly relevant to planning law include *Guerra v Italy*;[42] *LCB v United Kingdom*;[43] *Osman v United Kingdom*;[44] and *Lopez Ostra v Lane* (*Lopez Ostra*).[45]

In the last-mentioned case, the State (Spain) had granted a subsidy to several tanneries to build a waste treatment facility only 12 metres from the applicants' home. The European Court of Human Rights found a violation of the *European Convention*, notwithstanding the absence of any specific finding as to the likely cause of the health problems complained about. In doing so, the Court stated that "severe environmental pollution may affect the individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health."[46] Having found a violation of the *European Convention*, the Court in Lopez Ostra awarded the applicants four million Spanish pesetas, assessed on an equitable basis, "to cover both pecuniary and non-pecuniary damage". Inevitably, the approach of the European Court of Human Rights, to which the English courts are still answerable, has had an impact upon subsequent analogous decisions in the United Kingdom.

Without an equivalent substantive treaty foothold for arguments of this kind, it would be rare at this time, certainly outside the Australian Capital Territory, Victoria and Queensland for analogous submissions based on human rights law to be raised successfully in planning decisions in Australia. However, the European reasoning is clearly a development that will need to be reviewed, in the event that human rights statutes spread in Australia. The likelihood of this happening is substantial, at least in the long term. At present, Australia is the only developed country without a body of binding human rights legislation and case law.

Climate Change: A Proactive Duty?

So far, I have addressed the impact on planning law decisions of normative rules, with which Australian lawyers are, or may easily become, familiar. Such decisions may be based in constitutional provisions; statutory enactments; or common law expositions by judges with the power to bind, or influence, courts, tribunals or officials by their decision-making.

However, many of the most acute decisions that the world faces today, fall outside these familiar normative sources. Thus, unless the international community can find and apply rules to address the problems presented with the proliferation of nuclear weapons, and the development of missiles that can deliver such weapons over huge distances, the problems that occupy our lives as lawyers, environmental

[41] D Hart, "The Impact of the European Court of Human Rights on Planning and Environmental Law" [2000] *Journal of Planning and Environmental Law* 117.

[42] *Guerra v Italy* (1998) 26 EHRR 357. See Hart, n 41, 122.

[43] *LCB v United Kingdom* (1999) 4 BHRC 447.

[44] *Osman v United Kingdom* (2000) 5 BHRC 293, 321 [116].

[45] *Lopez Ostra v Lane* [1994] ECHR 46; see also *McGinley v United Kingdom* (1999) 27 EHRR 1; *Pine Valley Developments v Ireland* (1992) 14 EHRR 319.

[46] *Lopez Ostra v Lane* [1994] ECHR 46, [51].

planners and other citizens may be entirely bypassed. We may continue to go about our daily work for a time. However, the greatest challenges for humanity will fall beyond the capacity and power of ordinary legal decision-making. The critical decisions will remain in the hands of a few people with great political, economic or military power. They may be people who are not particularly susceptible to the constraints of international law or even conventional decision-making.[47]

Another existential problem that humanity faces, only slightly less urgent than that of the proliferation of weapons of mass destruction, is the challenge of global climate change. Over the past 40 years, the international community has struggled to reach agreement upon a response to what has increasingly been seen as the urgent challenge involving global warming, the melting of polar ice reserves, the rising of ocean levels; the special danger faced by low-lying islands and territories and the advancement of exceptional climatic conditions involving flooding and increased cyclonic and hurricane activities and destructive weather patterns.

It was to address these conditions that the 21st Session of the Conference of the States Parties of the United Nations *Framework Convention on Climate Change* in Paris was convened in 2015.[48] Just as fundamental human rights, expressed in the UDHR and United Nations treaty law, have come to affect municipal planning law in many countries, so an increasing number of lawyers globally have begun to urge a human rights-based approach to the dangers of global climate change.[49] Such an approach, it is hoped, would "facilitate a meaningful response where legal frameworks are otherwise lacking, especially as it broadens the scope of available institutional knowledge, capacity and solutions". A new approach is arguably urgent and necessary to address the potential dangers of climate change, in the face of which rational human beings should no longer remain silent.

It was because of my support for this point of view that, in 2013, I accepted an invitation from judges of the Hoge Raad der Nederlanden (the Supreme Court of the Netherlands) to join an international expert group to develop legal principles that might meaningfully engage with the problem of climate change displacement, in a way that municipal judges and like decision-makers would understand and find useful.

The expert group first met at the seat of the Hoge Raad in The Hague, The Netherlands and subsequently in Oslo, Norway. On 1 March 2015, the group agreed upon a set of principles: the *Oslo Principles on Global Climate Change Obligations* (*Oslo Principles*).[50] The *Oslo Principles* were adopted before the Paris meeting summoned to agree upon a binding treaty on the subject. A purpose of the *Oslo Principles* was to support the momentum that was then developing for an international consensus to support, and increase the appreciation of, the urgency of action in the interests of human beings everywhere and of the biosphere and to enlarge a commitment to political and legal action by recruiting civil society organisations and concerned individuals to offer support. It was believed that with civil society, judges and lawyers would have an important role to play concerning the "leeways for choice" presented to them, acting in accordance with their own respective national jurisdictions and laws.

This is not the occasion to explain all of the provisions of the *Oslo Principles*. Suffice it to say that the expert group resolved:

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[47] MD Kirby, "International Arbitrators and Existential Problems", *ICC Dispute Resolution Bulletin* (2017, Issue 3) (Commentary). Compare B Wolski, "Ethical Duties Owed by Lawyer Mediators: Suggestions for Improving the NMAS Practice Standards" (2017) 26 JJA 184.

[48] Paris (France) 13 December 2015, in force 4 November 2016 UNFCC, *Report of the Conference of the Parties on its 21st Session – Addendum*, UN Doc FCCC/CP/2015/10/Add 1 (29 January 2016). Australia ratified the Paris Agreement on 10 November 2016. In August 2017, the Government of the United States submitted a formal notice that the United States intended to withdraw from the Paris Agreement, a process which will not be complete until November 2020, in accordance with Art 28 of the Agreement. See J Peel "Climate Change Litigation: Lessons and Pathways" (2017) 29(11) *Judicial Officers' Bulletin* 99, 100; see also J McAdam, *Climate Change, Forced Migration and International Law* (OUP, 2012); B Saul et al, *Climate Change and Australia: Warming to the Global Challenge* (Federation Press, 2012) 191–232.

[49] S Nagra, "The Oslo Principles and Climate Change Displacement: Missed Opportunity or Misplaced Expectations?" (2017) 11 *Carbon and Climate Law Review* 120 .

[50] A Benjamin et al, *Oslo Principles on Global Climate Change Obligations* (1 March 2015) <https://globaljustice.macmillan.yale.edu/sites/default/files/files/OsloPrinciples.pdf>.

> 6. States and enterprises must take measures based on Principle 1 to ensure that the global average surface temperature increase never exceeds pre-industrial temperature by more than 2ºC.

The ambit and application of the *Oslo Principles* were expressed as subject to the "precautionary principle" set out in Principle 1. Relevantly, that principle stated:

> 1. There is clear and convincing evidence that the greenhouse gas (GHG) emissions produced by human activity are causing significant changes to the climate and that these changes pose great risks of irreversible harm to humanity, including present and future generations, to the environment, including other living species, and the entire natural habitat, and to the global economy.

The *Oslo Principles* concluded that implementation of the precautionary principle required that:

> (1) GHG emissions be reduced to the extent, and at a pace, necessary to protect against the threats of climate change that can still be avoided; and
> (2) The level of reductions of GHG emissions required to achieve this should be based on … [the] credible and worst case scenario accepted by … eminent climate change experts.

In para 25 of the *Oslo Principles,* certain procedural obligations of nation states and enterprises were stated in order to fulfil the substantive requirements:

> 25. States must accept the jurisdiction of independent courts or tribunals in which the state's compliance with its obligations set forth in these principles may be challenged and adjudicated.
>
> (a) States must participate in those proceedings in good faith and ensure that such proceedings are fair and efficient;
> (b) In such proceedings, the state whose compliance with its obligations has been challenged, must fully disclose the ways in which it has effected compliance, in order to enable the court or tribunal to determine whether the state has complied with the relevant obligations and, where it is found that the state has not complied, to determine the state and nature of the state's failure to comply.

The *Oslo Principles* proved prescient in respect of legal developments that soon occurred in a number of countries. In July 2015, a court in the Netherlands upheld a class action that had been brought by an environmental group, Urgenda, on behalf of 886 named individuals. The plaintiffs claimed that the then announced plans of the Netherlands Government to cut emissions of all agencies under its control by 14–17% (based on 1990 levels) in time for 2020, were inadequate. Such a cut would not adequately protect the public of the Netherlands from the adverse effects of climate change.

As a low-lying country, renowned for its protective sea walls and large areas of reclaimed land that lie below sea level, the Netherlands is particularly exposed to the danger of the rise in sea levels. Especially is this so because of hazardous situations arising from notorious North Sea storms, sea and wind activity. The argument of Urgenda was that the Government of the Netherlands should be ordered to cut greenhouse emissions by at least 25% by 2020. The demand in the lawsuit was upheld by the trial court, applying municipal law.[51]

Another instance of inventiveness on the part of environmental defenders was seen in the German courts. In 2014 a Peruvian house owner (Mr Luciano) commenced proceedings in Germany against RWE AG, a German corporation. That company had been named as the largest emitter of carbon dioxide in Europe, responsible for 0.47% of aggregate global CO_2 emissions.[52] Mr Luciano sought an order in Germany that RWE bear the costs of protection measures in Peru designed to safeguard his home there against a "Glacial Outburst Flood" which he feared would be released from Lake Palcacocha in the Peruvian Cordillera Blanca.

At first instance, the trial court in Germany held that "in all likelihood, in the case of a flood wave, the house of the claimant would be flooded". It also held that, based on the evidence heard and accepted

[51] See T Baxter, "Urgenda – Style Litigation Has Promise in Australia" (2017) 32(3) *Australian Environment Review* 70. In common law countries such proceedings are likely to be brought under administrative review remedies. Compare *Thomson v Minister for Climate Change Issues* [2018] 2 NZLR 160; [2017] NZHC 733; <www.courtsofnz.govt.nz/cases/thomson-v-the-minister-for-climate-change-issues/atatimages/filedDecision?r=732.86082992. The Court found that the results of New Zealand's election, installing a Labour Coalition Government, rendered the decision moot as the new government had pledged to review and reduce the country's 2050 carbon target.

[52] Climate Accountability Institute, *Support Our Work* <http://carbonmajors.org>.

by it, scientifically, climate change could be responsible for such a flood if it were to occur. However, it rejected the claim for protection measures on legal grounds.

Mr Luciano appealed to the German High Court in Hann, Lower Saxony. That Court overturned the reasoning of the trial court. Specifically, it rejected RWE's argument that German law in principle, did not cover the consequences of climate change because it was "too complex" or because the sources of greenhouse gas (GHG) emissions were "multiple and undifferentiated". The High Court upheld the legal arguability of a claim, based on the *Civil Code* (Germany).[53] Specifically, in this regard, the Court relied upon the provision imposing a legal obligation on a wrongdoer who interferes with the property of another. Having found the arguability of such a legal claim, the High Court committed the matter to re-trial on evidence "to determine [whether] the respondent is liable, proportionately to its level of an impairment of 0.47%, to cover that proportion of the expense of appropriate safety precautions" as undertaken by the claimant to protect his property from a Glacial Lake Outburst Flood from Lake Palcacocha, insofar as the claimant might be burdened with such costs.

Clearly the German High Court enjoyed jurisdiction to decide the claim because of the presence in Germany of RWE and because of the activities of that company in Germany (and nearby) causing substantial global levels of greenhouse emissions. At the stage of the brief on the litigation report[54] all that was decided was a "Votum" – a preparatory opinion. The Court did not decide the merits on the evidence. It merely accepted the legal possibility that a case might be established by Mr Luciano, on the basis of the German legal standard invoked by him and the testimony offered in support of the contention that he could satisfy that legal standard. While RWE was not the sole potential cause of the risks against which the claimant sought protection, the High Court concluded that the share of RWE's GHG emissions was not insignificant for the purposes of the *Civil Code* (Germany). It therefore held that the claim could not be terminated summarily. It had to proceed to the reception of evidence so as to answer the remaining question expressed by the Court. RWE indicated its rejection of settlement discussions. No doubt it would have been concerned about the precedent involved and whether a payout to Mr Luciano, however small, would invite numerous other claims of actual or apprehended losses against RWE, attributed to global climate change.

A central issue in the German litigation was whether the claimant could show, to the requisite standard provided by German law, a causal link between the established GHG emissions proved against RWE and any already relevant changes or dangers in the Peruvian Andes. Factors that appeared to have persuaded the German court to hold causation to be arguable included clear statements published in the Intergovernmental Panel on Climate Change (IPCC), fifth Assessment Report concerning the impact of climate change in the Peruvian Cordillera Blanca:

- For the northern and central parts of the Peruvian Andes over the period 1961–2009, a temperature increase of between 0.2 and 0.45% per decade was recorded;
- The retreat of tropical glaciers in Peru had accelerated in the second half of the 20th century (area loss between 20 and 50%), especially since the late 1970s, in association with increasing recorded temperatures in that same period;
- The rapid retreat and melting of the tropical Andes Glaciers of Venezuela, Colombia, Ecuador, Peru and Bolivia has been further reported following the IPCC AR4, through use of new measurement techniques;
- "A finding that [the reduction] in tropical glaciers and ice fields in extra topical and tropical Andes over the second half of the 20th century … can be attributed to an increase in temperature (…); and the court's conclusion"; and
- Overall there is a "very high degree of confidence" in attribution of the glacial retreat in the Andes in South America to global climate change.

Naturally, the case before the German High Court involved extremely detailed, intricate and contested expert testimony. Huge consequences potentially hang on the ultimate outcome of the litigation. At this

[53] *Civil Code* (Germany) Art 1004.

[54] German Watch, *General Ruling of the Civil High Court in Hamm: Corporate Responsibility for Climate Change Impacts Existing in German Law – Depending on Evidence in Any Specific Case to Show Responsibility* (November 2017).

stage, there has been no final decision. However, the interlocutory appeal to the German High Court has affirmed that the claim brought by Mr Luciano is legally arguable. The actual legal entitlement was held to be dependent on conclusions that could not be made in the abstract, or isolated from factual or opinion testimony. Questions will now arise as to the proved specific risk to Mr Luciano's house, the proved share of any relevant causative emissions attributable to RWE; and consideration of whether there was a rational basis for assessing responsibility for a flood risk, whenever that might occur, if at all.[55]

In presenting testimony to address the issues for decision before the German High Court, computer modelling evidence presented by both sides is expected to assist the ultimate decision-makers to determine whether the German company, RWE, by its GHG emissions in Germany, should be held partly responsible for the risks of catastrophe against which it is reasonable for persons like Mr Luciano to take immediate precautions.[56]

A further instance, taken from actual litigation, may be added, based on a circumstance that confronted the author in a recent international commercial arbitration. The arbitration was conducted upon conditions of confidentiality, making identification of the parties and the details of their dispute inappropriate and possibly unlawful. Suffice it to say that the author was chairing the arbitral tribunal in Singapore. The dispute ultimately concerned the building of a dam in one Asian country by builders and engineers from another Asian country, pursuant to a written contract that provided for a submission to independent arbitration in the event of a dispute in a third country, Singapore.

A dispute having been notified and submitted to arbitration, it was scheduled for hearing, in Singapore. The arbitral tribunal was appointed and convened. However, before the hearing, the tribunal was informed that the parties had reached an agreement. They sought the formulation of a final award in terms of an agreement, to which both sides would consent.

Fresh from a meeting of the Expert Group that formulated the *Oslo Principles* on the potential environmental impact on surrounding communities of major engineering works, I was concerned as to my duty (as a member and chairman of the arbitral tribunal) to be satisfied that the settlement to which the tribunal was asked to give effect in its award was properly attentive to the "public interest", specifically as affecting the relevant environment. International commercial arbitration is a consensual procedure designed to avoid the uncertainties, delays, risks and alleged biases and defects of litigation before the national courts of contracting parties. Recognising this, most national courts show restraint in disturbing arbitral awards, including those made at the request, and by the consent, of the parties. However, in some national arbitration laws, provision is made for exceptional intervention by national courts on proved public policy grounds.[57]

Given the heightened sensitivity in many countries today, including in their national courts, concerning environmental degradation and the impact of climate change, the possibility could not be ignored, that in the event of a later and further dispute between the parties to the commercial arbitration, a national court might be persuaded that a consent award (although made by the arbitral tribunal in good faith) was in conflict with an unargued or unsuspected aspect of "public policy" or "fundamental policy" or "the

[55] German Watch, n 54.

[56] As to the use of the law of torts (nuisance) in common law countries, see N Durant "Tortious Liability for Greenhouse Gas Emissions? Climate Change Causation and Public Policy Considerations" (2007) 7 *QUT Law and Justice Journal* 404; P Cashman and R Abbs, "Tort Liability for Loss or Damage Arising from Human Induced Climate Change: Is This What Justice Requires and Fairness Demands" in R Lyster (ed) *In the Wilds of Climate Law* (Australian Academic Press, 2010) 235: W Burns and H Osofsky (eds) *Adjudicating Climate Change: State National and International Approaches* (CUP, 2009) 357–360.

[57] An example is the *Arbitration and Conciliation Act 1996* (India) s 34. ["Recourse Against Arbitral Award] [Application for setting aside arbitral awards]. Provision is made for the arbitral award to be set aside by the Court 'only if … (b) the court finds that – … (2) the arbitral award is in conflict with the public policy of India'. This expression is clarified by an Explanation 1, substituted by the *Arbitration and Conciliation (Amendment) Ordinance* 2015 (India) [Ord 94, 2015, dt 23.10.2015]. The making of such an order setting aside an arbitral award is envisaged where the award … (ii) is in contravention of the fundamental policy of Indian law; or (iii) is in conflict with the most basic notions of morality or justice". In support of this Ordinance provision. Explanation (2) provides: 'For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review of the merits of the dispute'." See also Shaun Star, *Australian and Indian Law* (Universal Law Publishing, 2016), 302–303.

most basic notions of morality or justice". I therefore suggested to the co-arbitrators the desirability of raising, for any submissions that the parties might wish to make, the possibility of a later challenge in the courts on such grounds. The other members of the arbitral tribunal agreed to our taking this course. The parties took instructions. By their submissions, they then satisfied the tribunal that there was no vitiating factor in the proposed consent award that might suggest the tribunal's withholding its consent to the formalisation of the requested award.

Depending on the composition of an arbitral tribunal, in a very substantial international commercial dispute, where the parties are all well advised, have agreed to a settlement and have requested an award giving effect to their agreement, some international arbitrators would doubtless question the necessity, wisdom and even lawfulness of an arbitral tribunal, of its own initiative, raising environmental or public policy concerns in circumstances such as those just described. Open-ended questions concerning public interest can sometimes lead to the escape of "unruly horses" in the law:[58] a common judicial description of the dangers of "public policy". Attitudes and approaches to matters such as this are likely to differ having regard to local practice, individual inclinations and relevant legal, social, economic and even personal values. There is no escaping the fact that different decision-makers (whether judges, tribunal members, arbitrators or otherwise) will sometimes display differing attitudes to the risks of environmental impacts and to their professional obligations to respond to such risks.

The growing sensitivity within diverse societies over the risks of climate change and the existential dangers of global warming have elicited not only the *Oslo Principles* but also the creation of local initiatives to harness the support of local judges, arbitrators and lawyers. Thus, in France, the *Club de Juristes* has been formed with relevant objects.[59] It is a professional body of serving judges who have concluded that modern decision-makers, including judges, should find ways to address the dangers to the biosphere, human and other life forms and the global economy that demand more than a passive or formalistic response to problems for the environment, and specifically for global climate change.

Without a substantive legal foundation for relevant initiatives, most decision-makers, especially judges, will probably stay their hands and leave any relevant action to be taken by legislators, advised by experts and observing democratic procedures. The case involving a consent award between parties building a dam is the type of instance where common sense and experience may sometimes suggest intervention and the need for reassurance. Frequently, that may be possible without the adoption of novel procedures or claims to legal inventiveness that go beyond standards acceptable to commercial lawyers. Such lawyers will themselves increasingly evidence sensitivity to environmental degradation and risks. They may do so because of concern for the planet. But that concern also has a commercial edge. If the relevant decision-makers ignore environmental concerns, they may do the parties no favours. If, subsequently, a consent agreement were set aside by a national court on public policy or like grounds, for lack of consideration (or inadequate consideration) by the arbitral tribunal of serious environmental issues, the consequences could be far more costly to the parties than observance of special care where important environmental considerations are raised or emerge from prudent investigation.

Corporate Duty to Address and Inform of Risks

The last-mentioned consideration leads naturally to my final topic. I refer to a new development affecting the duties of the officers of corporations concerning advice and action about developments affecting corporate responsibility for, and awareness about, the impact of climate change.

This is a relatively new concern. However, it grows out of orthodox statutory sources, including in Australia the provisions of s 180 (1) of the *Corporations Act 2001* (Cth). That sub-section imposes general duties of care and diligence on the part company directors. Given the fast-moving developments

[58] The analogy of public policy and unruly horses derives from *Besant v Wood* [1879] 12 Ch D 605 (Jessel MR), applying *Richardson v Mellish* (1824) 130 ER 294 (Burrough J).

[59] Club des Juristes, *Strengthening the Effectiveness of International Environmental Law – Duties of States, Rights of Individuals* (2015). The Club is described as a "citizen's initiative … proposed in order to incite States to act… [T]he national judge must become an international *jus commune* judge, to verify that States are observing their commitments".

affecting potential corporate liability for environmental degradation, does this statutory provision (or the general legal duty of care and vigilance on the part of corporate officers) require new initiatives on the part of company officers to which attention needs to be drawn in present context?

A question along these lines was raised at a conference in 2016 by Mr Geoff Summerhayes, a member of the executive board of the Australian Prudential Regulation Authority (APRA). In response to a question, Mr Summerhayes acknowledged the seriousness of the issue, but he did not elaborate.

However, the question was revived in 2017 by a number of developments. The first was an initiative of the Centre of Policy Development and the Future Business Council in securing an opinion on the issue from leading lawyers. That opinion had been made public. It was provided by Mr Noel Hutley SC, an experienced Senior Counsel who, until recently, had been the President of the New South Wales Bar Association. It is co-signed by Mr Sabastian Hartford-Davis. They were retained by Minter Ellison, lawyers. The opinion cannot be rejected as coming from a "bleeding heart" or "greenie" source. The question posed was whether the statutory duty expressed in s 180(1) "can be expected to feature in any future related litigation against company directors" so far as it relates to the responses of Australian corporations to the risks of climate change?" The opinion concluded that the answer to the question should be in the affirmative:[60]

> In summary, the legal opinion stated:[61]
>
> 3.1 Climate change risks … are capable of representing risks of harm to the interests of Australian companies, which would be regarded by a Court as being foreseeable at the present time.
> 3.2 "Climate change risks" may be relevant to a director's duty of care and diligence to the extent [that] they represent a corporate opportunity or foreseeable risks to the company or its business model.
> 3.3 For the avoidance of doubt, company directors are certainly not legally prohibited from taking into account climate change and related economic, environmental and social sustainability risks, where those risks are, or may be, material to the interests of the company.
> 3.4 To the contrary, company directors certainly *can*, and in some cases *should*, be considering the impact on their business of "climate change risks".
> 3.5 It is conceivable that directors who fail to consider "climate change risks" now could be found liable for breaching their duty of care and diligence in the future.
> 4. Directors who do turn their minds to the impact of "climate change risks" on their business will need to form their own assessment and make their own decisions as to what action, if any, is to be taken. This is likely to including obtaining and relying upon information and advice provided by employees and experts [*Corporations Act* 2001 (Cth) s 189]. Directors, who are proactive in this regard, even if they decide on a properly informed and advised basis not to act, may have the protection of a statutory defence such as the "business judgment rule", under s 180(2) of the Act.
> 5. Finally, whether or not they decide to act, directors who perceive that climate change does present risks to their business should also consider the adequacy of the disclosure of those risks within the company's reporting frameworks.

In some ways, the situation now presented in relation to directors' liabilities in respect of climate change risks is comparable to that faced in earlier decades in the minerals industry, in relation to the risks of exposure of investors, employees and customers to asbestos risks. Likewise, the risks presented to the manufacturers and suppliers to tobacco products, as the growing scientific consensus began to accumulate concerning the consequences of smoking tobacco or being otherwise exposed to that product. In the earliest days of research on asbestosis, mesothelioma and lung cancer, directors of the relevant corporation could reasonably plead the "business judgment rule". However, as increasing scientific research emerged and was publicised, that defence became increasingly unpersuasive. At least in the case of exposure to tobacco inhalation it had to be replaced with a defence based on the provision of prominent warnings and arguments respecting individual informed choice. Exposure to global climate change is not analogous to the perils of exposure of the individual to lung cancer. Individual decisions of consumers to avoid, or accept, the dangers of lung cancer from tobacco inhalation can scarcely be a

[60] Noel Hutley SC and Sebastian Hartford-Davis, *Memorandum of Opinion*, 7 October 2016 on "Climate Change and Directors' Duties". Released by the Centre for Policy Development and the Future Business Council (2017).

[61] Hutley and Hartford-Davis, n 60, 2 [3]–[4].

substitute for the prudent, properly informed decisions of responsible corporate actors. This point was made in the joint legal opinion of Mr Hutley and Mr Hartford-Davis.

The writers of the joint opinion brought to notice particular reasons why Australian corporations might need to be especially sensitive to, and alert about, the particular risks of the decisions they make for their impact in Australia on global changes that are now underway:[62]

> The *Garnaut Review*[63] found that Australia is particularly exposed to the physical risks of climate change; as an already hot and dry country, in a region containing developing countries in weaker positions to adapt to climate change, and with terms of trade that would be damaged more than those of any other developed country. The CSIRO and Bureau of Meteorology have observed an increase of average surface air temperature in Australia of 0.9ºC since 1910. This has been linked to increasingly frequent and intense heatwaves, and changing rainfall patterns observed in recent years. Incidentally, the month of August 2016 was the 16th straight month in which record mean temperatures were set globally. Modelling undertaken as part of the *Garnaut Review* in 2008 suggested that, if we experience temperature increases in Australia beyond 2ºC, it is possible that the following impacts might be felt in Australia:
>
> 17.1 The large majority of agricultural production in the Murray Darling Basin will cease;
> 17.2 Catastrophic destruction of the Great Barrier Reef, with correlative impact on tourism;
> 17.3 A significant increase in the cost of supplying urban water;
> 17.4 A significant increase in health-related deaths, and increased incidence of vector-borne disease; and
> 17.5 Major dislocation within global mega-cities in south Asia, south-east Asia and China, and displacement of people in islands adjacent to Australia.[64]

According to the joint opinion, the foregoing risks were already "readily apparent". Their capacity to impact the interests of a company was a matter that "falls to be assessed on a case by case basis". Although "climate change litigation" had arisen in the United States, it has not yet reached Australia. However, as the authors pointed out, the 2011 flooding in Queensland, which was associated by some media reports with a local consequence of climate change, caused widespread financial loss. It had generated class action litigation. This might accurately have been described as a "climate change case" or the manifestation of a "climate change risk". However, technically, the litigation in question had focused on the alleged professional negligence of flood engineers who had failed to ensure sufficient flood storage capacity in proximate dams.

The joint opinion acknowledged the litigation difficulties that would be faced by litigation that asserted a causal link between corporate action and global climate change. However, the recent cases in the Netherlands and Germany, identified above, indicate that intrepid litigants will chance their arm because of the importance of the issues and the large financial stakes involved. Courts may strike-out such cases as unarguable. Or they may assess matters adversely to corporations on their merits.[65] Therefore Australian corporations, and their officers, may need to be alert to this potential risk and

[62] Hutley and Hartford-Davis, n 60, 7 [16]–[17].

[63] R Garnaut, *The Garnaut Climate Change Review: Final Report* (CUP, 2008) xix. See also E Gerrard, "Climate Change and Human Rights: Issues and Opportunities for Indigenous Peoples" (2008) 31.3 *UNSW Law Journal* 941. Various obligations under international treaties were called to mind by the then President of the Commission (then Australian Human Rights and Equal Opportunity Commission) See J von Doussa, "Human Rights and Climate Change: A Tragedy in the Making" (2008) 31.3 *UNSW Law Journal* 953.

[64] Climate Works Australia, *Pathways to Deep Carbonisation in 2050: How Australia Can Prosper in a Low Carbon World* (Initial Project Report, 2014) 8. See Hutley and Hartford-Davis, n 60, 8 [19].

[65] The passage of particular federal legislation in Australia might also be relevant. Obligations of reporting greenhouse and energy production and consumption were included in the *National Greenhouse and Energy Reporting Acts 2007* (Cth), with supplementary definitions, criteria and rules in the *National Greenhouse and Energy Reporting Regulations 2008* (Cth). See M Wilder and L Fitz-Gerald, "Carbon Markets and Policy in Australia: Recent Developments" (2008) 31 *UNSW Law Journal* 838, 847. The strategy of this initial legislation included the increase of the then existing Mandatory Renewable Energy Target from 2% to 20% by 2020. See also the inclusion of a "greenhouse trigger: of the *Environment Protection and Biodiversity Act 1999* (Cth); and the introduction of *Tax Laws Amendment (2008 Measures No 1) Bill*, permitting an Australian taxpayer reduction in income tax for carbon reduction initiatives". See at 853.

aware of its possible financial consequences for the corporation to which they owe duties of care and due diligence.[66]

The joint opinion also draws to notice the particular exposure of bodies that provide regulatory approvals which involve and affect environmental decision-making. The writers state that, "It is established in Australian law that greenhouse gas emissions and climate change can be relevant to environmental decision-making."[67] Of course, this is subject to any specific provisions of the particular statute authorising their approval. Still, recent land-use development applications in Queensland involving proposed mining operations have already drawn attention to the potential consequences of such operations for climate change. It is therefore likely that, in the future, such matters will be explored scientifically, technologically and with the aid of computer models that seek to assess the impact of individual decisions on national, regional and global trends.

The foregoing is the background to the debate to which Mr Summerhayes of APRA returned in his address in February 2017 at the annual forum of the Insurance Council of Australia.[68] After reviewing the various possibilities and difficulties raised by the issue of corporate accountability, he concluded:[69]

> Now, to avoid any doubt, I am not making any comments about the appropriateness about one particular policy or mechanism. Clearly governments here and globally have a wide range of policy and approaches available to meet their emissions reductions commitments. My point is that it's unsafe for entities or regulators to ignore risks, just because there is uncertainty or even controversy, about the policy outlook. Like all risks, it is better that they are explicitly considered and managed as appropriate, rather than simply ignored or neglected.
>
> A critical implication of what I have just recounted is the importance of considering, and modelling, the potential impact of climate related risks under different scenarios and over different time horizons. The most important scenario, in my opinion, is the sub-two degrees Celsius transition scenario that the Paris Agreement is anchored around, since that will guide much of the government policy around the world. … [T]o be blunt, given all the developments that I've flagged today, if entities' internal risk management processes are not starting to include climate risk as something that has to be considered – even if risks are ultimately judged to be minimal or manageable – that seems a pretty reasonable indicator that there might be something wrong with the process. Similarly, if you're an investor and you're not already asking questions about how the companies you invest in approach these issues – perhaps you should be … [R]isk culture varies substantially across entities.
>
> Our role [APRA] isn't to prescribe a particular approach to risk management or to regulate certain practices into existence. But we do have a responsibility to provide clear expectations, and encourage improvement where this is necessary. … [S]omething you would already be aware of is a greater emphasis on stress testing for organisational and systemic resilience in the face of adverse shock. … [T]his does not mean suddenly elevating climate related issues to the top of our priority list. But it does mean joining the wider conversation that is already going on around the issue – and being explicit that climate change is likely to have material financial implications that should be carefully considered. … [W]e make no apologies for expecting regulated entities to rise to this challenge with us. These are shared responsibilities. When things go wrong, it reflects badly on all of us – regulators, entities, governments and the entire financial ecosystem. For our part we know when regulators are slow-moving, or equivocal, it makes problems even worse.

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[66] A relevant initiative that demands attention is the creation of environmental protection officials and groups, empowered to challenge, under existing law, harm to the environment that could contribute to climate change. See M Hogarth, *Law of the Land: Rise of the Environmental Defenders* (EDO, 2014). See also BJ Preston, "The Role of Public Interest Environmental Litigation" (2006) 23 EPLJ 337, 350.

[67] Summarised in *Walker v Minister for Planning* [2007] NSWLEC 837, [69]–[119] (Biscoe J) and on appeal: *Minister for Planning v Walker* (2008) 161 LGERA 423; [2008] NSWCA 224, [43]–[44], [55]–[56] (Hodgson JA), [65] (Campbell JA), [66] (Bell JA) agreeing.

[68] G Summerhayes (Executive Board Member APRA), "Australia's New Horizon, Climate Change Challenges and Prudential Risk", unpublished, Insurance Council of Australia, Annual Forum, 2017 (17 February 2017).

[69] Summerhayes, n 68, 5.

These statements for APRA appear reasonable.[70] They call attention to legal norms.[71] They address an increasing challenge. The Centre for Policy Development[72] has also called for corporate scenario analysis. The importance of the issue has been prominently reported in the national media in Australia.[73] Corporate governance in Australia has clearly been put on notice. Likewise, corporate regulators throughout the nation have been warned. The substantive point is to call these developments to the attention of the workers at the coal face. Some issues may be especially relevant to the impact on Australia's indigenous peoples.

This is what I have endeavoured to do. It would be unwise to wait for a future Royal Commission or litigation to unveil the neglect, indifference and carelessness of those in responsible positions of decision-making who are sleepwalking in a blindfold while potentially important problems are looming that may be found by later generations to have required prudential attention.

Climate Change and Planning Decisions

One final development in Australia has happened in judicial proceedings involving the application of the *Environmental Planning and Assessment Act* 1979 (NSW). In February 2019 the Land and Environment Court of NSW (Preston CJ) for the first time refused consent to development of a coal mine project on the basis of climate change considerations. In *Gloucester Resources Ltd v Minister for Planning*,[74] the judge decided that the proposed coal mine development would be "in the wrong place at the wrong time". The reference to the "wrong place" involved consideration of standard environmental considerations of the immediate neighbourhood. However the "wrong time" was a reference to "the greenhouse gas emissions of the coal mine and its coal product [that] will increase global total concentrations of greenshous gasses at a time when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in greenhouse gas emissions".[75] To the suggestion that an individual decision could not relevantly affect global climate change trends, Preston CJ declared that such challenges "need [] to be addressed by multiple local actions to mitigate emissions by sources and remove greenhouse gasses by sinks."[76] One such local action was the decision of the specialised Land and Environment Court with its statutory obligations to guard the environmental impacts of such developments and the public interest.[77]

The coal mine developer criticised the judicial decision declaring that reference to climate change considerations was a "sideshow and a distraction." However, the judge did not accept this argument. If Australia did not comply with the Framework Convention on Climate Change 1992, other less wealthy countries would be tempted to do likewise or worse. The judicial reasoning was criticised as an overreach of judicial reasoning. However, knowledgeable experts declared that the Land and Environment Court was performing its statutory duties as required by its legislation.[78]

The development in *Gloucester Resources Ltd v Minister for Planning* shows how far the law has come and how fast it is moving. It indicates the way very large global concerns are finding their way into local litigation in Australia. It seems certain that there will be more such developments. Planning lawyers must be prepared.

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[70] See BJ Preston, "'Foreword' in Forum, Climate Change in Australia" (2008) 31 *University of NSW Law Journal* 831, 833 ("Climate change, according to most scientific studies, is real and is happening. To a significant extent, the causes are anthropogenic. Urgent action is called for … ensuring … development of a policy and legal framework. Development of such framework involves consideration of environmental, economic and social factors" (833, 836).

[71] Preston, n 66, 350.

[72] Centre for Policy Development (Australia), "Climate Horizons" (Discussion Paper, Melbourne, November 2017) 11.

[73] M Roddan, "APRA to Test Climate-Change Stresses", *The Australian*, 30 November 2017, 21.

[74] *Gloucester Resources Ltd v Minister for Planning* [2019] NSWLEC 7.

[75] *Gloucester Resources Ltd v Minister for Planning* [2019] NSWLEC 7, [699].

[76] *Gloucester Resources Ltd v Minister for Planning* [2019] NSWLEC 7, [515].

[77] *Gloucester Resources Ltd v Minister for Planning* [2019] NSWLEC 7, [530]–[540].

[78] R White, J Hallinan and B Rayment, "Climate Change Takes Centre Stage in Land and Environment Court" [2018] *NSW Law Society Journal* 80; M Wilder and S Courtts, "The Mainstreaming of Climate Litigation" [2019] *Asian Jurist* 71.