EPLA Conference 2008 Bangalow: Session 2: The integration of considerations of ESD, BASIX Climate change and offsets (Bio banking) into the Environmental Assessment process

ARE WE THERE YET? ARE WE THERE YET? ARE WE THERE YET?

This paper will focus on the concepts of Ecologically Sustainable Development ("ESD") and climate change and their integration within the development assessment process provided under the *Environmental Planning and Assessment Act 1979* (NSW) ("EPA Act"). With reference to the EPA Act and after looking at recent cases, if integration is the goal, this paper concludes that we are simply *not there yet*.

Biobanking will also be addressed briefly. However, it is too soon to assess its integration into the development assessment process.

As a preliminary matter, this paper alters the focus of the discussion topic to more accurately reflect the process in discussion. It is the author's view that the primary process in NSW that features such concepts is the 'development' assessment process provided under the EPA Act. In this process, the assessment of the 'environment' is often compromised in order to justify the development. It is a substantive distinction not to be lightly overlooked.

ESD & Climate Change

Under Chief Justice Preston,[1] a body of jurisprudence around ESD has been developing in the Land and Environment Court at rather rapid rates.[2] The Chief Judge has driven ESD from a concept of general aspiration containing principles of common sense[3] that may be unworkable[4] and relegated to the object clause of the EPA Act[5], to

[1] Brian Preston SC was appointed Chief Judge of the Land and Environment Court in November 2005.
[2] See, *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133; Preston, B, "Judicial Implementation of the Principles of Ecologically Sustainable Development in Australia and Asia", A paper presented to the Law Society of New South Wales Regional Presidents Meeting, Sydney, NSW, 21 July 2006, available at: <http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Speech_21Jul06_Preston.pdf/$file/Speech_21Jul06_Preston.pdf> ; Preston, B, "Ecologically Sustainable Development in the Courts in Australia and Asia", A paper presented to a seminar on environmental law organised by Buddle Findlay, Lawyers Wellington, New Zealand, 28 August 2006, available at <http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Speech_28Aug06_Preston.pdf/$file/Speech_28Aug06_Preston.pdf>; Preston, B, "Principles of Ecologically Sustainable Development", 23 November 2006, available at: <http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Speech_28Aug06_Preston.pdf/$file/Speech_28Aug06_Preston.pdf>; Preston, B, "The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific", A Paper Presented to the Kenya National Judicial Colloquium on Environmental Law Mombasa, Kenya, 10-13 January 2006, available at: <http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Speech_10Jan06_Preston.pdf/$file/Speech_10Jan06_Preston.pdf>
[3] *Leatch v National Parks and Wildlife Service & Shoalhaven City Council* (1993) 81 LGRA 270
[4] *Nicholls v Director-General of National Parks and Wildlife Service* (1994) 84 LGRA 397
[5] Section 5(a)(vii) *Environmental Planning and Assessment Act 1979*

a tangible internationally referenced operating consideration in the development assessment process provided in Part 4 of the EPA Act.[6]

Climate change is clearly not yet expressly integrated into the development assessment process under the EPA Act and for that matter is largely absent in the broader legislative framework that we call environmental law in NSW and Australia wide.[7] However, the Chief Judge of the Land and Environment Court has stated that consideration of the public interest under s79C(1)(e) of the EPA Act, which is a mandatory consideration for those developments assessed under Part 4 of the EPA Act, obliges a consent authority to have regard to the principles of ESD in cases where issues relevant to those principles arise.[8] In relation to ESD and climate change the Chief Judge has recently stated:

> *… that the principles of ESD particularly intergenerational equity and the precautionary principle are themselves ample enough to enable consideration of the impacts a development might have on climate change or the impacts climate change might have on the development.*[9]

However, the most environmentally impacting developments in NSW are now mostly assessed under Part 3A[10] of the EPA Act where the specificity of matters to be considered, including the public interest which by implication includes ESD and where relevant climate change, is simply not provided for.[11]

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[6] *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133

[7] Of 137 legislative instruments examined, only 16 make reference to 'climate change', 'greenhouse' or 'sea level rise', 3 Commonwealth Acts, 4 NSW Acts and 9 Coastal LEPs. 20 NSW and Commonwealth policies make reference to 'climate change', 'greenhouse' or 'sea level rise'. Costal Councils and Planning for Climate Change: An Assessment of Australian and NSW Legislation and government policy provisions relating to climate change relevant to regional and metropolitan coastal councils. February 2008, available at http://www.edo.org.au/edonsw/site/policy.php. At the Commonwealth level there has been promise of the insertion of a climate change trigger within the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

[8] This was first determined by the then Chief Judge of the Land and Environment Court McClennan J in *BGP Properties Pty Limited v Lake Macquarie City Council* [2004] NSWLEC 399; see also, Preston, B, "The Role of the Courts in Relation to Adaptation to Climate Change", A paper Presented to Adapting to Climate Change Law and Policy Organised by ANU Centre for Climate Law and Policy and Griffith University Socio-Legal Research Centre 19-20 June 2008 ANU College of Law The Australian National University, Canberra ACT, p11

[9] Preston, B, above, p11

[10] Part 3A has been widely criticised for its circumventing of the original intent of the EPA Act. See Ratcliff, I, "Community involvement and Appeal Rights limited by Part 3A of the EP&A Act" (2006) 44 (4) *Law Society Journal* 54. Ratcliff states "In effect, Part 3A of the … [EPA Act] dramatically reduces the involvement of the community in the original decision making process and seeks to reduce any risk of concerned individuals or groups delaying or preventing significant development, by limiting the grounds on which, or the circumstances in which, they can seek merits or judicial review. Instead, the Minister for Planning and Director General, Department of Planning maintain the power to make all key decisions regarding significant development, with advice from 'expert panels', limited input from other key agencies and little opportunity for effective criticism where the bureaucracy 'gets it wrong'."

[11] Under Part 3A the only matters expressed in the legislation that the Minister must consider are those in s75J (2)(a)-(c) namely the Director-General's report on the project and the reports, advice and recommendations (and the statement relating to compliance with environmental assessment requirements) contained in the report, and if the proponent is a public authority—any advice provided by the Minister having portfolio responsibility for the proponent, and if the Minister has directed an inquiry be held in accordance with section 119 with respect to the project—any findings or recommendations of the Commission of Inquiry.

Recent cases in the Land and Environment Court held some promise regarding the integration of climate change considerations under the consideration of ESD into decision making under Part 3A of the EPA Act. It appeared that the Courts, through judicial reason, were able to bridge the gap in the absence of the much needed express legislative consideration of climate change in environmental decision making. However, as discussed below the bridge of reason does not quite get us there.

The *Gray Case*

Gray v Minister for Planning & Ors (2006) 152 LGERA 258 was the first successful Part 3A challenge in the Land and Environment Court and the first successful NSW 'climate change case'. In *Gray,* Pain J held that the decision of the Director-General of Planning to accept the environmental assessment of the proponent of the Anvil Hill coal mine as adequately addressing the requirements of the Director-General was void and of no effect. She found that the decision failed to take into account relevant principles of ESD, namely the precautionary principle and intergenerational equity.[12] Specifically, the environmental assessment did not consider the indirect greenhouse gas emissions from the burning of the coal originating from the coal mine by third parties.

Importantly, in her Honour's reasoning in *Gray*, after reviewing several decisions in the Land and Environment Court which discussed the centrality of ESD in environmental decision making, Pain J stated that all decisions made under the EPA Act required consideration of ESD. She held that the exercise of the broad discretion under Part 3A must be exercised in accordance with the objects of the Act which includes the encouragement of ESD.[13]

The *Walker Case*

More recently, in *Walker v the Minister for Planning & Ors* [2007] NSWLEC 741, Biscoe J found that the Minister's consent under Part 3A of the EPA Act to a concept plan of a development at Sandon Point for up to 285 homes and an aged care facility to be built on flood-prone coastal land was void and of no effect. His Honour found that the Minister failed to consider the principles of ESD because he had not considered whether the flood risk on the site would be exacerbated by climate change. In particular, his Honour found that the Minister's approval was vitiated as he failed to consider whether changed weather patterns would lead to an increased flood risk in connection with the proposed development in circumstances where flooding was identified as a major constraint on development of the site.

Biscoe J held that under clause 8B of the *Environmental Planning and Assessment Regulation*, the Director-General was obliged to include in his report those aspects of the public interest which he considered to be relevant. He reaffirmed that it has been established in previous cases that ESD is an aspect of the 'public interest'. While his Honour distinguished previous cases concerning the integration of ESD in decision making by way of s79C(1)(e) of the EPA Act, he essentially applied similar reasoning

[12] *Gray v Minister for Planning & Ors* (2006) 152 LGERA 258 at 298 [143].
[13] *Gray v Minister for Planning & Ors* (2006 152 LGERA 258 at 298 [115].

to that which has required ESD to be considered as a relevant aspect of the public interest under Part 4 of the EPA Act.[14] His Honour held that the Director-General was obliged to consider ESD in deciding what matters needed to be addressed in his report. In this case the Director-General failed to consider whether the climate change related flood risk was a matter which needed to be addressed in his report. In his judgment Biscoe J stated:

> *Climate change presents a risk to the survival of the human race and other species. Consequently, it is a deadly serious issue. It has been increasingly under public scrutiny for some years. No doubt that is because of global scientific support for the existence and risks of climate change and its anthropogenic causes. Climate change flood risk is, prima facie, a risk that is potentially relevant to a flood constrained, coastal plain development such as the subject project.*[15]

In essence Biscoe J held that pursuant to clause 8B of the *Environmental Planning and Assessment Regulation*, and based on the established fact that the land was a flood constrained, coastal plain, the Minister was required to consider ESD to the degree of particularity of climate change flood risk.

Getting There?

Both *Gray* and *Walker* represent a significant step forward on part of the judiciary in the development of a reasoned response to the big challenges posed by climate change. They are perhaps examples of the NSW Land and Environment Court capitalising on its scope of intervention. In this regard the Chief Judge has recently stated:

> *The judicature has neither the jurisdiction nor the capacity to respond to the extent or in the manner that the legislature and executive can respond. The extent and manner of the judicature's response will be framed by the cases that invoke its jurisdiction and the functions that are involved in the determination of those cases. Nevertheless, even within the constraints within which judicial review and merits review are conducted, there is generally scope for courts to be more or less interventionist. The impacts of climate change are of such seriousness, magnitude and extent that the courts would be justified in taking a more interventionist approach (but staying within the permissible parameters of the type of review involved).*[16]

Not There Yet

The two significant 'climate change' decisions of the Land and Environment Court discussed above were at first cast in doubt and shadowed by other unsuccessful attempts to have climate change found to be a consideration binding the Minister

[14] See, *BGP Properties Pty Limited v Lake Macquarie City Council* [2004] NSWLEC 399; *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133.
[15] *Walker v the Minister for Planning & Ors* [2007] NSWLEC 741 at [161].
[16] Preston, B already cited note 8, p35.

under Part 3A of the EPA Act in the Court.[17] Now those cases have been eclipsed, and in the *Walker* case overruled, by the recent NSW Court of Appeal decision in *Minister for Planning v Walker* [2008] NSWCA 224 (the *Walker* Appeal).

The Wrong Way?

It is perhaps an appropriate time to briefly discuss where the real problems lie in relation to the failure to integrate the *deadly serious* consideration of climate change and ESD into the development assessment process. In 2006 Bates asked the question *whether government has lost its way in environmental policy development; or whether, on the contrary, the future will reveal that we are, at present, on the cusp of significant change…*[18] It would appear that the NSW State Government in particular has, indeed, lost its way.

It was in 2001 that the Intergovernmental Panel on Climate Change ("IPCC") released its Third Assessment Report which made a conservative case that the planet was experiencing human induced global warming primarily due to fossil fuels and that the ramifications of such on all life and ecosystems on earth range from adverse to, in certain circumstances, catastrophic.[19] While the IPCC was preparing its Fourth Assessment Report on climate change,[20] and just prior to the release of the Stern Report,[21] the NSW State Government introduced Part 3A into the EPA Act.[22] These amendments, along with other changes in environmental policy,[23] was a clear sign to many that the State Government was avoiding the big challenges being posed by climate change in environmental law and policy. The State Government's response of avoidance accelerated late last year (well after the release of the IPCCs Fourth

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[17] *Drake-Brockman v Minister for Planning* (2007) 158 LGERA 349; Mr Drake-Brockman relied on the decision in the *Gray* case and argued among other things that the Minister for Planning failed to take into account ESD when granting consent to a concept plan for a large redevelopment of the Carlton United Breweries site at Chippendale, suburb of Sydney. The applicant argued that the application of ESD required a detailed consideration of the climate change impacts of the development, including the emissions from the embodied energy for the construction of the development and the total annual emissions from the operation of the development. Jagot J of the Land and Environment Court distinguished *Gray* and held that Part 3A did not require the degree of particularity that the applicant argued.

[18] Bates, G, already cited note 1, pxiii.

[19] Intergovernmental Panel on Climate Change (IPCC), Climate Change 2001: The Scientific Basis – Summary for Policymakers – Contribution of Working Group I to the Third Assessment Report of the Intergovernmental Panel on Climate Change (Cambridge University Press, Cambridge, 2001).

[20] IPCC, Fourth Assessment Report : Climate Change 2007 http://www.ipcc.ch/ipccreports/assessments-reports.htm

[21] Stern Review "The Economics of Climate Change: Final Report" (2007) available at http://www.hmtreasury.gov.uk/independent_reviews/stern_review_economics_climate_change/sternreview_summary.cfm.

[22] Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reforms) Act 2005; Part 3A commenced 1 August 2005

[23] The introduction of *Threatened Species Legislation Amendment Act 2004* was said to weaken the *Threatened Species Conservation Act 1995*. It was said to introduce a new approach to threaten species management in NSW. The Environment Liaison Office claimed that the amendments introduced strategic land based management of threatened species at the expense of specific development by development assessment and provided for catchment action plans and priorities statements at the expense of comprehensive and enforceable threatened species recovery and threat abatement plans, Environment Liaison Office, *Threatened Species Position Paper and Response to Reforms*, Environment Liaison Office, Sydney, 19 April 2004, copy on file with author; Also the introduction of Biobanking Part 7A of the *Threatened Species Conservation Act* 1995

Report[24]) to a position of defending its right not to consider climate change when making state significant decisions that clearly have a climate change component, as in the *Walker* Appeal.

The *Walker* Appeal

In December 2007 the Minister for Planning appealed the finding of Biscoe J in the *Walker* Case to the NSW Court of Appeal. The Minister argued that it was not mandatory that he consider ESD in consenting to a concept plan under Part 3A, therefore in consenting to the concept plan for the Sandon Point development he did not need to consider climate change flood risk.

The Court of Appeal handed down its judgment on 24 September 2008, overturning the decision of Biscoe J in the Land and Environment Court. Hodgson JA held that while the Minister is obliged to consider the public interest in consenting to a concept plan under Part 3A of the EPA Act such consideration *operates at a high degree of generality and does not of itself require that regard be had to any particular aspect of the public interest*[25] including ESD and climate change flood risk. In this regard his Honour relied upon the construction of the statute and distinguished Part 3A from Part 4 of the EPA Act, with reference to s79C(1) in Part 4. His Honour held that failure to consider a materially relevant object of the Act, including the ESD specific objective, is not enough to vitiate a decision of the Minister. His Honour stated that:

> *good decision-making would involve the Minister considering whether any of the objects of the EPA Act was relevant to the decision, and taking into account those that were considered relevant; but that a failure by the Minister to consider whether ... [an object of the Act] was relevant to a particular decision, or that an incorrect decision that a particular objective was not relevant would not without more make a decision void*.[26]

Hodgson JA also suggested that the reasoning of Pain J regarding the necessity to consider ESD under Part 3A was incorrect. After overruling the decision of Biscoe J, Hodgson JA then said:

> *However, I do suggest 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 bone fide in the exercise of powers granted to the Minister, and thus become capable of avoiding decisions. It was not suggested that this was already the situation at the time when the Minister's decision was made in this case, so that a decision in this case could be avoided on that basis; and I would not so conclude.*[27]

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[24] IPCC, 2007: *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change,* M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson, Eds., Cambridge University Press, Cambridge, UK, 976pp.

[25] *Walker v the Minister for Planning & Ors* [2007] NSWLEC 741 at [41]

[26] *Walker v the Minister for Planning & Ors* [2007] NSWLEC 741 at [55]

[27] *Walker v the Minister for Planning & Ors* [2007] NSWLEC 741 at [56]

Interestingly, Hodgson JA went on to make some rather poignant comments, which Bell JA did not wish to agree with or endorse. Hodgson JA contended that had he found that the principles of ESD were a mandatory consideration, he would have found on the evidence that the Minister did not consider them in a way which dealt with their substance.[28] He went on to say that:

> *I find it somewhat surprising and disturbing that the Director-General's report did not address [the precautionary principle, intergenerational equity and the effect of climate change flood risk as] …aspects of the principles of ESD, and that the Minister did not postpone his decision until he had a report that did so*.[29]
>
> *Since these aspects of ESD were not addressed by the Minister in giving his approval to the concept plan, in my opinion they will need to be addressed when development approval is sought, whether this is sought from a consent authority … or from the Minister… I do not think approval of a concept plan should be considered as resolving these matters in favour of the development.*[30]

The Court of Appeal's judgement and the comments by Hodgson JA are a clear statement that *we are simply not there yet*. The concept of ESD and the reality of climate change are not yet effectively integrated into the EPA Act, which is effectively the pivotal hub under which most decisions that effect the NSW environment are made.

Biobanking

While this paper has focussed on the integration of ESD and climate change into the development assessment process under the EPA Act, the recently introduced biobanking scheme[31] arguably provides further substance to the contention that the NSW Government has lost its way in environmental legislative and policy development.

Biobanking in the context of the EPA Act is an optional alternative path to the preparation and lodging of a species impact statement (or other assessment for a Part 3A project) where a development is likely to have a significant effect on threatened species. Biobanking will allow biodiversity credits to be purchased to be used to offset the impacts of a development on biodiversity under both Part 3A and Part 4 of the EPA Act.

It is too soon to assess whether biobanking is, or can be, effectively integrated into the development assessment process under the EPA Act. While the biobanking scheme has technically commenced, at the time of writing, there are not yet any specialist assessors accredited to assess a biobanking site. It is also too soon therefore to assess

[28] *Walker v the Minister for Planning & Ors* [2007] NSWLEC 741 at [59]
[29] *Walker v the Minister for Planning & Ors* [2007] NSWLEC 741 at [61]
[30] *Walker v the Minister for Planning & Ors* [2007] NSWLEC 741 at [62]
[31] Biobanking is an offsetting scheme inserted into the *Threatened Species Conservation Act* 1995 at Part 7A. It technically commenced in July 2008

the effectiveness of biobanking in achieving its function of assisting the maintenance or improvement of biodiversity in NSW.

It is pertinent to note that one of the main principles of ESD is the conservation of biological diversity ("biodiversity"). The *Threatened Species Conservation Act 1995* ("TSC Act") was heralded as being the means to protecting biodiversity in NSW. This was a particularly critical claim as Australia's extinction rate includes the worst rate of mammal extinction in the world and NSW has the highest rate of mammal extinction in Australia.[32]

However, biobanking by its design and core function of offsetting enables loss of biodiversity in situ. The NSW Environmental Defender's Office has pointed out that:

> *[t]he biodiversity of a site will depend on a wide range of highly complex ecological processes and relationships, which are not well understood by scientists. In reality, no two patches of vegetation are of equal biodiversity value. Any biodiversity assessment tool will be necessarily simplistic and unable to account for the complexity of natural systems.*[33]

How Much Further?

The climate change issue is part of the larger challenge of sustainable development.[34] Ecologically Sustainable Development is defined as "development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends".[35] ESD in some form or another has been around for some 40 years, while the application and extent of the operating principles are to some extent still being finessed in the Courts the hard yards in developing the concept have been traveled. The NSW State Government has lost its way in environmental policy development and is not responding to the big challenges of climate change and biodiversity loss as it ought to. Instead it has introduced Part 3A and biobanking into the development assessment process and defended its right not to consider climate change in state significant development decisions. It does not appear to be listening to the community cries and the reasoning of the Courts on climate change. In relation to Government inaction on climate change the Chief Judge has very optimistically stated:

> *... although the extent and manner of the judicature's response will be less than those of the legislature and the executive, the status of the judicature and its institutional habit of public, reasoned decision-making may result in its*

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[32] Department of Environment and Conservation NSW, State of the Environment Report 2006, available at http://www.environment.nsw.gov.au/soe/soe2006/index.htm

[33] Environmental Defender's Office (NSW) Ltd, *Submission on "BioBanking – A Biodiversity Offsets and Banking Scheme" Working Paper* March 2006 p4

[34] IPCC, 2001: Climate Change 2001: Synthesis Report. A Contribution of Working Groups I, II, and III to the Third Assessment Report of the Integovernmental Panel on Climate Change [Watson, R.T. and the Core Writing Team (eds.)]. Cambridge University Press, Cambridge, United Kingdom, and New York, NY, USA, 398 pp. p4

[35] Australian Government Department of the Environment, Sport and Territories, *National Strategy For Ecologically Sustainable Development*, 1996, available on the website of Department of the Environment, Water, Heritage and the Arts http://www.environment.gov.au/biodiversity/publications/strategy/index.html

> *response having meaningful effects, including a catalytic effect on the legislature and the executive to take their own action to mitigate or adapt to climate change.*[36]

ESD is a well defined vehicle that can drive NSW state environmental law and policy development. The specialist Land and Environment Court has provided public, reasoned decision making and discussion regarding ESD, its implementation and its application, extending to the consideration of climate change. With matters as *deadly serious* as climate change and biodiversity loss the need to steer away from a business as usual approach and introduce legislative reforms and policies that actually implement and enforce the principles of ESD is clearer than it has ever been. Hopefully, the mounting body of evidence, including the *Walker* Appeal, which shows there is a need for legislative action will send a clear message to the NSW State Government. The message is that many with an eye on the road are getting rather impatient on the journey of environmental legislative and policy development. There needs to be a direct route to a whole of Government approach to deal with and prioritise the big issues of climate change and biodiversity loss.

[36] Preston, B, already cited note 8, p35