
The precautionary principle, the coast and Temwood Holdings

Hon Justice Stephen Estcourt*

In 1999, Stein J, then of the New South Wales Court of Appeal, observed extra judicially that how the rhetoric of the precautionary principle could be operationalised was one of the challenges for the first decade of the 21st century. French comparative law and environmental law specialist, Professor Nicolas de Sadeleer, expressed the view in 2002 that the logic of the law, with its quest for certainty, finds itself out of step with the quest of science to describe unpredictable natural phenomena and environmental threats that are inherently uncertain. The aim of this article is to endeavour to see how far Australia has come since 1992 in “operationalising” the precautionary principle, particularly in relation to planning and development applications relating to the coast. The conclusion is that the cases referred to demonstrate that there is no lack of flexibility in Australian courts and tribunals in accommodating scientific uncertainty, and in balancing the precautionary principle and the other components of environmentally sustainable development with the continuing pressure for development of the Australian coast.

INTRODUCTION

“If a man will begin with certainties, he shall end in doubts; but if he will be content to begin with doubts, he shall end in certainties.” – Francis Bacon, *The Advancement of Learning* (1605) bk 1, ch 5, sect 8.I

This quotation was footnoted by Osborn J of the Supreme Court of Victoria in *Western Water v Rozen* (2008) 30 VAR 12; [2008] VSC 382, where his Honour said:

The statements made by the Tribunal in the paragraphs last quoted above confirm the view that in the present case the Tribunal did not recognise the true nature of the precautionary principle.¹

In a 1999 paper entitled, “Are Decision-Makers Too Cautious With The Precautionary Principle”, Justice Paul Stein, then of the New South Wales Court of Appeal, observed:

How the rhetoric of the [precautionary] principle can be operationalised is one of the challenges for the first decade of the 21st Century.²

Eight years on from the turn of the century it would appear that Osborn J, at least, may have doubted that the challenge had been altogether met.

French comparative law and environmental law specialist, Professor Nicolas de Sadeleer, has expressed the view that the logic of the law, with its quest for certainty, finds itself out of step with the quest of science to describe unpredictable natural phenomena and environmental threats that are inherently uncertain.³ The aim of this article is not to consider a thesis at such a high level of abstraction as Professor de Sadeleer’s. The aim is a modest, practical one only, namely, to endeavour to see how far we have come since 1992⁴ in “operationalising” the precautionary principle, particularly in relation to planning and development applications relating to the Australian coast.

* Judge, Supreme Court of Tasmania. This article originated from a paper delivered at the Australasian Conference of Planning and Environment Courts and Tribunals, Henry Jones Art Hotel, Hobart, 5-7 March 2014.

¹ *Western Water v Rozen* (2008) 30 VAR 12; [2008] VSC 382 at [108]-[109].

² Stein P, “Are Decision-Makers Too Cautious With The Precautionary Principle” (Paper delivered at the Land and Environment Court of New South Wales Annual Conference, 14-15 October 1999).

³ de Sadeleer N, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press, Oxford, 2002), p 176.

⁴ The precautionary principle was embodied in s 3.5.1 of the Australian Government *Intergovernmental Agreement on the Environment* of 1 May 1992.

The subsidiary aim of the article, given that the engagement of the precautionary principle does not of itself preclude the particular proposal affected,⁵ is to note the limits of validity of the “proportionate”, “precautionary measures” that may be taken by way of the imposition of conditions of approval designed to “avert the anticipated threat of environmental damage”.⁶

As to the question of the validity of conditions of planning approval, the author observes that, notwithstanding that the High Court decided *Planning Commission (WA) v Temwood Holdings Pty Ltd* (2004) 221 CLR 30; 137 LGERA 232; [2004] HCA 63 almost a decade ago, the subject of the test for validity still attracts judicial attention. Some useful examples include: *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure* (2013) 194 LGERA 347; [2013] NSWLEC 48; *Botany Bay City Council v Saab Corp Pty Ltd* (2011) 183 LGERA 228; [2011] NSWCA 308 and *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221.

THE PRECAUTIONARY PRINCIPLE

The German principle, signified by the term “vorsorgeprinzip”, or “precautionary principle”, first emerged in the 1960s and soon became embodied in West German legislation. The principle subsequently gained hold in international agreements such as the *Ministerial Declaration of the Second International Conference on the Protection of the North Sea* in 1970, and later the *Rio Declaration on Environment and Development* in 1992.

The principle was embodied in s 3.5.1 of the Australian Government *Intergovernmental Agreement on the Environment* of 1 May 1992, in the following terms:

3.5.1 Precautionary principle –

Where 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:

- i. careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and
- ii. an assessment of the risk-weighted consequences of various options.

Section 3.5 of the *Intergovernmental Agreement* incorporates the four, now well-recognised, principles of environmentally sustainable development (ESD), namely: the precautionary principle; intergenerational equity; conservation of biological diversity and ecological integrity; and improved valuation, pricing and incentive mechanisms. The Australian development of ESD, including the precautionary principle, its incorporation into New South Wales legislation, and the cases up until 2007, are canvassed in some detail by Biscoe J in *Walker v Minister for Planning*. (2007) 157 LGERA 124 at [61]-[112].

The case of *Leatch v National Parks and Wildlife Service* (1993) 81 LGERA 270 in 1993 was, apparently, the second New South Wales case to apply the precautionary principle.⁷ However, it appears to be the first case in the New South Wales Land and Environment Court to consider the underlying nature of the principle. Stein J stated it thus:

the precautionary principle is a statement of common sense and has already been applied by decision-makers in appropriate circumstances prior to the principle being spelt out. It is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. Its premise is that where uncertainty or ignorance exists concerning the nature or scope of environmental harm (whether this follows from policies, decisions or activities), decision-makers should be cautious.⁸

⁵ *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [179]-[181].

⁶ *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [128] citing de Sadeleer N, *Environmental Principles: From Political Slogans to Legal Rules* (2nd ed, 2005), p 155.

⁷ Stein, n 2. (After some searching the author has been unable to identify the first case.)

⁸ *Leatch v National Parks and Wildlife Service* (1993) 81 LGERA 270 at 282, cited with apparent approval by Osborn J in *Environment East Gippsland Inc v VicForests* [2010] VSC 335 at [185].

Four years later, Wheeler J developed this concept of caution in *Bridgetown/Greenbushes Friends of the Forest Inc v Department of Conservation and Land Management* (1997) 18 WAR 102; 93 LGERA 436. He said:

Although there has been very little judicial consideration of the precautionary approach or “precautionary principle” (a similar or perhaps identical concept which appears in a number of intergovernmental agreements) the clear thread which emerges from what consideration has been given to the approach is that it does dictate caution, but it does not dictate inaction, and it will not generally dictate one specific course of action to the exclusion of others: see *Leach v National Parks and Wildlife* (1993) 81 LGRA 270 at 281-283; *Nicholls v Director General, National Parks and Wildlife* (1994) 84 LGRA 397 at 418-419; *Greenpeace v Redbank Power Co Pty Ltd* (1994) 86 LGRA 143 at 154; *Greenpeace New Zealand Inc v Minister of Fisheries* (unreported, High Court of NZ, 27 November 1995) at 31-32.⁹

The precautionary principle was canvassed in considerable detail by Preston CJ in his decision in *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [125]-[183]. That decision is widely regarded as containing the most extensive judicial analysis of the principle of ESD and the precautionary principle in Australia;¹⁰ and will be considered further below, with a careful examination of the principles derived from it, by Osborn J, in *Environment East Gippsland Inc v VicForests* [2010] VSC 335. It is sufficient at this point to observe that Osborn J respectfully adopted the analysis of Preston CJ and accepted his Honour’s fundamental conclusion, which was as follows:

The application of the precautionary principle and the concomitant need to take precautionary measures is triggered by the satisfaction of two conditions precedent or thresholds: a threat of serious or irreversible environmental damage and scientific uncertainty as to the environmental damage. These conditions or thresholds are cumulative. Once both of these conditions or thresholds are satisfied, a precautionary measure may be taken to avert the anticipated threat of environmental damage, but it should be proportionate.¹¹

The precautionary principle is now of course ubiquitous, permeating a myriad of Commonwealth and State and Territory statutes,¹² planning schemes and ordinances and government policies. Such policies, as they affect the Australian coast, involving as they do, a consideration of the science of climate change, provide a convenient focus for examining the progress since 1992 in the “operationalisation” of the precautionary principle.

COASTAL POLICIES

Many government coastal policies, Tasmania’s in particular, have been framed in relatively broad, some might say, vague, terms. The *Tasmanian State Coastal Policy 1996*, for example, defines the precautionary principle in the same terms as s 3.5.1 of the *Intergovernmental Agreement*, but then goes on, fairly unhelpfully, in cl 2.1.5 to state:

The precautionary principle will be applied to development which may pose serious or irreversible environmental damage to ensure that environmental degradation can be avoided, remedied or mitigated. Development proposals shall include strategies to avoid or mitigate potential adverse environmental effects.¹³

⁹ *Bridgetown/Greenbushes Friends of the Forest Inc v Department of Conservation and Land Management* (1997) 18 WAR 102; 93 LGERA 436 at [118]-[119].

¹⁰ Bell K, “The Precautionary Principle: What is it and How do Courts Use it to Protect the Environment?” (Paper delivered at Environment Defender’s Office, Seminar Series 2010, 13 July 2010).

¹¹ Preston CJ in *Telstra Corporation Limited v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [128], cited in *Environment East Gippsland Inc v VicForests* [2010] VSC 335 at [188].

¹² Schedules of Australian legislation including the precautionary principle, treaties including the principle, and cases considering it (all as at the date of publication of the book), from Appendices A, B and C to Peel J, *The Precautionary Principle in Practice* (The Federation Press, 2005).

¹³ Peel, n 12 at [185].

Other policies, such as the *Victorian Coastal Strategy 2008*, are of more assistance, requiring decision-makers, in order to put the precautionary principle into practice, to plan for sea level rise, avoid development in low-lying coastal areas, and to ensure that new development is located and designed so as to protect it from climate change and coastal hazards.¹⁴

Yet again, some policies are further operationalised by planning directives and practice notes. The *Victorian State Planning Policy Framework*, for example, requires planning authorities to: plan for specified sea level rise; to apply the precautionary principle; to ensure that new development is located and designed to take account of coastal climate hazards; to ensure that future development is not at risk; and to avoid development in coastal areas subject to inundation and other hazards.¹⁵

It is clear however, as already noted, that the triggering of the precautionary principle does not necessarily preclude the carrying out of the particular development. Nor is the principle directed to the avoidance of all risks.¹⁶ The various coastal policies and planning directives and practice notes do not greatly assist planning courts and tribunals in making decisions around these considerations in respect of particular development proposals, particularly those where a “land use” approach is not available.

This situation is well instanced by the decision of Potts M in *Kala Developments Pty Ltd v Surf Coast Shire Council* [2011] VCAT 513 at [38]-[43] in the following passages (emphasis added):

38. At the time of the original granting of a permit for development of this site, the potential impacts of inundation from projected sea level rise were not a planning consideration. Subsequent to that time, the State Planning Policy Framework was amended to give effect to the Victorian Coastal Strategy 2008 by providing policy direction to address the impacts of climate change along Victoria’s coast.¹⁷

39. The State Policy objective, now found at Clause 13.01-1 of the planning scheme is to “plan for and manage the potential coastal impacts of climate change”. Strategies to address this objective are to:

Plan for sea level rise of not less than 0.8 metres by 2100, and allow for the combined effects of tides, storm surges, coastal processes and local conditions such as topography and geology when assessing risks and coastal impacts associated with climate change.

Apply the precautionary principle to planning and management decision-making when considering the risks associated with climate change.

Ensure that new development is located and designed to take account of the impacts of climate change on coastal hazards such as the combined effects of storm tides, river flooding, coastal erosion and sand drift.

Ensure that land subject to coastal hazards are identified and appropriately managed to ensure that future development is not at risk.

Avoid development in identified coastal hazard areas susceptible to inundation (both river and coastal), erosion, landslip/landslide, acid sulfate soils, wildfire and geotechnical risk.

40. A General Practice Note¹⁸ has also been prepared by the Department of Planning and Community services to assist in these matters. At the present time, there are no other planning scheme provisions, such as zonings or overlays that apply to this matter in respect to coastal inundation hazards.

41 *I concur with submissions made by Mr Merret that a consideration of the above strategies and the associated practice note leads one to the conclusion that strategic land use responses are preferable to site by site engineering or design responses.*

42 *In this application however there is not the luxury of such a “land use” approach as such.* As has been stated earlier this proceeding is about a request to amend an existing approved development. Accordingly there is no question that some form of development must be assumed to be proceeding. It is a matter of what, on balance, will be the preferable and acceptable outcome of any such development.

¹⁴ *Victorian Coastal Strategy 2008*, p 38.

¹⁵ *State Planning Policy Framework*, cl 13.

¹⁶ *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [157]-[160].

¹⁷ Planning Scheme Amendment VC52 amended cl 15.08 in December 2008.

¹⁸ *Managing Coastal Hazards and the Coastal Impacts of Climate Change*, General Practice Note Department of Planning and Community Development (December 2008).

43 Accordingly I have considered the following questions:

What are the projected coastal hazards and levels of risk;

Are the proposed amendments acceptable given these hazards and levels of risk?

However, even in subdivision cases and cases where entirely new development on vacant land is proposed, there is still not a lot to guide planning courts and tribunals as to the considerations of the “proportionate response”¹⁹ or the “precautionary measures” required by the principle.

It will be considered, below: what assistance can be derived from a number of decided cases since *Telstra Corporation Ltd v Hornsby Shire Council*; and whether those cases have indeed progressed the operationalisation of the precautionary principle, particularly in its application to the coast. However, given that there is now a general acceptance of the science of climate change, there is a case to be made for an even more specific framework of guidelines in coastal policies and related documents, in order to more clearly signify when and where the precautionary principle is engaged and to assist decision-makers in ensuring consistency of outcomes.

First, however, a look at some recent authorities on the limits of validity of planning conditions may provide some illumination of the question as to how the precautionary principle can sit with the notion that its engagement in a particular case requires a proportionate response and does not sound the death knell of the proposal.

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The first observation under this rubric is that the power to attach conditions to an approval may or may not be confined by the provisions of the particular legislation under consideration. The *Environmental Planning and Assessment Act 1979* (NSW), s 75J(4), is an example often considered. In such cases the power must be exercised within the objects and purposes of the Act.

Quite recently, in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure*, Preston CJ said:

While the power to impose conditions under s 75J is not confined in the manner specified for conditions of development consent granted under Part 4 of the Act, and is wide (*Ulan Coal Mines Ltd v Minister for Planning* [2008] NSWLEC 185; (2008) 160 LGERA 20 at [74], [75]) it is not unlimited. A condition must fall within the class of conditions expressly or impliedly authorised under s 75J, which involves construction of the section and its application to the circumstances of the particular project: *Ulan Coal Mines Ltd* at [50], [51]; *Rivers SOS Inc v Minister for Planning* [2009] NSWLEC 213; (2009) 178 LGERA 347 at [133]; *Barrington-Gloucester-Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure* [2012] NSWLEC 197 at [76].²⁰

The second observation is that, as was cautioned by Pain J in *Hunter Environment Lobby Inc v Minister for Planning*,²¹ legislation such as the *Environmental Planning and Assessment Act* is not directed at worldwide environmental problems such as climate change, because the scale in which the Act operates is a local planning scale, and the regimes operate on an application-by-application basis.

That is equally true, of course, where not otherwise specified, of planning legislation. Pain J’s comment is a useful reminder that when considering whether a threat is “able to be addressed by adaptive management”²² or whether the “measure alleged to be required is proportionate to the threat in issue”,²³ worldwide environmental problems are a consideration but not necessarily a determining factor.

The third observation is that the power to impose conditions on an approval also frequently includes a statutory power to require the proponent to enter into a planning agreement or a restrictive

¹⁹ *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10.

²⁰ *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure* (2013) 194 LGERA 347; [2013] NSWLEC 48 at [72].

²¹ *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221 at [65].

²² *Environment East Gippsland Inc v VicForests* [2010] VSC 335 at [212].

²³ *Environment East Gippsland Inc v VicForests* [2010] VSC 335 at [212].

covenant. The use of such a power can be a flexible and effective tool when considering factors noted by Preston CJ in *Telstra Corporation Ltd v Hornsby Shire Council*,²⁴ such as the availability of means of manageability of possible impacts and the reversibility of possible impacts, if reversible.

Finally, it is probably now safe to say that whether or not the High Court in *Temwood Holdings* did indeed adopt the three-part test laid down by the House of Lords in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, the requirements of that test remain appropriate considerations.

In *Botany Bay City Council v Saab Corp Pty Ltd*, Basten JA, with whom Macfarlan JA agreed, considered the statement of the primary judge that:

The three-part test laid down in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 has frequently been applied in this court when dealing with the validity of conditions of consent. The tests were stated by McHugh J in *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30; 137 LGERA 232, at [57], in the following terms:

A condition attached to a grant of planning permission will not be valid therefore unless:

1. The condition is for a planning purpose and not for any ulterior purpose. A planning purpose is one that implements a planning policy whose scope is ascertained by reference to the legislation that confers planning functions on the authority, not by reference to some preconceived general notion of what constitutes planning.
2. The condition reasonably and fairly relates to the development permitted.
3. The condition is not so unreasonable that no reasonable planning authority could have imposed it.²⁵

Basten JA said, as to that statement (emphasis added):

Although McHugh J stated, in a footnote, that the test he set out was articulated by the House of Lords in *Newbury District Council*, no reference to any particular passage in the various opinions is identified: in fact, the test expressed by McHugh J appears to be an amalgam of language used in different opinions, being also reflective of earlier decisions of the High Court in, for example, *Allen Commercial Constructions Pty Ltd v The Council of the Municipality of North Sydney* (1970) 123 CLR 490 at 499–500 per Walsh J and *Bathurst City Council v PWC Properties Pty Ltd* [1998] HCA 59; (1998) 195 CLR 566 at 577.

Secondly, all five members of the House of Lords in [1981] AC 578 expressed the test in slightly different language which, in part, owed its origin to earlier authorities, including that of Lord Denning in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554 at 572. Thirdly, each exposition in *Newbury* was obiter, all members of the House of Lords having accepted that no planning permission was required, so that the validity of the condition was irrelevant. Fourthly, the test was formulated in circumstances where the statute conferred a right of appeal from the planning authority to the appropriate minister, on grounds identified in the statute. The appeal to the courts was limited to a review of the minister's decision and, thus, only indirectly the validity of the condition imposed on the development.

Of the majority in *Temwood*, Gummow and Hayne JJ referred, with apparent approval, to the opinion of Lord Scarman: *Temwood* at [93] and fn 131. McHugh J was also in the majority in *Temwood*. *Newbury* has been applied by this Court in *Lake Macquarie City Council v Hammersmith Management Pty Ltd*; (2003) 123 LGERA 225 per Tobias JA (Mason P and Young CJ in Eq agreeing) in respect of contributions required as a condition of development under s 94(1) of the *Environmental Planning and Assessment Act 1979* (the EP&A Act). It has, however, also been held not to diminish the reasonableness requirements found in subs 94(8) and subs 94(12). *Newbury* has been described as a standard guideline by the New Zealand Court of Appeal: see *Meads Brothers Ltd v Rotorua District Licensing Agency* [2002] NZAR 308 at [55]–[56] per McGrath, Tipping and Anderson JJ; see also [2006] 2 NZLR 619 per Chambers, Baragwanath and Goddard JJ.

In Australia the question is not so much whether the “Newbury test” has been adopted by the High Court, or courts of intermediate appeal, but rather what it requires. Labels are frequently adopted without sufficient reference to the specific statutory and factual context in which they are to be applied.

²⁴ As listed by Osborn J in *Environment East Gippsland Inc v VicForests* [2010] VSC 335 at [190].

²⁵ *Botany Bay City Council v Saab Corp Pty Ltd* (2011) 183 LGERA 228; [2011] NSWCA 308 at [3].

The “Newbury test”, even more than the test of “Wednesbury unreasonableness”, is the subject of varying expressions. As explained by McMurdo P in *Ajana Park Pty Ltd v Mackay City Council*; [2011] 1 Qd R 403 at [25]–[27] (with the agreement of Fraser JA and McMeekin J), although Callinan J in *Temwood* took issue with aspects of the formulation by Viscount Dilhorne at 599–600 and by Lord Fraser of Tullybelton at 607–608 – see *Temwood* at [155] – his Honour applied a not dissimilar test.²⁶

After the decision of the Court of Appeal in *Botany Bay City Council v Saab Corp Pty Ltd*, both Pain J²⁷ and Preston CJ²⁸ of the Land and Environment Court appear to have taken it as settled that the “principles” in *Newbury* represent the test for the validity of a condition of approval.

In *Hunter Environment Lobby Inc v Minister for Planning*, Pain J said:

The principles referred to by Lord Fraser in *Newbury*, to test the validity of a condition are:

- (i) It must have a planning purpose. In *Temwood* at [57], McHugh J described a “planning purpose” as one that implements a planning policy whose scope is ascertained by reference to the legislation that confers planning functions on the authority, not by reference to some preconceived notion of what constitutes planning.
- (ii) It must fairly and reasonably relate to the permitted development to which it is annexed. Lord Fraser referred in this context in *Newbury* to the following statement of Lord Denning in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554 (at 572):
- (iii) A planning authority is not at liberty to use its powers for an ulterior object, however desirable that object may seem to be in the public interest.
- (iv) It must not be so unreasonable that no reasonable planning authority could have imposed it.²⁹

And, in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure*, Preston CJ said:

The power to attach conditions to an approval requires that a condition be for a purpose for which the power to grant approval under Part 3A of the Act is conferred, as ascertained by a consideration of the scope and purpose of the Act, and not for an ulterior purpose; reasonably and fairly relate to the project permitted by the approval; and not be so unreasonable that no reasonable approval authority could have imposed it: *Newbury District Council v Secretary of State for the Environment* [1981] AC 578; *Western Australian Planning Commission v Temwood Holdings Pty Ltd* [2004] HCA 63; (2004) 221 CLR 30 at [57]; *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221 at [87], [88].³⁰

It follows from the reasoning underpinning the decision in *Botany Bay City Council v Saab Corp Pty Ltd*, and indeed from the result in the case itself (the confirmation of the validity of a condition requiring the replacement of aboveground electricity and telecommunications cables within the road reserves and within the site, with underground cable and appropriate street light standards), that there is very considerable scope for continued innovation in the imposition of conditions of approval to address at least some threats of serious or irreversible environmental damage by precautionary measures, proportionate response or adaptive management.³¹

²⁶ *Botany Bay City Council v Saab Corp Pty Ltd* (2011) 183 LGERA 228; [2011] NSWCA 308 at [4]–[7].

²⁷ *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221 at [82]–[88].

²⁸ *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure* (2013) 194 LGERA 347; [2013] NSWLEC 48.

²⁹ *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221 at [66].

³⁰ *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure* (2013) 194 LGERA 347; [2013] NSWLEC 48 at [73].

³¹ Otherwise known as a “step-wise” approach whereby uncertainties are acknowledged and the project is expanded as the extent of the uncertainty is reduced. In the instant case the measures in issue by way of “survey requirements” and “management zone reviews” were “adaptive management measures”.

As Pain J said in *Hunter Environment Lobby Inc v Minister for Planning*:

What emerges from this consideration of the authorities³² is that the power to impose conditions on an approval under Pt 3A is wide, and includes imposing a condition that retains practical flexibility leaving a choice of the means by which an outcome or objective is to be met for the proponent.³³

The *Hunter Environment Lobby* case, of course, is an excellent example of the flexible nature of conditions of approval.³⁴

In that case Pain J held that a condition requiring the offsetting of emissions directly attributable to the operation of a coal mining project, in order to address direct potential or actual adverse impacts on the environment, was valid as being related to the purpose of assessing and approving a significant extension of the coal mine, both in terms of time and the rate of extraction of the resource.³⁵ Her Honour said:

In the context of this application, the condition would be imposed on an approval that extends the life of this coal mine for 10 years and permits extraction of substantial additional coal each year of that extended period. The offsetting relates directly to the additional emissions generated over that time. That this is the first such condition imposed on a coal mine in NSW is not necessarily discriminatory, it is simply the first occasion that has occurred. I have found that it is otherwise lawful.³⁶

OPERATIONALISATION OF THE PRECAUTIONARY PRINCIPLE

If Preston CJ's analysis of the precautionary principle in *Telstra Corporation Ltd v Hornsby Shire Council* (the *Telstra* case), is the best, then the epitome of its elements by Osborn J in *Environment East Gippsland Inc v VicForests* is certainly the best practical adumbration of those elements.

In that case, Environment East Gippsland Inc sought to restrain the logging by VicForests, of four coupes of old growth forest located in the valley of Brown Mountain Creek in Victoria, claiming that the logging proposed would breach the conditions pursuant to which VicForests was permitted to lawfully undertake timber harvesting. In particular, Environment East Gippsland Inc contended that the proposed logging would breach VicForests' obligations to provide habitat reserves for endangered species and/or to proceed in accordance with the precautionary principle in respect of habitat preservation for endangered species.

Osborn J commenced, as has already been noted, by respectfully accepting Preston CJ's "fundamental conclusion"³⁷ in the *Telstra* case, namely:

The application of the precautionary principle and the concomitant need to take precautionary measures is triggered by the satisfaction of two conditions precedent or thresholds: a threat of serious or irreversible environmental damage and scientific uncertainty as to the environmental damage. These conditions or thresholds are cumulative. Once both of these conditions or thresholds are satisfied, a precautionary measure may be taken to avert the anticipated threat of environmental damage, but it should be proportionate.³⁸

As to the first condition precedent, or threshold, to the engagement of the principle, namely "the threat of serious or irreversible environmental damage", Osborn J, after a consideration of Preston CJ's factors pointing to the existence of a threat, adopted the language of the *Shirt* calculus. His Honour said:

³² *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221 at [82]-[88].

³³ *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221 at [87].

³⁴ The decision ultimately gave validity to a condition imposing requirements for carbon offsets, which condition allowed for its own lapse in the event of a financial or regulatory liability being imposed under another law (of any jurisdiction) in relation to the project's emissions.

³⁵ *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221 at [93].

³⁶ *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221 at [100].

³⁷ *Environment East Gippsland Inc v VicForests* [2010] VSC 335 at [188].

³⁸ *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [128].

In my view the statement in another context by Mason J in *Wyong Shire Council v Shirt*, that a risk though remote may nevertheless be real and not fanciful or far-fetched is apposite here. At 48 his Honour stated that “[a] risk which is not far-fetched or fanciful is real and therefore foreseeable”.³⁹

As to the second of the conditions precedent, namely, that there be “a lack of full scientific certainty”, Osborn J noted that, as with the first condition precedent, it was a question of fact, potentially involving complex factors, and he set out Preston CJ’s postulation of those factors.⁴⁰ He then referred to Preston CJ’s summation of the body of theoretical debate as to what is the requisite degree of uncertainty required to trigger application of the principle,⁴¹ and concluded, pragmatically (emphasis added):

In the present case I propose to analyse the evidence on the basis of a standard of *substantial uncertainty*. Such a standard falls within the ambit of the principle whatever may be its theoretical limits.⁴²

Next, from the *Telstra* case,⁴³ Osborn J noted that if the two conditions precedent were satisfied, then the burden of showing that damage would not occur “effectively shifts to VicForests to show that the threat of environmental damage does not exist or is negligible”.⁴⁴ His Honour then⁴⁵ helpfully epitomised the pivotal principles to be derived from Preston CJ’s exegesis, as follows:

- The precautionary principle permits the taking of preventative measures without having to wait until the reality and seriousness of the threat have been fully known.⁴⁶
- The precautionary principle is not directed to the avoidance of all risks.⁴⁷
- The degree of precaution appropriate will depend on the combined effect of the seriousness of the threat and the degree of uncertainty.⁴⁸
- The margin for error in respect of a particular proposal may be controlled by an adaptive management approach.⁴⁹
- The precautionary principle requires a proportionate response. Measures should not go beyond what is appropriate and necessary in order to achieve the objective in question. The principle requires the avoidance of serious or irreversible damage to the environment wherever practicable. It also requires the assessment of the risk-weighted consequences of optional courses of action.⁵⁰
- A reasonable balance must be struck between the cost burden of the measures and the benefit derived from them.⁵¹
- The relevant notion of proportionality is, however, not readily captured by traditional cost benefit analysis.⁵²

³⁹ *Environment East Gippsland Inc v VicForests* [2010] VSC 335 at [191].

⁴⁰ *Environment East Gippsland Inc v VicForests* [2010] VSC 335 at [194]-[195].

⁴¹ *Environment East Gippsland Inc v VicForests* [2010] VSC 335 at [196].

⁴² *Environment East Gippsland Inc v VicForests* [2010] VSC 335 at [197].

⁴³ *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [150]-[155].

⁴⁴ *Environment East Gippsland Inc v VicForests* [2010] VSC 335 at [199].

⁴⁵ *Environment East Gippsland Inc v VicForests* [2010] VSC 335 at [201]-[211].

⁴⁶ *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [156].

⁴⁷ *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [157]-[160].

⁴⁸ *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [161].

⁴⁹ *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [163]-[164].

⁵⁰ *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [166].

⁵¹ *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [167]-[171].

⁵² *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [172]-[178].

- The triggering of the precautionary principle does not necessarily preclude the carrying out of a particular land use or development proposal.⁵³

The precautionary principle may also require consideration in the context of other principles of environmentally sustainable development.⁵⁴

Osborn J then proceeded to operationalise the precautionary principle in the case before him, adopting a checklist approach. His Honour said:

In summary, the application of the precautionary principle to aspects of this case raises the following fundamental issues:

- (a) is there a real threat of serious or irreversible damage to the environment?
- (b) is it attended by a lack of full scientific certainty (in the sense of material uncertainty)?
- (c) if yes to (a) and (b), has VicForests demonstrated the threat is negligible?
- (d) is the threat able to be addressed by adaptive management?
- (e) is the measure alleged to be required proportionate to the threat in issue?⁵⁵

If *Environment East Gippsland Inc v VicForests* is helpful for its “ready reckoner” exposition of the principles exhaustively examined in the *Telstra* case, then a number of cases in the Victorian Civil and Administrative Appeals Tribunal (VCAT), involving climate change considerations are also helpful as demonstrating some of the issues and arguments thrown up by the operation of the principle.

In *Ronchi v Wellington Shire Council* [2009] VCAT 1206 the developers of two double-storey dwellings on a site in Seaspray told the tribunal that they were aware of the climate change risks that affected the site, and argued that they were content to accept those risks and would prefer not to elevate the units in order to comply with the relevant planning scheme clause⁵⁶ and Practice Note.⁵⁷

Baird SM rejected the developers’ proffered self-sacrifice, saying:

I also do not agree that an acceptance by the owners of the potential risk is a responsible way forward. Decision making is directed by Clause 15.08 to take a precautionary approach and that means making decisions that minimise adverse impacts to current and future generations.⁵⁸ Orderly planning, referred to as a decision guideline in Clause 65, and Clause 15.08, both require a different and planned response.⁵⁹

In *Myers v South Gippsland Shire Council* [2009] VCAT 1022, Bilston-McGillen M, utilised the mechanism of a provisional decision in circumstances where she would otherwise have refused to grant a permit for a coastal subdivision in Waratah Bay in Victoria on the basis of the application of the precautionary principle in circumstances of potential sea level rise, storm tide and surge and coastal processes. Instead of ordering a refusal, the Member issued an interim decision stating that before deciding whether to approve the subdivision she required the permit applicant to prepare a coastal hazard vulnerability assessment considering the factors on which she lacked adequate information. The choice then became one for the permit applicant with the Member stating, unequivocally, in her decision, that if the applicant decided not to undertake the vulnerability assessment, she would refuse to grant the permit.

As a matter of interest, the permit applicant did prepare a vulnerability assessment and when the matter came back for hearing before the Member and Potts M, the expert evidence showed that by 2100, without mitigation measures, there would be no dune, no foreshore access, no road, and the

⁵³ *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [179]-[181].

⁵⁴ *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [182]-[183].

⁵⁵ *Environment East Gippsland Inc v VicForests* [2010] VSC 335 at [212].

⁵⁶ Planning Scheme Amendment VC52 amended cl 15.08 introduced in December 2008.

⁵⁷ *Managing Coastal Hazards and the Coastal Impacts of Climate Change*, General Practice Note Department of Planning and Community Development (December 2008).

⁵⁸ *Managing Coastal Hazards and the Coastal Impacts of Climate Change*, General Practice Note Department of Planning and Community Development (December 2008) p 3.

⁵⁹ *Ronchi v Wellington Shire Council* [2009] VCAT 1206 at [19].

subject site would be inundated by sea water. In the absence of any strategy or work being undertaken in the Waratah Bay area on how the issues of climate change, rising sea level and increase in storm surges, were to be addressed, the tribunal applied the precautionary principle and refused the permit.

The decision of Gibson DP, and Potts and David MM in *Alanvale Pty Ltd v AJ & KM Graham Pty Ltd* [2010] VCAT 480 is a good example of the operationalisation of the precautionary principle. The case involved the impact of climate change on rainfall and, in turn, the consequences for the long-term sustainability of groundwater as a resource.

Far from proving Professor de Sadeleer's thesis that the logic of the law finds itself out of step with the quest of science to describe unpredictable natural phenomena that are inherently uncertain, the tribunal proceeded by means of a simple application of the principle of uncertainty. After a brief, but perfectly sufficient, statement of the precautionary principle, reference to Osborn J's endorsement in *Western Water v Rozen* of the statement of the fundamental thrust of the principle by Stein J in *Leatch v National Parks and Wildlife Service*, and reference to Preston CJ's analysis in the *Telstra* case, the tribunal said:

We consider that both these conditions precedent are present in the current case.

We find there is a risk that over allocation of groundwater resources may significantly deplete the Hawkesdale GMA aquifer. We regard this as a threat of environmental damage that is both serious and potentially irreversible. We also find there is scientific uncertainty about the nature and scope of the threat. The threat may be manifested by a fall in the aquifer storage level, effects on surface water systems or intrusion of seawater and resultant salinisation of bores near the coast. However, we do not know the full extent of these threats. At best there are only theoretical calculations and conceptual understandings.

We consider that until the implications of the effects of climate change on rainfall recharge for the aquifer are investigated and better understood, we should apply the precautionary principle and be cautious in making decisions about the allocation of groundwater resources now.⁶⁰

In *Taip v East Gippsland Shire Council* [2010] VCAT 1222, Potts M was called upon to deal with three predictable, but at the time, perhaps somewhat novel arguments, mounted to circumvent the application of the precautionary principle. The case concerned a proposal for the development of eight dwellings in Lakes Entrance in Victoria, which has a very high vulnerability to climate change, including sea level rise.

The permit applicant argued: first, that a design response of raising the floor levels of the buildings was adequate; second, that given the long lead time of climate change impacts the buildings would have an adequate opportunity to live out their economic life; and third, that the application of the precautionary principle was questionable because the case was not one of environmental degradation arising from a development, but rather a case of the environment impacting on the development. The tribunal dispatched these arguments with some concision.

As to the design response, Potts M said:

To address the issues of climate change the proposed design response for this development relies solely on raising the sensitive use areas to be above the combined projections of flood and sea level rise levels. I find the reliance on this response to be a simplistic and ultimately a misguided approach. In short it is insufficient to address the broader issues raised in this matter and the issues of intensification of the land use that would result from the development.

There is no disputing that the design would indeed meet one limb of the policy requirement, responding to the 0.8m rise in water level. However this is not the end of this matter. The development will contain eight dwellings, all dependant on access to and from the site by motorised vehicle or pedestrian movement. Such access will be vulnerable to the gradually increasing flood levels, and ultimately a level that will be not less than 0.8m higher than the current peak and lower flood levels set out earlier.

...

The development will be supported by reticulated sewer, water, power and telecommunications services. Such services rely on either below ground infrastructure or assets that are otherwise susceptible to flooding under current lake levels, let alone future raised levels.

⁶⁰ *Alanvale Pty Ltd v AJ & KM Graham Pty Ltd* [2010] VCAT 480 at [155]-[156] and [159].

...

There is therefore a foreseeable risk to the failure of these service with consequential risks of harm to residents, e.g. lack of sanitary services, clean drinking water and power, all basic essentials to sustain urban development.⁶¹

As to the “economic life” argument the Member was even more “concise”:

The proposition is little more than a spurious argument to defer proper and balanced decision making and focuses only on the short term economic benefits. Even from an economic perspective it avoids the longer term impacts. It is clear enough from the current understanding of the impacts to Lakes Entrance that without intervention, the development will be subject to conditions that may well lead to it being unviable for occupation. The resultant economic cost would be to those future owners and quite possibly the wider community. It is hardly fair or equitable to see this as a balanced outcome for intergenerational equity.

I find the proposition is one that is contrary to the wider objectives of planning in Victoria to provide for intergenerational equity, fair and orderly planning, sustainable development, and to balance the interests of current and future Victorians.⁶²

On the third argument of “nature versus man” as opposed to “man versus nature”, Potts M simply regarded the case as nonetheless one for the “understood application of [the precautionary] principle, albeit in a different context, where it is the environment that is the source of potential adverse impacts and risks to the development and not the other way around”.⁶³

CONCLUSION

In her book, *The Precautionary Principle in Practice*, Jacqueline Peel observes:

There is also a detectable shift in decision making in terms of an improved awareness on the part of many decision-makers of the need to consider scientific uncertainty either expressly or implicitly in decision making. However, there remains a lack of consistency as to how such consideration takes place. Relatively little innovation has occurred to fashion decision making processes that are more responsive to issues of uncertainty and indeed there is a perception, particularly among courts, that such innovation is unnecessary, because “commonsense” will suffice.⁶⁴

Nine years on from the learned author’s observation, the present author would suggest that it is no longer a valid criticism of planning and environment courts and tribunals in Australia, if indeed it was in 2005 when those words were written.

No doubt that observation had its genesis in the commonsense analogy drawn by Stein J in *Leatch v National Parks and Wildlife*,⁶⁵ but that very early, simple statement, while since endorsed by others, has been followed by a developing jurisprudence in cases such as *Bridgetown/Greenbushes Friends of the Forest Inc v Department of Conservation and Land Management*, the *Telstra* case and *Walker v Minister for Planning*; and the precautionary principle, with its core premise of uncertainty, has clearly been operationalised by cases such as *Environment East Gippsland v VicForests*.

Moreover, cases such as *Botany Bay City Council v Saab Corp Pty Ltd* and *Hunter Environment Lobby Inc v Minister for Planning*, and the VCAT cases referred to above, demonstrate that there is no lack of flexibility in Australian courts and tribunals in accommodating scientific uncertainty, and in balancing the precautionary principle and the other components of ESD with the continuing pressure for development of the coast.

To respond to Stein J’s musing, as to how the rhetoric of the precautionary principle might be operationalised in the first decade of the 21st century, the present author would offer that, by the end of that decade, we were doing pretty well in this country in rising to the challenge, and that we continue to do so.

⁶¹ *Taip v East Gippsland Shire Council* [2010] VCAT 1222 at [61]-[65].

⁶² *Taip v East Gippsland Shire Council* [2010] VCAT 1222 at [90]-[91].

⁶³ *Taip v East Gippsland Shire Council* [2010] VCAT 1222 at [109].

⁶⁴ Peel, n 12, p 227.

⁶⁵ *Leatch v National Parks and Wildlife* (1993) 81 LGERA 270 at 282.

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