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# Environmental Principles and the Construction of a New Body of Legal Reasoning

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## 1. Introduction

The New South Wales Land and Environment Court (NSWLEC) has developed a highly evolved body of reasoning around principles of ‘ecologically sustainable development’ (ESD principles) over the last three decades. This body of legal reasoning has come about partly due to specific features of the court – notably its history and distinctive jurisdictional identity – and developments that have flowed from this, including the court adopting new lines and modes of reasoning, its transnational borrowing of legal ideas, and the evolving culture of the court itself. Beyond these specific institutional features, the legislation that empowers the Court and shapes its reasoning has constructed an environment in which ESD principles have flourished as legal norms, through reasoning that might be seen as relatively routine in terms of the common law tradition of incremental reasoning. In combination, institutional, cultural, and legislative features of the NSWLEC have cultivated a body of highly novel legal doctrine around ESD

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principles, making it a powerful seat for judicial ‘strengthening [of] national efforts to realize the goals of environmentally-friendly development’.<sup>1</sup>

In light of this doctrinal innovation, it is fair to say that the NSWLEC is a global legal leader in reasoning involving environmental principles. However, this description – or accolade – brings with it potential preconceptions about what environmental principles are as legal concepts and how they might inform legal doctrine. This is because environmental principles are often framed as foundations for a global ‘environmental rule of law’,<sup>2</sup> forging an international narrative around environmental principles as universal, transnational global norms that embed environmental protection within legal systems.<sup>3</sup> And whilst environmental principles are indeed symbolic and transformative concepts in environmental law globally,<sup>4</sup> they are evolving as legal norms, and driving legal developments, in many and varied ways across different jurisdictions.<sup>5</sup> The NSWLEC provides a particularly rich example of such jurisdictional developments, providing a fertile legal setting for environmental principles to embed systematically within a body of domestic environmental law. Its example also shows that, despite challenges in

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<sup>1</sup> Donald Kaniaru et al, *UNEP Judicial Symposia on the Role of the Judiciary in Promoting Sustainable Development 22* (1998), as cited in Brian J Preston, ‘Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study’ (2012) 29(2) *Pace Environmental Law Review* 396, 398.

<sup>2</sup> IUCN, *World Declaration on the Environmental Rule of Law* (2017) [https://www.iucn.org/sites/dev/files/content/documents/world\\_declaration\\_on\\_the\\_environmental\\_rule\\_of\\_law\\_final\\_2017-3-17.pdf](https://www.iucn.org/sites/dev/files/content/documents/world_declaration_on_the_environmental_rule_of_law_final_2017-3-17.pdf).

<sup>3</sup> Ludwig Krämer and Emanuela Orlando (eds), *Principles of Environmental Law* (Edward Elgar 2018); Tseming Yang and Robert V Percival, ‘The Emergence of Global Environmental Law’ (2009) 36 *Ecology LQ* 615.

<sup>4</sup> Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (2<sup>nd</sup> ed, OUP 2020); Eloise Scotford, ‘Environmental Principles Across Jurisdictions: Legal Connectors and Catalysts’ in Emma Lees and Jorge Vinuales (eds), *Oxford Handbook of Comparative Environmental Law* (OUP 2019).

<sup>5</sup> Eloise Scotford, *Environmental Principles and the Evolution of Environmental Law* (Hart Publishing 2017); Louis J Kotzé and Caiphaz B Soyapi, ‘African Courts and Principles of International Environmental Law: A Kenyan and South African Case Study’ (2021) 33(2) *JEL* 257.

translating policy principles into legal norms, legal institutions can foster and develop environmental principles as legally relevant concepts within bodies of carefully crafted legal reasoning.

This chapter is a study of the legal context and developments involved in constructing a dense and specific body of legal reasoning involving environmental principles. Investigating the specific legal features of the NSWLEC's ESD reasoning, it shows how environmental principles have co-evolved with the legal culture of the Court and how these developments illustrate a highly evolved, but contingent, example of environmental principles in environmental law. The first section of the chapter examines how this legal reality lines up with the legal rhetoric around environmental principles, outlining narratives and emergent theories relating to the nature of environmental principles in environmental law, and demonstrating why framing these principles as legal concepts is fraught with complexity as well as potential. The potential of environmental principles derives from the fact that they are politically amplified and amorphous policy objectives, which lend themselves to multiple meanings and functions, including legal ones. Wrestling these ideas onto the legal plane is a jurisprudentially complex exercise, not least because questions arise about the proper role of courts in developing or implementing policy ideas. The increasing roles played by environmental principles in judicial reasoning across diverse jurisdictions thus raises questions about how this legal translation happens and whether it is done justifiably.

The second section examines how environmental principles have become a legal reality in the specific context of New South Wales (NSW) law through the development of a dense body of NSWLEC case law on ESD principles. This body of legal reasoning is path-breaking in both its depth (it has built from modest steps first taken in the early 1990s), in its breadth (now covering a wide jurisdiction of environmental cases), and in

the sheer intricacy of legal reasoning building on the unique statutory and institutional foundations of the court. Over 30 years, an established body of environmental jurisprudence around ESD principles has been developed. There are thus now many examples of how legislative incorporation of ESD principles has sparked doctrinal developments in the Court's reasoning, from constituting mandatory requirements in environmental impact statements,<sup>6</sup> to elaborating the nature of regulatory offences,<sup>7</sup> to informing a breach of duty in negligence.<sup>8</sup> The concluding section reflects on this picture and asks some questions about the legitimacy of ESD reasoning in the NSWLEC, and how this reasoning should be understood and critiqued.

In considering the legal character and evolution of environmental principles – in general discussion and in the context of the NSWLEC – this chapter's analysis is confined to principles expressing substantive environmental policy. Globally, environmental principles of this kind remain an amorphous and open-ended group – ranging from the precautionary principle and polluter pays principle to the principles of inter- and intra-generational equity and the principle of non-regression.<sup>9</sup> In the context of the NSWLEC,

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<sup>6</sup> *Gloucester Resources Limited v Minister for Planning* (2019) 234 LGERA 257; [2019] NSWLEC 7.

<sup>7</sup> *Harrison v Perdikaris* [2015] NSWLEC 99.

<sup>8</sup> *JK Williams Staff Pty Limited v Sydney Water Corporation* [2021] NSWLEC 23.

<sup>9</sup> There is no definitive catalogue of environmental principles globally. There are some key international, soft law instruments that list environmental principles – notably the Brundtland Report 1987 (World Commission on Environment and Development, *Our Common Future* (OUP 1987) Annex 1); the Rio Declaration 1992 (United Nations Conference on Environment and Development, 'Rio Declaration on Environment and Development' (14 June 1992) UN Doc A/CONF.151/26 (Vol I) 31 ILM 874 (1992)), the World Declaration on the Environmental Rule of Law 2016 (n 2), and the Draft Global Pact for the Environment 2017 (<https://globalpactenvironment.org/en/document/draft-global-pact-for-the-environment-by-the-igep/>, accessed 11 July 2021). Each of these international instruments contains a different categorical list of principles, reflecting different contexts in which these agreements were made, and also different perspectives on what constitutes an environmental 'principle' and which principles are valuable to recognize.

a more specific group of such ‘ESD principles’ are defined in NSW legislation – outlined in Section 3.1 – giving environmental principles concrete identities in NSW law.

## **2. The Promise and Perils of Environmental Principles in Environmental Law**

To understand the significance of reasoning involving environmental principles in the NSWLEC, it is important to understand environmental principles writ large. Environmental principles offer a lot of promise, as both policy and legal ideas. In policy terms, they express simple, powerful messages about environmental ambition in relation to multi-dimensional, interdisciplinary, often transnational environmental problems. They act as policy beacons that both raise the profile of environmental policy and set a policy direction, transcending the socio-political complexity that characterises many environmental problems.<sup>10</sup> They also speak to multiple audiences – policymakers, activists, citizens, legislators, courts – in different countries and different legal systems, which makes them easier to champion as universal ideas.<sup>11</sup> At the same time, the linguistically open-textured character of environmental principles also makes them vulnerable to different policy interpretations. The precautionary principle is perhaps most notorious in this respect, with fierce intellectual and trade policy debates over the merits of the principle often expressing different visions of what the principle means.<sup>12</sup>

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<sup>10</sup> Elizabeth Fisher, Bettina Lange & Eloise Scotford, *Environmental Law: Text, Cases and Materials* (2<sup>nd</sup> ed, OUP 2019) ch 2.

<sup>11</sup> Scotford, *Environmental Principles and the Evolution of Environmental Law* (n 5) ch 2.

<sup>12</sup> Ranging from a prohibitive, protectionist version of the principle (no action must be taken where there is any risk of environmental harm) to a more administrative version of the principle based on rigorous risk assessment and management processes: eg Cass Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (CUP 2005); cf Commission

All of this policy promise is compounded by – and sometimes conflated with – their legal promise.<sup>13</sup> The cataloguing of environmental principles in international agreements indicates that they have an international normative character, and there is much academic discussion of whether they constitute principles of international environmental law,<sup>14</sup> as well as serious efforts to formalise them in treaty form.<sup>15</sup> They are also advocated as foundations of new forms of law – such as ‘global environmental law’<sup>16</sup>, ‘post-modern law’,<sup>17</sup> or in reframing law based on a ‘principle of sustainability’.<sup>18</sup> The legal reality is more complex. Their international normative character is hard to pin down partly because they are interstitial – they occupy a space between policy rhetoric and firm legal rules,<sup>19</sup> between international and domestic legal orders, between general

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of the European Communities, ‘Communication from the Commission on the Precautionary Principle’ COM (2000) 1.

<sup>13</sup> For more on the policy and legal reasons for the high profile of environmental principles, including the legal scholarly appetite for these principles in legitimizing environmental law as a discipline, see Scotford, *Environmental Principles and the Evolution of Environmental Law* (n 5) ch 2.

<sup>14</sup> Kotzé & Soyapi note that environmental principles, as principles of IEL are ‘famously abstract and have a uniquely amorphous nature that ranges between binding and non-binding normativity’: Kotzé & Soyapi (n 5) 3.

<sup>15</sup> Draft Pact on Environmental Principles (n 9).

<sup>16</sup> Tseming Yang and Robert V Percival, ‘The Emergence of Global Environmental Law’ (2009) 36 *Ecology LQ* 615.

<sup>17</sup> de Sadeleer (n 4).

<sup>18</sup> Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Ashgate 2008).

<sup>19</sup> They are ‘twilight’ norms in international law (Ulrich Beyerlin, ‘Different Types of Norms in International Environmental Law: Policies, Principles and Rules’ in Daniel Bodansky, Jutta Brunee and Ellen Hey (eds) *The Oxford Handbook of International Environmental Law* (OUP, 2007) 426); they are an ‘ideal bridge between ideals and duties, between values and rules’ (Ludwig Krämer and Emanuela Orlando, ‘Introduction’ in Krämer and Orlando (n 3) 1). This conceptual ladder from policy ideal, through to principle, then legal rule invites jurisprudential comparison with ‘legal principles’ as framed by Ronald Dworkin, although his theory for common law reasoning based on principles explicitly distinguishes legal principles from collective expressions of policy, which are best left to political institutions to debate and implement: see Scotford, *Environmental Principles and the Evolution of Environmental Law* (n 5) 41-44, 59-60.

international law and international environment law,<sup>20</sup> between science, law and politics<sup>21</sup> – but also because they can take on a variety of legal roles within domestic legal systems, and because their legal roles can be controversial.

Within specific domestic jurisdictions and legal cultures, environmental principles are living up to their potential as legal norms.<sup>22</sup> Environmental principles are being adopted in legislative form,<sup>23</sup> informing constitutional norms,<sup>24</sup> and infusing judicial reasoning.<sup>25</sup> In taking on these legal roles, environmental principles are fitting established doctrinal paths within domestic legal systems, such as informing the interpretation of legal rules through teleological reasoning or informing existing legal tests in EU law.<sup>26</sup> They are also catalysing new legal reasoning, and connecting developments between jurisdictions, as in the NSWLEC.<sup>27</sup> Connections between jurisdictions are made through transnational judicial dialogue, where judges appeal to developments in other jurisdictions to support their reasoning involving similar-named environmental principles.<sup>28</sup> This, in combination with the sheer weight of global

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<sup>20</sup> Teresa Fajardo del Castillo describes environmental principles as ‘connecting vessels of domestic law and international law, and ... also in the relations between international environmental law and general international law, or other specialist fields of international law’: Teresa Fajardo del Castillo, ‘Environmental Law Principles and General Principles of International Law’ in Ludwig Krämer & Emanuela Orlando (eds), *Principles of Environmental Law* (Edward Elgar 2018).

<sup>21</sup> Scotford, *Environmental Principles and the Evolution of Environmental Law* (n 5) 65 and ch 2 generally.

<sup>22</sup> Krämer & Orlando (n 3); Scotford *Environmental Principles and the Evolution of Environmental Law* (n 5).

<sup>23</sup> See Section 3.1 below.

<sup>24</sup> Eg *Vellore Citizens’ Welfare Forum v Union of India* AIR 1996 SC 2715; *AP Pollution Control Board v Nayudu* AIR 1999 SC 812 (India).

<sup>25</sup> Eg in EU law: Scotford, *Environmental Principles and the Evolution of Environmental Law* (n 5) ch 4.

<sup>26</sup> *ibid.*

<sup>27</sup> Scotford, ‘Environmental Principles Across Jurisdictions’ (n 4).

<sup>28</sup> These kinds of appeals differ in ‘form, function and degree of reciprocal engagement’ but they all demonstrate a reliance on persuasive authority to legitimise new reasoning

developments concerning environmental principles, confirms the scholarly view that environmental principles are central concepts in environmental law. However, rather than representing an emergence of international or global legal norms, this legal picture is best understood as ‘global legal pluralism’<sup>29</sup> or ‘globalised localisms’,<sup>30</sup> whereby environmental principles are evolving as legal norms through specific legal cultures, and which spread transnationally.<sup>31</sup>

This global legal pluralism demonstrates that, encouraged by international soft law agreements headlining environmental principles,<sup>32</sup> environmental principles open up meaningful spaces for legal development in environmental law. These normative spaces are exploited extensively in the reasoning of the NSWLEC. At the same time, the evolving role of environmental principles in domestic legal systems can also be controversial. This is for at least two reasons. First, the indeterminate nature of environmental principles as policy ideas can also make them indeterminate or uncertain legal ideas. When employed to inform a legal test, interpret a legal norm, or even establish a legal norm, a significant amount of interpretive or analytical work is required to flesh out what legal role that environmental principle is playing, and what conclusion it leads to. Thus, for example, some courts undertake extensive analysis in employing the precautionary principle to inform administrative decision-making,<sup>33</sup> or to inform the

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and reflect ‘a common sense of judicial identity and enterprise’: Anne-Marie Slaughter, ‘A Typology of Transjudicial Communication’ (1994) 29(1) *University of Richmond Law Review* 99, 101-102. See also Scotford, *ibid*.

<sup>29</sup> Paul Schiff Berman, ‘The Evolution of Global Legal Pluralism’, in Roger Cotterrell & Maksymilian Del Mar (eds), *Authority in Transnational Legal Theory: Theorising Across Disciplines* (Edward Elgar 2016).

<sup>30</sup> Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science, and Politics in the Paradigmatic Transition* (Routledge 1995).

<sup>31</sup> See Scotford, *Environmental Principles and the Evolution of Environmental Law* (n 5) ch 6 and generally.

<sup>32</sup> (n 9).

<sup>33</sup> *Telstra Corporation v Hornsby Shire Council* (2006) 67 NSWLR 256; [2006] NSWLEC 133.



review of administrative decision-making.<sup>34</sup> Environmental principles provide space for courts to be ‘norm entrepreneurs’.<sup>35</sup> This can be seen as a positive development with courts strengthening environmental protection through law,<sup>36</sup> or as worrying licence for courts to engage in reasoning about policy issues where no clear legal structures or rationales exist,<sup>37</sup> or where specific environmental problems might demand fine-grained policy debate.

The second reason for controversy around the legal roles of environmental principles relates to their essential character as policy-directing ideas. Policy and law are uncomfortable bedfellows in Anglo-American jurisprudence,<sup>38</sup> and, whilst policy is a firm feature of environmental law,<sup>39</sup> environmental principles inject collective policy ideas directly into environmental law regimes in ways that can test the balance of functions between judicial and political branches of the state. The heated debate around the merits of ‘retaining’ in UK law environmental principles – which are firmly embedded in EU law – after the UK’s withdrawal from the European Union demonstrated this tension.<sup>40</sup> This is not to say that environmental principles are illegitimate as legal norms, or that mature bodies of law concerning environmental law cannot develop – the NSWLEC’s example shows that this is possible – but that a finely tuned dance between

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<sup>34</sup> Case T-13/99 *Pfizer Animal Health SA v Council* [2002] ECR II-3305.

<sup>35</sup> *Kotze and Soyapi* (n 5) 5.

<sup>36</sup> Brian Preston, ‘The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific’ (2005) 9(2) *Asia Pac J Envtl L* 109.

<sup>37</sup> Eg criticism of Indian constitutional jurisprudence involving environmental principles: Geetanjoy Sahu, ‘Implications of Indian Supreme Court’s Innovations for Environmental Jurisprudence’ (2008) 4(1) *Law, Environment and Development Journal* 375.

<sup>38</sup> Ronald Dworkin, *Taking Rights Seriously* (2nd edn, Duckworth, London 1978) ch 2.

<sup>39</sup> Fisher, Lange, Scotford (n 10) ch 8.

<sup>40</sup> Maria Lee and Eloise Scotford, ‘Environmental Principles After Brexit: The Draft Environment (Principles and Governance) Bill’ (2019 working paper), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3322341](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3322341).

environmental principles as policy concepts and legal norms plays out in many jurisdictions.

When environmental principles become constitutionalized or embedded as legal norms through a thick web of legal structures within specific jurisdictions, this is not a surprise. Their legal potential paves the way for such legal evolution. But this kind of legal development is complex to analyse and theorise, and raises questions about how this kind of legal development unfolds, and whether it is justifiable, which can only be addressed by exploring the relevant jurisdictional context. The NSW context demonstrates that highly evolved environmental principles in environmental law can develop within a legislative environment and body of jurisprudence constructed over decades, in which environmental principles co-evolve with a legal culture to orient its norms and reasoning around a core thread of environmental protection. The following section examines how this distinctive legal evolution has occurred in NSW law, and the features of the NSWLEC's legal culture that construct and explain the normative character of its environmental principles.

### **3. Making Environmental Principles a Legal Reality: The Pioneering Case of the NSWLEC**

The NSWLEC has developed a highly evolved body of reasoning around ESD principles over the last three decades. This reasoning has developed partly due to specific jurisdiction of the court and also due to contingent developments, including political fortunes, new lines and modes of reasoning, transnational borrowing of legal ideas, and the evolving culture of the court itself. Notably, this jurisprudence has also evolved through routine processes of law – the drafting of legislation and its interpretation, and

incremental reasoning in judicial review and administrative appeals. The Court has thus developed a mature body of reasoning involving environmental principles through a combination of legal innovation and stabilizing processes of legal development, all embedded within a specific jurisdictional context.

### **3.1. The Legislative Foundation of the Court's ESD reasoning**

The role of legislation in the development of the NSWLEC's ESD reasoning has been central. The initial emergence of ESD principles in Australia was through a national ESD policymaking process that responded to the international sustainable development agenda and developed a vision of how to make sustainable development operational in Australia.<sup>41</sup> This vision was articulated in the 1992 Intergovernmental Agreement on the Environment (IGAE) – a quasi-constitutional but non-legal agreement – which was drawn up to manage Australian federal-state governance arrangements over environmental matters as much as to pursue sustainable development.<sup>42</sup> Subsequent legislation embedded the IGAE's ESD principles into NSW law. This legislative incorporation process unfolded over the late 1990s and early 2000s,<sup>43</sup> and was not inevitable – scholarly and extra-judicial pressure<sup>44</sup> and political fortune played a part.<sup>45</sup> This legalizing of ESD principles through legislation began mainly through including ESD in the 'objects' clauses of Acts relating to environmental protection and land use planning. A key amendment was the inclusion in 1998 of the object 'to encourage ecologically sustainable

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<sup>41</sup> See Scotford, *Environmental Principles and the Evolution of Environmental Law* (n 5) 99-106.

<sup>42</sup> *ibid* 99-106.

<sup>43</sup> *ibid* 110-113.

<sup>44</sup> Eg Ronnie Harding (ed), 'Sustainability: Principles to Practice' (Fenner Conference on the Environment 1994) 6, 8; Paul Stein, 'Turning Soft Law into Hard – An Australian Experience with ESD Principles in Practice' (1997) 3(2) *The Judicial Review* 91, 95.

<sup>45</sup> Cf UK experience in reforming environmental law post-EU exit: Eloise Scotford, 'Legislation and the Stress of Environmental Problems' (2021) CLP (in press).

development’ into the list of objects in s 5(a)(vii) (now s 1.3(b)) of the Environmental Planning and Assessment Act 1979 (EPA Act).<sup>46</sup> This legislative prompt sparked the first ‘planning principle’ case on ESD principles – fleshing out what regard planning consent authorities should give to ESD principles.<sup>47</sup> This was not the first ESD case – the Court had previously relied on other aspects of its legislative framework to introduce ESD reasoning (see Section 3.3) – but it represented a major doctrinal statement by the Court about the importance of its reasoning involving ESD principles.

A next major legislative development was the introduction of a definition of ‘ecologically sustainable development’ through its elaboration as a set of ESD principles – this essentially adopted the list and explanation of ESD principles in clauses 3.2 and 3.5 IGAE, first incorporating these to define the ESD object of the NSW Environmental Protection Authority in s 6(2) of the Protection of Environment Administration Act 1991 (POEA Act):

(2) [E]cologically sustainable development requires the effective *integration* of social, economic and environmental considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following *principles and programs*:

(a) the *precautionary principle*—namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

In the application of the precautionary principle, public and private decisions should be guided by:

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<sup>46</sup> Environmental Planning and Assessment Amendment Act 1997.

<sup>47</sup> *BGP Properties v Lake Macquarie City Council* (2004) 138 LGERA 237; [2004] NSWLEC 399. McClellan J’s purposive interpretation of s 5(a)(vii) was also rationalizing the increasing use of ESD principles in planning merits appeals: see nn 98-99.

careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and

an assessment of the risk-weighted consequences of various options,

(b) *inter-generational equity*—namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations,

(c) *conservation of biological diversity and ecological integrity*—namely, that conservation of biological diversity and ecological integrity should be a fundamental consideration,

(d) improved valuation, pricing and incentive mechanisms—namely, that environmental factors should be included in the valuation of assets and services, such as:

(i) *polluter pays*—that is, those who generate pollution and waste should bear the cost of containment, avoidance or abatement,

(ii) the users of goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste,

(iii) environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems.

This legislative articulation of ESD principles is not a simple catalogue listing environmental policy ‘principles’ for achieving ecologically sustainable development – ‘programmes’ are also included, which is how the ‘improved valuation, pricing and incentive mechanisms’ in s 6(2)(d) might be best described. Furthermore, identifying the ‘ESD principles’ in this provision – precautionary principle, intergenerational equity,

conservation of biological integrity, polluter pays, integration – is partly a matter of recognising these principles as familiar from global developments articulating environmental principles,<sup>48</sup> and also a process of their evolution as a group of ‘ESD principles’ in the reasoning of the NSWLEC over time.<sup>49</sup> This group has also been expanded in the reasoning of the Court, with the principles of ‘intragenerational equity’ and ‘sustainable use of natural resources’ included as complementary ESD principles.<sup>50</sup>

Other environmental and planning legislation subsequently defined statutory requirements and objects of ESD and ESD principles by referring back to the s 6(2) POEA Act definition, or by similarly incorporating the IGAE exposition of ESD and its principles.<sup>51</sup> This phase of legislative articulation and rationalisation of ESD principles embedded ESD principles widely across the dense network of NSW environmental and planning legislation and provided an opportunity for the NSWLEC to respond to and build on. As Stein J put it, the Court had an obligation ‘to turn soft law [as he saw the ESD principles, deriving from international environmental law and the IGAE] into hard law’ and to flesh out the ESD concept, thus providing a ‘lead for the common law world’.<sup>52</sup> And the Court has special institutional foundations that allowed it to embrace and fulfil this obligation, as the following section outlines.

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<sup>48</sup> See eg nn 22-25.

<sup>49</sup> Eg *BGP Properties* (n 47).

<sup>50</sup> *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* (2013) 194 LGERA 347; [2013] NSWLEC 48 [492]; *Hub Action Group Incorporated v Minister for Planning* (2008) 161 LGERA 136; [2008] NSWLEC 116.

<sup>51</sup> Eg Local Government Act 1993 (NSW), ss 3, 7(e), as amended by the Local Government Amendment (Ecologically Sustainable Development) Act 1997 (NSW) (effective 1999); Environmental Planning and Assessment Regulation 2000 (NSW) sch 2, cl 7; Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005 (NSW).

<sup>52</sup> Paul Stein, ‘Are Decision-Makers Too Cautious with the Precautionary Principle?’ (2000) 17(6) *Environmental and Planning Law Journal* 33.

### 3.2. The Institutional Foundations of the Court's ESD Reasoning

The NSWLEC's distinctive institutional design has also allowed an innovative body of ESD reasoning to flourish. Its construction as a 'superior court of record' in NSW<sup>53</sup> imbued the court with authority and tradition, establishing it with seniority within a hierarchy of Australian common law courts. At the same time, the Court has a wide-ranging, legally heterogeneous jurisdiction relating to environmental problems. This hybrid identity created a setting where legal innovation has been balanced by legal stability, and deeply rooted legal developments concerning complex environmental disputes and challenges have been possible. At its very inception, the Minister for Planning and Environment envisaged that the Court would develop its own precedents on major planning issues<sup>54</sup> – it had a mandate to develop new environmental jurisprudence across the wide-ranging jurisdiction of the Court. The Court has taken this opportunity to develop a distinctive and intricately reasoned body of environmental jurisprudence, including ESD principles as core concepts.

The Court's special institutional identity is partly due to its history and the reasons for its establishment, and is also constructed by its distinctive jurisdiction as a 'one stop shop' for all matters related to land use and protection of the environment.<sup>55</sup> The NSWLEC was created in 1980 to take on the dual role of a tribunal (involved in administrative review)<sup>56</sup> and a court (exercising judicial power), which was a

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<sup>53</sup> Land and Environment Court Act (NSW) (LEC Act) s 5(1).

<sup>54</sup> David Paul Landa, New South Wales Legislative Council, *Parliamentary Debates (Hansard)*, 21 November 1979, 3355, cited in Andrew Edgar, 'Managing Non-Compliance: The Land and Environment Court and Flexible Rules of Development Assessment' (PhD Thesis, University of Sydney 2003) 22.

<sup>55</sup> Preston, 'Benefits of Judicial Specialization in Environmental Law' (n 1) 402.

<sup>56</sup> See Stein, this volume.

constitutionally ambiguous design.<sup>57</sup> One reason for this amalgamated jurisdiction was the need to reform a fragmented system of land use appeals, where the separation of legal and non-legal issues in planning appeals had been found to be counter-productive and unworkable,<sup>58</sup> in an era of wider tribunal creation in Australia.<sup>59</sup> In taking on this rationalizing role, its core identity as a superior court reinforced its function of acting ‘independently and according to law’,<sup>60</sup> and the Court’s role in articulating and applying environmental law doctrine is central to its purpose. At the same time, a spate of new environmental protection legislation was introduced at the time of the Court’s creation,<sup>61</sup> some of which contained ESD principles as discussed above, but also enlarging its jurisdiction and caseload and thus its scope for judicial activity. The Court’s jurisdiction is now split over eight classes – ranging from merits review and judicial review to valuation and Aboriginal land claim cases, and criminal proceedings and appeals<sup>62</sup> – which comprise a wide range of judicial and review functions, but which all relate to land use or environmental protection.<sup>63</sup> Its role as a superior court also gives it the status to

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<sup>57</sup> Elizabeth Fisher, ‘Administrative Law, Pluralism and the Legal Construction of Merits Review in Australian Environmental Law’ in Linda Pearson, Carol Harlow and Michael Taggart (eds) *Administrative Law in a Changing State* (Hart Publishing 2008) 330; Ceri Warnock, ‘Reconceptualising Specialist Environmental Courts and Tribunals’ (2017) 37(3) LS 391.

<sup>58</sup> Patricia Ryan, ‘Court of Hope and False Expectations: Land and Environment Court 21 Years On’ (2002) 14(3) JEL 301.

<sup>59</sup> Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart Publishing 2007) 133-4.

<sup>60</sup> Mahla Pearlman, ‘The Land and Environment Court of New South Wales a Model for Environmental Protection’ (2000) 123 *Water, Air and Soil Pollution* 395 (‘[o]ne of the most important features of the Land and Environment Court is that it is a court’).

<sup>61</sup> The Court’s creation corresponded with a growing body of specialised legislation in the area of environmental protection as well as planning, which confer jurisdiction on the Court, eg National Parks and Wildlife Act 1974 (NSW); Protection of the Environment Administration Act 1991 (NSW); Threatened Species Conservation Act 1995 (NSW).

<sup>62</sup> See Preston, this volume.

<sup>63</sup> Some criticised the development of a court that could decide issues beyond those that were strictly ‘legal’ in the Diceyan tradition: see Zada Lipman, ‘The NSW Land and Environment Court: Reforms to the Merit Review Process’ (2004) 21 *Environmental and Planning Law Journal* 415, 416. See also Peter Cane, ‘Understanding Administrative



establish relevant legal principles across this composite jurisdiction.<sup>64</sup> In particular, this has allowed ‘innovative decision-making in both substance and procedure by cross-fertilization between different classes of jurisdiction’.<sup>65</sup> This has been important for managing and expediting claims, and harnessing specialist expertise in environmental matters, but also for consistency and certainty in environmental decision-making, and ‘[facilitating] the development of environmental laws, policies and principles’,<sup>66</sup> including ESD principles.

The inclusion of ‘non-judicial’ decision-making through the court’s merits review powers is a notable aspect of its broad jurisdiction. Merits review was introduced through the tribunal system to fill a gap in Australian administrative law review, moving beyond public law doctrines of judicial review traditionally exercised by courts:<sup>67</sup>

[In a merits appeal, a tribunal] sits in the place of the original administrative decision-maker and re-exercises the administrative decision-making functions.

The decision of the [tribunal] is final and binding and becomes that of the original decision-maker.

A Court having this merits review jurisdiction was unusual – and the Court has specialist Commissioners (sitting alongside Judges) to assist in these merits review cases. The

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Adjudication’ in Linda Pearson, Carol Harlow and Michael Taggart (eds) *Administrative Law in a Changing State* (Hart, Oxford 2008) 32.

<sup>64</sup> Preston, ‘Benefits of Judicial Specialization in Environmental Law’ (n 1) 434 (‘The Court has shown that an environmental court of the requisite status has more specialized knowledge, has an increased number of cases and hence more opportunity to - and is more likely to - develop environmental jurisprudence.’).

<sup>65</sup> *ibid* 425; Warnock (n 57) (environmental courts as ‘highly innovative bodies, creatively responding to the demands of environmental conflict resolution and illustrative of a new, dynamic form of adjudication’).

<sup>66</sup> *ibid* 403.

<sup>67</sup> NSWLEC, *Land and Environment Court of NSW Annual Review 2019* (2020) 15.

Court's merits review jurisdiction occupies much of its caseload<sup>68</sup> and has provided opportunities for the Court to apply ESD principles in administrative decision-making (albeit on review), and thus to demonstrate the concrete implications of ESD principles for complex environmental and planning decisions (e.g. an open-cut coal mine should not be permitted,<sup>69</sup> a new wind energy development should be allowed)<sup>70</sup>.

Indeed, the merits review jurisdiction of the court has provided a significant space in which new lines and modes of reasoning about environmental principles have been possible. At common law, courts, in undertaking judicial review, are not meant to stray into evaluating or deciding the merits of a decision.<sup>71</sup> However, the NSWLEC is a court that undertakes both judicial review and merits review, and its ESD reasoning has developed in both kinds of cases, particularly in merits appeals. Merits review cases allow the full application – and thus definition – of environmental principles, as mentioned above, and they also fuel the development of legal doctrine. This occurs through the cross-fertilisation of legal reasoning concerning ESD principles from merits review to judicial review and then to other cases,<sup>72</sup> as well through express effort to develop the precedent-setting quality of merits appeals, including through formulation of 'planning principles' to promote consistency in decision-making.<sup>73</sup> The NSWLEC has designated two major

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<sup>68</sup> In 2021, Class 1 Environmental planning and protection appeals make up almost 70% of the Court's caseload: <https://www.lec.nsw.gov.au/lec/types-of-cases/class-1---environmental-planning-and-protection-appeals.html> (accessed 7 July 2021).

<sup>69</sup> *Bulga Milbrodale* (n 50).

<sup>70</sup> *Taralga Landscape Guardians Inc v Minister for Planning* (2007) 161 LGERA 1; [2007] NSWLEC 59.

<sup>71</sup> *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 38.

<sup>72</sup> Eg *Gray v The Minister for Planning and Ors* (2006) 152 LGERA 258; [2006] NSWLEC 720 (judicial review), citing *BGP Properties v Lake Macquarie Council* (2004) 138 LGERA 237; [2004] NSWLEC 399 (merits review), as one of '[n]umerous decisions of this Court [that] have confirmed the importance of ESD principles for decision makers making decisions under legislation which adopts ESD principles' [109].

<sup>73</sup> The Court defines a 'planning principle' as a 'a statement of a desirable outcome from a chain of reasoning aimed at reaching, or a list of appropriate matters to be considered

merits appeals concerning ESD principles as planning principle cases: one on ESD principles generally, as mentioned above (*BGP Properties v Lake Macquarie City Council*),<sup>74</sup> and one concerning the precautionary principle (*Telstra Corp Ltd v Hornsby Shire Council*).<sup>75</sup>

Furthermore, merits appeals concerning the application of ESD principles beyond these explicit precedent-setting cases are not a ‘wilderness’ of fact-specific cases.<sup>76</sup> Rather they involve the development of legal doctrine. Thus they build on previous reasoning to develop new lines of reasoning concerning ESD principles.<sup>77</sup> The Court’s ESD merits appeals also reveal an overlap in doctrine between merits review and judicial review cases, particularly in relation to the doctrine of mandatory relevant considerations (a central administrative law doctrine). This is because, in both types of action (merits and judicial review), the Court needs to determine which considerations – in particular, which ESD principles – are legally required and relevant, either to review whether they have been properly taken into account (judicial review) or to apply them directly (merits review). This is particularly apparent in cases where a judicial review action is brought where no merits appeal is available, as in *Gray v The Minister for Planning and others*.<sup>78</sup> In this case, Pain J used ESD principles to conclude that planning approval process for a coal mine project had been flawed. She found that, as a matter of law, the broad discretion

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in making, a planning decision’: <https://www.lec.nsw.gov.au/lec/practice-and-procedure/principles/planning-principals.html> (accessed 7 July 2021).

<sup>74</sup> *BGP Properties* (n 49).

<sup>75</sup> *Hornsby* (n 33).

<sup>76</sup> Michael Kirby, ‘Introduction’ in Linda Pearson, Carol Harlow and Michael Taggart, *Administrative Law in a Changing State* (Hart, Oxford 2008) 7 (referring to Elizabeth Fisher’s chapter in the same volume (see n 57), elaborating this very point).

<sup>77</sup> Eg *Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council and Stoneco Pty Limited* [2010] NSWLEC 48 (developing the Court’s reasoning on the precautionary principle in the context of a series of factual uncertainties on which the enlivening of the principle depended).

<sup>78</sup> *Gray* (n 72). See also *Walker v Minister for Planning* (2007) 157 LGERA 124; [2007] NSWLEC 741.

of the relevant planning decision-maker (the Director-General) was to be exercised in accordance with ESD principles.<sup>79</sup> Pain J reached this conclusion by looking to the ‘substantial judicial pronouncement’ of *Telstra Corp Ltd v Hornsby Shire Council* (a merits appeal, and ‘planning principle’ case, discussed further below) as well as the considerable NSWLEC case law confirming the importance of ESD principles for decision-makers under Acts that adopt the principles (mainly merits appeals), including the planning legislation at issue in this case.<sup>80</sup> Pain J then determined that the principles of intergenerational equity and precautionary principle were relevant on the facts of this case, and that there had been a failure of the ‘legal requirement’ to consider the principles by the Director-General. This doctrinal reasoning was founded on ESD reasoning in merits appeals, showing that merits review is not just about ‘resolving disputes, but... in doing so it [defines] categories and the boundaries of action’ of environmental decision-makers.<sup>81</sup> New lines of administrative law reasoning have thus been shaped by the unique legal jurisdiction and culture of the Court, representing a particular form of environmental law in the NSWLEC, in which merits appeals concerning ESD principles play an important role.<sup>82</sup>

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<sup>79</sup> Ibid [115].

<sup>80</sup> See Section 3.2.

<sup>81</sup> Elizabeth Fisher, ‘“Jurisdictional” Facts and “Hot” Facts’ (2015) 38 MULR 968, 982 (merits appeals are thus a form of administrative law in that they are ‘part of the day-to-day operation of the accountability of environmental decision-making’).

<sup>82</sup> Australian environmental law scholars have treated merits appeals as part of ‘environmental law’ for some time: eg Jacqueline Peel, ‘Ecologically Sustainable Development: More Than Mere Lip Service?’ (2008) 12(1) Australasian Journal of Natural Resources Law and Policy 1. See also Fisher, ‘Legal Construction of Merits Review’ (n 57).

### 3.3. Developing ESD Reasoning Through Localising Global Legal Ideas

A further distinctive feature of the Court's reasoning around ESD principles is its appeal to international instruments and transnational borrowing of legal ideas, allowing its ESD doctrine to develop with support from international regimes and developments in other courts, and contributing to a transnational judicial dialogue on environmental principles. The very beginnings of the Court's ESD case law were in early merits appeals where the Court drew inspiration from international developments such as the Rio Declaration, as well as national ESD policy developments, to find that ESD principles were relevant considerations in planning decisions.<sup>83</sup> Subsequently, as the Court's ESD case law become more sophisticated, so did its transnational reasoning, localizing the global legal phenomenon of environmental principles.

This is well demonstrated in a case like *Telstra Corp Ltd v Hornsby Shire Council*<sup>84</sup> – a 'planning principle' merits review case concerning the precautionary principle and its application by decision-makers in the planning context. In *Telstra*, Preston CJ maps out a lengthy multi-stage process of how the precautionary principle should be applied by decision-makers, seeking to provide some clarity amongst a growing body of case law that had firmly established the principle as a relevant planning consideration under s 79C (now s 4.15) of the EPA Act. Preston CJ considers a wide range of scholarly and legal articulations of the principle, including different applications of the principle in other jurisdictions, and its articulation in international sustainable development instruments.<sup>85</sup> Preston CJ uses these sources to give authority and legitimacy

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<sup>83</sup> Eg *Leatch v Director General of National Parks and Wildlife Service* (1993) 81 LGERA 270; *Northcompass Inc v Hornsby Shire Council* [1996] 130 LGERA 248.

<sup>84</sup> *Hornsby* (n 33).

<sup>85</sup> *ibid* eg [108]-[112]; [130]-[138]; [144]-[149].

to his reasoning,<sup>86</sup> whilst also demonstrating a willingness ‘to “domesticate” [the international norm of the precautionary principle] in order to further develop, enrich, and ultimately strengthen [this] domestic environmental law [regime]’.<sup>87</sup> Preston CJ sees this judgment as an important step in applying ESD principles internationally, as part of a ‘paradigm shift [to a world] where a culture of sustainability extends to institutions, private development interests, communities and individuals’.<sup>88</sup> Within the NSWLEC, new doctrine on ESD principles consciously contributes to a broader project of developing a ‘global jurisprudence’ in relation to environmental principles and sustainability.<sup>89</sup> This outward-looking attitude to environmental law globally is part of the NSWLEC legal culture that shapes its ESD doctrine.

### **3.4. Routine Legal Processes: Interpreting Legislation and Case Law Development**

In addition to the special jurisdictional and institutional features of the NSWLEC outlined in Sections 3.2 and 3.3, there are also more routine aspects of the Court and the law it applies, which have been central to the development of a body of ESD jurisprudence. As noted above, the Court’s ESD reasoning is framed by the legislation that the Court must interpret and apply, and this has been elaborated through incremental case law reasoning, developed over decades. In combination with the special features of the Court and the open-textured nature of environmental principles, these more familiar aspects of

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<sup>86</sup> Cf Andrew Edgar, ‘Institutions and Sustainability: Merits Review Tribunals and the Precautionary Principle’ (2013) 16 *Australasia Journal of Natural Resources Law and Policy* 61.

<sup>87</sup> Kotze and Soyapi (n 5) 23.

<sup>88</sup> *Telstra* (n 108) [120].

<sup>89</sup> Peter Biscoe, ‘Ecologically Sustainable Development in New South Wales’ (5<sup>th</sup> Worldwide Colloquium of the IUCN Academy of Environmental Law, Brazil, 2 June 2007) [76]. See also Kotze and Soyapi (n 5); Brian Preston ‘Leadership by the Courts in Achieving Sustainability’ (2010) 27 *EPLJ* 321.

lawmaking and common law adjudication have created a substantial and remarkable body of legal doctrine around ESD principles.

As detailed in Section 3.1, legislation provided a firm legal foothold for the development of ESD jurisprudence. Unsurprisingly, significant ESD reasoning in NSWLEC case law is based on the direct incorporation of ESD principles in legislation. A prime example is seen in *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority*,<sup>90</sup> where the Court construed the duty on the NSW Environmental Protection Authority under s 9(1) POEA Act ‘to develop environmental quality objectives, guidelines and policies to ensure environment protection’ in light of the EPA’s objective (in s 6(1) of the Act), by which it must have regard to the ‘need to maintain ecologically sustainable development’, as expressed through its constituent ESD principles (elaborated in s 6(2) – see Section 3.1 above). This was a foundational step in a detailed exercise of legislative interpretation by the Court, leading to the conclusion that the EPA was under a duty to develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change specifically, which duty it had not yet fulfilled.<sup>91</sup>

The strong legislative basis for the Court’s ESD jurisprudence has also arisen through other statutory provisions that have been interpreted by the Court to reflect the principles. As Ceri Warnock points out, a ‘critical element with environmental legislation [is] that it tends to guide rather than prescribe’, giving the Court an important interpretive

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<sup>90</sup> [2021] NSWLEC 92.

<sup>91</sup> *ibid* [61] (‘Protection of the environment from climate change implements the principles of ecologically sustainable development, including the precautionary principle, intergenerational equity, conservation of biological diversity and ecological integrity, and the polluter pays principle, thereby enabling the achievement and maintenance of ecologically sustainable development.’)

role.<sup>92</sup> In the landmark 1993 case that first embraced the precautionary principle as a legally relevant consideration in a merits appeal – *Leatch v Director General of National Parks and Wildlife Service*<sup>93</sup> – Stein J drew on two statutory provisions to support his endorsement of the precautionary principle as being legally relevant: the Land and Environment Court Act’s requirement to take into account the ‘public interest’ in all LEC merits appeals,<sup>94</sup> and the requirement of the National Parks and Wildlife Act, directly at issue in this case, that ‘any matter [considered to be] relevant’ should be taken into account in decisions regarding fauna destruction licence applications.<sup>95</sup> Both statutory considerations were broad enough to include a reference to the precautionary principle through the Court’s interpretation of them, including by reference to international sustainable development developments.

By 2004, the Court was confident in finding that ESD principles were relevant to a wide range of statutes granting it jurisdiction. Thus, in the judicial review decision in *Murrumbidgee Ground-Water Preservation Association v Minister for Natural Resources*,<sup>96</sup> which concerned powers exercised under the Water Management Act 2000 (NSW), McClellan J held that ESD principles are to be applied ‘when decisions are being made under... any... Act which adopts the principles’.<sup>97</sup> In McClellan J’s view, the

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<sup>92</sup> Ceri Warnock, *Environmental Courts and Tribunals: Powers, Integrity and the Search for Legitimacy* (Hart 2020) 164.

<sup>93</sup> *Leatch* (n 82).

<sup>94</sup> Land and Environment Court Act 1979 (NSW). Section 39(4) requires that in making a decision in a relevant ‘appeal’, the Court ‘shall have regard to this or any other relevant Act, any instrument made under any such Act, the circumstances of the case and the public interest’.

<sup>95</sup> National Parks and Wildlife Act 1974 (NSW) s 92A (now repealed).

<sup>96</sup> *Murrumbidgee Ground-Water Preservation Association v Minister for Natural Resources* [2004] NSWLEC 122.

<sup>97</sup> *ibid* [178]. McClellan J explicitly rejected the view that the precautionary principle was a ‘merely a political aspiration’. See also *BT Goldsmith Planning Services v Blacktown City Council* [2005] NSWLEC 210 (Pain J adopting similar reasoning to widen the application of the precautionary principle to all decisions under the EPA Act).



common ESD purpose across NSW environmental and planning law – with ESD and ESD principles included across a wide range of statutes – was of such significance that ESD principles were relevant considerations in decisions made under any such Act, in the common law administrative law sense.

The legal relevance of ESD principles as expressing the ‘public interest’ has been particularly important in the evolution of NSWLEC ESD reasoning. A longstanding line of the Court’s case law has established that ESD principles are legally relevant considerations in determining planning consent decisions, since the decision-maker must take into account the ‘public interest’,<sup>98</sup> and this includes giving effect to ESD principles.<sup>99</sup> The fundamental role of the ‘public interest’ importing ESD principles into planning decisions is seen particularly in relation to approval of major projects and infrastructure under the EPA Act. These are often very controversial decisions – many concerning approval of coal mines<sup>100</sup> or major residential developments<sup>101</sup> – which are regulated by bespoke planning legislation designed to give decision-making discretion to Ministers or planning commission bodies with minimal intervention by the Court. The now repealed Part 3A regime for major projects<sup>102</sup> showed that, despite more limited statutory scope for imputing the relevance of ESD principles, ESD principles were nonetheless relevant in approving such projects in a series of judicial review and merits

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<sup>98</sup> EPA Act, s 4.15 (previously s 79C).

<sup>99</sup> *Carstens v Pittwater Council* (1999) 111 LGERA 1; [1999] NSWLEC 249; *BGP Properties* (n 49).

<sup>100</sup> *Gray* (n 72); *Bulga Milbrodale* (n 50); *Gloucester Resources* (n 6).

<sup>101</sup> *Drake-Brockman v Minister for Planning* (2007) 158 LGERA 349; [2007] NSWLEC 490; *Walker v Minister for Planning* (2007) 157 LGERA 124; [2007] NSWLEC 741.

<sup>102</sup> Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005 (NSW); Environmental Planning and Assessment Amendment (Part 3A Repeal) Act 2011.

appeals cases.<sup>103</sup> Some of the reasoning in these cases is very intricate, particularly since it needs to engage with very complex statutory frameworks,<sup>104</sup> but this succession of cases showed a determination by the court to interpret all planning decision-making as implicating the public interest, particularly where environmentally sensitive issues arose. Thus, in *Bulga Milbrodale*, Preston CJ did not find it necessary to determine that ESD principles were mandatory relevant considerations in this Part 3A major development, since it was sufficient to conclude that ‘as an aspect of the public interest they may be taken into account in cases where issues relevant to the principles of ESD arise’.<sup>105</sup> This was supported as matter of law by the NSW Court of Appeal in *Walker*.<sup>106</sup>

...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.

The Court of Appeal subsequently interpreted Hodgson JA’s reasoning in *Walker* as ‘authority for the proposition that where it is necessary to consider the environmental impact of a project, the public interest [embraces ESD]’.<sup>107</sup> With the introduction of a new NSW regime for major projects – with specific regimes for approving State

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<sup>103</sup> See Scotford, *Environmental Principles and the Evolution of Environmental Law* (n 5) 240-450 (including on the complexity of applying judicial review doctrine in these cases).

<sup>104</sup> See eg Gray (n 72) [105]-[115].

<sup>105</sup> *Bulga Milbrodale* (n 50) [59].

<sup>106</sup> *Minister for Planning v Walker* (2008) 161 LGERA 423; [2008] NSWCA 224.

<sup>107</sup> *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* (2014) 86 NSWLR 527; [2014] NSWCA 105 [296]. In the NSWLEC decision under challenge, *Bulga Milbrodale* (n 50), Preston CJ had relied on the ESD objects of the act and the implicit duty of the Minister to consider the public interest, citing *Minister for Planning v Walker* (ibid): ‘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’: [56].

Significant Development (SSD) and State Significant Infrastructure (SSI) under EPA Act, and limiting even further the review oversight of the NSWLEC<sup>108</sup> – the statutory scheme retains a role for ESD principles. This is most clearly seen for SSD,<sup>109</sup> where the ‘public interest’ (informed by ESD principles) is reintroduced as a mandatory relevant planning consideration, alongside a requirement to conduct an environmental impact statement,<sup>110</sup> which must include ‘the reasons justifying the carrying out of the development, activity or infrastructure in the manner proposed, having regard to biophysical, economic and social considerations, including the principles of ecologically sustainable development’.<sup>111</sup> A high profile 2019 merits appeal in an SSD case – *Gloucester Resources Limited v Minister for Planning*<sup>112</sup> – contains important reasoning outlining how the principle of intergenerational equity is applied, reinforcing the ongoing centrality of ESD principles across the Court’s reasoning despite complexities in its evolving legislative environment for large scale infrastructure development.

This outline of NSW legislative developments also highlights the Court’s progressive ESD reasoning in applying and interpreting this legislation. After decades of development, the Court’s ESD jurisprudence is notable due to its sheer reach. The Court’s doctrinal reasoning around ESD principles has cross-fertilized into all classes of its jurisdiction,<sup>113</sup> and now freely extends beyond legislative frameworks.<sup>114</sup> There are major

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<sup>108</sup> EPA Act, ss 5.26, 5.27, 8.6(3)(a).

<sup>109</sup> For SSI, there is a requirement to prepare an environmental impact statement, which, on the Court’s previous case law, would import a requirement to consider ESD principles: n 107.

<sup>110</sup> EPA Act, ss 4.12(8) and 5.16.

<sup>111</sup> Environmental Assessment Regulation 2000, sch 2, para 7(1)(f).

<sup>112</sup> (n 6).

<sup>113</sup> Eg *Bentley v BGP Properties* (2006) 145 LGERA 234; [2006] NSWLEC 34 (criminal proceedings), citing *Murrumbidgee* (n 96), a judicial review action, to find that ESD principles were central to informing common law sentencing principles. See Scotford, *Environmental Principles and the Evolution of Environmental Law* (n 5) ch 5.

<sup>114</sup> Eg *Taralga* (n 70).

precedent-setting judgments on the precautionary principle,<sup>115</sup> the principle of intergenerational equity,<sup>116</sup> the principle of intragenerational equity,<sup>117</sup> and the principle of sustainable use of natural resources.<sup>118</sup> This reasoning is not strictly common law reasoning by analogy<sup>119</sup> – there is a ‘top down’ element with ESD principles framing developments, and there are dense thickets of legislation and administrative decision-making to navigate – however the reasoning is doctrinal and incremental, building on previous cases applying the same legislation, interpreting new legislation as importing the ESD principles into decision-making, drawing doctrinal threads across related legal cases. These incremental steps are familiar features of common law reasoning,<sup>120</sup> and have provided deep legal foundations for the Court to apply the principles in cases where issues relevant to the principles of ESD arise.<sup>121</sup> As a result of this steady, progressive reasoning, ESD and its principles now extend across the jurisdiction and reasoning of the Court as a ‘touchstone, a central element in decision-making relating to planning for and development of the environment and the natural resources that are the bounty of this environment’.<sup>122</sup> Within a complex body of environmental law – driven by the complexity of environmental problems (our developing knowledge about them, society’s changing political views in addressing them, their intersecting and interdisciplinary

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<sup>115</sup> *Hornsby* (n 33).

<sup>116</sup> *Bulga Milbrodale* (n 50).

<sup>117</sup> *ibid.*

<sup>118</sup> *Hub Action Group* (n 50); *Gloucester Resources* (n 6).

<sup>119</sup> Alison Young, ‘Public Law Cases and the Common Law: A Unique Relationship?’ in Elizabeth Fisher, Jeff King, Alison Young (eds), *The Foundations and Future of Public Law* (OUP 2020).

<sup>120</sup> Sir John Laws, ‘Lecture One— the Common Law and State Power’, in *The Common Law Constitution* (CUP 2014) 3.

<sup>121</sup> (n 107).

<sup>122</sup> *Bentley v BGP* (n 275) [57].

dimensions)<sup>123</sup> – the common thread of ESD principles through NSW environmental and planning law provides valuable stability and coherence.

#### **4. Final Reflections: Questions of Legitimacy and Critique**

Before the creation of the NSWLEC, ‘[t]here was no [NSW] environmental law as we now know it’.<sup>124</sup> A key feature of this body of law is the central role played by ESD principles in its evolving jurisprudence. As shown in the sections above, this jurisprudence has evolved through a combination of political developments, institutional reform, unique jurisdictional design, new lines and modes of legal reasoning, openness to international soft law developments and transnational judicial dialogue, as well as applying and interpreting an intricate body of environmental and planning legislation through an expansive and cross-fertilising case law, reasoned over time to generate ESD doctrine, all expressing and co-evolving with the legal culture of the Court. This is not an easily replicable legal example.

This body of law shows that, despite the controversial features of environmental principles outlined in Section 2, it is possible to develop a mature body of legal reasoning based on environmental principles. Legally entrenching environmental principles through legislative incorporation and carefully reasoned case law in some respects looks like familiar legal reasoning in the common law tradition. However, it is a distinctive body of law in which policy ideas are being fleshed out and determined by courts rather than administrative or political decision-makers. As indicated above, one might respond to this state of affairs with a political response – it is either a good thing that a Court is pursuing an agenda of ecological sustainability through law, or it is inappropriate for courts to

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<sup>123</sup> Fisher, Lange, Scotford (n 10) ch 2.

<sup>124</sup> Preston, ‘Benefits of Judicial Specialization in Environmental Law’ (n 1) 402.

engage in such reasoning. Both reactions might mistakenly assume that the Court's decisions are all 'anti-development' – they are not.<sup>125</sup> Moreover, they fundamentally misunderstand the legal work of the Court. As with any Court, it has a duty to adjudicate the disputes that come before it<sup>126</sup> and it is empowered with a specific and valuable jurisdiction, which frames legal actions around environmental problems and not vice versa.<sup>127</sup> The central subject matter of its jurisdiction – environmental problems<sup>128</sup> – necessitates complex reasoning, and ESD principles facilitate this. This is because ESD principles not only pursue an agenda of environmental protection but they recognise the uncertainty (precautionary principle), interdisciplinarity (conservation of biological diversity), economic and social implications (polluter pays, integration), and temporal dimensions (intergenerational equity) of environmental problems. As legally relevant considerations in many environmental regimes, they provide the normative space for these aspects of environmental problems to be examined with careful reasoning. Thus, for example, taking into account scientific uncertainty in an environmental dispute is not a simple calculation of right versus wrong that can be determined along a bright line of common law principle (or even rights-based reasoning). It requires painstaking assessment of facts against a careful set of decision-making steps that can be tested for their rigour, as the Court's precedent-setting articulation of the precautionary principle has demonstrated.<sup>129</sup> As Warnock argues, the legitimacy of the Court's reasoning is both questioned and answered by its approach to reasoning that is both judicial and appropriate

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<sup>125</sup> The Court has approved many contentious developments after weighing the relevant considerations, including ESD principles: *Greenpeace Australia v Redbank Power* (1994) 86 LGERA 143; *Telstra* (n 33); *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221.

<sup>126</sup> Preston, 'Benefits of Judicial Specialization in Environmental Law' (n 1).

<sup>127</sup> Environmental law is notoriously fragmented due to the wide range of legal issues implicated by environmental problems: Fisher, Lange, Scotford (n 10) ch 1.

<sup>128</sup> Including land use problems.

<sup>129</sup> *Hornsby* (n 33).

for the nature of the complex environmental disputes before it,<sup>130</sup> taking seriously their polycentricity,<sup>131</sup> scientific uncertainty, and their impact on diverse communities and complex ecologies.

Recognising this specific and important jurisdiction of the Court raises questions about how its ESD reasoning should be critiqued. ESD principles remain open-textured and there are many different fact-specific articulations of the principles even as the Court develops more and more leading precedents articulating what the principles mean and how to apply them in specific contexts. In this respect, the incremental, methodical nature of the Court's reasoning provides legal stability and authority for its reasoning. But just as the principles are not purely legal, and environmental problems display multiple dimensions, so the evaluation of the Court's ESD case law raises extra-legal questions. We are in newly charted jurisprudential territory in the Court's ESD case law, as is justified by the nature of environmental problems, and critiques of its case law must at once respect the Court's jurisdiction whilst also taking seriously the contestable dimensions of environmental problems and environmental policy. Overall, the NSWLEC's jurisprudential gift to environmental law is a huge body of dedicated judicial work and enterprise putting environmental problems and principles at the heart of a body of legal reasoning and doctrine – it is a pioneering body of law.

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<sup>130</sup> Warnock (n 92) ch 6 and generally.

<sup>131</sup> The reasoning in *Bulga Milbrodale* (n 50) expressly confronts and addresses the polycentricity of environmental problems.