

## **Speech by the Hon. Justice Brian J Preston SC**

### **“Writing Judgments ‘Wildly’”**

**to the**

### **Australian Earth Laws Alliance Wild Law Judgments Workshop**

**12 November 2014, UNSW**

Michelle Maloney and Nicole Rogers have asked me, as a current judge, to make some introductory comments on “writing judgments ‘wildly’”. This choice of words made me wonder what inside knowledge they possessed about how I write my judgments.

“Wildly” as an adverb means “in a wild manner”. “Wild”, as an adjective, has many meanings. One of these meanings is: “of unrestrained violence, fury, and intensity” etc (Macquarie Dictionary). Now I know that occasionally the nefarious conduct of particular parties or their lawyers in a few environmental cases does raise my blood pressure to unhealthy levels but I have not yet resorted to unrestrained violence in the courtroom and I will never do so. I hope the organisers did not have this meaning in mind in selecting the topic of my introductory comments.

Another meaning of “wild” is “frantic, distracted, crazy or mad”. Whilst I am resigned to the fact that, in response to some of my judgments, at least one of the parties may have thought that “he must be mad to have made the decision he did”, I do try not to be crazy in my judgments. But then again I used to think that *One Flew Over the Cuckoo’s Nest* was a nature film about avian fauna. I will therefore pass over this meaning.

A third meaning of “wild” is “undisciplined, unruly, flawless or turbulent”. This meaning would be more of a problem for a judge who is meant to uphold the law and the rule of law. Judges are not meant to be undisciplined and lawless in their

judgments. One of Lord Denning's books is entitled *The Discipline of Law*.<sup>1</sup> Lord Denning speaks of the discipline of the law in the sense of imparting instruction in the principles of the law as they have been, as they are, and as they should be. The theme of his book is that:

the principles of law laid down by the Judges in the 19<sup>th</sup> century – however suited to social conditions of that time – are not suited to the social necessities and social opinion of the 20<sup>th</sup> century. They should be moulded and shaped to meet the needs and opinion of today.<sup>2</sup>

Lord Denning believed that judges can play a role in making the law correspond with the justice that the case requires. In the book, Lord Denning discusses how he did this in the various cases he decided over his long career as a judge. In doing so, Lord Denning did not believe that he was behaving in an undisciplined or lawless manner; to the contrary, he was acting within the law in a disciplined manner to develop legal principles. Here is an approach to writing judgments to which I will return.

A fourth meaning of “wild” is “unrestrained by reason or prudence”. Again, this meaning poses a problem for judges. The essential characteristic of adjudication – the act of judging is the application of reason to reach a decision. Courts are institutionally committed to acting on the basis of reasoned argument.<sup>3</sup>

A fifth and more general meaning is “to behave in an unrestrained or uncontrolled manner”. Judges are constrained by the law and the act of judging. Their task is to adjudicate the dispute before the court applying the relevant law to the facts found on the evidence before the court. Again, it is antithetical to the act of judging for a judge to behave in a manner unrestrained or uncontrolled by the law and the evidence in the case to be judged. This much can be accepted. But that still leaves unanswered the questions of:

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<sup>1</sup> (Butterworths, London, 1979).

<sup>2</sup> *Ibid* v.

<sup>3</sup> As Lon Fuller explained in his classic article ‘The forms and limits of adjudication’ (1978) 92 *Harvard Law Review* 353, 371.

- What is the law to be applied?
- How is it to be interpreted?
- What facts should be found and inferences should be drawn on the evidence before the court?
- How does the law, properly interpreted, apply to the facts as found?
- What remedies and relief should be granted if breach of the law be found?

These questions help frame what are the restraints and the controls on the judge who is judging the dispute before the court. As Lord Denning has observed, there is scope within these restraints and controls to make the law correspond with the justice that the case requires.

Of course, my remarks so far are a play on the word “wildly”. I really do know that this workshop is to discuss the Australian Wild Law Judgments Project. But as you will soon hear, some of my word play remarks actually do have relevance to the topic of writing judgments from a wild law perspective.

Wild law is a theory of earth-centred law and governance. It takes an ecocentric or nature-centred approach rather than a human-centred approach. It values the earth not merely instrumentally as a commodity belonging to humans but also intrinsically as a community to which we belong. If I can appropriate and adapt the title of Edward Schumacher’s famous book on economics, wild law can be described as: “Wild is beautiful: a study of law as if nature mattered”.

If we were to apply this approach, if nature really did matter, what would the law be and what would judgments of the court applying the law be? This is the central concern of the Wild Law Judgments Project. The brief I have been given, therefore, is to begin the discussion on how would judges decide cases and how would judgments be written if nature really did matter.

I would suggest that there are at least two approaches that could be taken. One approach is to examine where in the judging process there are opportunities for adopting a wild law perspective. This first approach accepts the law as it currently

exists, but explores where there is scope for finding, interpreting and applying the law to best meet the justice – including the ecological justice – of the situation. It is the more orthodox approach, applying the same technique and logic as is used in judging other disputes. I discussed this approach in an article I wrote on “The Art of Judging Environmental Disputes”.<sup>4</sup> In large part it accords with Lord Denning’s approach that I have summarised earlier. Judgments would be rewritten to identify where and how the opportunities have been taken to prefer a wild law perspective and how doing so would affect the outcome of the case.

The other approach is to challenge the existing law and mould it to fit the earth’s demands. This falls outside the orthodox technique and logic of judging disputes. Judges are not permitted to be legislators. However, the object of engaging in this second approach is to highlight the inadequacies of the existing law. Judgments would be rewritten to identify the reformed laws and show how the application would affect the outcome of the case.

Both approaches have utility and could be employed productively in the Wild Law Judgments Project.

Let me now explain in a little more detail the opportunities available under each approach for rewriting judgments from a wild law perspective.

Under the first approach, the opportunities arise in finding, interpreting and applying the law. The first step of judging is finding the law – ascertaining which of the many rules in the legal system is to be applied, or, if none is applicable, reaching a rule for the particular case. This step of supplying a new rule is to be undertaken by a principled and rational process. Different but equally legitimate methods may be used. They include the method of analogical reasoning following the line of logical progression from similar cases; the method of evolution along the line of historical development of a principle; the method of tradition along the line of customs of the community; and the method of sociology along the lines of justice, morals and social

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<sup>4</sup> (2008) 12 *Southern Cross University Law Review* 103.

welfare and the mores of the day.<sup>5</sup> A wild law perspective may inform and supply a different rule than was selected by the court in the judgment being considered.

Having found the applicable rule of law, the second step of judging is interpreting the rule of law. Interpretation of the law is always required, for a variety of reasons. First, all legal rules involve classifying particular cases as instances of general terms. For any rule, it is possible to distinguish clear central cases, where the rule certainly applies, and cases where there is doubt as to when the rule applies, there being reasons both asserting and denying that it applies. It is in this penumbra of doubt that judicial interpretation of the rule and its application in the case at hand is required.

Secondly, indeterminacy arises from the need to use ordinary English words. The English language is indeterminate and irreducibly open textured. Just like the rules, words used to formulate the rules can be seen to contain a core of certainty and a penumbra of doubt. Judicial interpretation is needed to ascertain the appropriate meaning of words in the applicable rule.

Thirdly, there is indeterminacy in the rules in legislation. Legislators can have no knowledge of all the possible combinations of circumstances which the future may bring. This inability to anticipate brings with it a relative indeterminacy of aim. It is impossible to have a complete legislative provision in advance covering every case. Judicial interpretation is required to determine whether rules in legislation apply to the particular circumstances of the case at hand.

Fourthly, the rules may use very general standards, such as reasonableness, fairness, or what is just and equitable, or general concepts such as the community or the public interest. By using these general standards or concepts, the rules incorporate extra legal norms into the law.<sup>6</sup> The use of these standards and concepts enables changes in the community's values to be taken into the law.<sup>7</sup> The standards and concepts are relative to time and place. They will, therefore, vary in

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<sup>5</sup> Justice Benjamin Cardozo, *Nature of the Judicial Process* (1949) 30-31.

<sup>6</sup> Oliver Wendell Holmes, Jr., *The Common Law* (Dover Publications, 1991) 1.

<sup>7</sup> *Ibid.*

content from time to time and place to place. Courts need to interpret what is the current meaning and content of the standards and concepts in deciding the case.

Finally, there is indeterminacy inherent in the common law system of precedent. The effect of the court exercising its interpretive role is to create the law, even though this may be interstitial and subject to many constraints.<sup>8</sup>

A wild law perspective may inform and lead to the adoption of a different interpretation of the rule of law than that adopted by the court in the judgment being considered.

The third step of judging is to apply the law as found and interpreted. This third step involves two stages. The first stage is to find the facts relevant to the identified rule of law. Fact finding and inference drawing requires the court to exercise its intellectual judgment on the evidence submitted to it in order to ascertain the truth. The facts able to be found will be constrained by the evidence before the court. However, the available evidence may nevertheless provide a foundation for finding more facts than the court chose to find in the judgment being considered. Adopting a wild law perspective may warrant further fact finding than would be required by adopting an anthropocentric perspective.

For example, if fact finding of the impact of conduct on the environment is required, perhaps in assessing the impacts of a proposed development or in assessing the objective harmfulness of criminal conduct for sentencing, factual findings could be made not just on the direct impacts on specific biota, such as threatened species of plants or animals, but also on the indirect impacts on ecological functioning and services and the ecological relationships between that biota and its biotic and abiotic environment.

The second stage is to apply the identified rule of law to the facts as found. In this second stage, consideration needs to be given to the types and content of the remedies or relief to be granted if a breach of law be found. Adopting a wild law

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<sup>8</sup> HLA Hart, *The Concept of Law* (OUP, 2<sup>nd</sup> ed, 1994) 273.

perspective may expand the choice and result in different remedies being granted to those granted by the court in the judgment being considered. For example, remedial orders could be made to restore ecosystem functioning and services or ecological interrelationships, or compensation could be ordered for the affected environment and not merely for affected humans.

Consideration also needs to be given to whether the applicable law accords a judicial discretion as to the remedy, relief or punishment to be granted if a breach of law were to be found. The duty of the court in matters of judicial discretion is to exercise its moral judgment as to what is right, just, equitable or reasonable in the case. Again, this provides an opportunity for a court to take a range of considerations into account, pertaining to both the private interests of the parties and third parties, as well as the public interest. The public interest could include environmental considerations such as upholding conservation of biological diversity and ecological integrity. Adopting a wild law perspective may result in a different exercise of the discretion to grant or withhold relief to that originally exercised by the court.

This first approach can be pursued for many different types of judgments, not only those in environmental and planning law cases, but also cases in resource law, administrative law, constitutional law, property law, agricultural law, tort law, contract law, commercial law, corporations law, intellectual property law, trade practices law, consumer law and criminal law. There is also scope for applying this approach to judgments on procedural law to highlight how a wild law perspective could improve access to justice, including environmental justice.

The second approach to writing judgments from a wild law perspective is more involved. It requires identifying and reforming the aspects of existing laws that prevent or impede achieving earth justice. This step of reformulation of the law is in substitution of the first step of finding the law and the second step of interpreting the law under the orthodox method of judging. The reformed law is then applied in the third step of judging. This may involve new fact finding to meet the needs of the reformed law. The application of the reformed law to the facts as newly found would be expected to lead to a different outcome to that held by the court in the judgment

under consideration. This, of course, is one of the principal objects of the exercise – to highlight how the inadequate law lead to non-earth-centred outcomes.

My identification and brief explanation of these two approaches is not intended to constrain how the Wild Law Judgments Project could be undertaken. Other approaches can legitimately be adopted to analysing and rewriting judgments. Indeed, the purpose of this workshop is to encourage a wild germination of ideas and approaches. One topic for discussion is: “What do we mean by writing from a wild law perspective?”. My remarks are not intended to be, and should not be taken to be, a complete answer to that question. Rather, my remarks are intended to stimulate discussion, to trigger the germination process.

I have been asked to illustrate what might be a wild law judgment by reference to the hypothetical judgment I gave in a mock trial concerning green sea turtles. This was a case where the green sea turtles brought proceedings in public nuisance against the Federal and State government who, the turtles claimed, caused a public nuisance by both their actions and omissions to act. The governments’ actions comprised granting various approvals to coal mines in Queensland. Coal mining results in onshore and offshore greenhouse gas emissions. The governments’ omissions to act included their failure to take action to reduce Australia’s greenhouse gas emissions and to mitigate the impacts of climate change on the Great Barrier Reef. The turtles claimed that greenhouse gas emissions from mining and burning of coal have contributed to climate change. Climate change caused damage to the Great Barrier Reef. The Great Barrier Reef is the habitat of the turtles. Hence, the climate change induced damage to the Great Barrier Reef impacted directly on the turtles.

At the outset, I have to say it was much easier and much more enjoyable giving judgment in a hypothetical case rather than in a real case. There are no disappointed litigants to appeal the judgment, no rebukes from appellate courts and no censure in the media.

In writing the hypothetical judgment, I adopted both of the two approaches I have outlined. I worked within the constraints of the existing law, but I found opportunities



to take a wild law perspective. I also reformed aspects of the law where they were barriers.

The turtles' cause of action was in public nuisance. I applied the established elements of that cause of action but I interpreted key concepts from a wild law perspective.

In the first element, concerned with whether there was interference with a public rather than a private right, I construed the concept of the public to include not only humans but also the turtles. This step was, however, made possible by my adopting the second approach of reforming the law. I assumed the law had been amended to extend the class of rights holders from humans only so as to include non-human life, such as the turtles. Once that step was taken, I was readily able to find that there was an interference with the rights of this wider public.

The second element was whether the interference was unreasonable. I was able to interpret and apply existing legal rules but I also reformed the law in one respect. This was to assume legislative change to adopt the public trust doctrine. This assisted in finding that the governments' conduct was contrary to law, by failing to discharge their public trust duties to take action to protect common natural resources. I also found that the governments' defence to the public nuisance was ineffectual.

The third element concerned the remedies that should be granted for the established public nuisance. Here, the law of public nuisance required that the plaintiffs – the turtles – suffer special injury different to the ordinary member of the public. Once turtles were accepted as being members of the public, and having standing to sue, it was easy to conclude that they would, on the facts found, suffer special injury. The turtles' lives and health would be significantly adversely affected. Such harm was different in kind to the harm suffered by human members of the public.

The issue of the type of remedy was important. Clearly, the equitable remedy of an injunction was required, firstly, to restrain the governments from granting further coal mine approvals so as to mitigate future greenhouse gas emissions and, secondly, to

compel the governments to take action to mitigate the adverse effects on the turtles' habitat and to enable the turtles to better adapt to the affected environment. That left unabated and unaddressed the damage already caused to the turtles. That harm could be compensated by an award of damages. I was not in a position to deal with that remedy and I reserved that claim to another day. But I had in mind that the assessment of the damages would need to take a turtle-centric perspective – what monetary amount would compensate for the loss of the turtles that had already died, the loss of their habitat and the loss that would continue even with mitigation of greenhouse gas emissions until viable populations of turtles and their habitat could be restored? This would involve a different method of assessing damages to conventional methods.

There is one other aspect of the sea turtles judgment that I would like to mention. This concerns the language and style of the judgment. A wild law perspective might suggest that the language, structure and style of traditional judgments ought to be readdressed. My sea turtles judgment did not radically depart from the traditional judgment language, structure and style. But I did commence the judgment in a less conventional and more poetic manner. I hope you will forgive me if I read that opening as it might inspire your creativity:

In 1949, the foresighted forester, Aldo Leopold, in his famous book, *A Sand County Almanac*, challenged society to reflect on the unsustainable exploitation of the environment and its consequences, including loss of animals and birds. In his essay "Goose Music", Leopold asked:

"And when the dawn-wind stirs through the ancient cottonwoods, and the grey light steels down from the hill over the old river sliding softly past its wide, brown sand bars - what if there be no more goose music?"

In 1962, the eminent zoologist and biologist, Rachel Carson, in her classic book, *Silent Spring*, described the chronic, bioaccumulative effects pesticides, including DDT, can have up the food chain, particularly on birds, and called for governmental action. The title "Silent Spring", referred to Carson's fear that uncontrolled use of pesticides would eventually result in a season in which no birds could be heard because they had all died from exposure to pesticides. The title was inspired by the John Keats poem, "La Belle Dame Sans Merci" which contains the lines:

"The sedge was wither'd from the lake  
And no birds sing".

Today, in 2032, a group of green sea turtles have raised alarm and made a clarion call for governmental action to address a pernicious, pervasive and pressing threat to

the environment – climate change’s devastation of the habitat of the turtles. They ask us to reflect on a future where there are no more turtles.

The turtles have issued their call for action in these legal proceedings.

This little vignette about the endangered green sea turtles may offer ideas for writing judgments from a wild law perspective.

By this time in my remarks, you are no doubt starting to think again about those different meanings I proffered about the word “wildly”. Some of you may be thinking “he really is mad”, but a few more may be thinking “he is behaving in an unrestrained or uncontrolled manner”. So, let me take control and restrain myself from speaking any further on “Writing Judgments ‘Wildly’”.

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