LEADERSHIP BY THE COURTS IN ACHIEVING SUSTAINABILITY

By

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A paper presented at the
Resource Management Law Association of New Zealand
2009 Conference

Capital Leadership – in the national interest?
Challenges for effective environmental management

Conference organised by

The Resource Management Law Association of New Zealand

at

The Wellington Convention Centre, Wellington, New Zealand

1-3 October 2009

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INTRODUCTION

The three branches of government – the legislature, executive and judicature - are partners in achieving sustainable development. Sustainable development involves three components: economic development, social progress and environmental protection. Each of the three branches of government can play a leadership role consistent with their functions.

The concept of the separation of powers is that there is a recognised distinction between the branches of government such that each branch has a central and primary function. The primary function of the legislature is to legislate, to create both statutes and subordinate legislation such as regulations. The primary function of the executive is to execute the laws, both the legislation and the common law. The primary function of the judicature is to judge, to resolve disputes by adjudication.

However, the separation of powers is not pure in that, in addition to its primary function, each branch of government can perform some functions that belong to other branches, provided they are intimately related to the branch's primary function.[1]

The judicial branch of government can provide leadership primarily in the exercise of its central function of judging disputes. However, it can also provide leadership when exercising functions of other branches of

[1] A Barak, *The Judge in a Democracy* (2006) 37.

government transferred to it in appropriate circumstances. I will outline some of the ways in which the judicature can provide leadership in the exercise of these central and transferred functions.

FUNCTION OF JUDGING

The primary leadership role the judicial branch of government can play is in the exercise of its central function of judging disputes. Judging disputes involves finding the law, interpreting the law and applying the law.[2] Each of these steps provides opportunities to exhibit leadership in the attainment of the goal of achieving sustainable development.

Finding the Law

The first step of finding the law involves ascertaining which rule in the legal system is to be applied. At times, this involves no particular difficulty. The legal rule to be applied may be prescribed by legislation, either primary or subordinate, or be settled by precedent. If a legal rule is applicable, it must be applied and the answer it gives must be accepted. Having found the applicable law, the court must proceed to the subsequent steps in adjudication of determining the meaning of the rule and applying it.

In many cases, however, this first step of finding the law is not so simple. There might be more than one legal rule or principle which might apply and the parties are contending which should be made the basis of the decision. In that event, the several rules or principles must be interpreted in order that a rational selection may be made. If none of the existing rules or principles are adequate to cover the case, then a new one must be supplied. It is this task of supplying a new rule or principle, and whether this involves law-making, that is controversial.

[2] The following discussion draws on B J Preston, "The Art of Judging Environmental Disputes" (2008) 12 *Southern Cross University Law Review* 103.

Irrespective of the jurisprudential debate concerning whether judges find or make law, the process they undertake in articulating the rule or principle to be applied ought to be a principled and rational one.

The judge starts with the existing law; that is to say, some legal rule or principle the validity of which is admitted. This existing legal rule or principle, by hypothesis, is not directly applicable to the case at hand. It might be found in persuasive precedents in the domestic law on closely related topics. The judge may also find it helpful to consider persuasive foreign decisions which may show how other jurisdictions have solved the problem in question. As Fuller notes "judges of the common law have always drawn their general rules of law from a variety of sources and with a rather free disregard for political and jurisdictional boundaries".[3] The value of foreign judgments depends on the persuasive force of their reasoning.

The increasing globalisation of environmental law and the harmonisation of international and national environmental law make reference to international and other national sources of law of assistance. This is particularly the case in relation to the principles of ecologically sustainable development. These principles have developed in international law but have been domesticated into national laws throughout the world. The precautionary principle, for instance, is found in international conventions and in soft law, such as Principle 15 of the Rio Declaration on the Environment and Development. The formulation of the precautionary principle in Principle 15 of the Rio Declaration has been adopted in many national laws, including in New South Wales. This harmonisation of principles between international and national law, and between the laws of different nations, facilitates a judge drawing guidance across borders and jurisdictions and the cross-fertilisation between laws of different nations and jurisdictions.

Thus, courts in Australia have been able to draw on foreign judicial decisions and learned academic writings to elucidate the content of the principles of ecologically sustainable development or, to use a metaphor, to provide flesh to the skeletal form in which the principles are expressed in domestic planning and environmental statutes. A clear

[3] LL Fuller, *Anatomy of the Law* (1971) 138.

example is the decision in *Telstra Corporation Ltd v Hornsby Shire Council*,[4] where guidance was sought in international and foreign sources of law, as well as domestic decisions in other jurisdictions, to elaborate on the content and process for application of the precautionary principle.

Having considered the existing law on related topics in both domestic and foreign sources of law, the judge develops competing logical extensions of the potentially applicable rules to meet the new circumstances of the case at hand and makes a choice.

A means of developing logical extensions is reasoning by analogy. Edward Levi posits that the basic pattern of legal reasoning is reasoning by example, that is, reasoning from case to case.[5] Where a precedent is binding, the rule of law derived from the precedent is applied to the case at hand. Where no binding precedent applies, a rule of law described in an earlier case or line of cases might be extended so as to apply to the case at hand because of "resemblances which can reasonably be defended as both legally relevant and sufficiently close".[6] It is the judge's task to determine the legally relevant similarities and differences.

Such analogical reasoning has a logic about it in the sense that it follows "the line of logical progression".[7] The new formulation will be seen as a step in an "evolutionary process or continuum".[8] It should maintain "the logic or the symmetry of the law"[9] and uphold integrity in law.

Apart from using analogical reasoning, which Cardozo describes as the rule of analogy or the method of philosophy, Cardozo also identifies three other methods to guide the selection of a rule or principle to be applied to a new case. Cardozo observes that the directive force of a

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[4] (2006) 67 NSWLR 256 at 265-281; (2006) 146 LGERA 10 at 35-50. Other examples are *Conservation Council of South Australia Inc v Development Assessment Commission and Tuna Boat Owners Association of SA Inc (No 2)* [1999] SAERDC 86 affirmed on appeal sub nom *Tuna Boat Owners Association of SA Inc v Development Assessment Commission* (2000) 110 LGERA 1; *BGP Properties Pty Ltd v Lake Macquarie City Council* (2004) 138 LGERA 237; *Walker v Minister for Planning* (2007) 157 LGERA 124; and *Aldous v Greater Taree City Council* (2009) 167 LGERA 13.

[5] E H Levi, *An Introduction to Legal Reasoning* (1948) 1.

[6] H L A Hart, *The Concept of Law* (2nd ed, 1994) 127.

[7] B N Cardozo, *The Nature of the Judicial Process* (1949) 30.

[8] A Mason, "The role of the judge at the turn of the century" in G Lindell (ed), *The Mason Papers* (2007) 56-57.

[9] A V Dicey, *Law and Public Opinion in England* (2nd ed, 1962) 364.

principle may be exerted along the line of historical development (the method of evolution); along the line of customs of the community (the method of tradition); and along the lines of justice, morals and social welfare, the mores of the day (the method of sociology).[10]

Salmond suggests that, in cases involving novel points of law, the judge must look, not only at existing law on related topics, but also at "the practical social results of any decision he makes and at the requirements of fairness and justice".[11] To similar effect, Sir Anthony Mason says that judges "must have an eye to the justice of a rule, to the fairness and the practical efficacy of its operation in the circumstances of contemporary society".[12]

Sometimes these factors point to the same conclusion. At other times, each may pull in different directions. In this event, the judge will need to weigh the factors one against the other and decide between them. Salmond notes, "[t]he rationality of the judicial process in such cases consists in fact of explicitly and consciously weighing the pros and cons in order to arrive at a conclusion".[13] Indeed, this explicit rationalisation is the hallmark of adjudication and is crucial to the judicial decision making process.

An illustration of development of a rule or principle along the line of logical progression, that is, the use of the rule of analogy, is the line of decisions of the Land and Environment Court of New South Wales holding that the principles of ecologically sustainable development are relevant matters to be considered in determining an application for a statutory approval to carry out development that is likely to impact the environment.[14]

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[10] Cardozo, above n 7, 30-31.
[11] P J Fitzgerald, *Salmond on Jurisprudence* (12th ed, 1966) 188.
[12] A Mason, "Future directions in Australian law" in G Lindell (ed), *The Mason Papers* (2007) 21.
[13] Fitzgerald, *Salmond on Jurisprudence*, above n 11, 188. See also, Sir A Mason "Legislative and judicial law-making: Can we locate an identifiable boundary?" in G. Lindell (ed), *The Mason* Papers (2007) 64.
[14] See *Leatch v National Parks and Wildlife Service* (1993) 81 LGERA 270, *Carstens v Pittwater Council* (1999) 111 LGERA 1, *Hutchison Telecommunications (Australia) Pty Ltd v Baulkham Hills Shire Council* [2004] NSWLEC 104, *BGP Properties Pty Ltd v Lake Macquarie City Council* (2004) 138 LGERA 237, *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10, *Gray v Minister for Planning* (2006) 152 LGERA 258 and *Walker v Minister for Planning* (2007) 157 LGERA 124 (NSWLEC) and (2008) 161 LGERA 423 (NSWCA)

Interpreting the law

The second step involved in judging is interpreting the law, that is, determining its meaning and intended scope. This task arises commonly where the rule of law has its source in legislation (whether primary or subordinate), but can also arise under the common law.

The need for judicial interpretation of the law arises for a variety of reasons. First, all rules involve classifying particular cases as instances of general terms. For any rule it is possible to distinguish clear central cases, where the rule certainly applies, and cases where there is doubt as to when the rule applies, there being reasons both asserting and denying that it applies. Hart says that "[n]othing can eliminate this duality of a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rules. This imparts to all rules a fringe of vagueness or 'open texture'…".[15]

Secondly, indeterminacy arises from the need to use ordinary English words. Drafters of a statute, however expert, have no special resources at their command to express the core meaning of both substantive and definitional provisions, except those available to any user of the language. Lon Fuller eloquently conveyed this dilemma as follows:

> "In projecting his intention into the future he must, like the layman, launch on the shifting currents of life a fragile vessel of words built from the materials that are available to everyone".[16]

The English language is indeterminate and "irreducibly open textured".[17] Just like the rules, words used to formulate the rules can be seen to contain a core of certainty and a penumbra of doubt.

Thirdly, legislators can have no knowledge of all the possible combinations of circumstances which the future may bring. As Hart notes "[t]his inability to anticipate brings with it a relative indeterminacy of aim".[18] It is impossible to have "a complete legislative provision in

[15] Hart, above n 6, 123. See also Levi, above n 5, 28.
[16] Fuller, above n 3, 23.
[17] Hart, above n 6, 128.
[18] Ibid.

advance covering every case, and authoritative extra-judicial interpretation".[19]

Fourthly, the rules, whether in statutes or the common law, may use very general standards, such as reasonableness, fairness or what is just and equitable, thereby incorporating extra-legal norms into the law. These standards are predicated, Julius Stone says, "on fact-value complexes, not on mere facts".[20] For this reason, the use of these standards enables changes in society's values to be "taken bodily into the law".[21] As Oliver Wendell Holmes pointed out, the standards direct the court to "derive the rule to be applied from daily experience".[22] The standards, therefore, "are relative to time and place".[23] The result, Stone observes, is that "[i]n such cases if these standards are properly administered the 'propositions of law' will vary in content from time to time".[24]

Finally, there is indeterminacy inherent in the common law system of precedent.[25]

The task of interpreting the law is a necessary incident of the judicial function. As Marshall CJ memorably pronounced in *Marbury v Madison*,[26] "it is emphatically the province and duty of the judicial department to say what the law is".[27] This task includes stating authoritatively what the words of a statute mean.

In undertaking the task of interpretation, the court will be guided by the principles of statutory interpretation.[28] There have been, and still are,

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[19] R Pound, *The Spirit of the Common Law* (1999) 179 and see also 174. See also Pound, *Introduction to the Philosophy of Law* (1954) 51.
[20] J Stone, *Legal System and Lawyers' Reasonings* (1964) 264.
[21] J Stone, *The Province and Function of Law* (1961) 144.
[22] O W Holmes, *The Common Law* (first published 1881, republished by Dover Publications, 1991) 123.
[23] Pound, *The Spirit of the Common Law*, above n 19, 172.
[24] Stone, *The Province and Function of Law*, above n 21, 144.
[25] Hart, above n 6, 134-135; M D A Freeman, *Lloyd's Introduction to Jurisprudence* (7th ed, 2001) 1390; E W Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (2005) 123, 131-135, 139-163.
[26] (1803) 1 Cranch 137; 5 US 137.
[27] Ibid, 177.
[28] See generally D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) and Bennion F, *Statutory Interpretation: A Code* (4th ed, 2002).

different judicial approaches to statutory interpretation. The three main ones are the literal rule, now called textualism; the golden rule, now called contextualism; and the mischief rule, now called purposive interpretation.[29] Austin and Pound have discussed the distinction between genuine or proper interpretation, and spurious or improper interpretation.[30] Genuine interpretation includes determining which of two or more co-ordinate rules to apply and what the law-maker intended to prescribe by a given rule. Spurious interpretation includes meeting deficiencies or excesses in rules imperfectly conceived or enacted.[31]

In the environmental context, it would be spurious interpretation for a court to cure what it perceived to be deficiencies in the statute by making, unmaking or remaking the law to promote or better implement environmental goals, however worthy, such as achieving ecologically sustainable development. However, this is not to say that a court cannot adopt a construction of the statute which promotes or better implements environmental goals, if to do so is consonant with and required by the principles of genuine interpretation. Indeed, courts have, through genuine interpretation, construed many planning or environmental laws to require consideration of the principles of ecologically sustainable development. The line of decisions of the Land and Environment Court referred to earlier is an illustration.[32]

The effect of the exercise by the court of its interpretative role may be to make law, even though this may be interstitial. As a result of this incremental process, Fuller observes, "no enacted law ever comes from its legislator wholly and fully 'made'".[33]

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[29] J J Spigelman, "The Common Law Bill of Rights" (First lecture in the 2008 McPherson Lectures on Statutory Interpretation and Human Rights, University of Queensland, Brisbane, 10 March 2008).

[30] J Austin, *Lectures on Jurisprudence* (edited by R Campbell, 4th ed, 1879) vol 2, 1023-1036; R Pound, "Spurious Interpretation" (1907) 6 *Columbia Law Review* 379.

[31] Pound, above n 30, 381.

[32] A more complete discussion of cases implementing the principles of ESD can be found in B J Preston, "The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific" (2005) 9 *Asia Pacific Journal of Environmental Law* 109.

[33] Fuller, above n 3, 85-86.

Applying the law

The third step of judging is applying the law so found and interpreted to the dispute. This encompasses two stages. The first stage is to find the facts relevant to that identified rule of law. The facts identify the minor premise in the model of syllogistic reasoning that characterises judicial decision-making. The duty of the court in determining questions of fact "is to exercise its intellectual judgment on the evidence submitted to it in order to ascertain the truth".[34] The second stage is to apply the identified rule of law (the major premise) to the facts as found (the minor premise) and "a determination of the existence or non-existence of rights, obligations and liabilities emerges to support the award or refusal of remedies as the case may be".[35]

In this second stage, consideration needs to be given to whether the applicable law accords a judicial discretion as to the remedy, relief or punishment, if any, to be granted by the court if, upon application of the law to the facts of the matter, a breach of the law were to be found. The judicial discretion may have its source in statute, the common law or in equity. The duty of the court in matters of judicial discretion is to exercise its moral judgment as to what is right, just, equitable or reasonable in the case. The exercise of the judicial discretion permits individualisation in the application of the law.

In the environmental law context, statutes commonly permit a court that has found a breach of the statute to make "such order as it thinks fit" to remedy or restrain the breach.[36] Such a phrase empowers the court "to mould the manner of its intervention in such a way as will best meet the practicalities as well as the justice of the situation before it".[37] The discretion extends to withholding relief if the court does not think any order is fit to remedy or restrain the breach.

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[34] Fitzgerald, *Salmond on Jurisprudence*, above n 11, 70-71.
[35] R French, "Dolores Umbridge and policy as legal magic" (2008) 82 *Australian Law Journal* 322 at 328.
[36] See, for example, *Environmental Planning and Assessment Act* 1979 (NSW), s 124(1).
[37] *F Hannan Pty Limited v Electricity Commission (NSW) (No 3)* (1985) 66 LGRA 306 at 311 (Street CJ).

The court may take into account a range of considerations, pertaining to both private interests of the parties and third parties, as well as the public interest. A breach of a planning or environmental law involves a breach of a public duty; the orderly development and use of the environment is in the public interest. Obligations imposed on public authorities to assess and approve applications under planning or environmental laws also impose public duties and are important in the public interest. The subject matter of the litigation may itself raise issues concerning the public interest. Natural resources such as the air, waterways, forests and national parks can be seen, to use the language of the Roman law, as *res publicae*, being held by the government in trust for the benefit of present and future generations. The concept of the public trust was invoked in *Willoughby City Council v Minister Administering the National Parks and Wildlife Act*[38] in relation to national parks. This concept was used to reject the submission, made by the government agency that had been found to have acted ultra vires in approving a building in a national park, that the Court should withhold declaratory and injunctive relief.

Upholding the law

A major task of the judicial branch of government is to protect and uphold the rule of law. This implies the subordination of all branches of government to certain principles generally accepted to be characteristic of law, such as the ideas of the fundamental principles of justice, fairness and due process. It implies limitations on legislative power; safeguards against abuse of executive power; adequate and equal opportunities of access to legal advice and assistance and protection; proper protection of individual and group rights and liberties; and equality before the law.[39]

Upholding the rule of law involves upholding laws, properly made and within power, that encourage sustainable development. In this way, courts ensure good governance, which is itself a principle of sustainable development. [40]

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[38] (1992) 78 LGERA 19 at 34.
[39] D M Walker, *Oxford Companion to Law* (1980) 1093.
[40] *Hub Action Group Inc v Minister for Planning* (2008) 161 LGERA 136 at [2], [69].

The courts may also uphold and enforce laws that provide for access to justice, including access to environmental justice, another principle of sustainable development.[41] Such laws include those giving rights of public access to information; rights to public participation in legislative and administrative decision-making, including requirements for public notification, exhibition and submission and requirements for environmental impact assessment; and public rights to review and appeal legislative and administrative decisions and conduct. The courts facilitate access to justice by decisions upholding these rights of access to justice.[42] The courts work as a partner with the legislative and executive branches in these tasks.

FUNCTION OF EXECUTING LAWS

Courts can also exercise functions of the executive branch of government. In conventional courts, this executive function is limited and is intimately connected with the judicial function. Courts execute judgments they have handed down. Court administration also involves executive functions.

The objectives of court administration are equity, effectiveness and efficiency. The objectives of equity and effectiveness involve ensuring access to justice. Courts can provide leadership by improving the quality of court administration so as to facilitate access to justice.[43] Courts can take action to improve affordability of litigation in the court, accessibility of the court and responsiveness of the court to the needs of users. Affordability is affected by court fees and the costs of litigation. Court fees are usually fixed by regulation made by the executive branch under delegated authority from the legislative branch. Courts may have an advisory role. Courts can, however, play a critical role in lowering the

[41] See Principle 10 of the Rio Declaration on Environment and Development and the Recitals and Articles 1, 3 and 9 of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, done at Aarhus, Denmark on 25 June 1998 (entered into force on 30 October 2001).
[42] B J Preston, "Operating an environment court: The experience of the Land and Environment Court of New South Wales" (2008) 25 *Environmental and Planning Law Journal* 385 at 406-407.
[43] See Preston, above n 42, 398-402.

costs of litigation. Courts can review and revise their practice and procedure so as to reduce delay and the costs of litigation. Courts can also improve accessibility in a number of ways, including geographical accessibility, access for people with disabilities, access to help and information, access for unrepresented litigants, access to alternative dispute resolution processes, and facilitating public participation.

Courts can, therefore, provide leadership through quality court administration to ensure access to justice. The achievement of access to justice is especially important in environmental disputes.

The most significant exercise of the functions of the executive is undertaken by courts that are vested with jurisdiction to undertake merits review of administrative decisions or conduct. The exercise of statutory power by an administrative decision maker involves the exercise of function of the executive branch to execute legislation. Merits review involves the re-exercise of the statutory power and hence also involves the exercise of the function of the executive branch. The identity of the person or body in whom the power of merits review is reposed does not affect the nature of the function being exercised. Hence, merits review of administrative decisions or conduct undertaken by a court still remains an exercise of an executive function.

Where a court is vested with jurisdiction to undertake merits review of administrative decisions or conduct, the court can provide leadership by its decisions. Merits review has many benefits. It can provide a forum for full and open consideration of issues of major importance; increase accountability of decision makers in the executive branch; clarify the meaning of legislation made by the legislative branch; ensure adherence to legislative principles and objects; focus attention on the accuracy and quality of policy documents, guidelines and instruments made by the executive branch; and highlight problems that should be addressed by law reform. Merits review by courts of environmental and planning decisions can particularly yield these benefits.

In *Telstra Corporation Ltd v Hornsby Shire Council*,[44] the Land and Environment Court of NSW explored the meaning of one of the

[44] (2006) 67 NSWLR 256; (2006) 146 LGERA 10.

principles of ecologically sustainable development, the precautionary principle, as well as the procedure for application of the principle in practice. The factual circumstances of the case concerned the installation of a telecommunications base station and the community's perceptions of adverse impact on the health and safety of residents and the local environment by exposure to electromagnetic emissions. The Court's reasons for decision explicated and applied the precautionary principle and in so doing promoted the legislative object of encouraging ecologically sustainable development.

In *Hub Action Group Inc v Minister for Planning,*[45] the Land and Environment Court's refusal of development consent for a waste disposal facility implemented the principle of good governance. The principle of good governance is essential to sustainable development. It requires the enactment and the enforcement of clear and effective laws that support sustainable development. In that case, a legislative instrument supported sustainable development by prohibiting the grant of development consent unless the development would not have an adverse effect on the long term use for sustainable agricultural production of any prime crop and pastoral land. The waste disposal facility was proposed to be located on land identified as prime crop and pastoral land. The development was likely to jeopardise the use of the land for sustained agricultural production.

In a number of cases, courts undertaking merits review have refused to grant development consent, or granted development consent on precautionary conditions, for developments likely to adversely affect or be adversely affected by coastal processes that may be exacerbated by climate change.[46] Through their decisions the courts have explicated and upheld the principles of sustainable development relating to climate change.[47]

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[45] (2008) 161 LGERA 136.

[46] Examples are *Van Haandel v Byron Shire Council* [2006] NSWLEC 394, *Charles and Howard Pty Ltd v Redland Shire Council* (2007) 159 LGERA 349, *Northcape Properties Pty Ltd v District Council of Yorke Peninsula* [2008] SASC 57, and *Gippsland Coastal Board v South Gippsland Shire Council* [2008] VCAT 1545.

[47] See further B J Preston, "The role of courts in relation to adaptation to climate change" in T Bonyhady, J McDonald and A Macintosh (eds), *Adapting to Climate Change: Australian Law and Policy* (Federation Press, in press) and B J Preston, "Climate Change Litigation" (2009) 9 *The Judicial Law Review* 205, republished (2009) 26 *Environmental and Planning Law Journal* 169.

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

In *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd*,[48] the Land and Environment Court approved a large wind farm. Local residents of a nearby village, Taralga, and its surrounds had objected to the proposed wind farm on a variety of grounds, including visual impact and noise. The wind farm was, however, beneficial in providing renewable energy with no greenhouse gas emissions, which could be substituted in part for non-renewable, fossil fuel energy with greenhouse gas emissions. The conflict was between the geographically narrower concerns of the residents and the broader public good of increasing the supply of renewable energy.[49] The Court noted that increasing the supply of renewable energy involved promoting sustainable development, including intergenerational equity.[50] On balance, the Court concluded that "the overall public benefits outweigh any private disbenefits either to the Taralga community or specific landowners".[51]

Courts undertaking merits review can also provide leadership by formulating and applying principles. The principles derive from the case at hand, but can be of more general applicability. This involves rule-making by adjudication and is distinguishable from legislative rule-making. Courts undertaking merits review can by rule-making add value to administrative decision-making by extrapolating principles from the cases that come before them and publicising these to the target audience, who can apply them in future administrative decision-making.[52] The benefits of adopting principles are similar to the benefits of adopting a guiding policy. Decision-making is facilitated by the guidance given by the principles. The integrity of decision-making in

[48] (2007) 161 LGERA 1.
[49] Ibid at [3].
[50] Ibid at [73] and [74].
[51] Ibid at [352].
[52] Creyke R, "The special place of tribunals in the system of justice: How can tribunals make a difference?" (2004) 15 *Public Law Review* 220 at 234.

particular cases is better assured if decisions can be tested against the principles. Application of the principles can diminish inconsistency and enhance the sense of satisfaction with the fairness and continuity of the administrative process.[53]

The Land and Environment Court has recognised the value-adding benefits of principles in merits review and has encouraged, in appropriate cases, the formulation and dissemination of planning principles in planning appeals[54] and tree dispute principles in tree applications.[55]

The Court's explication of the principles of ecologically sustainable development, and the precautionary principle in particular, in *Telstra Corporation Ltd v Hornsby Shire Council*[56] has been beneficial in future decision-making.[57]

There is, therefore, a capacity for courts undertaking merits review of decisions raising issues of sustainable development to extrapolate principles from the cases, which principles are capable of adding value to decision-making by the executive branch in future matters involving issues of sustainable development.

FUNCTION OF LEGISLATING

The judicature can also exercise legislative functions by delegation from the legislative branch. Courts can make rules of court regulating the practice and procedure for the hearing and determination of disputes. Courts can review and revise rules of court to ensure the just, quick and

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[53] *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 640.
[54] Against decisions under the *Environmental Planning and Assessment Act* 1979 (NSW).
[55] Under the *Trees (Disputes Between Neighbours) Act* 2006 (NSW).
[56] (2006) 67 NSWLR 256; (2006) 146 LGERA 10.
[57] An illustration is the application of the Court's discussion in *Telstra Corporation Ltd v Hornsby Shire Council* in planning cases by the State Administrative Tribunal of Western Australia: see D Parry, "Ecologically sustainable development in Western Australian planning cases" (2009) 26 *Environmental and Planning Law Journal* 375, in particular *Mount Lawley Pty Ltd and Western Australian Planning Commission* [2007] WASAT 59 and *WA Developments Pty Ltd and Western Australian Planning Commission* [2008] WASAT 260.

cheap resolution of proceedings. Courts can make rules that facilitate access to justice. The Land and Environment Court of NSW, for example, has reviewed and revised its court rules to facilitate public interest litigation. The Court, if it is satisfied that the proceedings have been brought in the public interest, may decide not to order an unsuccessful applicant to pay the costs of the other parties in the proceedings, order an applicant in any proceedings to give security for the respondent's costs, or order an applicant to give any undertaking as to damages in relation to an interlocutory injunction or order sought by the applicant or an undertaking offered by the respondent in response to the application.[58]

CONCLUSION

Each branch of government, including the judicature, has a role to play in achieving sustainable development. The nature and extent of the role necessarily varies depending on the functions exercised by the branch.

Traditional thinking sees the legislature and executive as playing the lead role, with the judicature acting merely as an agent in the implementation of the will and action of the legislature and the executive. But such thinking is too cramped. The judicature legitimately can make a meaningful contribution in the exercise of its central function of judging.

The process of judging inherently involves judicial law-making. Judicial interpretation of legislation, both primary and subordinate, involves law-making, although this is interstitial and incremental. By fulfilling this interpretive role, courts have been described as "the judicial partner in the legislative project".[59]

This process is especially significant for environmental legislation which characteristically is drawn as a framework of rules expressed at a high level of generality. The principles of ecologically sustainable development are a case in point. A court can, by interpretation, flesh

[58] See Pt 4, r 4.2 of the *Land and Environment Court Rules* 2007.
[59] Barak, above n 1, 4.

out the skeletal framework, both in meaning and application to the facts of the dispute before the court.

The judicial branch also acts as a partner to the legislative and executive branches by upholding and enforcing the lawful exercise of legislative and executive functions by the other branches. The upholding and enforcing of laws encouraging sustainable development ensures good governance.

In addition to its central function of judging, the judicature exercises some executive and legislative functions. In doing so, the judicature also acts as a partner with the other branches of government. The most significant exercise of executive functions is where a court is vested with authority to undertake merits review of administrative decisions and conduct. Merits review of environmental decisions provides opportunity for courts to achieve sustainability in the case at hand and add value to decision-making by the executive branch in future matters.

The judicature can also facilitate access to justice, including environmental justice, in the exercise of its executive functions, including court administration, and its legislative functions by making delegated legislation in the form of court rules.

Through the exercise of its judicial, executive and legislative functions, therefore, the judicature can provide leadership in achieving sustainability.