

**JURISPRUDENCE ON
ECOLOGICALLY SUSTAINABLE DEVELOPMENT:
PAUL STEIN'S CONTRIBUTION**

By

**The Honourable Justice Brian J Preston
Chief Judge, Land and Environment Court of
New South Wales**

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INTRODUCTION

I am honoured and privileged to speak at this Symposium, this “festschrift” to mark the significant contribution of the Honourable Paul Stein AM in the field of environmental and planning law. My brief is to focus on his contribution to the implementation of ecologically sustainable development.

May I take the liberty in my speech to refer to him by his surname, as one would in academic literature, because the proper form of address, the Honourable Paul Stein AM, is too lengthy for repetition throughout my speech and the use of his first name is too familiar and disrespectful of his status and reputation.

Stein's contribution is partly through the judicial decisions he made, especially as a judge of the Land and Environment Court, but also partly through his extra-judicial speeches and essays.

JUDICIAL DECISIONS

I will commence with his judicial decisions.

Stein was a judge of the District Court of NSW from June 1983 until June 1985 when he was appointed as a judge of the Land and Environment Court of NSW. He served on that Court from June 1985 to April 1997 when he was appointed to the Court of Appeal. He remained on the NSW Court of Appeal until his retirement in April 2003.

Leatch v National Parks and Wildlife Service

One of the cases for which Stein is most remembered, and indeed revered, is *Leatch v National Parks and Wildlife Service and Shoalhaven City Council*.¹ It has acquired the status of being the seminal case on the precautionary principle, one of the principles of ecologically sustainable development (“ESD”). It has been referred to extensively in decisions of courts in New South Wales, but also in other States of Australia and in the Federal Court of Australia and overseas, including the United Kingdom and New Zealand. It has been included in training materials for judiciaries on environmental law prepared by the United Nations Environment Program. It has been cited frequently in academic literature, in Australia and overseas.

¹ (1993) 81 LGERA 270.

I will explore this case and its contribution in some detail, not only because of its importance but also because it provides a vehicle for understanding the contribution of Stein to ESD.

Before I come to deal with the *Leatch* decision and its contribution, let me set a temporal context for the decision.

The concept of ESD, and the precautionary principle in particular, had been gaining momentum internationally for some time. In 1987, the World Commission on Environment and Development had published its report, *Our Common Future*, also referred to as the Brundtland Report, after the chairperson of the Commission, Gro Harlem Brundtland. The Commission called for sustainable development, “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.² The Commission also recommended a comprehensive global conference on environment and development.³

In 1989, the United Nations General Assembly resolved to hold the United Nations Conference on Environment and Development (“UNCED”). The mandate of the conference was “to devise integrated strategies that would halt and reverse the negative impact of human behaviour on the physical environment and promote environmentally sustainable economic development in all countries”.⁴ The conference was held in Rio de Janeiro in 1992.

In 1991, the International Union for the Conservation of Nature (“IUCN”) prepared and published *Caring for the Earth: A Strategy for Sustainable Living*. This report was designed to update the earlier *World Conservation Strategy*.⁵ One recommendation was for the national legal system to implement the principles of ecologically sustainable development, including providing for the application of the precautionary principle, the use of economic incentives and disincentives, and the requirement that all proposed new development and new policies should be subject to environmental impact assessment and public participation.⁶

In Australia at this time, work was being carried out to progress from the *National Conservation Strategy for Australia* to a *National Strategy for Ecologically Sustainable Development*. In mid 1990, a discussion paper titled “Ecologically Sustainable Development” was released.⁷ Nine working groups on ecologically sustainable development were established to investigate the possibility of introducing

² World Commission on Environment and Development report, *Our Common Future*, 1987, at p 44.

³ *Ibid*, at 387.

⁴ United Nations *The United Nations Programme of Action from Rio* (United Nations Department of Public Information, New York: 1992) 3.

⁵ IUCN, UNEP and WWF *Caring for the Earth: A Strategy for Sustainable Living* (Earthscan, London: 1991). See further, P W Birnie and A E Boyle *International Law and the Environment* (Clarendon Press, Oxford: 1992) at 428-430; and Sands *Principles of International Environmental Law* (2nd ed, Cambridge University Press: 2003) at 47-48.

⁶ *Ibid*, at 68.

⁷ B.Boer, “Institutionalising Ecologically Sustainable Development: The Roles of National, State and Local Government in Translating Grand Strategy into Action” (1995) 31 *Willamette Law Review* 307 at 343.

sustainable development policies for each major economic sector. The ecologically sustainable development working groups reported their findings at the end of 1991.”⁸

New South Wales passed the *Protection of the Environment Administration Act* in December 1991. That Act set objectives for the Environment Protection Authority including “to protect, restore and enhance the quality of the environment in NSW giving regard to the need to maintain ecologically sustainable development”. The concept of ecologically sustainable development was defined in s 6(2). This formulation has become the touchstone for all subsequent statutes in NSW referring to ecologically sustainable development. It contains the four, familiar principles of the precautionary principle; inter-generational equity; conservation of biological diversity and ecological integrity; and improved valuation pricing and incentive mechanisms.

In mid 1992, the *Draft National Strategy for Ecologically Sustainable Development* was published and public comments invited. Also around this time, in May 1992, the Commonwealth, each of the State and Territory Governments, and the Australian Local Government Association, met and agreed upon the *Intergovernmental Agreement on the Environment* (“IGAE”).⁹

Under the IGAE, the respective governments agreed that the development and implementation of environmental policy and programmes by all levels of government should be guided by the considerations and principles set out in s 3 of the Agreement.¹⁰ The considerations and principles in s 3 relate to ecologically sustainable development. The parties agreed that the principles of ecologically sustainable development should inform policy making and programme implementation.¹¹ The four well-known principles of ecologically sustainable development – the precautionary principle, intergenerational equity, conservation of biological diversity and ecological integrity, and improved valuation, pricing and incentive mechanisms – are set out in the agreement.¹²

In June 1992, the UN Conference on Environment and Development, also known as the Earth Summit, was held in Rio de Janeiro, Brazil. Amongst the international instruments signed were the Rio Declaration on Environment and Development, Agenda 21, and the Convention on Biological Diversity. The documents enunciated the concept of ecologically sustainable development and recommended a programme of action for the implementation of the concept at international, national and local levels.

The Rio Declaration contained a number of principles. One of them, Principle 15, was the precautionary principle. The formulation of the principle was in essentially the same terms as had been adopted in Australia in the IGAE and in s 6(2) of the *Protection of the Environment Administration Act 1991* (“POEA Act”).

⁸ Above n 5, at 307.

⁹ *The Intergovernmental Agreement on the Environment*, signed 1 May 1992, <<http://www.deh.gov.au/esd/national/igae/index.html>> at 16 April 2010.

¹⁰ *Ibid*, cl 3.1.

¹¹ *Ibid*, cl 3.5.

¹² *Ibid*.

By December 1992, back in Australia, the National Strategy for ESD was launched. The National ESD Strategy was adopted by the Commonwealth and each of the States and Territories in Australia.

So it is in this context that the *Leatch* proceedings came to be determined. The proceedings were heard on 1-5 November 1993 and judgment was given on 23 November 1993.

The proceedings involved an appeal under the then s 92C of the *National Parks and Wildlife Act 1974* ("NPW Act") against a decision of the Director-General of the National Parks and Wildlife Service to issue a licence which gave permission to a local government authority, Shoalhaven City Council, to take and kill endangered fauna from an area of natural bushland where a road was proposed to be constructed.

As fate would have it, the statutory provisions in relation to the issue of the licence and the right of appeal to the Court were introduced into the NPW Act by the *Endangered Fauna (Interim Protection) Act 1991*. That Act was in part a response to Stein's decision in *Corkill v Forestry Commission (NSW)*¹³ concerning logging in the Cheulundi State Forest. The endangered fauna in *Leatch* included the Giant Burrowing Frog and the Yellow-bellied Glider.

The evidence revealed that there was scientific uncertainty in determining both the types of threatened species that might be present and the likely effect on those threatened species. Both the third party objector who was the applicant and the Director-General of National Parks and Wildlife Service submitted that the Court should, in determining whether to issue a licence, apply the precautionary principle. Stein J recorded the submissions in part as follows:

"As previously mentioned, at least two submissions raised the question of the application of the 'precautionary principle'. The question arises whether, if the principle is relevant, it may be raised in the appeal. Mr Dodd [solicitor for the appellant] asks that it be taken into account, particularly in relation to the Giant Burrowing Frog. On behalf of the Director-General, Mr Preston submits that the principle could be applicable. For example, he says that the Court would not issue a licence to take or kill a particular endangered species if it was uncertain whether that species would be present or if there was scientific uncertainty as to the effect of the development on the species."¹⁴

Justice Stein surveyed the adoption of the precautionary principle in the international, national and state jurisdictions. His Honour then referred to the submission on behalf of the Director-General that the precautionary principle could be seen to have been incorporated into domestic law and continued:

"On behalf of the Director-General, Mr Preston made submissions on the incorporation of international law into domestic law. It seems to me unnecessary to enter into this debate. In my opinion the precautionary

¹³ (1991) 73 LGRA 126.

¹⁴ (1993) 81 LGERA 270 at 281.

principle is a statement of commonsense 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, decision or activities), decision-makers should be cautious.”¹⁵

Justice Stein determined that, having regard to the nature of the appeal under the relevant enactment, s 92C of the NPW Act, it was “relevant to have regard to the precautionary principle or what I refer to as consideration of whether a cautious approach should be adopted in the face of scientific uncertainty and the potential for serious or irreversible harm to the environment”.¹⁶ Justice Stein concluded that:

“While there is no express provision requiring consideration of the ‘precautionary principle’, consideration of the state of knowledge or uncertainty regarding a species, the potential for serious or irreversible harm to an endangered fauna and the adoption of a cautious approach in protection of endangered fauna is clearly consistent with the subject matter, scope and purpose of the Act.”¹⁷

Having determined that the precautionary principle could properly be applied, Stein J did so. Justice Stein noted that in respect to the key threatened species which the appellant was concerned, the Giant Burrowing Frog, it had only recently been added to the schedule of endangered species as vulnerable and rare and hence the factors threatening extinction of the species were still operating and had not been abated. In these circumstances:

“... caution should be the keystone of the Court’s approach. Application of the precautionary principle appears to me to be most apt in a situation of a scarcity of scientific knowledge of species population, habitat and impacts. Indeed, one permissible approach is to conclude that the state of knowledge is such that one should not grant a licence to ‘take or kill’ the species until much more is known. It should be kept steadily in mind that the definition of ‘take’ in s 5 of the Act includes disturb, injure and a significant modification of habitat which is likely to adversely affect the essential behavioural patterns of a species. In this situation I am left in doubt as to the population, habitat and behavioural patterns of the Giant Burrowing Frog and am unable to conclude with any degree of certainty that a licence to ‘take or kill’ the species should be granted.”¹⁸

Justice Stein found that there had been inadequate assessment of the need for this particular road or possible alternatives to it. Adequate alternative assessment is, of course, an element of the precautionary principle, Justice Stein concluded:

¹⁵ Ibid at 282.

¹⁶ Ibid.

¹⁷ Ibid, at 282-283.

¹⁸ Ibid, at 284.

“It is in the context of thorough examination of alternatives, especially ones which have minimal environmental impact, that one must balance the issue of a licence to take or kill endangered fauna. The need for a link road is accepted but I question, when all pertinent factors are weighed in the balance, whether the need is for this particular road. The issue of the best route, taking account of all relevant circumstances, including environmental factors, needs to be carefully assessed. It appears to me that alternatives need to be further explored. I am not satisfied that a licence to take or kill the Yellow-bellied Glider, or any of other species discussed in the fauna impact statement, is justified. The applicant for such a licence needs to satisfy the Court, on the civil standard on the balance of probabilities, that it is appropriate in all the relevant circumstances to grant the licence. I am not convinced of the strength and validity of the economic arguments presented to the Court by the Council, nor do I take such a predictable view of human behaviour as Mr Nairn.

Following an examination of the evidence, I am not satisfied that a licence under s 120 of the *National Parks and Wildlife Act* to take or kill endangered fauna should be granted to the Council. However, it should be emphasised that refusal of this licence application should not necessarily be assumed to be an end of the proposal. Further information on endangered fauna and advances in scientific knowledge may mean that a licence could be granted in the future. Also, changes in the proposal and ameliorative measures may lead to a different assessment. This case has been determined, as it must, on the evidence produced to the Court at the hearing and the Court cannot speculate as to the future.”¹⁹

As I have said, Stein’s decision in *Leatch* has become famous. No self-respectful judge or academic writing on the precautionary principle would omit reference to it. It is interesting to examine why the decision has become famous. As I will explain in a moment, I do not believe that the reasons concern Stein’s actual statement or as I will suggest later, re-statement of the meaning and content of the precautionary principle, but rather relate to the fact that the precautionary principle was invoked and applied in the decision-making process. I can see at least six reasons for the decision’s fame.

First, the decision was the first judicial decision to refer to the precautionary principle, and in any detailed way. (There was a slightly earlier decision of an assessor of the Land and Environment Court that made passing reference to the precautionary principle). There is the fame associated with it being the first.

Secondly, it was also the first judicial decision to endeavour to translate soft law (from international and national law) into hard law. Indeed, Stein used this expression of turning soft law into hard as the title of one of his speeches, given in May 1996, (“Turning Soft Law into Hard – An Australian Experience with ESD Principles in Practice”²⁰).

¹⁹ Ibid at 286-287.

²⁰ (1997) 3 *The Judicial Review* 91.

Thirdly, not only did the decision turn soft law into hard, but Stein showed by his reasoning how courts can do so, by proper interpretation of the applicable statutory provisions.

The NPW Act at that time did not expressly refer to any of the principles of ESD, including the precautionary principle, either in the specification of the matters required to be considered or in the objects of the Act.²¹ Nevertheless, the then applicable s 92C of the NPW Act required the Court to take into account on an appeal the public submissions made, some of which had argued that the precautionary principle was appropriate to the case, and any other matter which the Court considered relevant, which, having regard to the subject matter, scope and purpose of the Act, would include the precautionary principle. In addition, the *Land and Environment Court Act 1979* (NSW) (“the Court Act”) provided that the Court on an appeal is to have regard to “the circumstances of the case and the public interest”.²²

Stein J held that, while there was no express provision requiring consideration of the precautionary principle, nevertheless it was a relevant matter to be considered by means of these statutory provisions and having regard to the subject matter, scope and purpose of the Act.²³

This interpretative approach has subsequently been used by other judges of the Land and Environment Court and the Court of Appeal to find that the principles of ESD are relevant matters to be considered in determining application for approvals to carry out development under other statutes and statutory provisions. *Carstens v Pittwater Council*,²⁴ *BGP Properties Pty Ltd v Lake Macquarie City Council*,²⁵ *Telstra Corporation Ltd v Hornsby Shire Council*²⁶ and *Minister for Planning v Walker*²⁷ are examples. I have examined how this rule or principle has been developed by analogical reasoning, from case to case, in my article “The Art of Judging Environmental Disputes”.²⁸

Fourthly, Stein’s decision challenged the classical, declaratory theory of judicial decision-making of which Blackstone was the chief exponent. This held that judges do not, and cannot, make law; they merely discover and declare it. Under this theory, there would have been no scope for application of the precautionary principle, as the legislature had not expressly adopted it in the NPW Act or the Court Act. This theory would appear to have held sway with the judges determining two later cases, *Nicholls v Director-General of National Parks and Wildlife Service*²⁹ and *Greenpeace Australia Ltd v Redbank Power Company Pty Ltd*.³⁰

²¹ The *National Parks and Wildlife Act 1974* (NSW) was subsequently amended so as to refer expressly to ESD: see s 2A(2).

²² *Land and Environment Court Act 1979* (NSW) s 39(4).

²³ (1993) 81 LGERA 270, 282-3.

²⁴ (1999) 111 LGERA 1.

²⁵ (2004) 138 LGERA 237.

²⁶ (2006) 67 NSWLR 256; (2006) 146 LGERA 10.

²⁷ (2008) 161 LGERA 423.

²⁸ (2008) 12 *Southern Cross University Law Review* 103 at 115-121.

²⁹ (1994) 84 LGERA 397.

³⁰ (1994) 86 LGERA 143.

The classical declaratory theory of judicial decision-making has been trenchantly criticised as a fiction or myth. Notable critics include Bentham, Austin, Hart, Lord Deed and Sir Anthony Mason. Positivistic jurisprudence accepts that judges may legitimately fill in the gaps left by rules, including statutes, using their discretion.³¹ Moreover, interpretation of the law involves judicial law-making. It involves determining the meaning and intended scope of statutory provision. By this process of legitimate interpretation, Stein, and the judges that followed him, construed the statutes to require consideration of the principles of ESD.³²

Stein himself observed, in his 1996 speech, “Turning Soft Law into Hard – An Australian Experience with ESD Principles in Practice”³³, that the judicial decisions on ESD illustrate “the discomfort of members of the judiciary with ‘soft law’ especially by ‘black letter lawyers’”.

Fifthly, Stein’s decision in *Leatch* began a process of demystification and familiarisation with the concept of the precautionary principle. In his classic article, “Should Trees have Standing”, Professor Christopher Stone spoke of the fact that new ideas and concepts, especially ones challenging long held views, are always seen to be strange and alien.³⁴ But as the ideas and concepts are discussed and mulled over they lose their strangeness, their foreignness. In time, they become commonplace. So, Stein’s discussion and use of the precautionary principle began that process. It has taken some time, but today we can recognise that the concept of ESD, and the precautionary principle in particular, are no longer confronting. They are familiar and are commonplace in decision-making.

Sixthly, Stein’s decision provided an illustration of how decision-makers can use, and legitimately use, the precautionary principle in exercising discretionary statutory powers, including those to determine applications for approval to carry out development that impacts on the environment. As Stein later said in a number of his speeches and essays, a hurdle in the implementation of ESD is how to translate high sounding theory into practical reality. His decision, however, gave guidance as to how this translation of theory into reality can occur.

I have posited six reasons for the decision in *Leatch* being famous. Its fame would suggest that it should have resulted in many judicial decisions explicating and applying the precautionary principle. However, this did not occur for many years, indeed for over a decade, after *Leatch*. Why would this be so? There may be many explanations. Some may be sociological or relate to the then composition of the Courts. I will not explore these possibilities.

Another is that to the law and the environment’s detriment, Stein only once afterwards had the opportunity to explore the concept of ESD and the precautionary principle. He therefore, was not able to revisit and continue the iterative process of developing ESD jurisprudence.

³¹ See “The Art of Judging Environmental Disputes”, above n 28 at 110.

³² *Ibid*, at 121-124.

³³ Above n 20 at 95.

³⁴ C Stone, “Should Trees have Standing? – Towards legal rights for natural objects” (1972) 45 *Southern California Law Review* 450.

Instead, I suggest the explanations relate to the way in which the decision re-stated the meaning and content of the precautionary principle. I feel some trepidation in positing these explanations. The fame of the *Leatch* decision gives it the status of a sacred cow. Any suggestion that the decision has not been highly influential may be seen to border on the sacrilegious. I also do not want to be seen to be critical in any way of Stein's contribution to environmental law. Nevertheless, I suggest it is a worthwhile exercise to explore why the decision did not have as great an influence on other judges and their decisions as one would have expected. This also may be informative for judicial decision makers in the future. As judges, we can only use the words of the English language to express our reasons. To use Lon Fuller's evocative phrase, we "launch on the shifting currents of life a fragile vessel of words".³⁵ Those words will determine the influence of the decision.

With this apologetic preface, can I suggest four explanations for the less than expected influence of the *Leatch* decision on the development of ESD jurisprudence.

First, the precautionary principle was watered down to be a form of platitude with which no one, whatever be their theory of judicial decision making, could object. The precautionary principle was said to be "a statement of commonsense". No one would want to be accused of lacking commonsense. And it was said that the precautionary principle's "premise" was that "decision-makers should be cautious". Again, no one would want to be caused of being incautious.

One can probably understand some of the reasons for stating the precautionary principle in these non-contentious, general terms. Indeed, the very reasons I have suggested why the decision has acquired fame, and justifiably so, are reasons for describing the precautionary principle in these terms. It was early days in the life of the concept of ESD and the precautionary principle. There were critics and sceptics including in the judiciary. There was a risk of appeal to a conservative Court of Appeal. The prospects of acceptance of the decision and the precautionary principle itself would be improved by formulating the principle in unexceptional terms.

But there is a downside. Expressed in these terms, the precautionary principle has no teeth. To say that decision-makers should be cautious tells us what should be the state of being, but not what action should follow. As I will observe in a moment when I offer my fourth reason, the reduction of the precautionary principle to decision-makers merely being cautious effects a change in the meaning and application of the principle.

Secondly, the re-statement of the precautionary principle created the risk of trivialisation by other decision-makers, including judges. Indeed, this occurred in the very next decision of the Land and Environment Court in *Nicholls v Director General of National Parks and Wildlife*³⁶. That case was again an appeal by a third party objector to the Court involving merits review of a decision of the Director-General of National Parks and Wildlife Service to issue a licence to the Forestry Commission of NSW, to take or kill endangered fauna in the course of forestry operations within the Wingham Management area on the north coast of NSW. Justice Talbot said that

³⁵ L Fuller, *Anatomy of the Law*, Penguin Books Ltd, (first published in 1968, 1971) p 23.

³⁶ (1994) 84 LGERA 397.

“the statement of the precautionary principle, while it may be framed appropriately for the purpose of a political aspiration, its implementation as a legal standard could have the potential to create interminable forensic argument. Taken literally in practice it might provide to be unworkable”.³⁷ Talbot J noted, as Stein had noted, the statement in the IGAE (at 3.5.1) that “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.”³⁸

Talbot J then said:

“That is a practical approach which this Court finds axiomatic, in dealing with environmental assessment.”³⁹

Hence the precautionary principle is either a “political aspiration” incapable of implementation as a legal standard or it goes no further than the existing practical approach that is axiomatic. Either way, on this interpretation, it has no work to do.

Thirdly, the re-statement of the precautionary principle is capable of being understood and applied in different ways by different decision-makers. Indeed, decision-makers could profess to applying the precautionary principle (using the re-statement in *Leatch*) when in fact they are not applying the true precautionary principle at all. The decision in *Nicholls* is one example. Another is the decision in *Greenpeace Australia Ltd v Redbank Power Company Pty Ltd*.⁴⁰

Greenpeace had appealed, as a third party objector, to the Land and Environment Court against a decision of Singleton Council to grant consent for the construction of a power station and ancillary features in the Hunter Valley of NSW. Greenpeace contended that the impact of air emissions from the project would unacceptably exacerbate the “greenhouse effect” in the earth’s atmosphere and the Court should apply the precautionary principle and refuse consent for the proposal.

The power company, Redbank, whilst acknowledging that the project would emit greenhouse gasses, nevertheless relied on the countervailing, environmentally beneficial effects of the project.

Hence, the debate was that sustainable development principles pulled in different directions. The project was inferior on sustainability criteria in terms of increasing CO₂ emissions but superior in terms of mitigating the environmental problem of tailings disposal, efficiently using the finite resource of coal and reducing the emission of CO₂ and Nitrous Oxides.

³⁷ Ibid at 419.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ (1994) 86 LGERA 143.

Justice Pearlman considered the precautionary principle and its use in cases involving scientific uncertainty:

“There are, however, instances of scientific uncertainty on both sides of the issues in this case. For example, Redbank has contended that tailing dams pose environmental problems, whilst Greenpeace has denied that there are serious environmental problems surrounding current methods of tailing disposal. On the other hand, Greenpeace has asserted that CO² emission from the project will have serious environmental consequences, whilst Redbank has asserted that there is considerable uncertainty about its consequences. The important point about the application of the precautionary principle in this case is that ‘decision-makers should be cautious’ (per Stein J in *Leatch v National Parks & Wildlife Service* (1993) 81 LGERA 270 at 282). The application of the precautionary principle dictates that a cautious approach should be adopted in evaluating the various relevant factors in determining whether or not to grant consent; it does not require that the greenhouse issue should outweigh all other issues.”⁴¹

The precautionary principle was reduced to an exhortation to decision-makers that they should be cautious. In this form, the Court said it had applied the precautionary principle. But that is not what the precautionary principle actually requires.

The risk of misunderstanding and misapplication of the precautionary principle when it is reformulated as merely requiring a cautious approach is also exemplified in the statement that application of the precautionary principle dictates that a cautious approach should be adopted in evaluating the various factors in determining whether or not to grant consent. Again that is not what the true precautionary principle says or requires. The precautionary principle operates on each factor which is a threat of serious or irreversible damage and which has the requisite degree of scientific uncertainty. The principle fulfils the function of allowing preventative measures to be taken to reduce or mitigate the threat as if the threat was certain. The precautionary principle does not, however, dictate merely that caution be adopted in evaluating factors one against each other.

I also note briefly the decision in *Friends of Hinchinbrook Society Inc v Minister for the Environment*.⁴² The environmental NGO had challenged consents granted by the Commonwealth Minister for the Environment under the *World Heritage Properties Conservation Act 1983* (Cth) to dredge a marina access channel and to cut and remove mangroves in certain areas. The works were carried out as part of a proposed resort village on the Queensland mainland coast adjacent to Hinchinbrook Channel and opposite Hinchinbrook Island, both part of the Great Barrier Reef World Heritage Area. The applicant submitted the Minister’s decision was vitiated by his failure to have regard to the precautionary principle. The claim was rejected by Sackville J of the Federal Court of Australia:

“I do not think the precautionary principle in the form adopted by the 1992 *Intergovernmental Agreement* (nine years after the enactment of the World

⁴¹ Ibid at 154.

⁴² (1997) 93 LGERA 249.

Heritage Act), is a relevant consideration that the Minister is bound to take into account in exercising the powers conferred by the World Heritage Act. There is nothing to suggest that in 1983 any particular formulation of the precautionary principle commanded international approval, let alone endorsement by the Parliament. It may be that the “commonsense principle” identified by Stein J is one to which the Minister must have regard. But this would flow from the proper construction of the relevant legislation and its scope and purpose, rather than the adoption by representatives of Australian governments of policies and objectives relevant to a national strategy on the environment: cf *Nicholls v Director-General of National Parks and Wildlife* (1994) 84 LGERA 397 at 419.⁴³

Note the difference drawn between the precautionary principle in the form adopted in the IGAE and the “commonsense principle” identified by Stein J in *Leatch*.

Fourthly, the re-statement of the precautionary principle in *Leatch* is at variance with the actual precautionary principle. The precautionary principle has work to do. I endeavoured to explain how the precautionary principle works in my judgment in *Telstra Corporation Ltd v Hornsby Shire Council*.⁴⁴ In essence, the principle operates to shift the evidentiary burden of proof as to whether there is a threat of serious or irreversible environmental damage. Where there is a reasonably certain threat of serious or irreversible damage, the precautionary principle is not needed and is not invoked. The principle of prevention, one of the ESD principles, would require the taking of preventative measures to control or regulate the relatively certain threat of serious or irreversible environmental damage. But where the threat is uncertain, past practice had been to defer taking preventative measures because of that uncertainty. The precautionary principle operates, when activated, to create an assumption that the threat is not uncertain but rather certain. Hence, if there is a threat of serious or irreversible environmental damage and there is the requisite degree of scientific uncertainty, the precautionary principle will be activated. A decision-maker must assume that the threat of serious or environmental damage is no longer uncertain but is a reality. The burden of showing that this threat does not, in fact, exist or is negligible effectively reverts to the proponent of the project. If the burden is not discharged, the decision-maker proceeds on the basis that there is threat of serious or irreversible environmental damage and determines what preventative measures ought be taken. The decision-maker is in the same position as if there had been a relatively certain threat of serious or irreversible damage. This operation of the precautionary principle is different to the statement that the principle is a matter of commonsense and merely requires the decision-maker to be cautious.

The problem that flows from this difference in meaning of the precautionary principle is that it has hindered the iterative process of judicial explication and application of the precautionary principle. As I have endeavoured to explain by my reference to three of the subsequent cases, *Nicholls*,⁴⁵ *Greenpeace*⁴⁶ and *Friends of*

⁴³ Ibid, at 296.

⁴⁴ (2006) 67 NSWLR 256; (2006) 146 LGERA 10.

⁴⁵ (1994) 84 LGERA 397.

⁴⁶ (1994) 86 LGERA 143.

Hinchinbrook,⁴⁷ the iterative process has focused on the “commonsense principle” in *Leatch*, rather than the actual precautionary principle.

Northcompass Inc v Hornsby Shire Council

The next decision that Stein made directly on the concept of ESD was some three years later in *Northcompass Inc v Hornsby Shire Council*.⁴⁸ This case was another case involving the principles of ecologically sustainable development tugging in different directions. It was an appeal by way of merits review to the Land and Environment Court in which the applicant, a residents’ action group, was objecting to the local government authority, Hornsby Shire Council, granting itself development consent for a green organics bioremediation facility. The group was particularly concerned as to the impact of odour and air pollution from the proposed facility’s open windows on proximate, sensitive receptors of a public school and pre-school and residences. There was scientific uncertainty as to the effect of odour and air pollution on children and residents in close proximity. Justice Stein noted in a postscript to the judgment of the Court:

“It must be said that this case is not an example of the so-called NIMBY (not in my backyard) syndrome. On the evidence, it is simply inappropriate to locate a bioremediation plant with open windows so close to sensitive land uses. One would need a trial which proved an environmental success, rather than a failure, to lend confidence in good environmental performance given the present location. Alternatively, a proponent could demonstrate the soundness of a proposal by field or laboratory tests simulating operating conditions, as suggested by the EPA. This has not occurred.

The council argue that the concept of a bioremediation facility is an excellent example of ecologically sustainable development. We agree. It is consistent with ESD to have a facility which takes green wastes away from diminishing landfill and provides value added end products. This is consistent with the core principle of intergenerational equity. It must, however, be noted that another core ESD principle is the precautionary principle. This was mentioned by the EPA and a cautionary approach was quite specifically adopted by Commissioner Cleland in his report and recommendations to council. We think that he was correct to do so, given the particular factual context and bufferless location.

There are of course many Rio principles which are relevant to environmental decision-making, including a case such as this. For example, the right to a healthy environment (principle 1). Indeed, the principle of environmental harm is a major cornerstone of ESD. This is most effectively accomplished through environmental impact assessment processes (Rio principle 17) involving full public participation (principle 10).⁴⁹

⁴⁷ (1997) 93 LGERA 249.

⁴⁸ (1996) 130 LGERA 248.

⁴⁹ *Ibid*, at 264-265.

Corkill v Forestry Commission of New South Wales (No 2)

Stein did, of course, hear and determine many other cases that can be seen to be relevant to the broader concept of ESD.

Stein's decision in *Corkill v Forestry Commission of New South Wales (No 2)*⁵⁰ was relevant to the ESD principle of the conservation of biological diversity and ecological integrity, although the principle was not directly an issue in the case. In *Corkill*, the Forestry Commission of New South Wales had granted licences to three logging contractors to carry out a number of operations in forest areas which contained, or were likely to contain, over 30 different species of fauna species under the *National Parks and Wildlife Act 1974* (NSW). The applicant claimed the respondents were in breach of s 98 and s 99 of the NPW Act which provided that it was an offence to take or kill any protected or endangered fauna. Stein held that s 98 and s 99 of the NPW Act were not confined to the direct and intended consequences of conduct constituting the taking or killing of fauna.⁵¹ In particular, Stein discussed the meaning of the term "disturb" in the definition of "take" in s 5 of the NPW Act. Stein held that "disturb":

"covers conduct which modifies habitat in a significant fashion thus placing the species of fauna under threat by adversely affecting essential behavioural patterns relating to feeding, breeding or nesting. In other words, it includes habitat destruction or degradation which disturbs an endangered or protected species by adverse impact upon it leading immediately or over time to a reduced population."⁵²

Stein's holistic reasoning is consistent with the principle of conservation of biological diversity and ecological integrity. The proposed logging operations were found to constitute an imminent breach of s 98 and s 99 of the NPW Act in relation to the many species of endangered and protected species of fauna.⁵³ Stein's decision was upheld by the New South Wales Court of Appeal.⁵⁴

Willoughby City Council v Minister Administering the National Parks and Wildlife Act

Stein's decision in *Willoughby City Council v Minister Administering the National Parks and Wildlife Act*⁵⁵ concerned the public trust. The applicant sought declaration that a lease and building consent relating to land reserved under the NPW Act were void. The Minister had approved a lease for a building on national park land at Middle Harbour on the north shore of Sydney, and the construction commenced without the consent of the local council and in breach of the NPW Act. In accepting the applicant's submission that there was a public trust over national parks, and the Minister could not lawfully make an administrative decision to harm the land, Stein

⁵⁰ (1991) 73 LGRA 126.

⁵¹ *Ibid*, at 137.

⁵² *Ibid*, at 139-140.

⁵³ *Ibid*, at 161.

⁵⁴ *Forestry Commission of New South Wales v Corkill* (1991) 73 LGRA 247.

⁵⁵ (1992) 78 LGERA 19.

declared the lease and building consent to be void *ab initio* and ordered the building be demolished. Relevantly, Stein stated:

“... national parks are held by the State in trust for the enjoyment and benefit of its citizens, including future generations. In this instance the public trust is reposed in the Minister, the director and the service. These public officers have a duty to protect and preserve national parks and exercise their functions and powers within the law in order to achieve the objects of the *National Parks and Wildlife Act*.”⁵⁶

The concept of the public trust is relevant to ESD, in particular inter-generational equity. Although the relationship between the public trust and ESD was not stated in the judgment, Stein has in his extra judicial writings noticed this.⁵⁷

Environmental impact assessment cases

Stein also gave decisions upholding the importance of the role of environmental impact assessment (“EIA”). Environmental impact assessment is integral to achieving ecologically sustainable development.⁵⁸ Two such decisions are *Drummoyne Municipal Council v Roads and Traffic Authority of NSW*⁵⁹ and, perhaps more importantly, *Drummoyne Municipal Council v Maritime Services Board*.⁶⁰ In the latter decision, Stein held that a determining authority cannot determine the question of whether a proposed activity is likely to significantly affect the environment (and hence require an EIS) by reference to the imposition of certain conditions that may have the effect of mitigating the environmental impact of the activity.⁶¹

In his extra judicial speeches and essays, Stein has commented on the inter-relationship between EIA and ESD, observing that EIA complements the core ESD principles and that EIA is underpinned by the precautionary principle.⁶²

Public participation cases

Stein also, in a series of decisions, has enforced statutory provisions for public participation and access to information. These include: *Monaro Acclimatisation Society v Minister for Planning*,⁶³ *Canterbury Residents and Ratepayers Association Inc v Canterbury Municipal Council*,⁶⁴ *Nelson v Burwood Municipal Council*,⁶⁵ *Curac*

⁵⁶ *Ibid*, at 34. For a discussion of this case, see T Bonyhady “A Usable Past: The Public Trust in Australia” (1995) 12 *Environmental and Planning Law Journal* 329 at 330.

⁵⁷ See “Incorporating sustainability principles in legislation” in P Leadbeter, N Gunningham and B Boer (eds), *Environmental outlook no. 3, law and policy*, (Federation Press, Sydney: 1999) at 57; and “Ethical issues in land use planning and the public trust” (1996) 13 *Environmental and Planning Law Journal* 493.

⁵⁸ See *Bentley v BGP Properties Pty Ltd* (2006) 145 LGERA 235 at [67] – [71].

⁵⁹ (1989) 67 LGRA 155.

⁶⁰ (1991) 72 LGRA 186.

⁶¹ *Ibid*, at 192.

⁶² See “Incorporating sustainability principles in legislation” in Leadbeter, Gunningham and Boer (eds), above n 57 at 63 and “Public participation in policy and water decisions – water up not water down” (2000) 5 *Local Government Law Journal* 205 at 206.

⁶³ [1989] NSWLEC 13 (unreported, Stein J, 2 March 1989).

⁶⁴ (1991) 73 LGRA 317.

⁶⁵ (1991) 75 LGRA 39.

v Shoalhaven City Council,⁶⁶ *Maybury v Minister for Planning*,⁶⁷ and *Johnson v Lake Macquarie City Council*.⁶⁸

Public participation and access to information are also relevant to the concept of ESD, although ESD was not raised as an issue in these cases. Again, however, Stein has noted the link in his extra-judicial writings.⁶⁹

EXTRA-JUDICIAL ESSAYS

I have mentioned a number of times in my speech that Stein has spoken and written extra-judicially on ESD. There are at least 14 speeches and essays, given between 1993 and 2002, exploring the concept of ESD and its implementation. These speeches and essays make an important contribution to the literature – and the debate – on ESD and its implementation. There are some recurring themes.

First, Stein observes that the concept of ESD, and the four principles most commonly cited, are expressed in vague and ambiguous terms. This leads to the concept, and the principles, being given a wide range of divergent meanings, providing a fundamental barrier to attempts at implementation.⁷⁰ Stein recommends the legislature clarify the concept and principles and their role in decision-making.⁷¹

Secondly, Stein criticises the legislature's failure to give guidance as to the role of ESD. Increasingly, the principles of ESD are referred to as one of the objects of a statute or the objectives of an agency established under a statute. But there is no legislative guidance as to the weight or priority to be afforded ESD. In many instances, there is no engagement between the objects provision and the substantive provisions, such as those containing powers to make decisions affecting the environment including granting approval to carry out development that will impact on the environment. In the few instances where the substantive provision refers to ESD, it is often merely to make ESD one of many matters to be taken into consideration in decision-making. Again, no weighting or priority is given to ESD over other relevant matters. The statutes also provide no guidance as to any outcome, such as to implement the principles of sustainable development. Stein calls for the legislature to provide guidance on these questions.⁷²

Thirdly, courts have a role to play in turning soft law into hard, in fleshing out the principles of ESD.⁷³

⁶⁶ (1993) 81 LGERA 124.

⁶⁷ (1995) 87 LGERA 154.

⁶⁸ (1996) 91 LGERA 331.

⁶⁹ See "An Antipodean Perspective on Environmental Rights" (1995) 12 *Environmental and Planning Law Journal* 50 at 52; and "Public participation in policy and water decisions – water up not water down" above n 62 at 207.

⁷⁰ See "Are decision makers too cautious with the precautionary principle?" (2000) 17 *Environmental and Planning Law Journal* 3 at 5.

⁷¹ "Turning soft law into hard – an Australian experience with ESD principles in practice" above n 20 at 95.

⁷² *Ibid.* See also "Incorporating Sustainability Principles in Legislation" in Leadbeter, Gunningham and Boer (eds), above n 57 at pp 62-63, 71-72; and "Public participation in policy and water decisions – water-up not water-down" above n 62 at 213 – 214.

⁷³ "Are decision makers too cautious with the precautionary principle?" above n 70 at 21; "Courts and Tribunals – Appeal Systems – Why Reinvent the Wheel?" (1999) 4 *Local Government Law Journal* 90

Fourthly, Stein views the ESD principles as recognising our duty to each other, to future generations and to the earth itself.⁷⁴

Fifthly, Stein posits that a user of land has a responsibility to use land in an ecologically responsible fashion.⁷⁵ This call is reminiscent of Aldo Leopold's land ethic in his famous book, "*A Sand County Almanac*".⁷⁶

Sixthly, this stewardship responsibility of users of land is allied to the public trust doctrine. Public land held on trust should be used only in a way which is consistent with that trust and involves stewardship of, or ecological responsibility for, the land.⁷⁷

Seventhly, Stein recommends an Environmental Bill of Rights – "rights to clean air, clean water, uncontaminated lands, guaranteed access to the 'bush' (countryside), to implementation of the principles of ecologically sustainable development (ESD), to information about the environment and to participate in decision-making". Stein continues, "it is imperative that such rights be enforceable in the courts through open standing and other mechanisms".⁷⁸

Finally, Stein reminds us that the concept of ecologically sustainable development is not about sustained developed in the sense of sustained growth. Rather, implementation of ESD involves "viewing development as a level, a static concept, rather than a (seemingly necessary) rate of change, as denoted by the concept of growth".⁷⁹ Stein's comments recall those of Edward Schumacher, as well as Boulding and Daly, advocating a steady state economy where the stock of physical wealth is maintained constant at some desired level by a minimal rate of maintenance or minimal throughput. Stein's calls for a land ethic and steady state economy are similar to Schumacher's. Schumacher's famous book "*Small is Beautiful*"⁸⁰ was subtitled "a study of economics as if people mattered". He saw economics as a way of sustaining, restoring and maintaining the immense diversity and complexity of the biosphere in addition to nourishing, nurturing and fulfilling appropriate needs. In short, economics is to service people and planet. For Schumacher, care for the land and for the soil was fundamental to caring for the whole natural world, as well as a way of creating a just and equitable society.

at 101; and "Turning soft law into hard – an Australian experience with ESD principles in practice" above n 20, at 91.

⁷⁴ "Major issues confronting the judiciary in the adjudication of cases in the area of environmental decision-making", (Paper presented at the South-East Asian Regional Symposium on the Judiciary and the Law of Sustainable Development, Manila, 6 March 1999) p 3.

⁷⁵ "Ethical issues in land use planning and the public trust" above n 57 at 493.

⁷⁶ (first published 1949, Ballantine Books, New York: 1970 ed), pp 237-264.

⁷⁷ "Ethical issues in land use planning and the public trust" above n 57 at 496.

⁷⁸ "An Antipodean Perspective on Environmental Rights" above n 69 at 52.

⁷⁹ "Incorporating Sustainability Principles in Legislation" in Leadbetter, Gunningham and Boer (eds), above n 57 at p 59.

⁸⁰ E F Schumacher, *Small is Beautiful: Economics as if People Mattered*, (first published in 1973, Blond and Briggs, London: 1999 ed).

CONCLUSION

In his words and deeds, over his judicial career, Stein can be seen to be a disciple of Schumacher. For Stein too, caring for the land, the waters, the environment is fundamental and necessary for a just and equitable society. And this brings me to conclude that this is perhaps Stein's greatest legacy – to remind us that at the root of all our endeavours should be an ethical foundation, a caring for country, for one another and for future generations.