

# THE ART OF JUDGING ENVIRONMENTAL DISPUTES

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## I INTRODUCTION

The determination of proceedings by a court or a judge (the two expressions may be here treated as equivalent) may involve more art than science, but it is neither unprincipled nor irrational.

Sir Owen Dixon famously referred to the judicial method of the common law as traditionally involving ‘high technique and strict logic’.<sup>1</sup> Whilst Dixon conceded that in more modern times it would no longer be accurate to use the adjectives of ‘high’ and ‘strict’,<sup>2</sup> nevertheless it remains true to describe the way in which the administration of justice proceeds as involving a particular technique and logic. Dixon stated that ‘courts proceed upon the basis that the conclusion of the judge should not be subjective or personal to him but should be the consequence of his best endeavour to apply an external standard’.<sup>3</sup> The standard, Dixon considered, is to be found in the body of positive knowledge which the judge has acquired.<sup>4</sup> The standard might be an identifiable, settled legal rule or principle or an extension of such a rule or principle (such extension itself being determined using the judicial method). But it cannot be an entirely new rule or principle, fashioned by the judge to pursue the judge’s personal or subjective views in the name of justice or social necessity or social convenience.<sup>5</sup>

The observation that the administration of justice should proceed by technique and logic, and not by the idiosyncratic views of individual judges, has a topical resonance with current environmental issues.

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1 Sir O Dixon, ‘Concerning Judicial Method’ in *Jesting Pilate* (2<sup>nd</sup> ed, 1997) 157.

2 Ibid 158.

3 Ibid 157.

4 Ibid 157–8.

5 Ibid 158.

The ecological crisis facing the earth, climate change being the recent high profile illustration, triggers demands for action, including for the pursuit of ecologically sustainable development. What ought be the role of judges in meeting this crisis, in achieving ecologically sustainable development?

It is no doubt true that the law, to be effective, ought be responsive and adapted to the demands of the society of today, including the environmental issues it faces. Roscoe Pound suggests a means by which this can be achieved. He identifies in the legal system two elements: a traditional or habitual element and an enacted or imperative element. The latter is usually the modern element, exemplified by statute, and is becoming more predominant. The former is the older or historical element upon which juristic development proceeds by analogy.<sup>6</sup> Pound posits that we must bring about the infusion of social ideas into the traditional element of the law.<sup>7</sup> In this way there will be a body of law which will satisfy the demands of the society of today.<sup>8</sup> Although care needs to be taken, the courts might take a leadership role in this regard.<sup>9</sup>

However, judges ought not base their conclusions on views that are personal or subjective to them. The fate of disputes concerning pressing environmental issues such as climate change, ought not turn on the personal or subjective views of the individual judge assigned to hear and determine the matter. For example, the outcome should not be dependent on whether the judge is a climate change believer or a climate change sceptic. It should not be assumed that recourse to the judge's own subjective views will necessarily result in decisions in favour of environmental protection and ecologically sustainable development rather than against them.<sup>10</sup>

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<sup>6</sup> R Pound, *The Spirit of the Common Law* (1999) 190.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> L L Jaffe, *English and American Judges as Lawmakers* (1969) 33. Although see Pound, above n 6, 191, who issues a caution against judges proceeding in the advance guard, rather than the main body.

<sup>10</sup> This point was illustrated by the climate change sceptic view adopted by the Land and Resources Tribunal of Queensland in *Re Xstrata Coal Queensland Pty Ltd* [2007] QLRT 33 (15 February 2007). The Tribunal's decision was set aside by the Queensland Court of Appeal on the ground that the Tribunal denied procedural fairness

To avoid ad hoc decision making, judges ought to employ accepted technique and logic in arriving at their decision. By conforming to such standards of decision making, decisions will have an explicit rationality. Furthermore, the decisions will contribute to a body of law that has integrity. One social need is for a reasonably logical and consistent system of law.<sup>11</sup>

In this short article, I will outline techniques and logic that judges can apply in determining disputes involving environmental issues. I will illustrate the judicial method with examples of judicial decisions regarding ecologically sustainable development.

## II DIFFERING FUNCTIONS OF THE JUDGE IN ENVIRONMENTAL DISPUTES

A range of disputes involving environmental issues come before the courts. Some disputes call for the exercise of a judicial function, but others call for the exercise of an administrative or executive function. There is a contest as to whether judges, in making their decisions, exercise a legislative or law-making function.

The role of the judge, and the technique used, will vary with the nature of the function being exercised. Adjudication of disputes, in the strict sense, involves exercise of the judicial function. Adjudication involves the determination of a dispute by the reasoned application of a legal rule or principle to the facts of the matter.<sup>12</sup> The judge acts, not as an arbitrator, but strictly as a judge. The judge's task is to determine not what in the judge's view may be fair as between the parties in a given case, but what, according to the applicable rule or principle of law, are the respective rights or obligations.<sup>13</sup> I will elaborate on the steps in the adjudication process below.

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in failing to afford a fair opportunity to test or refute the climate change sceptic critique relied upon by the Tribunal: *Queensland Conservation Council Inc v Xstrata Coal Queensland Pty Ltd* (2007) 155 LGERA 322.

<sup>11</sup> P J Fitzgerald, *Salmond on Jurisprudence* (12<sup>th</sup> ed, 1966) 188.

<sup>12</sup> L L Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353, in particular at 371.

<sup>13</sup> A V Dicey, *Law and Public Opinion in England* (2<sup>nd</sup> ed, 1962) 483.

Adjudication, and the exercise of the judicial function, is employed in the determination of civil claims, including judicial review claims, and criminal prosecutions. However, in adjudication there may also be a discretion vested in the court as to the remedy, relief or punishment to be granted. The exercise of this discretion involves an administrative or executive function. But even here, such discretion needs to be exercised judicially, within accepted parameters laid down by precedent or the statute imposing the discretion.

Other environmental disputes that come before the courts involve, more completely, the exercise of an administrative or executive function. Many courts or tribunals are vested with the function of reviewing on the merits exercises of power by officers and bodies of the executive branch of government. An example is the function vested in planning and environment courts or tribunals to review decisions of local or State government in relation to applications for approval to carry out development.

In undertaking merits review, the court may exercise all the powers and discretions that are conferred on the original decision maker. The court is not confined to the material that was before the original decision maker but may receive and consider fresh evidence or evidence in addition to, or in substitution for, the material that was before the original decision maker. The decision of the court is substituted for the original decision maker; it is deemed to be the final decision of the original decision maker.<sup>14</sup>

In making its decision in a merits review, the court, like the original decision maker, acts as an arbitrator, not strictly as a judge. The court in merits review determines what decision is the correct or preferable one on the material before the court.<sup>15</sup> Where the statute reposing the power, the exercise of which is under review, imposes limits on the exercise of the power, such as that the power is only enlivened if certain circumstances exist or may only be exercised in a particular way if certain circumstances exist, the court must determine whether the limits on the power are satisfied. There may be only one decision reasonably available on the evidence and that

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<sup>14</sup> See, for example, s 39(2)–(5) of the *Land and Environment Court Act 1979* (NSW).

<sup>15</sup> *Drake v Minister for Immigration and Ethnic Affairs (No 1)* (1979) 24 ALR 577, 589.

decision will therefore be the correct decision. Where there are a range of decisions reasonably open, all of which would be correct, the court chooses, on the evidence before it, what it considers to be a preferable decision.

Unlike adjudication, the resolution by merits review of a dispute ordinarily does not involve the application of a dispositive legal rule or principle. One reason is that the disputes to be determined by merits review raise polycentric problems. Polycentric problems are unsuited to resolution through adjudication because their resolution involves 'spontaneous and informal collaboration, shifting its forms with the task at hand'.<sup>16</sup> Polycentric problems cannot be resolved by identifying each issue at the start then sequentially resolving each of the originally identified issues. In a polycentric problem, the resolution of one issue will have repercussions on the other issues; the issues may change in nature and scope depending on how the first issue is resolved.<sup>17</sup>

I will focus in the comments that follow on adjudication. I have sketched elsewhere the role of courts in undertaking merits review of environmental decisions.<sup>18</sup>

### III STEPS IN ADJUDICATION

Pound identified three steps in the adjudication of a dispute, namely, finding the law, interpreting the law and applying the law:

Three steps are involved in the adjudication of a controversy according to law: (1) Finding the law, ascertaining which of the many rules in the legal system is to be applied, or, if none is applicable, reaching a rule for the cause (which may or may not stand as a rule for subsequent cases) on the basis of given materials in some way which the legal system points out; (2) interpreting the rule so chosen or ascertained, that is, determining its meaning as it was framed and with respect to its intended

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<sup>16</sup> Fuller, above n 12, 371.

<sup>17</sup> Ibid 394–8. See also B J Preston, 'Limits of Environmental Dispute Resolution Mechanisms' (1995) 13 *Australian Bar Review* 148, 166–7.

<sup>18</sup> Justice 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* (2008) (in press).

scope; (3) applying to the cause in hand the rule so found and interpreted.<sup>19</sup>

These three steps interrelate. As Pound has noted elsewhere, ‘[i]t is as clear as legal history can make it that interpretation apart from judicial application is impracticable; that it is futile to attempt to separate the functions of finding the law, interpreting the law and applying the law’.<sup>20</sup>

These three steps constitute a model of syllogistic reasoning. Through the first two steps of finding and interpreting the law, the judge identifies the relevant rule of law which is the major premise. The rule of law typically states that in a given factual situation certain rights, obligations or liabilities exist. The third step, of applying the law so found and interpreted to the matter, involves two stages. The first stage is finding the facts relevant to the identified rule of law, which identify the minor premise. The second stage involves taking the rule of law as the major premise, employing the facts found as the minor premise, and, in theory, coming to a judgment by a process of syllogistic reasoning.

Such a syllogistical model works better in theory than in practice, for a variety of reasons. The rule of law may not be able to be expressed neatly as a categorical proposition so as to form the major premise in the categorical syllogism. The third term in the syllogism, the conclusion, may not be able to be reached by pure, syllogistic reasoning from the first two terms (the major and minor premises) because of the applicable law. For example, the applicable law may vest a judicial discretion as to whether to grant relief, even if by application of the law to the facts a right, obligation or liability is found to exist. And, in the reality of actual judging, judges may work back from conclusions to principles, however heretical this seems.<sup>21</sup>

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<sup>19</sup> R Pound, *An Introduction to the Philosophy of Law* (1954) 48.

<sup>20</sup> Pound, *The Spirit of the Common Law*, above n 6, 179.

<sup>21</sup> J Frank, *Law and the Modern Mind* (1949) 102–3.

Nevertheless, the model has a simplicity and logic and, therefore, will be used to structure the following discussion of the judicial method in adjudicating environmental disputes.

#### IV FINDING THE LAW

The first step involves ascertaining which legal rule is to be applied. At times, this involves no particular difficulty. The legal rule to be applied may be prescribed by statute, either primary or subordinate, or be settled by precedent.<sup>22</sup> If a legal rule is applicable, it must be applied and the answer it gives must be accepted.<sup>23</sup> 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.<sup>24</sup>

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.<sup>25</sup> It is this task of supplying a new rule or principle, and whether this involves law-making, that is controversial.

Under the classical, declaratory theory of judicial decision making, of which Blackstone was the chief exponent, judges do not, and cannot, make law; they merely discover and declare it.<sup>26</sup> The

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<sup>22</sup> As to the rules of precedent, see R Cross and J W Harris, *Precedent in English Law* (4<sup>th</sup> ed, 1991); Justice J Lockhart, 'The Doctrine of Precedent – Today and Tomorrow' (1987) 3 *Australian Bar Review* 1; Sir A Mason, 'The Use and Abuse of Precedent' (1988) 4 *Australian Bar Review* 93. See also *Proctor v Jetway Aviation Pty Ltd* [1984] 1 NSWLR 166, 177–80; *SZGME v Minister for Immigration and Citizenship* (No NSD 457 of 2007) (2008) 247 ALR 467, 479–80.

<sup>23</sup> R Dworkin, *Taking Rights Seriously* (1978) 24; B N Cardozo, *The Nature of the Judicial Process* (1949) 14.

<sup>24</sup> Pound, *An Introduction to the Philosophy of Law*, above n 19, 50.

<sup>25</sup> *Ibid.* See also Pound, *The Spirit of the Common Law*, above n 6, 183; Cardozo, above n 23, 14–16.

<sup>26</sup> W Blackstone, *Commentaries on the Laws of England*, Book 1 (first published 1765, reprinted in The Legal Classics Library, 1983) 69–70.

classical declaratory theory has been trenchantly criticised as a fiction or myth.<sup>27</sup>

Positivistic jurisprudence, from Bentham to Austin through to Hart, accepts that judges may legitimately fill in the gaps left by rules by using their discretion.<sup>28</sup> As Hart states:

[I]n any legal system there will always be certain legally unregulated cases in which on some point no decision either way is dictated by the law and the law is accordingly partly indeterminate or incomplete. If in such cases the judge is to reach a decision ..., he must exercise his *discretion* and *make* law for the case instead of merely applying already pre-existing settled law. So in such legally unprovided-for or unregulated cases the judge both makes new law and applies the established law which both confers and constrains his law-making powers.<sup>29</sup>

These law making powers, however, are interstitial and subject to many constraints.<sup>30</sup> Judges must not exercise their law making powers arbitrarily, must always have some general reasons justifying their decision and must act as a conscientious legislator would by deciding according to their own beliefs and values.<sup>31</sup>

Dworkin challenges this positivist view. Dworkin denies the existence of a strong (that is legally uncontrolled) judicial discretion.<sup>32</sup> Judges do not make law because all of the resources for their proper decisions are provided by the existing law, as correctly understood. These resources include the explicit settled law (rules) as well as the implicit legal principles that underlie and are

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<sup>27</sup> J Austin, *Lectures on Jurisprudence* (edited by R Campbell, 4<sup>th</sup> ed, 1879) vol 2, 655; Frank, above n 21, 32–41, 244; Lord Reid, ‘The Judge as Law Maker’ (1972) 12 *Journal of the Society of Public Teachers of Law* 22, 22; Sir A Mason, ‘The Role of the Judge at the Turn of the Century’ in G Lindell (ed), *The Mason Papers* (2007) 55; Sir A Mason, ‘Legislative and Judicial Law-Making: Can We Locate an Identifiable Boundary?’ in G Lindell (ed), *The Mason Papers* (2007) 62–3.

<sup>28</sup> H L A Hart, *The Concept of Law* (2<sup>nd</sup> ed, 1994) 132, 135–6.

<sup>29</sup> *Ibid* 272.

<sup>30</sup> *Ibid* 273.

<sup>31</sup> *Ibid*.

<sup>32</sup> Dworkin, *Taking Rights Seriously*, above n 23, 31–9, 68–71.

embedded in the settled law. Together, these existing legal resources should be treated as making up a ‘seamless web’.<sup>33</sup> The task of judges is to understand the content of the legal system and give effect to it in their judgments to the best of their ability.<sup>34</sup> This task is ‘interpretative’ but is also partly evaluative; it involves identification of the principles which both best ‘fit’ or cohere with the settled law and legal practices of the legal system and also provide the best moral justification for them, thus showing the law ‘in its best light’.<sup>35</sup>

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.<sup>36</sup> 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.<sup>37</sup> The judge may also find it helpful to consider persuasive foreign decisions which may show how other jurisdictions have solved the problem in question.<sup>38</sup> 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’.<sup>39</sup> The value of foreign judgments depends on the persuasive force of their reasoning.<sup>40</sup>

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

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<sup>33</sup> Ibid 115–18.

<sup>34</sup> R Dworkin, *A Matter of Principle* (1985) ch 5. See also R Cotterrell, *The Politics of Jurisprudence* (1989) 171.

<sup>35</sup> R Dworkin, *Law’s Empire* (1998) 90. See also Hart, above n 28, 240–1, 272.

<sup>36</sup> Dicey, above n 13, 488; Jaffe, above n 9, 37; Fitzgerald, *Salmond on Jurisprudence*, above n 11, 185–6.

<sup>37</sup> Fitzgerald, *Salmond on Jurisprudence*, above n 11, 185–6.

<sup>38</sup> Ibid 186; A Barak, ‘A Judge on Judging: The Role of a Supreme Court in a Democracy’ (2002) 116 *Harvard Law Review* 19, 114.

<sup>39</sup> L L Fuller, *Anatomy of the Law* (1971) 138.

<sup>40</sup> Sir A Mason, ‘Future Directions in Australian Law’ in G Lindell (ed), *The Mason Papers* (2007) 17.

assistance.<sup>41</sup> 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.<sup>42</sup> 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 example is the decision in *Telstra Corporation Ltd v Hornsby Shire Council*,<sup>43</sup> 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.<sup>44</sup>

Having considered the existing law on related topics in both domestic and foreign sources of law, the judge develops competing

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<sup>41</sup> See B Boer, 'The Globalisation of Environmental Law: The Role of the United Nations' (1995) 20 *Melbourne University Law Review* 101; D Rothwell and B Boer, 'From Franklin to Berlin: The Internationalisation of Australian Environmental Law and Policy' (1995) 17 *Sydney Law Review* 242; Sir A Mason, 'The Influence of International and Transnational Law on Australian Municipal Law' in G Lindell (ed), *The Mason Papers* (2007) 269–73.

<sup>42</sup> For example, s 6(2)(a) of the *Protection of the Environment Administration Act 1991* (NSW).

<sup>43</sup> (2006) 67 NSWLR 256, 265–81; (2006) 146 LGERA 10, 35–50.

<sup>44</sup> See also *Conservation Council of South Australia Inc v Development Assessment Commission and Tuna Boat Owners Association of SA Inc (No 2)* [1999] SAERDC 86 (16 December 1999) 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.

logical extensions of the potentially applicable rules to meet the new circumstances of the case at hand and makes a choice.<sup>45</sup>

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.<sup>46</sup> 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’.<sup>47</sup> 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’.<sup>48</sup> The new formulation will be seen as a step in an ‘evolutionary process or continuum’.<sup>49</sup> It should maintain ‘the logic or the symmetry of the law’<sup>50</sup> and uphold integrity in law.<sup>51</sup>

Such analogical reasoning is not deductive. As Julius Stone notes:

The choice between competing starting points cannot be made by logical deduction; it necessarily involves a reference to the facts and to standards of justice (however covert) in order to decide which analogy will give a ‘preferable’ result in the instant case .... The decisive element in such cases of conflicting analogies is not logic, therefore, but the pre-logical choice between the starting points, that is, the premises .... The syllogism does not come into play until after the choice is made.<sup>52</sup>

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45 Jaffe, above n 9, 36.

46 E H Levi, *An Introduction to Legal Reasoning* (1948) 1.

47 Hart, above n 28, 127.

48 Cardozo, above n 23, 30.

49 Sir A Mason, ‘The Role of the Judge at the Turn of the Century’, above n 27, 56–7.

50 Dicey, above n 13, 364.

51 Dworkin, *Law’s Empire*, above n 35, generally and ch 7 in particular.

52 J Stone, *The Province and Function of Law* (1961) 139–40.

Analogical reasoning is also not truly inductive, although the direction is from the particular to the general.<sup>53</sup>

Although no analogy is compelling in a purely logical sense as leading to a necessary conclusion, nevertheless, as Lloyd notes, ‘as a practical matter human beings do reason by analogy, and find this a useful way of arriving at normative or practical decisions’.<sup>54</sup>

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 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).<sup>55</sup>

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’.<sup>56</sup> 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’.<sup>57</sup>

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’.<sup>58</sup>

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<sup>53</sup> Levi, above n 46, 27, see also the quote from Aristotle at 1, fn 2. See also Fitzgerald, *Salmond on Jurisprudence*, above n 11, 185.

<sup>54</sup> M D A Freeman, *Lloyd’s Introduction to Jurisprudence* (7<sup>th</sup> ed, 2001) 1409.

<sup>55</sup> Cardozo, above n 23, 30–1.

<sup>56</sup> Fitzgerald, *Salmond on Jurisprudence*, above n 11, 188.

<sup>57</sup> Sir A Mason, ‘Future Directions in Australian Law’, above n 40, 21.

<sup>58</sup> Fitzgerald, *Salmond on Jurisprudence*, above n 11, 188. See also Sir A Mason, ‘Legislative and Judicial Law-Making: Can We Locate an Identifiable Boundary?’, above n 27, 64.

Indeed, this explicit rationalisation is the hallmark of adjudication<sup>59</sup> and is crucial to the judicial decision making process.<sup>60</sup>

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 series of decisions of the Land and Environment Court of New South Wales holding that the principles of ecologically sustainable development (ESD) are relevant matters to be considered in determining an application for approval to carry out development that is likely to impact the environment.

The first case in which one of the principles of ESD, namely the precautionary principle, arose was *Leatch v National Parks and Wildlife Service*.<sup>61</sup> A local council granted development consent to itself to construct a link road through native vegetation. The road construction was likely to take or kill endangered fauna. The Council applied to the National Parks and Wildlife Service for a licence to take or kill endangered fauna under the then applicable provisions of the *National Parks and Wildlife Act 1974* (NSW). The Service granted the licence but an objector appealed to the Court against the decision.

The appeal was by way of merits review of the Service's decision to grant the licence. One issue on the appeal was whether the Court, exercising the functions and discretions of the Service, could take into account the precautionary principle.

The *National Parks and Wildlife Act 1974* (NSW) at that time did not expressly refer to any of the principles of ESD, including the precautionary principle, either in the specification of the matters required to be considered or in the objects of the Act.<sup>62</sup> Nevertheless, the then applicable s 92C of the *National Parks and Wildlife Act 1974* (NSW) required the Court to take into account on an appeal the public submissions made, some of which had argued that the precautionary principle was appropriate to the case, and any other matter which the Court considers relevant, which, having

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<sup>59</sup> Fuller, above n 12, 365–72, 377.

<sup>60</sup> Jaffe, above n 9, 37–8.

<sup>61</sup> (1993) 81 LGERA 270.

<sup>62</sup> The *National Parks and Wildlife Act 1974* (NSW) was subsequently amended so as to refer to the principles of ESD: see s 2A(2).

regard to the subject matter, scope and purpose of the Act, would include the precautionary principle. In addition, the *Land and Environment Court Act 1979* (NSW) provided that the Court on an appeal is to have regard to ‘the circumstances of a case and the public interest’.<sup>63</sup>

Stein J held that, while there was no express provision requiring consideration of the precautionary principle, nevertheless it was a relevant matter to be considered by means of these statutory provisions and having regard to the subject matter, scope and purpose of the Act.<sup>64</sup>

The issue subsequently arose under a different enactment, the *Environmental Planning and Assessment Act 1979* (NSW), in *Carstens v Pittwater Council*.<sup>65</sup> By this time, that Act had been amended to add the encouragement of ESD as an object of the Act.<sup>66</sup> However, the list of matters in s 79C(1) that a consent authority (including the Court on a merits review appeal) is required to take into account in determining a development application did not expressly refer to the principles of ESD, although the list did include ‘the public interest’ (s 79C(1)(e)).

A commissioner of the Court had dismissed the applicant’s appeal against the refusal of the local Council to approve a dwelling house and associated work. Critical to the commissioner’s decision was his holding that the Act required the principles of ESD to be a factor in the consideration of a development application under the Act. The applicant appealed on a question of law to a judge of the Court. To succeed in establishing an error of law, the applicant had to show that the principles of ESD were an irrelevant matter that the commissioner was bound to ignore.

Lloyd J held that the principles of ESD could not be said to be irrelevant for two reasons: first, it is not an irrelevant consideration for a decision maker to take into account a matter relating to the objects of the Act, one of which is to encourage ESD and, secondly,

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<sup>63</sup> *Land and Environment Court Act 1979* (NSW) s 39(4).

<sup>64</sup> *Leach v National Parks and Wildlife Service* (1993) 81 LGERA 270, 282–3.

<sup>65</sup> (1999) 111 LGERA 1.

<sup>66</sup> *Environmental Planning and Assessment Act 1979* (NSW) s 5(a)(vii).

one of the considerations expressly mentioned is ‘the public interest’ and it is in the public interest, in determining a development application, to give effect to the objects of the Act.<sup>67</sup>

The rule that a principle of ESD may be considered under the heading of ‘the public interest’ was therefore transposed to a different statutory enactment and cast as a not irrelevant consideration.

In the next case, *Hutchison Telecommunications (Australia) Pty Ltd v Baulkham Hills Shire Council*,<sup>68</sup> Pain J held that the precautionary principle is a relevant consideration under s 79C of the *Environmental Planning and Assessment Act 1979* (NSW), given the reference to ESD in the Act’s objects.<sup>69</sup> Although Pain J stated that this approach was also taken by Lloyd J in *Carstens v Pittwater Council*, in fact, Pain J’s decision was an extension of Lloyd J’s decision. Lloyd J had held that the principles of ESD were not irrelevant matters under s 79C(1) (which is different to holding that they were relevant matters). Pain J extended this to hold that the principles of ESD were relevant matters under s 79C(1).

Pain J also had regard to the definition of the precautionary principle given in another statute, namely in s 6(2) of the *Protection of the Environment Administration Act 1991* (NSW), to give content to the relevant matter to be considered, the precautionary principle, under the *Environmental Planning and Assessment Act 1979* (NSW).<sup>70</sup> At that time, there was no definition of the principles of ESD in the *Environmental Planning and Assessment Act 1979* (NSW). Subsequently, a definition was inserted which adopted, as Pain J had held was appropriate, the definition in s 6(2) of the *Protection of the Environment Administration Act 1991* (NSW).<sup>71</sup>

In *BGP Properties Pty Ltd v Lake Macquarie City Council*,<sup>72</sup> McClellan J examined in detail whether the principles of ESD were

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<sup>67</sup> *Carstens v Pittwater Council* (1999) 111 LGERA 1, 25 [74].

<sup>68</sup> [2004] NSWLEC 104 (26 March 2004).

<sup>69</sup> *Ibid* [26].

<sup>70</sup> *Ibid*.

<sup>71</sup> See now *Environmental Planning and Assessment Act 1979* (NSW) s 4(1).

<sup>72</sup> (2004) 138 LGERA 237.

relevant matters to be considered when determining a development application under the *Environmental Planning and Assessment Act 1979* (NSW). The judgment does not refer to Pain J's decision in *Hutchison Telecommunications (Australia) Pty Ltd v Baulkham Hills Shire Council*. McClellan J agreed with Lloyd J's conclusion in *Carstens v Pittwater Council*,<sup>73</sup> but went further to hold that

by requiring a consent authority (including the Court) to have regard to the public interest, [s 79C(1)(e)] of the EP&A Act obliges the decision maker to have regard to the principles of ecologically sustainable development in cases where issues relevant to those principles arise.<sup>74</sup>

Again, this holding is cast in positive terms (the principles of ESD are relevant matters to be considered), not the double negative terms that Lloyd J had used (the principles of ESD are not irrelevant matters).

In arriving at the conclusion that the principles of ESD are relevant matters, McClellan J had regard to a variety of sources of law, both domestic and international. Domestic sources of law included other statutes referring to the principles of ESD, quasi-legislative policy documents, persuasive precedents in prior decisions of the Court and of courts in other Australian jurisdictions while the international sources of law consisted particularly of international soft law on the principles of ESD.

Subsequent cases have affirmed the rule that had now been articulated by these cases, that the principles of ESD are relevant matters to be considered by a consent authority when determining a development application under Part 4 of the *Environmental Planning and Assessment Act 1979* (NSW), under the rubric of the 'public interest'.<sup>75</sup>

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<sup>73</sup> Ibid 257 [101].

<sup>74</sup> Ibid 263 [113].

<sup>75</sup> *Port Stephens Pearls Pty Ltd v Minister for Infrastructure and Planning* [2005] NSWLEC 426 (15 August 2005), [54]; *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 146 LGERA 10, 38 [121]–[124]; *Minister for Planning v Walker* [2008] NSWCA 224 (24 September 2008), [42]–[43].

The next phase in the evolution of the rule came when the issue had to be determined with respect to applications for approval under a different part of the *Environmental Planning and Assessment Act 1979* (NSW), namely Part 3A concerning major infrastructure and other projects. The prior decisions had concerned development applications under Part 4. As noted, one of the matters that a consent authority is required to consider in determining a development application is the public interest in s 79C(1)(e). In contrast, Part 3A is spare in its express specification of matters to be considered by the Minister in determining an application under this Part. There is no express specification of the public interest as a relevant consideration.

In *Gray v Minister for Planning*,<sup>76</sup> Pain J held that, notwithstanding the absence of express specification that the public interest or the principles of ESD are to be considered, nevertheless there is an implied obligation to consider these matters. In *Gray*, the decision challenged was that of the Director-General to accept the proponent's environmental assessment as adequately addressing the Director-General's requirements. Pain J held that the Director-General was required to exercise the discretion as to whether to accept the proponent's environmental assessment, in accordance with the objects of the Act, which include the encouragement of the principles of ESD.<sup>77</sup> Pain J also accepted the applicant's argument that the Director-General was required to take into account the public interest and that consideration of the public interest included encouragement of the principles of ESD.<sup>78</sup>

By this decision, the rule was extended from decisions under Part 4 of the *Environmental Planning and Assessment Act 1979* (NSW) to one type of decision under Part 3A of that Act. The next extension came in *Walker v Minister for Planning*.<sup>79</sup> Biscoe J held that the principles of ESD were relevant matters to be considered in another

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<sup>76</sup> (2006) 152 LGERA 258.

<sup>77</sup> The NSW Court of Appeal, in a subsequent case, disagreed with the view of Pain J that a failure to consider any one of the objects of the Act, including encouragement of ESD, renders void a Minister's decision: see *Minister for Planning v Walker* [2008] NSWCA 224 (24 September 2008), [55].

<sup>78</sup> *Ibid* 291 [114]–[115].

<sup>79</sup> (2007) 157 LGERA 124.

type of decision under Part 3A of the Act, namely that of the Minister in approving a concept plan. Biscoe J's reasoning seized upon the rule developed in prior decisions concerning Part 4 of the Act that the public interest can include the principles of ESD, and extended it to the circumstances of the exercise of the statutory power there in question. Biscoe J noted that s 75O of the *Environmental Planning and Assessment Act 1979* (NSW) mandates that the Minister must consider, when approving a concept plan, the Director-General's report on the project and the reports and recommendations contained in the report. Clause 8B of the *Environmental Planning and Assessment Regulation 2000* (NSW) requires the Director-General to include in the report 'any aspect of the public interest that the Director-General considers relevant to the project'. Biscoe J held that the reference to 'public interest' in cl 8B includes the principles of ESD.<sup>80</sup> On appeal, the NSW Court of Appeal reversed the result, but upheld certain aspects of the reasoning of Biscoe J.<sup>81</sup> Hodgson JA (with whom Campbell and Bell JJA agreed) held that it is a condition of validity of the exercise of powers under the *Environmental Planning and Assessment Act 1979* (NSW) that the Minister consider the public interest. Although that requirement is not explicitly stated in the Act, it is so central to the task of a Minister fulfilling functions under the Act that it goes without saying. Any attempt to exercise powers in which a Minister did not have regard to the public interest could not be a *bona fide* attempt to exercise the powers.<sup>82</sup> Confirmation is to be found in clause 8B of the *Environmental Planning and Assessment Regulation 2000* (NSW).<sup>83</sup> That regulation bore on the construction of the legislation because Part 3A of the Act and Part 1A of the Regulation (containing cl 8B) constituted a single scheme and were introduced together.<sup>84</sup> Confirmation is also to be found in s 79C of the Act, dealing with development consents by consent authorities, which specifies the public interest as a factor to be taken into

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<sup>80</sup> Ibid 189 [154].

<sup>81</sup> *Minister for Planning v Walker* [2008] NSWCA 224 (24 September 2008).

<sup>82</sup> Ibid [39].

<sup>83</sup> Ibid [40].

<sup>84</sup> Ibid [36]–[37].

account.<sup>85</sup> Hodgson JA agreed with the earlier decisions of the Land and Environment Court, summarised in *Telstra Corporation Limited v Hornsby Shire Council*,<sup>86</sup> that in respect of a consent authority making a decision in accordance with s 79C of the Act, and a court hearing a merits appeal from such a decision, consideration of the public interest embraces ESD.<sup>87</sup> Hodgson JA then held that:

the principles of ESD are likely to come to be seen as so plainly an element of the public interest, in relation to most if not all decisions, that failure to consider them will become strong evidence of failure to consider the public interest and/or to act *bona fide* in the exercise of powers granted to the Minister, and thus become capable of avoiding decisions.<sup>88</sup>

However, because this was not already the situation at the time when the Minister made his decision to approve the concept plan in that case some years before, the decision could not be avoided on that basis. Hence, the Court of Appeal allowed the appeal and set aside the orders of Biscoe J.<sup>89</sup>

This line of decisions illustrates the process of logical progression by which a rule can be extended by reasoning from case to case.

## V INTERPRETING THE LAW

The second step involved in adjudication 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 statute (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

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<sup>85</sup> Ibid [40].

<sup>86</sup> (2006) 67 NSWLR 256, 268 [121]–[124]; 146 LGERA 10, 37–38.

<sup>87</sup> *Minister for Planning v Walker* [2008] NSWCA 224 (24 September 2008), [42]–[43].

<sup>88</sup> Ibid [56].

<sup>89</sup> Ibid [56], [64].

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'....<sup>90</sup>

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.<sup>91</sup>

The English language is indeterminate and 'irreducibly open textured'.<sup>92</sup> Just like the rules, words used to formulate the rules can be seen to contain a core of certainty and a penumbra of doubt.<sup>93</sup>

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'.<sup>94</sup> It is impossible to have 'a complete legislative provision in advance covering every case, and authoritative extra-judicial interpretation'.<sup>95</sup>

Fourthly, the rules, whether in statutes or the common law, may use very general standards, such as reasonableness, fairness or what is

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<sup>90</sup> Hart, above n 28, 123. See also Levi, above n 46, 28.

<sup>91</sup> Fuller, *Anatomy of the Law*, above n 39, 23.

<sup>92</sup> Hart, above n 28, 128.

<sup>93</sup> Ibid 123; Freeman, above n 54, 1390.

<sup>94</sup> Hart, above n 28, 128.

<sup>95</sup> Pound, *The Spirit of the Common Law*, above n 6, 179, see also 174. See also Pound, *Introduction to the Philosophy of Law*, above n 19, 51.

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’.<sup>96</sup> For this reason, the use of these standards enables changes in society’s values to be ‘taken bodily into the law’.<sup>97</sup> As Oliver Wendell Holmes pointed out, the standards direct the court to ‘derive the rule to be applied from daily experience’.<sup>98</sup> The standards, therefore, ‘are relative to time and place’.<sup>99</sup> 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’.<sup>100</sup>

Finally, there is indeterminacy inherent in the common law system of precedent.<sup>101</sup>

The task of interpreting the law is a necessary incident of the judicial function. As Marshall CJ memorably pronounced in *Marbury v Madison*,<sup>102</sup> ‘[I]t is emphatically the province and duty of the judicial department to say what the law is’.<sup>103</sup> 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.<sup>104</sup> There have been, and still are, 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.<sup>105</sup> Austin and Pound have discussed

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<sup>96</sup> J Stone, *Legal System and Lawyers’ Reasonings* (1964) 264.

<sup>97</sup> Stone, *The Province and Function of Law*, above n 52, 144.

<sup>98</sup> O W Holmes, *The Common Law* (first published 1881, republished by Dover Publications, 1991) 123.

<sup>99</sup> Pound, *The Spirit of the Common Law*, above n 6, 172.

<sup>100</sup> Stone, *The Province and Function of Law*, above n 52, 144.

<sup>101</sup> Hart, above n 28, 134–5; Freeman, above n 54, 1390; E W Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (2005) 123, 131–5, 139–63.

<sup>102</sup> (1803) 5 US 137.

<sup>103</sup> *Ibid* 177.

<sup>104</sup> See generally D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (6<sup>th</sup> ed, 2006); F Bennion, *Statutory Interpretation: A Code* (4<sup>th</sup> ed, 2002).

<sup>105</sup> Chief Justice 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).

the distinction between genuine or proper interpretation, and spurious or improper interpretation.<sup>106</sup> 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.<sup>107</sup> Spigelman has explored the ramifications of legitimate and spurious interpretation in the context of statutory interpretation and human rights.<sup>108</sup>

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 referred to earlier is an illustration.<sup>109</sup>

The effect of the exercise by the court of its interpretative role may be to make law, even though this may be interstitial.<sup>110</sup> As a result of this incremental process, Fuller observes, ‘no enacted law ever comes from its legislator wholly and fully “made” ’.<sup>111</sup>

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<sup>106</sup> Austin, above n 27, 1023–36; R Pound, ‘Spurious Interpretation’ (1907) 6 *Columbia Law Review* 379.

<sup>107</sup> Pound, ‘Spurious Interpretation’, above n 106, 381.

<sup>108</sup> Chief Justice J J Spigelman, ‘Legitimate and Spurious Interpretation’ (Third lecture in the 2008 McPherson Lectures on Statutory Interpretation and Human Rights, University of Queensland, Brisbane, 12 March 2008).

<sup>109</sup> A more complete discussion of cases implementing the principles of ESD can be found in Justice 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.

<sup>110</sup> Hart, above n 28, 274; Freeman, above n 54, 1404; *Southern Pacific Co v Jensen* (1917) 244 US 205, 221 (Holmes J); *Geelong Harbour Trust Commissioners v Gibbs Bright & Co* (1974) 129 CLR 576, 583 (Privy Council).

<sup>111</sup> Fuller, *Anatomy of the Law*, above n 39, 85–6.

## VI APPLICATION OF THE LAW

As I have observed above, through the first two steps of finding and interpreting the law, the judge identifies the relevant rule of law which is the major premise in the model of syllogistic reasoning usually involved in adjudication. The rule of law typically states that in a given factual situation certain rights, obligations or liabilities exist.

The third step, of applying the law so found and interpreted to the matter, encompasses two stages. The first stage is to find the facts relevant to that identified rule of law. The facts identify the minor premise. 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'.<sup>112</sup> 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'.<sup>113</sup>

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.<sup>114</sup> The exercise of the judicial discretion permits individualisation in the application of the law.<sup>115</sup>

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.<sup>116</sup> Such a phrase empowers the

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<sup>112</sup> Fitzgerald, *Salmond on Jurisprudence*, above n 11, 70–1.

<sup>113</sup> Justice R French, 'Dolores Umbridge and Policy as Legal Magic' (2008) 82 *Australian Law Journal* 322, 328.

<sup>114</sup> Fitzgerald, *Salmond on Jurisprudence*, above n 11, 68–9, 70–1.

<sup>115</sup> Pound, *Introduction to the Philosophy of Law*, above n 19, 53, 56, 63. See also Chief Justice A M Gleeson, 'Individualised Justice – the Holy Grail' (1995) 69 *Australian Law Journal* 421.

<sup>116</sup> See, for example, *Environmental Planning and Assessment Act 1979* (NSW) s 124(1).

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'.<sup>117</sup> The discretion extends to withholding relief if the court does not think any order is fit to remedy or restrain the breach.<sup>118</sup>

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.<sup>119</sup> 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.<sup>120</sup> 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.<sup>121</sup> The concept of the public trust was invoked by Stein J in *Willoughby City Council v Minister Administering the National Parks and Wildlife Act*<sup>122</sup> in relation to national parks. His Honour used this concept 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.<sup>123</sup>

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<sup>117</sup> *F Hannan Pty Ltd v Electricity Commission (NSW) (No 3)* (1985) 66 LGERA 306, 311 (Street CJ).

<sup>118</sup> *Ibid* (Street CJ). See also *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335, 338–41; *ACR Trading Pty Ltd v Fat-Sel Pty Ltd* (1987) 11 NSWLR 67, 82–3.

<sup>119</sup> *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335, 339.

<sup>120</sup> *Willoughby City Council v Minister Administering the National Parks and Wildlife Act* (1992) 78 LGERA 19, 34.

<sup>121</sup> Pound, *Spirit of the Common Law*, above n 6, 202–3; J L Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' (1970) 68 *Michigan Law Review* 471.

<sup>122</sup> (1992) 78 LGERA 19, 34.

<sup>123</sup> See further, T Bonyhady, 'A Usable Past: The Public Trust in Australia' (1995) 12 *Environmental and Planning Law Journal* 329.

## VII CONCLUSION

Adjudication of environmental disputes does not stand in a unique position, separate from the adjudication of other disputes. The art of judging environmental disputes involves the same technique and logic as judging other disputes. The role of the judge is, simply, to uphold and apply the law. This task involves the steps of finding, interpreting and applying the law. There are, in each of these steps, leeways of choice. But the choices are constrained. Judges must adjudicate in accordance with principle and reason, technique and logic, to ensure consistency and predictability, and public confidence, in the administration of justice.

*Brian J Preston*

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