How green is my ECT?

The challenge of impartial objectivity

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The rise of environmental law and ECTs

[1] Since at least the 1990s there has been a global explosion in environmental law. It has blossomed in scope, content, reach, status and significance. An even more recent phenomenon is the creation and proliferation of specialist environmental courts and tribunals ("ECTs"). This reflects a growing appreciation of the particular nature and character of environmental disputes and the special challenges and opportunities they present to those seeking to achieve efficient, effective and beneficial dispute resolution. The case for specialist ECTs is strong.

The role and function of an ECT

[2] The first challenge confronting any ECT is to ascertain its proper role and function. ECTs are not all alike. There are a myriad of models operating across a diverse range of legal, economic, environmental and social contexts. The primary determinant of the proper role and function of any ECT is the legislation or other authority by which it is constituted and by which jurisdiction is conferred upon it. The particular context in which an ECT operates will also be influential.

[3] This paper is directed at ECTs which are judicial or quasi-judicial bodies established in systems which, whilst permitting judicial review of decisions of government agencies, otherwise respect the separation of powers and where the ECT's role is not as regulator or formulator of government policy, but as a decision

maker in litigation, typically of an administrative character, including by way of merits review.

Independence

[4] There is a developing consensus surrounding "best practices" for ECTs. The work of Professor George ("Rock") Pring and his wife Catherine ("Kitty") Pring has been influential in that regard. The very first of the "best practices" is, of course, independence. As the Prings observe in their most recent work:[1]

> "ECT independence from political intervention or pressures in decision-making is critically important to assure the rule of law…"

[5] Environmental litigation does not occur in a vacuum, but typically arises in the context of a dynamic controversy where someone wants to do, stop or change something. That "something" often involves existing or proposed development which poses a range of potential economic, environmental and social consequences. Such disputes are prone to excite diverse and divergent interests, including monetary, political, governmental and public interest, to name but a few. Perhaps the most important role and function that independent ECTs provide is that they ensure that disputes concerning the environment can be taken from the political or other realm and brought to an independent forum which is clean from the taint of possible corruption, undue influence or other extraneous considerations.

[6] The subject matter of this paper relates to how an independent ECT of the kind described, once established, should approach its task. The focus is not on matters of practice and procedure, but rather upon the ethos or philosophical perspective taken by the particular ECT. In that context, it is important to bear in mind the purpose

[1] George (Rock) Pring and Catherine (Kitty) Pring, *Environmental Courts and Tribunals – A Guide for Policy Makers* (United Nations Environment Programme, 2016) 45.

for which independent ECTs are set up, namely to insulate them from external influences so as to enable them to make decisions, accordingly to law, without fear favour or affection. No court or tribunal should abuse its independence.

Impartiality and objectivity

[7] The first thing which is expected of any independent court or tribunal is impartiality. Impartiality can have two aspects. First is impartiality as between the parties to a dispute. Every litigant, whether in an environmental, civil or other dispute expects impartiality of that kind. The second aspect concerns whether the ECT demonstrates and is perceived to demonstrate impartial objectivity, or whether it consciously or unconsciously pursues a biased "agenda." It is the second of those aspects with which this paper is concerned.

[8] The diversity of competing interests in this field means that ECTs can be pulled in different directions. Some want ECTs to be de facto statutory regulators or government agencies, whilst others look to ECTs for protection against the excesses of such bodies. Some want ECTs to be environmental advocates and activists, in light of the importance of environmental protection and the broader significance, beyond the parties, of environmental litigation. Some would wish an ECT to cut through so called "green tape", whilst others look to ECTs to provide a more neutral forum.

[9] The growth of ECTs across the globe is occurring at a time of ever-increasing emphasis on, and debate about, development and environmental issues. If ECTs are part of a response to such issues, then to what extent should their judges or members seek to exercise their jurisdiction in a way which actively seeks to be an agent for

change for what they perceive to be the good of society, rather than simply doing justice according to law? In short, should ECTs engage in "cause judging"?

[10] The concept of "cause judging" is related to the concept of "cause lawyering". Traditionally, a lawyer's role involves the application of their professional skill and expertise, on a case by case basis, in order to give objective advice to their clients in relation to the client's case and, should it become necessary, to litigate the client's case to the best of the lawyer's ability, subject to their overriding obligation to the court. The lawyer's personal opinions or moral judgements are irrelevant. Cause lawyers, on the other hand, make their values regarding what is morally good and just the goal of their advocacy, rather than allowing the goals of the latter to be dictated by interests of their client.[2] Their primary loyalty is neither to their client nor the legal process, but rather to their cause. The client's case is a vehicle through which the cause lawyer uses his or her legal skills to pursue ideals that transcend the client's service.

[11] Cause judging is a logical extension of cause lawyering. It involves use of the judicial position as a vehicle to advance a cause to which the judge personally ascribes. Judges who engage in cause judging often have a vision of what they regard as positive transformation and feel a deep moral responsibility to take advantage of any opportunity presented to them as a judge, to promote their cause. In doing so they do not necessarily see themselves as overreaching activists, as opposed to reformists taking advantage of legitimate opportunities to develop the law.[3]

[2] See Hansford 'Cause Judging' (2014) 27 *Georgetown Journal of Legal Ethics* 1.
[3] Ibid 19, 20.

[12] The temptation to engage in cause judging can be quite strong for an ECT. The members of such courts and tribunals often have a genuine interest in, and passion for, environmental law, an understanding of the gravity of the issues at hand and a natural desire to be a force for good. The issues are often of a kind which excite interest, including from those who passionately believe that their point of view is not only correct, but also for the public good. Further, the scope for cause judging in environmental jurisdictions is substantial. It is a field in which courts and tribunals, although guided by statutory documents, retain a degree of discretion, particularly in merits review. This provides scope for those who would wish for any discretion to be exercised in way which furthers the cause which is close to their hearts.

Cautions from the High Court

[13] It should be noted that environmental lawyers are not unique in believing in the importance of their particular area of concern, nor are ECTs the only specialist courts and tribunals which need to guard against overenthusiasm. The High Court of Australia, Australia's highest court, cautioned against the overenthusiasm of specialist courts and tribunals generally in *Kirk v Industrial Relations Commission of New South Wales.*[4] Those risks, it was said, include:

- becoming overenthusiastic about vindicating the purposes for which the specialist court or tribunal was set up and exulting that purpose above all other considerations;
- pursuing the purpose for which the court or tribunal was set up in too absolute a way;
- becoming preoccupied, and
- developing distorted positions.

[4] (2010) 239 CLR 531, 589 (Heydon J).

[14] Excessive zeal can also lead to a temptation to disrespect jurisdictional limits and the separation of powers. India, for example, is a country noted for judicial activism. In her recent book "Environmental Justice in India – The National Green Tribunal", Dr Gill observes that the Supreme Court of India "moved from being exclusively an adjudicator to embracing the role of policy maker and, thereafter, superior administrator".[5] The National Green Tribunal, a relatively recently formed ECT in India has followed in those footsteps. Dr Gill's book recounts that the NGT, which has attracted controversy for its robust and activist approach, has controversially claimed (on the basis of implication) a judicial review jurisdiction not expressly conferred upon it. Further, it takes up matters on its own motion, in response to things such as newspaper reports. It also makes wide ranging orders which appear to intrude significantly on policy and other matters more conventionally the domain of executive government. It should be acknowledged that the NGT operates in its own particular context and that the environmental challenges which confront it in a populous emerging economy are far greater than typically confront ECTs in Australia and New Zealand. Further, Dr Gill formed a positive view of the NGT in that context. One can nevertheless understand the controversy which it has attracted.

[15] Recently, the now former Chief Justice of the High Court cautioned against the dangers of "cause lawyering."[6] As his Honour observed, the practice of the law is to be pursued within the framework of the rule of law in a representative democracy. To honour the rule of law and to work within it means that we may have to accept, at least pro tem, its limitations and imperfections. In litigation, the advocate seeks justice not according to his or her own concepts or the client's, but

[5] Gitanjali Gill, *Environmental Justice in India: The National Green Tribunal* (Routledge, 2017) 55.
[6] Chief Justice French, 'Lawyers, Causes and Passions' (Paper presented at EDO NSW 30th Anniversary Dinner, Sydney, 25 June 2015).

justice accordingly to law. Critical judgement and legal skill are needed more than passion. Further, "serving their ethical political commitments through their work constitutes cause lawyers as essentially political actors – albeit ones whose work involves doing the law", which is susceptible to creating tensions with their professional obligations. These difficulties and tensions are only magnified in the case of "cause judging", because of the sworn duty of a judge to do equal justice according to law without fear, favour or affection and the legitimate public expectation of a judge's impartiality, in the broadest sense.

Passion

[16] It would be wrong to suggest that ECT judges or tribunal members should be disinterested in the environment or other than passionate about environmental law. There is, however, a distinction between a genuine interest in and passion for environmental law and its proper application on the one hand, and unrestrained environmental advocacy on the other. Courts and tribunals are traditionally concerned with the former rather than the latter.

[17] Passion for the advancement of a particular cause can, if indulged in the execution of a judicial office, be unhelpful. As even the supporters of "cause judging" acknowledge,[7] there is some difficulty with a judge being, and being seen to be, impartial when they unashamedly look to use their office as a vehicle to promote a cause being moral, social, political or, in this case, environmental, in nature.

Risks

[18] Activist courts which indulge in cause judging have their supporters and are often, at least initially, cheered on by those who believe that such courts or tribunals are

[7] Above n 6, 2.

fighting the good fight. Such courts and tribunals however risk underestimating the value of impartial objectivity and undermining public confidence in, and the sustainability of, the court or tribunal itself, ultimately to the potential detriment of the environment. It must be remembered that an ECT will only be effective, on a sustained basis, if it persists, is entrusted with sufficient jurisdiction, performs its proper function, and makes decisions which are respected and followed.

[19] Whilst ECTs are typically of relatively recent origin, Australia and New Zealand have examples which are longstanding by international standards. The Planning and Environment Court of Queensland, for example, has remained constitutionally unaltered and has had its jurisdiction increased over its half century of life. It has not however, escaped scrutiny or review.

[20] The longstanding ECTs with which the author is familiar, have similarly been subject to regular review. That is not unexpected in a field which excites diverse and divergent interests. The stability and longevity of a number of ECTs in Australia and New Zealand owes much to the confidence which they have earned from the broad range of stakeholders representing those diverse and divergent interests. That confidence is underpinned by, most importantly, impartial objectivity. For example, the Planning and Environment Court of Queensland is not, and is not perceived to be, pro or anti-development or pro or anti "green" or pro or anti any sectional, political or other interest. It is respected as the independent, impartial and objective decision-maker. It would be a matter of concern if the position were otherwise.

[21] The importance of independent and impartial ECTs has already been noted. The existence of an independent ECT with the power to publically scrutinise, alter or overturn the decision of government agencies has a positive effect not just in achieving justice between the parties, but also on the quality and robustness of the

application and decision-making process more generally. Participants in an application assessment process do not have to tolerate or accept what they believe to be wrong, poor or even corrupt decision-making. Decision-makers, in turn, know that their decisions are potentially subject to rigorous and transparent review by a court or tribunal that is above sectional or political interest and that not only enjoys constitutional independence, but demonstrates impartial objectivity. Further, principled decision-making provides guidance in relation to the proper approach to the formulation and assessment of other applications. Fidelity to the role of independent and impartial decision-maker achieves much and should not be underestimated. "Cause judging" has the potential to compromise, if not corrupt, the exercise of that function and to undermine public confidence in, and the justification for, the court or tribunal and thereby to imperil its future.

[22] Further, adventurous ECTs risk losing respect for their decisions. In her book, Dr Gill exemplifies and examines one case where, in response to reported air quality concerns in Delhi, the NGT issued directions requiring government authorities to adopt an action plan including, amongst other things, measures banning vehicles 15 years or older, banning diesel trucks from entering Delhi and banning footpath parking. It subsequently gave further directions requiring, amongst other things, the introduction of a cap on the number of vehicles to be registered, the provision of incentives for carpooling and the imposition of higher registration fees and charges, including the imposition of congestion charges. Perhaps unsurprisingly, Dr Gill reports that a number of the NGT's directions were variously stayed by the Supreme Court, only partially implemented or not implemented at all.[8]

[8] Above n 5, 92 (Table 3.1).

[23] Whilst there are arguments in favour of "cause judging" and whilst the context within which ECTs operate in Australia and New Zealand is different to the context which may apply elsewhere, there is merit in the traditional self-limiting judicial approach in which jurisdiction is exercised without fear, favour or affection to arrive at a determination based on established principle in order to do justice according to law.

Interpreting and developing the law

[24] None of the above is to ignore or deny the legitimate and, indeed, necessary role of judges in developing the law within appropriate bounds. As has been observed:[9]

> "[t]he entrusting by the legislature to the judiciary of responsibility for developing the law within broadly stated guidelines is commonplace and has become more so over recent decades. It reflects the complexity of our society and the infinite variety of individual circumstances."

[25] The environmental field is one in which judges or tribunal members are often charged with the exercise of a discretion by reference to sometimes numerous, complex, lengthy and poorly drafted statutory instruments. Judges and tribunal members will be faced with the task of making or developing the law with respect to the proper construction of relevant statutory instruments, the range of relevant considerations otherwise and the proper approach to the exercise of discretion by reference to those considerations. The cause judge will see that as a legitimate opportunity to advance his or her cause. The traditional judge, on the other hand, will be guided by principle. In this regard, former Chief Justice French has said:

[9] Chief Justice French, 'Judicial Activism – the Boundaries of the Judicial Role' (Paper presented at Law Asia Conference, Ho Chi Minh City, 10 November 2009).

> "…interpretation is legitimate when it is principled and invokes criteria which, whether developed by courts or decreed by statute or both, are broadly understood by the legislature, the executive and the judiciary. And to that extent they represent another example of a necessary, legitimate and generally accepted authority to the judges to determine what the law is by determining what it means."

[26] That is not to ignore the particular nature of environmental legislation which the court or tribunal is called upon to interpret and apply. At least in the Queensland and broader Australian contexts, it is conventional to adopt a purposive approach to statutory interpretation.[10] The identifiable purpose of environmental legislation will therefore be influential in its proper interpretation, consistent with established principle. It is however, an exercise in the application of principle to find the meaning of a statutory provision, rather than an attempt to find a vehicle for the pursuit of an agenda otherwise.

[27] There can also be a difference of approach when it comes to developing the law in relation to the exercise of a particular discretion. The cause judge will seize upon what he or she regards as a legitimate opportunity to further their cause in the formulation of principles to guide the exercise of a discretion, whilst the traditional judge will be guided by a principled and objective analysis of the context in which the discretion falls to be considered.

[28] There are circumstances in which each type of judge might ultimately come to a similar position, because the particular passion of the cause judge coincides with the proper development and application of the law on a principled basis. For example,

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[10] *Acts Interpretation Act 1954* (Qld) s 14A; *Acts Interpretation Act 1901* (Cth) s 15AA; *Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 194 CLR 355 [69]–[71], [78].

both kinds of judge might, in the Queensland context, develop the law in relation to the exercise of a discretion in a way they consider optimises the pursuit of ecological sustainability, including by application of the precautionary principle and having regard to inter-generational equity. The traditional judge, however, will do so because that is consistent with the express purpose of the governing legislation in Queensland.[11] That approach is likely to lead to widespread acceptance and respect because it can be demonstrated to be supportive of a principle enshrined in statute.

[29] While there is a distinction between cause judging and the more traditional approach, there is, it should be acknowledged, some overlap of proverbial grey at the interface of the black and the white. Nevertheless, it is important to recognise the different philosophical starting points.

Striking the ecological sustainability balance

[30] A further illustration of the difference in approach can be seen in the sometimes difficult task of considering the balance inherent in ecological sustainability, as it applies to a particular proposal which comes before an ECT. Ecological sustainability involves a balance which integrates diverse considerations which may be summarised as relating to ecological, economic and social wellbeing. A cause judge who is 'green' might, when faced with striking a balance, routinely give priority to the ecological considerations, whilst an 'anti-green' or 'pro-development' cause judge might routinely prioritise economic considerations. The Planning and Environment Court adopts a different approach.

[31] The ecological, economic and social balance at the heart of ecological sustainability is rarely achieved entirely within the boundaries of a particular site, considered in

[11] *Sustainable Planning Act 2009* (Qld) ss 3–5; *Environmental Protection Act 1994* (Qld) ss 3–5.

isolation. It is a balance typically struck across a broader area (local, city-wide, regional, state, national, international or global). Its pursuit on a given plane of relevance may require, for example, one parcel of land within a broader area to be intensively developed, for economic wellbeing, whilst another is entirely preserved for ecological reasons.

[32] A usual first step in considering whether a particular proposal promotes or impedes ecological sustainability, is an objective evaluation of the role which the site plays, or is intended to play, in promoting ecological sustainability at a relevant level, or levels of influence. That involves both an examination (including by reference to expert evidence) of the relevant values of the site and the consequences of development or potential development, and a consideration of the statutory instruments which, in the context of Queensland, provide strategic guidance in relation to how ecological sustainability is sought to be achieved at various levels. That process informs how the balance is to be struck in a particular case. In some cases that involves giving greater priority to the ecological values of the site, whilst in others it involves giving priority to economic opportunities. It may involve a balance which integrates the diverse values and opportunities in a different way. The result is however, the subject of an objective, principled and impartial approach, rather than a pro or anti "green" or pro or anti-development bias at an institutional level.

Conclusion

[33] The case for specialist and independent ECTs is strong, as is evidenced by the proliferation of such bodies. A primary determinant for the proper role and function of ECTs is the legislative or other authority by which jurisdiction is conferred. The particular context within which the ECT operates will also be influential. Otherwise

however, ECTs can be pulled in different directions by diverse and divergent interests and it falls to the judges and members of each ECT to determine the proper approach to the exercise of jurisdiction. The allure of an activist or "cause judging" approach can be strong. Nevertheless, there are risks to such an approach and there is merit in the traditional self-limiting judicial approach of doing justice according to law, irrespective of the personal beliefs, values or passions of the decision-maker. ECTs which adopt a different approach risk underestimating the value of the independent, impartial and objective decision-maker in the broader scheme for the appropriate protection of the environment, and undermining public confidence in and the sustainability of, the institution itself, to the potential ultimate detriment of the environment.

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