Is administrative law becoming less important in environmental law litigation?

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On 19 July 2022, the Minister for the Environment released the 2021 *State of the Environment Report*. The damning assessments made in the report provide some insight into why the former government may have refused to release it earlier. As the Minister noted, it makes confronting reading.

Front and centre in this report is the impact of climate change on our environment and society — including extreme weather events, increased biodiversity loss, poorer air quality, and coral bleaching.[1] However, despite this reality, Australian politics still remains captive to the mineral resource extractive industry, and our new government remains committed to approving new coalmines despite mounting community opposition and the evidence that this is simply unsustainable.[2] This recalcitrance — both here and globally — has forced the community to resort to litigation in an attempt to compel necessary action.

Historically, much of this kind of litigation in Australia would have relied on administrative law. This article explores why administrative law may be becoming less significant — or, at least, less useful — and consider some of the alternative areas with which people are engaging. It concludes by considering the kinds of changes that could make administrative law more useful to communities that are seeking to protect the environment from the impacts of climate change.

Declining relevance of administrative law

There are myriad reasons why administrative law has not been an effective means of protecting the environment — especially in relation to climate change. They include:

- the limited availability of merits review;[3]
- the tendency to give more weight and credence to claimed economic benefits;[4]
- the challenges of establishing a causal link between the emissions of a development and the larger, cumulative problem of climate change;[5] and

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1 Blair Trewin, Damian Morgan-Bulled and Sonia Cooper, 'Australia State of the Environment 2021: Climate' in *Australia State of the Environment 2021* (Commonwealth of Australia, 2021).

2 Catie McLeod, 'Environment Minister Throws Support behind Mining Industry after "Shocking" Report', *News.com.au*, 19 July 2022 <https://www.news.com.au/technology/environment/environment-minister-throws-support-behind-mining-industry-after-shocking-report/news-story/5e2630779ead897066ca3a3648ca50d5>.

3 External merits review is not available for decisions made under the EPBC Act, and, while merits review is possible under NSW law, for example, it is not available where a public hearing has been held and an application has been assessed by the Independent Planning Commission (*Environmental Planning and Assessment Act 1979* (NSW) s 8.6) — which is a common process for coalmine approvals in NSW.

4 See, eg, Sandra Cassotta, Vladimir Pacheco Cueva and Malayna Raftopoulos, 'A Case Study of the Carmichael Coal Mine from the Perspectives of Climate Change Litigation and Socio-Economic Factors' (2021) 17 *Law, Environment and Development Journal* 67–71.

5 Ibid 63. On a global level, see Friederike EL Otto et al, 'Causality and the Fate of Climate Litigation: The Role of the Social Superstructure Narrative' (2022) *Global Policy* (publication forthcoming).

- the reluctance to consider Scope 3 emissions (emissions made elsewhere by burning the stuff we dig up here).[6]

Sometimes the omission of Scope 3 emissions has been dictated, such as when the merits review jurisdiction is restricted specifically to 'mining activity'.[7] A further reason is the common acceptance of the so-called 'drug dealer's defence', in which courts have accepted claims that if market demand for coal is not met by the proposed activities, it will be filled by coal mined from elsewhere.[8] All of this leads to a situation in which only Scope 1 (direct) and (sometimes) Scope 2 (those created by inputs to the project) emissions are considered, and those tend to be insufficient to justify the imposition of strong conditions or overturning the approval of a proposed mining project.

A further legislative limitation is the fact that climate change and greenhouse gas emissions are not considered to be 'matters of national environmental significance' under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act'), and are not explicitly referenced as 'relevant factors' for the purposes of many state government decisions under laws such as the *Environmental Planning and Assessment Act 1979* (NSW) and the *Mining Act 1992* (NSW).[9] As a result, these issues must be drawn in by implication. For decisions under the EPBC Act, this means that impacts on biodiversity or the Great Barrier Reef tend to be relied on as a proxy — an approach that has yet to be successful.[10] Similarly, when litigants seek to challenge state government decisions, they are often forced to argue that climate change and greenhouse gas emissions fall within the bounds of the 'public interest', general considerations of environmental impact or the principles of 'ecologically sustainable development'. Thus far, such claims have met with very limited success.[11] Even where there is a legislative requirement to 'have regard to' relevant national

6 In the state context, see, eg, *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221; *Xstrata Coal Qld Pty Ltd v Friends of the Earth, Brisbane Co-op Ltd* [2012] QLC 13. In the Commonwealth context, see, eg, *Australian Conservation Foundation Inc v Minister for the Environment and Energy* [2017] FCAFC 134.

7 Murray Raff, 'Climate Change Litigation in Australia' (2021) 12(4) ANU Centre for European Studies Briefing Paper series, citing *Xstrata Coal Qld Pty Ltd v Friends of the Earth, Brisbane Co-Op Ltd* (n 6) 598; *Hancock Coal Pty Ltd v Kelly and the Department of Environment and Heritage Protection (No 4)* [2014] QLC (2014) 12; *Adani Mining Pty Ltd v Land Services of Coast and Country Inc* [2015] QLC 48; *New Acland Coal Pty Ltd v Ashman and Chief Executive, Department of Environment and Heritage Protection (No 4)* [2017] QLC 24.

8 See, eg, *Xstrata Coal Qld Pty Ltd v Friends of the Earth, Brisbane Co-Op Ltd* (n 6) 598; *Hancock Coal Pty Ltd v Kelly and the Department of Environment and Heritage Protection (No. 4)* (n 7); *Adani Mining Pty Ltd v Land Services of Coast and Country Inc* (n 7); *New Acland Coal Pty Ltd v Ashman and Chief Executive, Department of Environment and Heritage Protection (No 4)* (n 7); *Hancock Galilee Pty Ltd v Currie* [2017] QLC 35.

9 Or the equivalent elsewhere, such as the *Environmental Protection Act 1994* (Qld) and the *Mineral Resources Act 1989* (Qld).

10 The Federal Court had yet to find a sufficient connection between the emissions of a mining project and the impacts of climate change on matters of national significance recognised by the Act. See Raff (n 7) citing, for example, *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* (2008) 244 ALR 87; *Australian Conservation Foundation Inc v Minister for the Environment and Energy* (n 6).

11 For example, the question of whether the impacts of climate change are relevant to a determination of 'the public interest' has been answered inconsistently over the years, but Chief Justice Preston answered it in the affirmative in *Gloucester Resources Ltd v Minister for Planning* [2019] 7 NSWLEC 7. Furthermore, the principles of 'ecologically sustainable development' have thus far been found to include only Scope 1 and 2 emissions; *Coast and Country Association of Queensland Inc v Smith*; *Coast and Country Association of Queensland Inc v Minister for Environment and Heritage Protection* [2015] 260 QSC 36. For further details, see Raff (n 7).

and state policies on greenhouse gas emissions, it has been determined that just considering them (rather than, for example, upholding those commitments) is sufficient.[12]

Industry pressure and government amendment

Many of these limitations could be remedied through legislative amendment. However, we tend to see the exact opposite: when a decision is made in favour of environmental protection, it is often met with backlash from industry, and the government responds with legislative amendment.

There are multiple examples of this tendency,[13] but the most notorious was the political reaction that followed the 2015 decision in the Adani case.[14] In response to the consent orders in that case, the government moved to limit standing under the EPBC Act to those 'persons aggrieved by the decision', in an attempt to limit the capacity of environmental groups to challenge mining projects under the Act.[15] While the amendment Bill never passed, the rhetoric from the Minerals Council and the government was extraordinary. Minister Hunt described the Mackay Conservation Group's case as being part of an illegitimate coordinated strategy amongst environmental groups to use 'green lawfare' to 'disrupt and delay key projects and infrastructure'.[16] Similarly, Attorney-General Brandis characterised the case as 'vigilante litigation by people … who have no legitimate interest other than to prosecute a political vendetta against development and bring massive developments … to a standstill'.[17]

Community expectations

Arguably, the Australian community has a very different conception of who has a 'legitimate interest' in relation to these kinds of projects. Since the mid-2000s, there has been a marked increase in visible community concern over the impact of resource extraction.[18] Relatedly, the Australian community has increasingly demonstrated an expectation that it will be provided with the opportunity meaningfully to participate in decisions that affect the environment, and that the science regarding climate change will be taken seriously in this context.[19]

That expectation is well supported by international environmental law, which has called for participatory rights in relation to environmental decision-making since at least the 1972 *Stockholm Declaration*.[20] Those participatory rights have been most explicitly

12 *Wollar Progress Association Incorporated v Wilpinjong Coal Pty Ltd* [2018] 92 NSWLEC.
13 See Raff (n 7).
14 *Mackay Conservation Group Inc v Commonwealth of Australia* (Federal Court of Australia, 2015).
15 EPBC Amendment (Standing) Bill 2015.
16 Greg Hunt MP, *EPBC Amendment (Standing) Bill 2015 Second Reading Speech*, 20 August 2015.
17 'Transcript of Interview with Senator George Brandis', *SkyNews*, 16 August 2015 <https://www.attorneygeneral.gov.au/transcripts/Pages/2015/ThirdQuarter/16-August-2015-Australian-Agenda-program-SkyNews.aspx>.
18 David Turton, 'Unconventional Gas in Australia: Towards a Legal Geography' (2015) 53 *Geographical Research*; Cristy Clark, 'The Politics of Public Interest Environmental Litigation: Lawfare in Australia' (2016) 31 *Australian Environmental Review* 258.
19 Clark (n 18); Hanabeth Luke, Martin Brueckner and Nia Emmanouil, 'Unconventional Gas Development in Australia: A Critical Review of its Social License' (2018) 5 *The Extractive Industries and Society* 648.
20 *Stockholm Declaration: Report of the United Nations Conference on the Human Environment* (1973) Preamble (1), (6), (7) and Principle 1.

recognised in the *Aarhus Convention* (1998),[21] which protects:

- the right to access publicly held environmental information;
- the right to participate in environmental decision-making; and
- the right to challenge public decisions made in violation of environmental laws in court.[22]

Although Australia is not a party to the *Aarhus Convention*, the International Law Association has asserted that those principles regarding participatory rights have 'now become a general rule of international law regarding environmental management'.[23]

Looking beyond administrative law

While administrative law is a fundamentally important area of public law, it is designed to uphold the law and the status quo. This means that to seek transformative change, people have begun to explore actions moving beyond administrative law in an attempt to secure better outcomes for public-interest environmental litigation in Australia.

The Sharma case

A recent novel attempt to use private law for public-interest environmental litigation was *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment*[24] ('*Sharma*'), in which eight children sought an injunction to restrain the Minister for the Environment from granting approval to the Vickery coalmine extension. The applicants claimed that the Minister owed them and other Australian children a duty of care to exercise her power under the Act with reasonable care so as not to cause them harm resulting from climate change, and that any approval would amount to a breach of that duty.

The most exciting thing about the *Sharma* case was that the legal arguments were successful at first instance, with Justice Bromberg accepting that the Minister did owe the children a duty of care and that an approval may amount to a breach. While his Honour declined to award an injunction,[25] this acceptance of the duty was significant.

However, the Minister appealed the decision on the grounds that:

1. she did not owe a duty of care to the children and, specifically, that the EPBC Act did not create such a duty; and
2. the conclusions reached by the primary judge in relation to both the impact of climate change generally, and the impact of this specific mine extension on climate change, were incorrect and reached beyond the evidence.

21 *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998, entered into force on 30 October 2001, United Nations Treaty Series 2161 ('Aarhus Convention').
22 Ibid, articles 4, 6–9.
23 John Dellapenna, *The Berlin Rules on Water Resources* (Report of the 71st Conference, International Law Association, 2004) 25.
24 [2021] FCA 560.
25 Ibid 499, 503–504.

The Full Court was unanimous in finding for the Minister in relation to the first point. Although each judge reached this conclusion for different reasons, all three agreed that the Minister did not owe a duty of care to the children in this case. In contrast, the Full Court unreservedly accepted the primary judge's factual findings in relation to climate change and the dangers it poses.[26]

However, the Full Court did not agree with the primary judge in relation to the reasonable foreseeability of the impact of this specific mine extension on climate change (or the 'causal nexus' between the mine extension and the impact of climate change on Australian children). Chief Justice Allsop and Justice Wheelahan both focused on an issue that has arguably plagued public-interest litigation in Australia: the issue of the separation of powers or institutional capacity. Both judges concluded that imposing a duty of care on the Minister would force the court into the role of re-evaluating, changing or maintaining 'high public policy', which is not the role of the judiciary.[27] Nonetheless, Justice Beach explicitly rejected those institutional capacity concerns and concluded, 'I accept that policy questions are involved. But whatever they may be, they can adequately be dealt with.'[28]

Ultimately, the appeal was a blow to the potential of private law to offer a new avenue for public-interest environmental litigation in Australia. Nonetheless, there appears to be room in the reasoning of all three judges for finding a duty of care in a different case where there is a closer causal relationship between the risk and the harm. Furthermore, the case represents a high-water mark in terms of the acceptance of climate science in litigation concerning the EPBC Act.

One case that may take advantage of this potential is *Pabai Pabai v Commonwealth*. In this case, two Torres Strait Islanders have taken the Australian Government to court, claiming that it owes a duty of care to protect the people, islands and culture of the Torres Strait from climate change.[29] The petitioners have grounded that claim in the law of torts, but also in the Torres Strait Treaty and their native title rights. This case raises a number of unique legal issues, and the decision in *Sharma* may not be determinative in regard to how it ends up playing out in court.

Human rights

Another group of Indigenous people from the Torres Strait — the 'Torres Strait Eight' — have also lodged a petition against the Australian Government in relation to climate change.[30] This group has taken its petition to the UN Human Rights Committee, alleging that Australia is violating their rights under the *International Covenant on Civil and Political Rights* due to the impact of the government's failure to address climate change on their rights to culture, privacy and life.

26 *Minister for the Environment v Sharma (No 2)* [2022] FCAFC 35, [1]–[2] per Allsop CJ.
27 Ibid [260]–[266].
28 Ibid [633].
29 *Pabai Pabai & Anor v Commonwealth of Australia — Concise Statement* [2022] Federal Court of Australia VID622/2021.
30 Sophie Marjanac and Sam Hunter Jones, 'Are Matters of National Survival Related to Climate Change Really beyond a Court's Power?' (2020) *Open Global Rights* <https://www.openglobalrights.org/matters-of-national-survival-climate-change-beyond-courts/>.

This link between human rights and the environment is receiving increasing global recognition, including at the UN Human Rights Council, which passed a resolution last October recognising the right to a clean, healthy and sustainable environment.[31] On 26 July 2022, the UN General Assembly made a declaration along similar lines,[32] and moves are underway in the ACT to give serious consideration to the inclusion of this right in the *Human Rights Act 2004* (ACT).[33] That would bring the ACT into line with the global norm, since 'around 80 per cent of UN member States [already recognise] the right to a healthy environment in constitutional or legislative texts.'[34]

The right to a healthy environment can contain both substantive and procedural obligations. Substantive obligations might, for example, impose a duty on the government to protect, preserve and improve the environment for the benefit of the community (in much the same way as claimed by the applicants in *Sharma* and the Torres Strait Island cases), while procedural obligations would likely reflect those participatory rights set out in the *Aarhus Convention*.[35]

The ACT has been a leader in relation to the legislative protection of human rights in Australia, but Victoria and Queensland also have human rights instruments[36] and have shown themselves to be willing to follow developments in international jurisprudence. A test for Queensland is currently before the court with the Waratah Coal case.[37] In that case, the applicants have contended that the grant of a mining lease (in the Galilee Basin) would be incompatible with the *Human Rights Act 2019* (Qld). Absent an explicit right to a healthy environment, the applicants have grounded their claim in a range of other rights recognised under the Act, including the rights to privacy and life and the cultural rights of Aboriginal and Torres Strait Islander peoples.

The community concern reflected in this explosion of novel litigation can also be seen in escalating community protest action. In this context, we have witnessed an unfortunate trend of increasingly draconian anti-protest laws being passed in response,[38] which highlights the connection between the right to protest and environmental rights.[39] Perhaps the best

31 *Resolution 48/13 The Human Right to a Clean, Healthy and Sustainable Environment*, UN Doc A/HRC/RES/48/13 (United Nations Human Rights Council, 8 October 2021).

32 United Nations General Assembly, 'The Human Right to a Clean, Healthy and Sustainable Environment', UN Doc A/76/L.75.

33 Justice and Community Safety Directorate, *Right to a Healthy Environment Discussion Paper: Public Consultation to Inform Consideration of the Introduction of a Right to a Healthy Environment in the Human Rights Act 2004* (ACT Government, 30 June 2022).

34 UN Special Rapporteur on Human Rights and the Environment, *Good Practices in Implementing the Right to a Healthy Environment* (2020) <http://www.srenvironment.org/report/good-practices-in-implementing-theright-to-a-healthy-environment-2020>.

35 See nn 15–16 above.

36 *Charter of Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2019* (Qld).

37 *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 4)* [2022] QLC 3 (Land Court of Queensland, 18 March 2022).

38 *Summary Offences and Other Legislation Amendment Act 2019* (Qld); *Roads and Crimes Legislation Amendment Act 2022* (NSW); *Police Offences Amendment (Workplace Protection) Act 2022* (Tas); *Criminal Code Amendment (Agricultural Protection) Act 2019* (Cth).

39 *Australia: Climate Protesters' Rights Violated — Disproportionate Punishments, Excessive Bail Conditions* (Human Rights Watch, 22 June 2022) <https://www.hrw.org/news/2022/06/22/australia-climate-protesters-rights-violated>.

known case in this category is *Brown v Tasmania*,[40] in which the High Court invalidated the *Workplaces (Protection from Protesters) Act 2014* (Tas)[41] as an impermissible burden on the implied freedom of political communication. Since that judgment, however, many governments have passed laws that criminalise peaceful protest (and specifically target environmental protesters).[42] Litigation to challenge the validity of at least some of these laws is already being considered.

Finally, litigants are also taking claims directly against the resource extractive industry. The Australasian Centre for Corporate Responsibility is taking action against Santos by arguing that its claims that natural gas is a 'clean fuel' that provides 'clean energy', and that it has a credible pathway to net zero emissions by 2040, constitute misleading and deceptive conduct under the *Corporations Act 2001* (Cth) and the Australian Consumer Law.[43]

Glimmers of hope for administrative law

Of course, while these alternative pathways for legal action are opening up out of community desperation to participate in environmentally significant decisions — a desperation that is only increasing as the impacts of climate change become more evident and serious — this doesn't mean that administrative law is no longer relevant to public-interest environmental litigation. A key takeaway from these developments is the need for improvements in administrative law jurisprudence concerning environmental law. In response to this evident need, this concludes by considering a few glimmers of hope that such improvements are already in development.

Gloucester

The first of those glimmers is Chief Justice Preston's progressive decision in *Gloucester Resources Ltd v Minister for Planning*[44] ('*Gloucester*'), which reversed a significant number of the problematic approaches considered above, including by considering the impact of the Scope 3 emissions of the proposed Rocky Hill Coal Project as part of its assessment of the project and decision to uphold the Minister's refusal to grant approval, and accepting that those emissions are contributing to a wide range of environmental impacts.[45]

In this decision, Preston CJ took Australia's and NSW's commitments under the Climate Change Convention and the Paris Agreement into consideration and, relatedly, adopted a carbon budget approach to determining the significance of the project's greenhouse gas emissions,[46] and used that lens to take cumulative impacts seriously. In doing so, his Honour also rejected the 'market substitution' argument (or so-called drug dealer's defence) that, if the coal were not supplied by this project, then it would simply be supplied to market from another mine.[47]

40 *Brown v Tasmania* (2017) 261 CLR 328.
41 *2014* (Tas).
42 *Summary Offences and Other Legislation Amendment Act 2019* (Qld); *Roads and Crimes Legislation Amendment Act 2022* (NSW); *Police Offences Amendment (Workplace Protection) Act 2022* (Tas); *Criminal Code Amendment (Agricultural Protection) Act 2019* (Cth).
43 *Australasian Centre for Corporate Responsibility v Santos Limited* (Federal Court of Australia).
44 *Gloucester Resources Ltd v Minister for Planning* (n 11).
45 Ibid 435.
46 Ibid 526.
47 Ibid 538.

Finally, his Honour adopted a sceptical approach to the developer's claims about hypothetical offsets and projected economic benefits by refusing to accept that the project's emissions would be offset by a variety of projected reductions from 'some unspecified and uncertain action at some unspecified and uncertain time in the future',[48] and by determining that the developer had overstated the economic benefits, with the result that they did not justify the environmental and social impacts of the mine.

Bushfire Survivors for Climate Action

In another decision,[49] Preston CJ found that the New South Wales Environment Protection Authority (EPA) had failed to fulfil its statutory duty to protect the environment from the threat of climate change, because none of the instruments it presented adequately provided for that protection.[50] In this case, the applicants had relied on s 9(1)(a) of the *Protection of the Environment Administration Act 1991* (NSW) ('POEA Act'), which provides that the EPA is required to 'develop environmental quality objectives, guidelines and policies to ensure environment protection'. The Court referred to the objectives of the EPA in determining the nature and scope of the duty contained in s 9(1)(a). Those objectives are set out in s 6(1) of the POEA Act and include a requirement 'to protect, restore and enhance the quality of the environment in NSW, having regard to the need to maintain ecologically sustainable development'.[51] Preston CJ then drew on evidence from a range of sources, including the most recent report of the Intergovernmental Panel on Climate Change, to determine that the principles of ecologically sustainable development necessarily include protecting the environment from the effects of climate change.[52] As a result, his Honour ordered the EPA 'to develop environmental quality objectives, guidelines and policies to ensure environmental protection from climate change' and to pay the costs of the applicants.

Sharma

As mentioned above, despite the loss in relation to the recognition of a duty of care, *Sharma* has broken new ground in terms of the unequivocal acceptance of the science of climate change, including both its causes and its impacts. Allsop CJ, for example, began his judgment by noting that the facts of climate change were not in dispute and were largely admitted by the Minister:

> The threat of climate change and global warming was and is not in dispute between the parties in this litigation … Evidence was led [at the trial that] … by and large, the nature of the risks and the dangers from global warning, including the possible catastrophe that may engulf the world and humanity was not in dispute.[53]

This staunch approach to the evidence could well prove significant for future litigation under the EPBC Act — so long as the issue of causation is easier to establish.

48 Ibid 529–530.
49 *Bushfire Survivors for Climate Action Inc v Environment Protection Authority* [2021] NSWLEC 92.
50 Ibid 142.
51 Ibid 41.
52 Ibid 60.
53 *Minister for the Environment v Sharma (No 2)* (n 26) [1]–[2].

Legislative reform

Finally, of course, there is also the possibility of legislative reform. One option would be to add a climate trigger to the EPBC Act. The Minister did not rule this out when asked about it at the National Press Club on 19 July 2022, but she did say that the government planned to focus on the recommendations of the Samuel report, which did reject such a trigger. Nonetheless, the idea has been picked up by the cross-bench and may well end up on the agenda as negotiations on climate legislation continue.[54]

While all areas of law are relevant to the climate crisis, the community has a legitimate expectation that public law will function to hold government (and industry) to account if they continue to act contrary to the best available scientific evidence and against the public interest. Therefore, it is now up to us — as lawyers (and members of the judiciary) — to pick up on these hopeful glimmers, and a range of others, and to keep pushing for this necessary change. In the face of catastrophic climate change, legitimate community demand for climate justice, and government intransience, there is no other ethical option.[55]

54 Brendan Sydes, Anita Foerster and Laura Schuijers, 'The Greens' Climate Trigger Policy Could Become Law. Experts Explain How it Could Help Cut Emissions — and Why We Should be Cautious' [2022] *The Conversation* <https://theconversation.com/the-greens-climate-trigger-policy-could-become-law-experts-explain-how-it-could-help-cut-emissions-and-why-we-should-be-cautious-187998>.

55 Hon Justice Brian J Preston SC, 'Climate Conscious Lawyering' (2021) 95 ALJ 51.