

Principles of environmental stewardship, prevention and precaution, and environmental governance

**Justice Brian J Preston
Chief Judge
Land and Environment Court of NSW
Australia**

Brasilia Declaration on Water Justice

- *The Brasilia Declaration of Judges on Water Justice (“the Brasilia Declaration”) recognises that water justice involves:
1. stewardship of water resources;
 2. ecological functions of water resources;
 3. indigenous and customary rights to water resources;
 4. the prevention principle;
 5. the precautionary principle;
 6. the *in dubio pro aqua* principle;
 7. internalisation of external environmental costs (including the polluter pays and the user pays principles);
 8. good water governance;
 9. integration of environmental factors in water decision-making; and
 10. procedural water justice.

Four principles explored

This presentation provides examples of how Australian courts have upheld four principles:

1. Water stewardship
4. Prevention principle
5. Precautionary principle
8. Good water governance

Water stewardship

Principle 1 - Water as a Public Interest Good

The State should exercise stewardship over all water resources, and protect them, in conjunction with their associated ecological functions, for the benefit of current and future generations, and the Earth community of life.

Water stewardship

- * Principle 1 of the Brasilia Declaration supports the notion that water is a public good and that governments should exercise stewardship over water resources for the benefit of the public.
- * This principle has been upheld in Australia in two types of cases:
 - * The first concerns whether water is a public good so that there are not private property rights in water resources; and
 - * The second concerns the power of State and Territory governments to charge companies licence fees for access to water or fish resources.

Water as a public good

- * At common law, a riparian owner is entitled to the reasonable use of water.
- * In Australia, the common law rights were largely abolished by water legislation

Water as a public good

- *The right to “the use and flow and to the control of the water in all rivers” was vested in the State Crown: *Broughton v Leslie* [2019] NSWSC 827 at [62]; *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 940; [2009] HCA 51 at [54]; *Randren House Pty Ltd v Water Administration Ministerial Corporation* [2020] NSWCA 14 at [41], [42], [198].
- *This vesting of rights to the use and control of water was an exercise of sovereignty of the state. The assertion of control over water includes the power to issue licences to take water: *ICM Agriculture* at [54]

Water as a public good

- * Water legislation did not disturb the common law notion that water is common property not especially amenable to private ownership and best vested in a sovereign state: *ICM Agriculture* at [55].
- * Sir William Blackstone, *Commentaries on the Laws of England* (1766) bk2, c2. p18:
 - “water is a moveable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein.”

Groundwater as a public good

- * By water legislation, the right to the use and flow and to the control of groundwater, like surface water, was vested in the Crown: *ICM Agriculture* at [72], [108], [144], [146], [195], [196]
- * The State's control over groundwater includes the power to issue bore licences and restrict the amount of water taken: at [108]

Changing water allocations

ICM Agriculture Pty Ltd v The Commonwealth

- * The replacement of licences to take groundwater with a new system that reduced users' allocations was **not an acquisition of property** contrary to the Australian Constitution
- * French CJ, Gummow and Crennan JJ: The farmers did not have property rights to the groundwater because “it was a **natural resource**, and the State always had the power to limit the volume of water to be taken from that resource” at [84]



Image source: <http://www.lgam.info/bore>

Changing water allocations

- * Hayne, Kiefel and Bell JJ: Four considerations point to the conclusion that the State gained no identifiable or measurable advantage from the change in water licensing and allocation:
 - * The replaceable and fugitive nature of groundwater
 - * Water licences are a creature of statute and inherently fragile
 - * Groundwater is not a subject of property
 - * Rights vested in the State are statutory rights for the purpose of controlling access to a public resource: at [149]

Intergenerational equity

- * Principle 1 of the Brasilia Declaration also promotes the importance of intergenerational equity.
- * This Principle acknowledges that governments have the responsibility to exercises stewardship over water resources for present and future generations.



Source: <http://equityforchildren.org/2018/01/climate-change-children-and-intergenerational-equity-event-at-the-new-school/>

Intergenerational equity

New Acland Coal Pty Ltd v Ahsman & Ors and Chief Executive, Department of Environment and Heritage (No 4) [2017] QLC 24

- * The Land Court of Queensland recommended that the Minister reject the proposed coalmine expansion because of the potential **impact on groundwater for future generations.**
- * There is a real possibility of landholders proximate to Stage 3 suffering a loss or depletion of groundwater supplies ... the potential for that loss or interference with water continues at least hundreds of years into the future, if not indefinitely.
- * The decision was overturned on the different ground that the relevant legislation did not allow consideration of groundwater: *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors* [2019] QCA 238



Image source: <https://ceowatermandate.org/resources/investor-risk-analysis-groundwater-matters-2017/>

Intergenerational equity



Site of the New Acland Coal Mine

Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors
[2019] QCA 238

Prevention & precaution principles

- *Principles 4 and 5 of the Brasilia Declaration promote the prevention principle (the prevention of harm should take precedence over remediation) and the precautionary principle.

Prevention principle

Principle 4 - Water Justice and Prevention

- * To avoid costly ex-post measures to rehabilitate, treat or develop new water supplies or water-related ecosystems, prevention of future harm to water resources and to related ecosystems should take precedence over remediation of past harm, having regard to best available technologies and best environmental practices.

Precautionary principle

Principle 5 - Water Justice and Precaution

- * The precautionary principle should be applied in the resolution of water-related disputes. Notwithstanding scientific uncertainty or complexity regarding the existence or extent of risks of serious or irreversible harm to water, human health or the environment, judges should uphold or order the taking of the necessary protective measures having regard to the best available scientific evidence.

Rio Declaration Principle 15

- *The most widely employed formulation of the **precautionary principle** is based on principle 15 of the Rio Declaration on Environment and Development (1992) which states:
 - * “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

Prevention & precaution principles

- * Courts in Australia have, since 1993, invoked the precautionary principle in judicial decision making.
- * Once the precautionary principle is activated, the **type and level of precautionary measures** that will be appropriate will **depend** on the combined effect of the **degree of seriousness and irreversibility of the threat and the degree of uncertainty**.
- * This involves assessment of risk, namely the probability of the event occurring and the seriousness of the consequences should it occur.
- * The more significant and uncertain the threat, the greater the degree of precaution required.

* Source: *Telstra Corporation Ltd v Hornsby Shire Council* (2007) 67 NSWLR 256 at [161].

Prevention & precaution principles

- * **Protective measures** adopted by the courts in Australia to address the threat of serious or irreversible harm to water resources and related ecosystems include:
 - * **obtaining further information** to reduce uncertainty;
 - * **allowing a margin for error**;
 - * **adopting an adaptive management approach**; and
 - * **prohibiting the development** or action that will cause the harm.

Prevention & precaution principles

Obtaining further information to reduce uncertainty

Leatch v National Parks and Wildlife Service (1993) 81
LGERA 270

- * Should a statutory licence to take or kill a species of endangered fauna, the Giant Burrowing Frog, be granted?



Image source: <http://www.pittwaterenvironmentalfoundation.org.au/rare-giant-burrowing-frog-found-in-upper-mullet-creek/>

Prevention & precaution principles

Leatch v National Parks and Wildlife Service (cont.)

- *The licence was necessary to construct a proposed link road through Bomaderry Creek Gorge.
- *While the Gorge was the prime habitat for the Giant Burrowing Frog, it may forage wider afield into drier areas where the road was proposed to be constructed.
- *However, there was a dearth of knowledge about the population of the frogs in the area and hence considerable **uncertainty as to the likely impact** of the proposed road **on the frogs**.
- *The Land and Environment Court of NSW **refused** to grant the **licence** to take or kill the frogs, including disturbing their habitat, **until further scientific evidence was available**.

Prevention & precaution principles

Allowing margin for error

Gales Holdings Pty Ltd v Tweed Shire Council (2006) 146 LGERA 136 (*Gales Holdings (No 1)*)

- * The Land and Environment Court of NSW applied the precautionary principle to require a species impact statement (SIS) assessing the impact of carrying out the proposed development of clearing and filling swampland for a shopping centre.
- * An endangered species of land snail, Mitchell's Rainforest Snail, had been found in swamp forest on the land.



Image source: <https://environmentallearning.wikispaces.com/Rainforest>

Prevention & precaution principles

Allowing margin for error (cont.)

- * In *Gales Holdings Pty Ltd v Tweed Shire Council* [2006] NSWLEC 212 (*Gales Holdings (No 2)*), the Court again applied the precautionary principle to require a SIS for two endangered species of frog, the Wallum Froglet and the Wallum Sedge Frog, found in freshwater swamps on the land.
- * The Land and Environment found that the proposed developments were **likely to significantly affect the populations** of the species which **demand**ed a full and proper SIS inform decision-making.



Wallum Froglet

Source:

<https://wetlandinfo.ehp.qld.gov.au/wetlands/ecology/components/species/?crinia-tinnula#prettyPhoto>



Sedgefrog

Source:

<https://wetlandinfo.ehp.qld.gov.au/wetlands/ecology/components/species/?litoria-olongburensis#prettyPhoto>

Prevention & precaution principles

Adopting an adaptive management approach

Newcastle and Hunter Valley Speleological Society Inc v Upper Hunter Shire Council and Stoneco Pty Ltd (2010) 210 LGERA 126

- * Proposed limestone quarry likely to impact on stygofauna, cave dwelling biota, likely to exist in wet systems in caves in the limestone.



Image source: <http://www.jenolancaves.org.au/about/limestone-cave-geology/>

Prevention & precaution principles

Adopting an adaptive management approach

Newcastle and Hunter Valley Speleological Society Inc v Upper Hunter Shire Council and Stoneco Pty Ltd (cont.)

- * The Land and Environment Court of NSW imposed as conditions of the consent an adaptive management approach to prevent impacts on the stygofauna. This is:
 - * “an iterative approach involving explicit testing of the achievement of defined goals. Through feedback to the management process, the management procedures are changed in steps until monitoring shows that the desired outcome is obtained” (at [184]).



Prevention & precaution principles

Prohibiting the development or action

BGP Properties v Lake Macquarie City Council (2004) 138 LGERA 237

- * The Land and Environment Court of NSW applied the precautionary principle to **refuse development consent** to the subdivision and industrial **development of land** that included the **Jewells Wetland**.
- * The wetland was part of a threatened ecological community, Sydney Freshwater Wetland, which was listed under the *Threatened Species Conservation Act 1995* (NSW).
- * The proposed development would have removed 30% of that threatened ecological community and, in time, indirect effects would have removed it entirely.
- * The proposed development would also have raised the water table which would have been likely to have an adverse effect on a threatened species of flora, *Tetratheca juncea*.

Jewells Wetland, NSW



Image source: <http://photography-on-the.net/forum/showthread.php?t=702447>

Prevention & precaution principles

Alanvale Pty Ltd v Southern Rural Water [2010] VCAT 480

The Victorian Civil and Administrative Tribunal relied on the precautionary principle in refusing a groundwater extraction licence.

The Tribunal considered that “until the implications of the effects of climate change on rainfall recharge to 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.” (at [195])

The Tribunal concluded:

“Based on the precautionary principle...the potential seriousness of permanently depleting the groundwater storage and the risk of irreversible damage to the environment makes it inappropriate to grant these licences.” (at [200])

Good water governance

Principle 8 - Water Justice and Good Water Governance

- * Consistent with the proper role of an independent judiciary in the upholding and enforcing of the rule of law, and ensuring transparency, accountability and integrity in governance, the existence of good water laws and their effective implementation and enforcement are essential for the protection, conservation and sustainable use of water resources and related ecosystems.

Good water governance

- * The principle of **good governance** is essential to the sustainable development of water resources and related ecosystems. It requires the **enactment, implementation and enforcement** of clear and effective **laws** that support the conservation and wise use of water resources and related ecosystems. The implementation and enforcement of such laws promotes good governance.
- * Effective implementation and enforcement of water laws required allocation of sufficient financial resources to perform these functions

Ensuring compliance

* *Environment Protection Authority v Sydney Water Corporation*
[2000] NSWLEC 156

* A statutory water corporation pleaded in mitigation for an offence of polluting waters that the financial resources that had been allocated for maintenance and upgrade of the sewer network were fixed but in an amount that was inadequate to undertake preventative maintenance to ensure that the sewer network would not cause pollution of waters, but instead only enabled reactive maintenance.

* The Land and Environment Court of NSW held:

“In the absence of a licence to pollute, Sydney Water *must not* pollute. It must spend all of its available resources on pollution prevention which, in this case, means preventative maintenance. Dividends or profits are inappropriate if they are coming from a corporation that is breaking the law on a routine basis. The priorities of Sydney Water’s management and its shareholder must be re-examined.”

Ensuring compliance

Environment Protection Authority v Lithgow City Council [2007]

NSWLEC 695

- * A local government authority operating a water treatment plant discharged polluted waters into a creek that drained into a drinking water reservoir.
- * The authority **pleaded** in mitigation that it had **limited budgetary resources** for the operation of the water treatment plant.
- * The Land and Environment Court rejected the plea:

“The sentence of the Court must deter those undertaking activities likely to harm the environment...to **eschew an attitude such as the Council adopted in this case of assigning a lower managerial and budgetary priority to compliance with the environmental protection licence and to taking the precautions required by the licence, than to its other business and government functions.**

Compliance with environmental laws is not optional; it is not contingent on a person having sufficient funds or sufficient willingness to expend funds to comply with environmental laws. The laws mandate compliance; it is a criminal offence not to comply. Persons must assign first priority to compliance with the laws and arrange their organisational structure, management, human resources and financial resources to ensure that this occurs.” (at [67]-[68])

Charging for water

- * Sustainable use of water resources includes the regulation of and charging for use of water.
- * Use of water contrary to the regulatory regime, including avoiding metering, is an offence under water legislation.

Avoiding regulation and metering

- * *Murray Irrigation Ltd v ICW Pty Ltd* [2005] NSWLEC 304:
 - * Irrigators were liable for lifting out of a water channel a Dethridge Wheel that regulated and metered the inflow of water. The result was that water flowed down the main supply channel to the irrigator's landholding without being regulated or metered.



Avoiding regulation and metering

* *Water NSW v Barlow* [2019] NSWLEC 30:

- * Irrigators were liable for operating pumps to take water from the Barwon River :
 - (a) When the metering equipment was not operating properly to record the volume of water taken and
 - (b) In drought times when there was an embargo on taking water from the river.

The Land and Environment Court held this conduct undermined the regulatory scheme relating to the distribution, sharing and taking of water and the beneficial protection of water resources (at [27], [32]).



Avoiding regulation and metering



An aerial shot of the Burren Downs dam
Water NSW v Barlow [2019] NSWLEC 30

Conclusion

- * Water justice is emerging as a new paradigm.
- * It encompasses the concepts of distributive justice, procedural justice and recognition justice, but emphasises certain components.
- * Courts in Australia have yet to expressly vocalise their judicial decision-making in terms of water justice but have decided water-related cases in ways that implicitly apply principles of water justice.



- * As the concept of water justice becomes better known, it is likely that courts will more frequently invoke and apply principles of water justice.