AN APPALLING STATE OF APPEALS: THE ROLE OF APPEAL RIGHTS IN WESTERN AUSTRALIA’S RESPONSE TO CLIMATE CHANGE

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This thesis is presented for the Honours degree of Bachelor of Laws of Murdoch University in 2015. I hereby declare it is my own account of my research.

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ABSTRACT

It was almost 10 years ago that Secretary General of the United Nations, Ban Ki Moon described climate change as the 'defining challenge of our age'. His comments came at a time when international attention centred around the Kyoto Protocol and the United Nations Framework Convention on Climate Change.

While important, the failure of Kyoto and the UNFCCC to engage key emitters such as China and the U.S has significantly hindered their perceived credibility. The target sets by these negotiations have also attracted criticism, a result of attempts to balance voluntary participation with unenforceable targets. Such criticisms of international efforts have begged the question as to the role of nation states in efforts to address climate change.

Since the time Ban Ki Moon made his comments, Australia has become the first country in the world to implement and repeal an emissions trading scheme. This is indicative of the on-going tensions between an economy dependent on fossil fuels and the growing public concerns with its government's inaction: a similar situation to many emissions intensive economies.

In the face of international and domestic shortcomings a new decentralized approach has been advocated. Unlike its predecessors, this approach does not present a single solution, but instead calls upon those concerned to effect change locally.
The result of such an approach can be seen in many forms, from litigation in the courts to adaptive approaches in local government. Key to these approaches is an underlying ethos, a movement which focuses not on a destination but direction. This direction is change.

As the world accepts the realities of our changing climate, so to must we adapt the manner in which we approach it. Western Australia is no exception. This paper will present the limited right to review government decisions as an existing issue which requires change in order to meet the challenges of climate change. Central to this argument is the need to engage local stakeholders, increase scrutiny of government decisions, develop climate jurisprudence and begin a response to climate change from the bottom up. It is in this way that climate change is the catalyst for reviewing appeal rights in Western Australia.
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I. INTRODUCTION

The environmental protection legislation in Western Australia and the Act potentially capable of mitigating Greenhouse Gas (‘GHG’) emissions is the Environmental Protection Act\(^1\) (‘EP Act’). Whilst the EP Act was not enacted to deal with problems of the complexity of climate change, consideration of GHG emissions is possible through the Act’s existing Environmental Impact Assessment (‘EIA’) mechanism under Part IV of the Act.

Given Western Australia’s wealth of natural resources, the state government has historically retained significant control over projects seeking their exploitation. This control is evident in the EIA Process, which culminates in a decision being made by the Minister for the Environment (‘the Minister’), in consultation with other Ministers.

This Government control is also extended to the environmental appeals process by which options of merit review are determined by the Minister rather than a judicial body or tribunal. This paper will examine existing criticism of this process and further the argument in favour its amendment.

Central to this paper’s argument is the added complexity climate change contributes to decision making. It is argued that incorporating the principles of Ecologically Sustainable Development (‘ESD’) is essential to improving

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\(^1\) *Environmental Protection Act 1986* (WA).
environmental and climate change related outcomes in decisions making, including the consideration of GHG emissions in the EIA process.

Without the right to an effective merit review, the ability to scrutinise decisions in line with ecologically sustainable development principles is limited. This not only hinders the effectiveness of the EIA process, but also the inclusion of climate change factors in decisions making. Efforts to address climate change in Western Australia then hinge on improving the access to appeal. Accordingly, it is the position of this paper that climate change is the catalyst for reforming the appeal provisions of the EP Act.

Part II begins with an introduction to Environmental Impact Assessment and the principles of Ecologically Sustainable Development. The current process of merit appeal will be explained, including the processes followed by the Appeal Convenor. This part will then examine access to judicial review before exploring the common law rules of standing and how they hinder public interest litigation.

Key criticisms of the merit appeal process will then be examined, including the dual role of the Minister and the perception of bias that this creates. The lack of procedural guidance placed on the Appeal Convenor and how the current process creates the perception of a breach of natural justice will also be discussed. Finally, the current Appeal Convenor model will be examined, specifically in relation to its inhibiting the development on environmental and climate jurisprudence.

Part III examines current international literature on climate change and seeks to place the recommended right of appeal within the direction of these works. This
includes an introduction to Rayner’s ‘bottom up’ approach to climate change and its implications for Rittel and Weber’s ‘wicked’ and ‘tame’ dichotomy. It is acknowledged that this is only one of many mechanisms needed to effectively bring about a reduction in GHG emissions, however it is an essential one due to the nature of climate change and the difficulties it poses to traditional environmental governance.

Public participation will then be examined and its importance to improving decision making. It is argued that an effective appeal process improves decisions making by increasing scrutiny on decisions and doing so in a ‘bottom up’ manner as advocated in the Part II.

The role of climate change litigation is introduced and it is argued that an adequate right to review would enable the principles of ESD to be implemented more rigorously into decision making. Litigation is also presented as a forum of public participation and the important role of the court in re-interpreting existing environmental legislation is discussed.

Part IV will build upon the arguments of the previous section by providing an account of relevant climate change litigation. This begins with an outline of cases which have developed ESD in Australia and then those which have incorporated ESD into a climate change context. Litigation’s development of issues surrounding causation, cumulative and indirect impacts will then be discussed as well as key cases which have had a regulatory impact on GHG emissions.
Finally, this section will examine planning decisions of the State Administrative Tribunal (‘SAT’). This will include an introduction to the *Planning and Development Act 2005* (WA) (‘PD Act’) and then provide an account of environmental considerations being included in planning decision making. It is argued that these considerations provide the scope for climate change to be considered in planning decisions and support the argument in favour of the SAT hearing environmental disputes. An example of the SAT’s consideration of climate change is also discussed to support this argument.

Finally, Part V will examine three ‘lightest’ to ‘heaviest’ options for implementing appeal rights in Western Australia. The first of these focuses on improving the current Appeal Convenor model. It is argued that placing procedural requirements on the process would encourage collective mediations and address existing issues related to apprehension of bias and breaches of natural justice. It is also suggested that the role of Appeal Convenor should be appointed to a current or retired legal practitioner so as to encourage independence from the government.

The second of these options will look at assigning responsibility of appeal to the SAT. It is suggested that there are two avenues worth considering, firstly an ultimate right of appeal in relation to the contents of the EPA report to the Minister. This would address criticisms surrounding the dual role of the Minister and that appeal decisions are often merely precursors to the decisions of cabinet made in the s 45 process.
The second avenue will examine incorporating within the EP Act a ‘call in’ power similar to that within the PD Act. This would enable the SAT to hear decisions and make a final recommendation to the Minister for consideration. Such an option would address criticisms related to procedural fairness and the independence of the Appeal Convenor from the Government. It would also allow for the creation of precedent around climate change matters and the development of ESD in the EP Act decisions.

The last option will examine the incorporation of an environmental court similar to that of the New South Wales Land and Environment Court (‘LEC’). It is noted this is an unlikely eventuation, however the benefits of such a court are presented. This section is concluded in favour of assigning responsibility of appeal to the SAT due to its being a compromise between the three options presented. This would address many of the criticisms raised whilst allowing government to retain significant decisions making sovereignty.
II. WESTERN AUSTRALIA: AN APPALLING STATE OF APPEALS

This Part will explain the operation of Environmental Impact Assessment in Western Australia and how by insisting on the incorporation of ESD principles, this process can be used to facilitate the regulation of GHG emissions. The limited availability of appeal will then be examined to highlight how this restricts the ability of the EIA process to incorporate ESD principles and accordingly limits the EIA processes’ ability to consider GHG emissions.

1. Environmental Impact Assessment in Western Australia

This section provides a brief outline of the steps involved in the EIA process to understand how the EIA mechanism operates in Western Australia. The Environmental Protection Authority (EPA) describes the EIA process as:

A predictive tool that is systematically applied at the early planning and design stages of development proposals so that government and community can form a view about a proposal’s environmental acceptability and what conditions, if any, should be applied to control potential risks and impacts.²

Part IV of the EP Act sets out the framework for the EIA process and is central to the approvals process for large developments of the state. All proposals for major projects are required to be referred to the EPA for assessment. This occurs before any decision made by the Minister. Section 38 of the Act functions as a trigger

for proposals considered to be ‘significant proposals’. A significant proposal is one that ‘appears likely, if implemented, to have a significant effect on the environment’.

Any person may refer a significant proposal to the EPA. Generally proponents refer their projects voluntarily, however it is mandatory for decision making authorities to refer significant matters that are not already referred to the EPA. Once a proposal has been referred, the EPA decides whether to assess it and what level of assessment is required. Currently there are five levels of assessment established by the EPA, depending on the likely impact of the proposal. The greater the likely impact on the environment, the greater the involvement of the public in the process.

Following the assessment, the EPA prepares a report for the Minister highlighting key environmental factors to consider in assessing the proposal (‘the Report’). Only environmental factors can be considered by the EPA in the Report and it is purely an informative document that does not bind the decision maker. The Report is then given to the Minister who publishes it and makes it available for public comment.

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3 *Environmental Protection Act 1986 (WA)* s 38.
4 Ibid s 37 B.
5 Ibid s 38(1).
6 Ibid ss 38(5), s38(5j).
7 Ibid ss 39A, 40(2), 40(3).
9 Ibid.
10 *Coastal Waters Alliance of Western Australia Incorporated v Environmental Protection Authority: Ex parte Coastal Waters Alliance* (1996) 90 LGERA 136, 152.
Following the publication and engagement with the public, the environment Minister is required to meet with any relevant decision making authorities to determine conditions required for implementation of the proposal, this is known as the ‘Section 45 process’. Upon agreement of implementation, the Environment Minister issues a ministerial statement verifying the approval of the proposal. If an agreement cannot be reached, the matter is referred to the Governor General to decide. If an agreement cannot be reached with relevant parties who are not ministers, the issue is referred to an Appeal Committee for resolution.

Accordingly, the Section 45 process involves a decision by the Environment Minister with consideration of the EPA’s recommendations, as well as other Ministers who present considerations relevant to their portfolio. The involving of other decision making authorities is seen as essential for consideration of proposals which have not only environmental but social and economic factors for consideration. This creates incentives for the state to approve the proposal on grounds of employment and government royalties and is the basis for arguments in favour of government retaining decision making sovereignty for proposals under the EIA process.

11 Environmental Protection Act 1986 (WA) s 45(1).
12 Ibid s 45(5).
13 Ibid s 45(2).
14 Ibid s 45(3).
2. **Incorporating Ecologically Sustainable Development**

By its nature, environmental decisions making requires the balancing of economic, environmental and social interests.\(^{16}\) It is for this reason that the principles of Ecologically Sustainable Development have been developed to ensure environmental values are adequately considered in the decision making process. The application of these principles to decision making in Western Australia is essential in a meaningful response to climate change. It is through applying ESD principles to the decision making under the EIA process that other jurisdictions such as New South Wales and the United States have prompted the partial regulation of GHG emissions (discussed below).

First recognised in the Bruntland report and delivered at the United Nations World Commission on Environment and Development, ESD is defined as ‘development which aims to meet the needs of Australians today, while conserving our ecosystems for the benefit of future generations.’\(^{17}\) Since their conception in the early 1990s, ESD has animated much of environmental law in Australia and form the objectives of many environmental statues in the county.\(^{18}\)

Originally used to assist decision makers balance competing interests in environmental disputes, ESD has assumed a new significance in the context of

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\(^{16}\) Ibid 160.


climate change litigation.\textsuperscript{19} Most relevant has been the need to consider the interests of future generations in making decisions that affect environmental resources (the ‘principle of intergenerational equity’) and the directive not to postpone measures to prevent harm where threats of serious or irreversible environmental damage exists simple on the basis of scientific uncertainty (‘the precautionary principle’).\textsuperscript{20} Due to the links between the purported harms of climate change and the intention of ESD, they have provided an excellent basis for challenging decision made without adequate consideration of climate change and its effects.

The following section then will outline the limited availability to appeal decision making under the EIA process and how this limits the ability to develop regulatory approaches to GHG emissions.

\textsuperscript{19} Gerry Bates, \textit{Environmental Law in Australia} (Butterworths, 8\textsuperscript{th} ed, 2013) 715.
\textsuperscript{20} Commonwealth, \textit{Intergovernmental Agreement on the Environment} (1992) s 3.5; Peel, above n 18, 954.
3. *Part VII Merit Appeal per the Environmental Protection Act*

The following analysis sets out the appeal process under Part VII of the EP Act. Key criticisms of the existing process will then be examined and their impact on facilitating the regulation of GHG emissions.

Merit appeal involves an adjudicating body conducting a *de novo* hearing to access the appropriateness of the original decision.\(^2^1\) A court approaches this role not as a judicial body but rather an administrative one and are able to remake the original decision being challenged based on its merits.\(^2^2\) In doing so the court may admit fresh evidence and approach the case in a flexible manner in which the rules of evidence to not apply.\(^2^3\)

Part VII appeals can be grouped into the following categories;

1. Appeals of regulatory decisions made by the Chief Executive Officer of the Department of Environmental Regulation. These include decisions under Part V of the EP Act to grant or refuse licences, works approvals, native vegetation clearing permits, pollution control orders and the like; and

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\(^2^2\) Bates, above n 19, 190.

2. Appeals of decisions and recommendations by the EPA and decisions of the Environment Minister in respect to the EIA process conducted under Part IV of the EP Act.\textsuperscript{24}

It is the second of these categories related to EIA which is the focus of the remainder of this section.

1. \textit{Appeals to the Environmental Impact Assessment Process}

Merit review is available for the proponent and third parties with relation to,\textsuperscript{25}

a) a decision of the EPA not to assess the proposal;\textsuperscript{26}

b) the level of assessment set by the EPA for a proposal;\textsuperscript{27} and

c) the content of, or any recommendations in, an EPA Report prepared following an EIA.\textsuperscript{28}

Proponents also have the ability to appeal the conditions or procedures imposed by the Minister in a Ministerial Statement.\textsuperscript{29} In this circumstance, the Minister is required to make a decision in accordance with the recommendation of an appeal committee.\textsuperscript{30} The Minister is however responsible for appointing the committee.\textsuperscript{31}


\textsuperscript{25} \textit{Environmental Protection Act 1986} (WA) s 100.

\textsuperscript{26} Ibid s 100 (1)(a).

\textsuperscript{27} Ibid s 100(1)(b).

\textsuperscript{28} Ibid s 100 (1)(d).

\textsuperscript{29} Ibid s 100(3).

\textsuperscript{30} Ibid ss 100(1a), 106(2), 109.

\textsuperscript{31} Ibid s 106(2).
All three of these options are important in ensuring environmental values are considered in the decision making process. It is however the contents of the EPA Report, which informs the Minister’s decision, that are relevant to this paper’s discussion. The application of ESD principles has in some jurisdictions resulted in the inclusion of GHG emissions in equivalent reports and this has in turn had impacts on GHG regulation. This point will be returned to below in further detail.

2. The Appeal Convenor as a Form of Merit Review

The Appeal Convenor undertakes the task of processing appeals, dealing with parties, attempting to narrow issues and generally considering the merit of contentions. This does not detract from the Minister maintaining the ultimate responsibility for determining appeals under Part VII. The Appeal Convenor’s main functions are to advise the Minister on appeal matters. This is done by the Convenor providing a report outlining their findings and making recommendations regarding the appeal.

The Appeal Convenor enjoys considerable discretion and flexibility in performing his or her duties. Provided there is consultation with the EPA and the Appellant, the obligation to liaise with other affected parties is completely to the Convenor’s discretion. Beyond this there is little in the EP Act to prescribe procedures which the Appeal Convenor should follow. In the event the Convenor is not technically competent, the Minister may also elect to appoint an appeal

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32 Ibid s 107A.
33 Ibid s 1007B(1)(a).
34 Ibid s 109(3).
35 Ibid ss 109(1), 107B.
committee.\textsuperscript{36} This is often politically preferable for dispute with significant public interest.

Having received the Appeal Convenors report, the Minister for Environment is required to make the final decision either;

\begin{itemize}
  \item[a)] In accordance with the recommendations of the Appeals Committee if the appeal is from a decisions of the Environment Minister;\textsuperscript{37} or
  \item[b)] Having regard to the Appeal Convenors recommendations if the appeal is not from a decision of the Minister.\textsuperscript{38}
\end{itemize}

\textsuperscript{36} Ibid s 106(2)(a).
\textsuperscript{37} Ibid ss 106(2)(b), 109(3).
\textsuperscript{38} Ibid s 109(3)(b).
4. Criticisms of the Appeal Provision in the Environmental Protection Act

The inadequacy of Western Australia’s right to appeal decisions under the EP Act has a long history of criticism.\textsuperscript{39} This section will examine these criticisms and their implications for addressing climate change.

Most recently, Declan Doherty outlined the need for reforming Part VII appeal in his article ‘Caesar to Caesar: The Merit of Western Australia’s Environmental Appeal Regime.’\textsuperscript{40} Doherty argues that despite the historical justification for the government retaining decision making sovereignty in relation to large natural resource based projects, reforming the appeal provisions could improve decision making and public confidence in the process without significantly diminishing Government control.\textsuperscript{41} Central to Doherty’s argument is that the Part VII appeal system creates perceived and or potential breaches of natural justice.\textsuperscript{42}

Doherty’s arguments are relevant to this paper as they highlight existing limitations in the appeal process. It is worth elaborating on some of Doherty’s points as they provide a foundation from which this paper will develop the argument for reform in line with the unique challenges and characteristics of climate change.

\textsuperscript{39} Johnston, above n 15; Doherty, above n 24.
\textsuperscript{40} Doherty, above n 24, 110.
\textsuperscript{41} Ibid.
\textsuperscript{42} Ibid 117.
1. *An Appeal from Caesar to Caesar*

The primary criticism that Doherty highlights is with the contradictory roles the Minister plays within the Appeal process. These roles include the Minister determining the composition of the Appeals Committee, even when the appeal is against the Minister’s decision. Also, the Minister is responsible for appointing the members of the EPA as well as determining any appeals on their behalf. Further, the role of Appeals Convenor has historically been a former member of the Department of Environmental Regulation, which also provides information to the Appeals Convenor and EPA when making their decisions in the appeals process.

Most importantly however is the Minister’s role to determine the outcome of the Section 45 process. The key issue being that this often occurs after determining any point of appeal from the EIA process and specifically, the contents of the EPA report. Doherty comments that this has resulted in the appeals determination being perceived as a ‘precursor’ to the final decision.

This point is particularly relevant to this paper’s analysis. Currently measures to address GHG emissions have been attempted by insisting on their inclusion as an environmental consideration in the EPA’s Report to the Minister.

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44 Environmental Protection Act 1986 (WA) s 106(2)(b).
45 Doherty, above n24, 118.
46 As noted above this involves the publication of the EPA’s report and public consultation, after which the Minister meets with relevant decisions making authorities to determine conditions required for the proposal’s implementation.
47 Doherty, above n24, 118.
The conflict arises out of the fact that in determining appeals to the EPA’s report, the Minister is bound to only consider environmental factors, however following the resolution of appeals, the Minister is then also required to participate in the political process and make a decision with consideration of a full spectrum of economic and social factors.

The perceived economic benefits from large projects naturally present and strong incentive for approval and the Minister’s ability to impartially consider solely environmental factors in the EIA appeal process is questionable. Further and significantly, fellow Ministers considering benefits to their portfolios may overrule the consideration of environmental factors by the Environment Minister during the Section 45 process.

An example of this followed the Environment Minister Donna Faragher’s appeal determination of an EPA Report regarding the Gorgon liquefied natural gas project on Barrow Island.\textsuperscript{48} The West Australian Newspaper reported that the cabinet had ‘trampled’ over her in considering appeals based on environmental factors including on the flat-backed turtle.\textsuperscript{49} This led to comments by the World Wildlife Fund that


It is very clear the Environment Minister’s comments [in the Appeal] are a precursor to an approval for the Gorgon Project, which we believe is a substantial threat to one of Western Australia’s most important environmental icons.\(^{50}\)

It is the very nature of Minister’s dual role through this process which Doherty suggests leaves him or her open to criticism that her decision was not made lawfully.\(^{51}\) This is particularly true for challenges made to the EPA’s report to the Minister, per the example above, as it is a requirement of s 45(6) that the proposal to which the report addresses must not be implemented otherwise than in accordance with the decision made on the appeal of the report.\(^{52}\) This has the result of undermining appeals to the EPA report, as the appeal is then decided in accordance with the decisions of the Government.

This feature of the EP Act was described as ‘strange’ by Justice Rowland in the *Coastal Waters Case*\(^{53}\) when he stated

> I have some difficulty in understanding how s 45(5) works in practice when there are differences between Ministers or other decisions making authorities. It appears that, even after the appeal process under s100 is completed and a decision made, the process of resolving differences between Ministers and other decisions making authorities has to be agreed or decided; but insofar as other Ministers or decisions


\(^{51}\) Doherty, above n 24, 119.

\(^{52}\) *Environmental Protection Act 1986 (WA)* s 45(6)(a)(ii).

\(^{53}\) *Coastal Waters Alliance of Western Australia Incorporated v Environmental Protection Authority; Ex parte Coastal Waters Alliance* (1996) 90 LGERA 136.
making authorities are concerned, they will be bound by the decisions of the Minister pursuant to s 45(6)(a).\textsuperscript{54}

The process brings into question the effectiveness of the EIA process in Western Australia to adequately balance competing interests in environmental decision making. As explained above, environmental considerations often conflict with the economic benefits of natural resource projects and in a State dependent on such projects there is an inherent risk that government decision makers fail to adequately consider and mitigate environmental harms.

This problem is exacerbated in the context of climate change. As GHG emissions do not meet the ‘significance’ threshold prescribed by the EIA process\textsuperscript{55}, their weight as an environmental concern to be considered in decision making for new projects and proposals is non-existent. Further, the ability to insist on the inclusion of GHG emissions in the EPA report to the Minister is unlikely to be successful, as the Minister will be required to discard this advice in making the final decision. It is evident how this is a politically undesirable position and unlikely it is to eventuate considering the consultation process with other Ministers in the section 45 process outlined above.

\textsuperscript{54} Ibid 7 per Rowland J.

\textsuperscript{55} Issues surrounding ‘significance’ are addressed under Part IV(D)(i).
2. *Risk of Breach of Natural Justice*

Doherty argues that the second key weakness in Western Australia’s merit review system is the lack of procedural guidance placed on the Appeal Convenor (‘the Convenor’).

Section 107D of the EP Act grants the Convenor the power to manage administrative procedures with relation to appeal.\(^{56}\) Doherty points out that the ‘Administrative Procedures’ page on the Appeal Convenor’s webpage provides little assistance beyond summarising the broad discretion granted under Part VII of the EP Act.\(^{57}\) Further, these procedures ‘have never been gazetted and approved by the Environment Minister as contemplated by s 107D’.\(^{58}\)

Key to Doherty’s criticism is that the manner in which the appeal takes place is often secretive and creates distrust. Behaviour which has led to this criticism includes the rarity of mediations, which are substituted by the Convenor meeting with each party privately and separately, and the Convenor taking advice from the EPA and Department of Environmental Regulation without providing a copy of this advice to parties even upon request.\(^{59}\) Insisting on an approach which relies upon the Convenor’s staff to accurately relay messages from the parties rather

\(^{56}\) *Environmental Protection Act 1986* (WA) s 107D.
\(^{57}\) Doherty, above n 24, 120.
\(^{58}\) Ibid.
\(^{59}\) Urban Development Institute of WA, ‘The Environmental Approvals process – Presentations and Speaking Notes by Debra Goostrey, UDIA WA’, Review of the Environmental Impact Assessment Process in Western Australia; Doherty, above n 24, 120.
than collaboratively meet, Doherty argues, hinders the objective of transparency and leaves the parties uncertain as to how the final decision reached.\textsuperscript{60}

An example of these practices is the Tutunup South Mineral Sands Project, in which a total of nine appeals were raised against the EPA’s Report recommending approval.\textsuperscript{61} The Appeal Convenor’s report for that appeal reflects conduct at issue described above and the following passage reflects this;

\begin{quote}
A representative of the office of the Appeal Convenor held discussions with the proponent and appellants during the investigation. This included a site visit and meetings with \textit{a number of} the appellants in Busselton.' (Emphasis added)\textsuperscript{62}
\end{quote}

This statement suggests that not all parties were involved in the site visit nor if the EPA advice referred to as the ‘investigation’ was made available to all parties, nor if they were given the opportunity to comment on them let alone discuss the recommendations with the EPA themselves. It is clear then how these circumstances can lead to affected parties treating the process with suspicion and criticisms that such a process is a breach of natural justice.\textsuperscript{63}

This process is inadequate as the discretion placed on the Convenor coupled with the fact the Convenor is appointed by the Minister suggests the inclusion of GHG emission in the EPA report are unlikely to be adequately considered.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{60} Ibid.
\item \textsuperscript{61} Appeals Convenor, \textit{Report 1308 Appeals 004-012 of 2009} (May 2009), \textless www.appealsconvenor.wa.gov.au\textgreater .
\item \textsuperscript{62} Ibid p4.
\item \textsuperscript{63} Gary Myers, ‘Meeting Public Expectations – Judicial Review of Environmental Impact Statements in the United States: Lessons for Reform in Western Australia?’ \textit{3(2) Murdoch University Electronic Journal of Law} 18; Doherty, above n 24, 120.
\end{itemize}
\end{footnotesize}
Central to the argument of this paper is that given the limitations of Part VII appeals, the responsibility for conducting appeals should be assigned to an independent court or tribunal. Given the lack of transparency in the current appeals process and the political discomfort with imposing the consideration of GHG emissions in the EIA process, assigning the responsibility of determining merit appeal to a judicial body or tribunal is necessary. This would ensure that decision makers consider the principles of ESD and with it GHG emissions, in the EIA process. It is by facilitating this process that Western Australia can begin to develop a response to climate change within the EIA decisions making process.

3. Judicial Review

Given the lack of transparency and potential for the Part VII process to breach the rules of natural justice, it is reasonable for parties to consider decisions reached through the Section 45 process and Appeal Convenor processes unlawful. Accordingly the next section then will examine the available of judicial review in Western Australia as the natural recourse for challenging the legality of decisions.

Judicial review involves the court assessing if a government decisions was made accordingly to the relevant legislation and common law rules of procedural fairness and natural justice. The court is not however permitted to assess the merit of decisions unless an appellant can demonstrate an inherent bias or

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unreasonableness which infringes on the procedural requirements of the decision making process.\textsuperscript{65} The later of these options is exceptionally difficult to satisfy.\textsuperscript{66}

The EP Act makes it clear that all decisions under Part VII are final and without further appeal.\textsuperscript{67} This means parties seeking administrative relief are required to meet the test established at common law.\textsuperscript{68} This can be brought to the Supreme Court under its inherent jurisdiction to grant prerogative remedies such as injunctions and declarations, however the reliance on common law standards of standing is a significant barrier for public interest litigants.

To establish standing under the common law, it must be shown that the person bringing the action has a ‘special interest’ in the subject matter over and above that enjoyed by the public generally.\textsuperscript{69} This is particularly difficult in the context of environmental law as often the action involves enforcing a public right.\textsuperscript{70}

This is also true for cases brought in the context of climate change. Given the uncertainty that specific emissions from a project will have on the global phenomenon that is climate change, it is difficult for parties to establish a ‘special interest’ above other members of the public as prescribed by the common law.\textsuperscript{71}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{65} Ibid 354.
\item\textsuperscript{66} Ibid.
\item\textsuperscript{67} \textit{Environmental Protection Act 1986} (WA) ss 101(1), 107(2), 109(3).
\item\textsuperscript{69} Ibid; Bannister, above n 63, 352.
\item\textsuperscript{71} Brian Preston, ‘Climate Change in the Courts’ (2010), 36 \textit{Monash University Law Review} 16, 18; Brian Preston, ‘Climate Change Litigation’, (2009) 9 \textit{The Judicial Review} 205, 220.
\end{itemize}
\end{footnotesize}
An example of the West Australian Supreme Courts approach to standing is evidenced in the case of *Ex parte Leeuwin Conservation Group*. In that case Justice Wheeler was required to consider whether an environmental group established some ten years prior to the case and with members whose land was within the close proximity of the proposed subdivision had sufficient standing to oppose the subdivision.

She noted the ‘longstanding difficulty in defining what, if any, standing requirements exist… in defining the relationship… between the particular interest of the applicant for the remedy sought [in judicial review] and the courts discretion to grant it’.

She ultimately denied the Leeuwin group’s application for standing on account of their failure to establish a real interest in the land in question. This was despite the group being formed for the purpose of protecting the environment of which the subdivision would impact, as well as their participation in the environmental consultation process.

The case is potentially distinguishable on account of it being made under the PD Act and the land in question being private land. This would arguably require the group to establish a higher level of interest on account of their interfering with a private right.

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72 *Re Western Australian Planning Commissions; Ex parte Leeuwin Conservation Group* (2002) WASCA 150.  
73 Ibid 21.  
74 *Re Western Australian Planning Commissions; Ex parte Leeuwin conservation Group* (2002) WASCA 150, 22.  
75 Ibid.  
76 *Planning and Development Act 2005* (WA).
The PD Act is however required to promote the sustainable use and development of land, a similar requirement to ESD under the EP Act. SAT decisions with respect to the PD Act will be considered in more detail later in this paper.

It is also possible that the court’s resistance to afford the potential remedy of certiorari as requested in the Leeuwin case is due to its view that judicial review requires a higher degree of administrative error to justify such remedies. This does however support arguments in favour of amending Western Australia’s merit review system, as presently parties are unable to find relief within the provisions of part VII or within the common law of judicial review.

It is also worth mentioning here that the limited approach to standing is not reflected in all other States in Australia. NSW for example has open standing provisions which apply to ‘any person, without exception’. The impact this has had on efforts to regulate GHG emission can be seen in cases such as Gray v Minister for Planning and Australian Conservation Foundation v Latrobe City Council. These cases and their impact on climate change regulation will be discussed in further detail below, however for present purposes it is suffice to say that the availability of judicial review is essential for developing the law.

77 Ibid s 3.
78 Bannister, above n 63, 352.
79 Environmental and Assessment Act 1979 (NSW) s 123.
81 Australian Conservation Foundation v Latrobe City Council (2004) 140 LGERA 100.
4. *Environmental and Climate Change Jurisprudence*

The final criticism this section will consider is the lack of environmental jurisprudence developed in Western Australia as a result of the Appeal Convenor system.

The availability of the Appeal Convenor’s recommendation to the Environment Minister and the Minister’s Decisions are both published on the Appeal Convenor’s Website.\(^\text{82}\) These decisions however are not encompassed by the doctrine of precedent.\(^\text{83}\)

Doherty is critical of the fact these decisions are clearly drafted by the Appeal’s Convenor’s office and seldom refer to previous decisions of either the Minister or other jurisdictions. The integrity of these decisions is then questionable, particularly in the event that the Minister or the Convenor is required to address more complex matters such as climate change.

Decisions of the Land and Environment Court of NSW (‘LEC’) have tackled some of these matters. These precedents are essential to ensuring decision making adequately balances the competing economic, social and environmental factors often at play in environmental disputes, let alone climate change. As the Appeal Convenor process rarely incorporates its own, let alone foreign precedents, the benefit of such decisions in not able to be realised in Western Australia.

\(^{82}\) www.appealsconvenor.wa.gov.au.

\(^{83}\) Doherty, above n 24, 122.
It is acknowledged that tribunals such as the SAT are not bound by precedent either, however the SAT has already built a body of jurisprudence which can assist with determining future matters of a similar nature.\textsuperscript{84} Again, this is an essential feature necessary to a decision making body being equipped to tackle the complexity of climate change. Decisions of both the SAT and LEC will be examined later in this paper in support of this point.

In conclusion the previous part has explained outlined key criticisms in relation to both merit and judicial review in Western Australia. It has also examined how the principles of ESD can be applied to the existing EIA mechanisms to facilitate efforts to consider GHG emissions when approving large projects within the State. It has further been shown how the current appeal arrangements hinder this development. This supports the main argument of the paper, that appeal rights should be assigned to the SAT. The next section then seeks to provide a context for this approach by explain how it fits within existing climate theory and acknowledging it as a part in a bigger directional shift required to meet the challenges of climate change.

\textsuperscript{84} Johnson, above n 15, 23.
IIII. THE CONTEXT OF APPEALS IN AN APPROACH TO CLIMATE CHANGE

Having identified the short comings of the EP Act’s appeal provisions, this part seeks to place the proposed amendments within the scope of the larger climate change picture. This will begin with an examination of current climate change theory and arguments in favour of a ‘bottom up’ approach as an alternative to existing international efforts such as the Kyoto Protocol. The role of public participation will then be examined as a fundamental component of a ‘bottom up’ approach and the role of climate change litigation will be examined as a regulatory approach. This will in turn provide a foundation for the discussion of key developments achieved through this litigation conducted in Part IV.

1. A ‘Bottom Up’ Approach to a Wicked Problem

This section will focus on current approaches to climate law and policy. Important to this discussion is the argument that international efforts have been ineffective due to being top-down approaches to governance.85 This same literature suggests a shift to a ‘bottom up’ approach which will be discussed below. Amending the existing appeal provisions in the EP Act to a court or tribunal is then presented as a ‘bottom up’ approach on account of its focus on lower level decisions making.

1. Defining a ‘Bottom Up’ Approach

A good starting point for defining a bottom up approach is as a contrast with existing international efforts which represent a ‘top down’ approach. Specifically, the Kyoto Protocol has prescribed emission reduction targets for a subset of its parties. The rationale behind this approach is the achievement of a universally inclusive regime which sets legally enforceable reduction targets for Annex I countries, which then integrates with a global carbon emissions target. This encourages nation states to implement domestic measures to reduce emissions and meet international obligations. This trickledown effect illustrates what is meant by a ‘top down’ approach.

Steve Rayner provides the clearest formulation for understanding what is meant by a ‘bottom up’ approach in his paper ’How To Eat An Elephant: A Bottom Up Approach To Climate Policy’. He suggests that the basic proposition of a ‘bottom up’ approach is that ‘climate change policies should be designed and implemented at the lowest feasible level of organisation’. Rayner builds upon criticisms that the Kyoto Protocol should no longer be viewed at the ‘silver bullet’ to dealing with climate change and that other complementary measures should be

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88 Ibid.
89 Ibid.
90 Ibid 617.
focused upon.\textsuperscript{91} These specifically include a focus on adaptation and technological innovation particularly within the global energy sectors.\textsuperscript{92}

Importantly to the argument of this paper, it is acknowledged by Rayner that a bottom up approach does not limit action exclusively at a local level.\textsuperscript{93} Instead Rayner suggests that a more common sense approach be taken and that if something can be done at a lower level, it should be.\textsuperscript{94} This is consistent with the argument of this paper, that Western Australia should be taking steps to enable the regulation of GHG emissions. As the states in Australia are primarily responsible for land use and environment decision making, facilitating the regulation of GHG emissions is arguably a matter of enabling the existing EIA mechanism to fulfil its intended function.

This is also consistent with Rayner’s observation that despite the appeal of an international approach to climate change, close to 80\% of global GHG emissions originate in 20 of the 200 countries involved in the Kyoto Protocol.\textsuperscript{95} Australia is one of these 20, boasting one of the highest per capita release of GHG emissions in the world.\textsuperscript{96} In turn, Western Australia’s engagement with GHG regulation is a feasible ‘bottom up’ approach, which focuses attention where it is needed to assist in a global response to climate change.

\textsuperscript{91} Ibid; See also Gywn Prins and Steve Rayner, \textit{The Wrong Trousers: Radically rethinking Climate Policy} (Joint Discussion Paper, James Martin Institute of Science and Civilization, University of Oxford and the MacKinder Centre for the Study of Long Wave Events, London School of Economics, 15.
\textsuperscript{92} Ibid 619.
\textsuperscript{93} Ibid 617.
\textsuperscript{94} Ibid.
\textsuperscript{95} Ibid.
2. Wicked Problems and Clear Direction on Climate Change

A key message from literature on climate policy is the need for a directional shift akin to ‘managing’ climate change compared to a view of ‘solving’ it. It is argued that enabling the courts to adjudicate climate disputes is part of this directional shift as it will facilitate the ongoing management of climate change.

Key to Rayner’s argument in favour of a ‘bottom up’ approach is a shift in perceptions as how best to ‘deal’ with climate change. Rayner argues that one of the limitations of international efforts as a ‘top down’ approach is a focus on a specific ‘point of arrival’. He argues that whilst it is important to have widely recognised goals for limited atmospheric carbon concentrations, at present it is more important to establish a clear direction.

This notion blends well with the re-emergence of Horst W J Rittel and Melvin M Webber’s ‘wicked’ and ‘tame’ dichotomy. In 1973, Rittel and Webber introduced the concept of a ‘wicked’ problem as one that lack a simplistic planning response. They list several characteristics that readily apply to climate change such as it being difficult to clearly define on account of different stake holders with contrary views of an appropriate response. Wicked problems also have many interdependencies and are often multi-causal without a clear solution.

Gwyn Prins and Steve Rayner apply Rittel and Webers dichotomy to climate change in their seminal work ‘The Wrong Trousers: Radically Rethinking Climate

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97 Rayner, above n 86, 620.
98 Ibid.
Policy’. Central to their argument is the criticism is that previous issues addressed through international treaties, such as nuclear proliferation and sulphur emissions, despite being complex and serious, are regarded as ‘tame’ problems. This term describes a type of problem for which a clear solution has been found. The examples above were able to be resolved as the causes could be identified and it was clear when a solution had been reached and implemented.

By contrast, climate change is a ‘wicked’ problem. This is owing to the difficulty in agreeing on a desired outcome or solution, demonstrated by the failure in reaching a global agreement on the extent and causes of climate change or its associated issues. The difficulty then with tackling climate change is that it is one part of a complex set of conditions effecting humanity. These include it’s inter jurisdictional nature and its required engagement with both state and non-state parties, none of which have the authority to implement a single solution.

These circumstances have led to the suggestion that, as a wicked problem, climate change must be coped with and managed, not fixed.

This is also the take home message from Mike Hulme’s book ‘Why We Disagree about Climate Change’. Hulme scrutinizes the belief that the United Nations

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101 Rittel and Webber, above n 98, 167.
102 Ibid.
103 Ibid; Prins and Rayner, above n 98.
104 Prins and Rayner, above n 99, 16.
106 Ibid.
Framework Convention on Climate Change and the Kyoto Protocol are the only ways of approaching climate change or that it is even the most appropriate way.

This leads onto his main argument that climate change is not a ‘discrete problem’ waiting for ‘a solution’ but rather it requires an internalisation of how climate change reflects society’s values and beliefs. Hulme’s argument aligns with the position of this paper, that any meaningful response to climate change requires a reanalysis and acknowledgment of existing criticisms of Western Australia’s approach to environmental governance.

In conclusion, this paper does not advocate amending appeal rights as a sole solution to climate change. Rather, providing appeal rights acknowledges the complexity of the climate change problem. The courts are then are able to function as part of the directional shift suggested by international literature, and enable the effective ‘management ‘of climate change from the lowest levels of decision making. This is consistent with a ‘bottom up approach’ as suggested by Rayner and Prins, and as one of many steps required for a meaningful response to climate change.
2. Public Participation

This section will explain how public participation, particularly in the EIA process, leads to increased scrutiny on decision makers and the importance of this in developing a response to climate change. The nexus between public participation and the right to appeal will then be explored and it will be explained how this process is a ‘bottom up approach’ to climate change.

1. The importance of Public Participation

As noted above, the EPA describes the EIA process as

A predictive tool that is systematically applied at the early planning and design stages of development proposals so that government and community can form a view about a proposal’s environmental acceptability and what conditions, if any, should be applied to control potential risks and impacts.\(^{107}\)

The reference to community infers a participatory role by the public which enhances environmental outcomes through consultation with affected parties.\(^ {108}\) Such a process is indicative of a ‘bottom up’ approach and essential to a meaningful approach to climate change.

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\(^{107}\) Environmental Protection Authority Western Australia, above n 1.

Adrian Finanzio discusses the importance of public participation in his article ‘Public Participation, Transparency and Accountability – Essential Ingredients for Good Decision Making’. ¹⁰⁹ Finanzio argues that for decisions to be ‘good’, they must enjoy the confidence of the people on which they impact. He states that it is through the process of public participation that members of the community can raise their concerns and have them considered in the decision making process. ¹¹⁰

Relevant to the argument of this paper is Finanzio’s argument that it is the expectation of scrutiny by the public that necessarily raises the standard of government oversight of projects and proposals.¹¹¹ New South Wales’s procedural requirement for GHG emissions to be considered in the EIA process serves as a case in point. This requirement only came to be through public interest litigation, namely *Gray v Minister for Planning* (‘Gray’).¹¹² This case will be discussed in further detail below, however at point here is the increased scrutiny imposed on the government as a result of this litigation. Following *Gray*, it is now a mandatory requirement for projects with substantial GHG emissions to include these emissions in information provided to the Minister when making the final decision.

This is exactly the kind of regulatory development which this paper advocates is possible through public participation, specifically by allowing the right to appeal decisions made in the EIA process. Without this scrutiny there is an unfortunate

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¹⁰⁹ Finanzio, above n 107.
¹¹⁰ Ibid 114.
¹¹¹ Ibid.
tendency for economic development to weigh more heavily in the mind of decision makers due to their easily identifiable benefits.

Jenny Steele discusses the failure of immediate human interests to fully encapsulate environmental impacts in her article ‘Participation and Deliberation in Environmental Law’.\textsuperscript{113} According to Steele the focus on ‘interests’ in processes such as EIA results in ‘an approach which gives priority to concrete interests’ such as commercial gain and employment.\textsuperscript{114} This is especially true when these concrete interests are contrast with percievably remote arguments of environmental risk.\textsuperscript{115} She argues that it is the process of public participation which can result in a broader scope of considerations in the decision making process.\textsuperscript{116}

Due to the ‘remoteness’ of risk presented by climate change, it is then essential that public participation is able to highlight this risk, particularly in the context of large scale natural resource exploitation which presents the perception of short-term economic benefits.

2. Public Participation and the Right to Appeal

This section will highlight the nexus between public participation and the right to appeal. The right to appeal as an important feature of public participation is discussed by Madeleine Figg is her piece ‘Protecting Third Part Rights to Appeal,

\textsuperscript{114} Ibid 420.
\textsuperscript{115} Ibid 423.
\textsuperscript{116} Ibid.
Protecting the Environment’. 117 Similar to the arguments of Finanzio, Figg addresses the detrimental impact of ‘streamlining’ the environmental approvals process by limiting the right of third party appeal.

Importantly to the argument of this paper is Figg’s empirical evidence which reflects the success of third party appeals in the Tasmanian Resource Management and Planning Appeal Tribunal (RMPAT). Success in this context refers to cases which resulted in the overturning or approval of permits with additional conditions. 118 Accordingly to this data 76% of appeals heard by the tribunal were considered successful. 119 Figg comments that ‘such a high figure is suggestive of the key role that the third party appeal process occupies in bringing unmeritorious decision to the attention of an independent decision making body such as the RMPAT.

Further, Figg’s analysis identifies the distinction between appeals brought in public and private interest. She notes that despite both enjoying equal rate of success, appeals in the public interest more often resulted in the variance of conditions compared to the permit being overturned. 120 These findings also support Finanzio’s argument that public participation increases scrutiny on decisions makers and results in better environmental outcomes. It is also worth noting that for proponents and Government, additional conditions are a desirable outcome when compared with a permit being over turned. This suggests a level of

118 Ibid 220.
119 Ibid.
120 Ibid 221.
compromise is being reached between community interests and development, as conveyed by the EIA mission statement at the beginning of this section.

The importance of public participation in enhancing government decision making is essential in the context of climate change. Due to the remote characteristics of its risks, climate change is not a matter considered in the approval of projects despite their potential contribution to GHG emissions. The right to appeal in Western Australia would ensure that decisions making around climate change benefits from the increased scrutiny and lead to 'bottom up' developments such as the consideration of GHG emissions in the EIA process.
3. The Role of Climate Change Litigation

The following section introduces the phenomenon of climate change litigation and its’ complimentary role in the regulation of GHG emissions. This discussion will also move through the notion of climate change litigation as a bottom up approach and outline its importance in encouraging judicial interpretation of existing environmental legislation in line with ESD principles.

1. An Introduction to Climate Change Litigation

Climate Change litigation is a term used to describe a broad range of matters each with varying foci related to climate change. This litigation has been particularly prominent in Australia and the U.S, a consequence commentators such as Jacqueline Peel, Hari Osofsky and Brian Preston attribute to both nations having significant coal industries and slow responses to both domestic and international climate change efforts.¹²¹

This litigation has sparked a significant body of academic literature seeking to highlight common themes and provide a scope of which to determine its successes and failures to address climate change.¹²² Peel and Osofsky’s article ’The Role of


Litigation in Multilevel Climate Change Governance\textsuperscript{123} provides understanding of the ‘ways in which litigation serves as regulation, mandates regulation and fosters regulation – as well as its limits and helps to provide a more complete view of how litigation has, is and could help to produce more effective approaches to the regulation of GHG emissions.\textsuperscript{124}

Their article is relevant as it provides not only a definition for what constitutes climate change litigation, but also presents litigation as ‘one part of the regulatory puzzle’.\textsuperscript{125} It is argued by Peel and Osofsky that regulatory litigation will be necessary regardless of the success of international efforts such as the Kyoto Protocol. This is due to the need to fill what they describe as ‘regulatory gaps’ which exist due to the jurisdictional complexities of climate change.\textsuperscript{126} Litigation is then necessary to fill these gaps and ensure regulatory efforts are both consistent and equitable.\textsuperscript{127}

This is consistent with the view of this paper, that providing adequate avenues for litigation is an essential complimentary measure in efforts to address climate change. Indeed to suggest any one ‘solution’ would be inconsistent with the examination undertaken in the previous sections.

\textsuperscript{123} Osofsky and Peel, above n 121.
\textsuperscript{124} Osofsky and Peel, above n 121; Brian J Preston ‘The Influence of Climate Change Litigation on Government and the Private Sector’ (2011) 2(4) Climate Law 485.
\textsuperscript{125} Osofsky and Peel, above n 121, 315.
\textsuperscript{126} Ibid.
\textsuperscript{127} Ibid 316.
2. *Defining the Scope of Climate Change Litigation*

Climate change litigation is difficult to define due to its interaction with various jurisdictions and areas of substantive law. For the purposes of this paper a broad view is taken in that climate change is not required to be the central focal point of the litigation.

This is important in the context of EIA as climate change is not always the sole focus of the process. It is rather one consideration which this paper argues could be included in the decision making process as consequence of providing adequate merit review and an insistence of ESD principles in decisions making.

The following figure then provides a visual aid to assist in understanding where cases addressing GHG regulation in EIA would fit within spectrum of climate change litigation.
3. **Litigation as a Bottom Up Approach**

Litigation provides an opportunity for interaction between the community and all levels of decision making.\(^{129}\) In this way, enabling the right to review would facilitate the climate change conversation with local and state government as well as the general public and relevant organisations.

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\(^{128}\) Ibid 305.

Osofsky argues that both successful and unsuccessful cases dealing with climate change have the benefit of putting both legal and moral pressure on a wide range on individuals and entities to act.\textsuperscript{130}

Litigation can also be viewed as a form of public participation. The ability to challenge decisions before an independent body is widely recognised as having beneficial impacts on the decisions making process.\textsuperscript{131} These include increasing scrutiny and transparency so as to ensure decisions made enjoy the confidence of the people on which they impact.\textsuperscript{132} By enabling this engagement with the public, litigation is then facilitating a bottom up approach, consistent with this focus of this Part.

4. The Role of Statutory Interpretation in Climate Change Litigation

Litigation is generally viewed as a forum for enforcement and interpretation of the law rather than a potential site of regulatory development. It has however been argued that in the courts can approach litigation with a view to develop the law.\textsuperscript{133} The following section will examine this notion and prepare a foundation for the following Part which examines the relevant case law.

\begin{flushright}
\textsuperscript{130} Ibid 6.
\textsuperscript{132} Finanzio, above n 107, 12.
\end{flushright}
Peel and Osofsky acknowledge the limited pathways for courts to impose direct regulatory measures as required by the doctrine of separation of powers.\textsuperscript{134} It is worth briefly commenting here on the boundaries imposed by the doctrine and the implication for the courts as a vessel for regulatory change.

This is the focus of Justice Brian Preston in his article ‘Leadership by the courts in achieving sustainability’.\textsuperscript{135} Preston argues that the courts should play an active role in developing the law as the three branches of government – the legislature, executive and judiciary, are all partners in the goal of achieving sustainable development.\textsuperscript{136}

Preston also argues that ‘the separation of powers is not pure in that, in addition to its primary function, each branch of government can perform some functions that belong to other branches, provided they are intimately related to the branch’s primary function’.\textsuperscript{137}

This supports the argument that in interpreting legislation, the court should regard the legislation’s objectives and the ESD principles therein. As Preston points out, the process of statutory interpretation does not then infringe the doctrine of separation of powers and is consistent with the judiciary’s role in interpreting the law.\textsuperscript{138}

\textsuperscript{134} Osofsky and Peel, above n 121, 134.
\textsuperscript{135} Preston, above n 134.
\textsuperscript{136} Ibid.
\textsuperscript{137} Ibid 37.
\textsuperscript{138} Ibid 39.
This is consistent with the argument of Peel and Osofsky, that statutory interpretation provides a promising avenue by which the courts can reinterpret existing pollution control and environmental statues to encompass climate changing emissions.\textsuperscript{139} It is by this process that the courts are able to require the consideration of ESD principles in response climate change concerns raised in the EIA process.

These points are central to the argument of this paper as they provide authority to the notion that the judiciary can apply the principles of ESD to existing environmental legislation so as to encapsulate issues related to climate change. It is by this process that providing a right to merit review for EP Act decisions, would enable regulatory measures to be developed in Western Australia and the ensure decisions making is done so with consideration of legal developments discussed in the following Part.

\textsuperscript{139} Osofsky and Peel, above n 121, 321.
IV. THE FRUIT OF LITIGATION: AN EXAMINATION OF LEGAL DEVELOPMENTS THROUGH CLIMATE CHANGE LITIGATION

The following Part will examine cases that highlight developments as a result of climate change litigation. This will be done in four sections.

The first will deal specifically with the incorporation of ESD principles into Australian jurisprudence. The case of *Telstra v Hornby Shire Council*[^140] is important as it was the first Australian case to examine the ESD principles in detail and provided a signal to decision makers that they are under a statutory obligation to consider them. Following this, the *Taralga Wind farm*[^141] case will be examined as an example of ESD principles being applied within the context of climate change.

The second section will explore two key examples of the re-interpretation of existing environmental legislation resulting in a regulatory impact on GHG emissions. The first of these cases is the Australian decision of *Gray v Minister for Planning*.[^142] This examination will specifically focus on Justice Pain’s implementation of ESD principles and the resulting requirement for the consideration of GHG emissions in EIA. The case of *Massachusetts v Environmental Protection Agency*[^143] will then be examined as the U.S case serves as the most significant example of the court imposing the regulation of GHG emissions as pollutants. These cases are important as they affirm the role of the

[^140]: Telstra Corporation Limited v Hornsby Shire Council [2006] NSWLEC 133.
[^141]: Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd [2007] NSWLEC 59.
[^142]: Gray v Minister for Planning (2006) 152 LGERA 258, 255.
court in interpreting existing environmental statutes to incorporate climate change considerations.

The Third section will outline the impact of climate change litigation on matters of causation and indirect or cumulative impacts. These topics are important as they have historically been sticking points for climate change debate. The court’s approach to these issues is then significance as they demonstrate the law dealing with these complex problems.

The final of these sections will move closer to home and examine decisions of the SAT with relation to the Planning and Development Act (2005). Specifically, it will be explored how the SAT has implemented environmental consideration into the planning decision making process. These examples are relevant as the process of EIA is similar with respect to planning and environmental decisions making. The consideration of environmental principles, specifically ESD, then evidences the importance of the SAT in developing these principles and applying them in Western Australian decisions making. These points are important as the recommendations in Part V will advocate in favour of assigning responsibility of appeal to the SAT.

1. Developing the Principles of Ecologically Sustainable Development

One of the key contributions of climate change litigation is developing the principles of ESD.144 ESD has animated much of Australia’s environmental law

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144 Tim Bonyhady and Peter Christoff, ‘The New Australian Climate Law’ in Tim Bonyhady and Peter Christoff (eds), Climate Law in Australia (Federation Press, 2007) 19, 20.
since its conception in the early 1990s and forms the objectives of most environmental statues in the country.\textsuperscript{145} They are an essential component to climate change law as they allow closer criticism of decision making and provide a mechanism for the courts to access the merit of decisions. Their development through climate change litigation then has the added benefit of contributing to the broader field of environmental and planning jurisprudence.

The two principles that have found the most traction in Australia are the Precautionary Principle and Intergenerational Equity. Their application in the following cases has been fundamental to their development and accordingly has been described as putting the meat on the bones of ESD.\textsuperscript{146}

1. \textit{Telstra v Hornsby Shire Council}

A key Australian case that considers ESD is \textit{Telstra Corporation Limited v Hornsby Shire Council}.\textsuperscript{147} The case was heard in the New South Wales Land and Environment Court under Justice Preston. The dispute was a result of the local community of Cheltemham in North-Western Sydney, opposing the construction of telecommunications infrastructure upon fears it would cause adverse health effects. The case was ultimately decided in favour of \textit{Telstra}, however Justice Preston addressed the principles of ESD and specifically the precautionary principle in detail.

\textsuperscript{145} Ibid.
\textsuperscript{146} Brian J Preston ‘The Influence of Climate Change Litigation on Government and the Private Sector’ (2011) 2(4) \textit{Climate Law} 485.
\textsuperscript{147} [2006] NSWLEC 133.
His honour summarised the precautionary principal by reference to the NSW Protection of the Environment Administration Act\(^{148}\) as follows:

If there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as reasoning for postponing measures to prevent environmental degradation. In the application of the principle… decisions should be guided by:

(i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and

(ii) an assessment of risk-weighted consequence or various options.

The most significant points of Justice Preston's decision are;

1. The precautionary principle shifts the burden of proof. ‘a decision maker must assume the threat of serious or irreversible environmental damage is a reality [and] the burden of showing this threat is negligible reverts to the proponent…’\(^{149}\)

2. That the precautionary principle invokes preventative action:’ the principle permits the taking of preventative measures without having to wait until the reality and seriousness of the threat become fully known.’

3. The precautionary measures appropriate will depend on the combined effect of the proposal – ‘The more significant and uncertain the threat, the greater… the precaution required’\(^{150}\)


\(^{149}\) Telstra Corporation Limited v Hornsby Shire Council [2006] NSWLEC 133, 113.

\(^{150}\) Ibid 182.
The decision of Justice Preston in *Telstra* not only represents a comprehensive analysis of the precautionary principle in the judicial context, but it also provides clear guidance to decisions makers as to when the principle applies. The case also highlights the importance of the principles of ESD, particularly when decision makers are under a statutory obligation to consider them. Accordingly, the principles of ESD were recognised as more than a merely aspirational objective and given substantive weight by which to scrutinise decisions.\textsuperscript{151}

2. The Taralga Case

The *Taralga* decision extends the implications of intergenerational equity with relation to GHG emission intensive projects, but does so by considering the positive intergenerational impacts of renewable energy projects that reduce emissions.\textsuperscript{152}

The case concerned the opposition of a wind farm comprising of 62 turbines on grounds of their potential impacts on amenity and environment including aesthetic impacts, noise emissions and impact on flora and fauna.\textsuperscript{153} The objectors brought a merits appeal before the NSWLEC and included in the dispute was the relevance of ESD principles to the decision making process.

Justice Preston noted in his decision that consideration was required of the geographically narrower concerns raised by the objectors, compared to the benefit

\begin{footnotes}
\item[151] Preston, above n 146, 492.
\item[152] Peel, above n 17, 954.
\item[153] *Taralga Landscape Guardians Inc v Minister for Planning* (2007) 161 LGERA 1, 15-17 (Preston CJ).
\end{footnotes}
of establishing renewable energy on ameliorating climate change.\textsuperscript{154} His honour cited the ‘greater public good’ and the principle of intergenerational equity in finding in favour of the project,\textsuperscript{155} noting that the principle’s impact on energy production should involve a requirement

as far a practicable, to increasingly substitute energy sources that result in less greenhouse gas emissions for energy sources that result in more greenhouse gas emissions, thereby reducing the cumulative and long term effects caused by anthropogenic climate change. In this the present generation reduces the adverse consequences for future generations.\textsuperscript{156}

The case provides an important signal that the principle of intergenerational equity will require broader long-term thinking when considering proposals which are in the ‘public interest’. The case is also important as it demonstrates that the principles of ESD being applied to further development and balance competing environmental interests, that is the impact of the construction versus the reduction in GHG emissions.

\textit{2. Regulation of Greenhouse Gas Emissions through the Re-interpretation of Environmental Legislation}

The following cases highlight key regulatory developments as a result of the court re-interpreting existing environmental legislation. This is the same process by which the EP Act could function to regulate GHG emissions. These cases then

\textsuperscript{154} Peel, above n 17, 957.
\textsuperscript{155} Taralga Landscape Guardians Inc v Minister for Planning (2007) 161 LGERA 1, 12 per Preston CJ.
\textsuperscript{156} Ibid.
serve as examples in support of providing adequate right to review in Western Australia.

1. *Gray v the Minister for Planning*

The Australian case most attributed for developing ESD principles in a climate change context is the *Gray* decision.\(^{157}\) The case challenged the assessment of the Anvil Hill project, including a proposed coalmine, and the failure to consider the emissions associated with the burning of the coal produced by the mine.

Although being an instance of judicial review, the case highlights the insistence of ESD principles in relation to projects with significant GHG emission. It also serves as an example of the court imposing a procedural requirement for GHG emissions to be included in the process of EIA for major extraction projects.

It is in the EPA’s report to the Minster that the court insisted upon the consideration of GHG emissions which, as noted above, is an entirely informative document that and holds no bearing on the final decision. This did not lead to the refusal of the Anvil Hill project nor other coal mines in the region. What is did do however was bring attention to the issue and force an acknowledgment by decision maker that these emissions are of environmental concern.

Due to the process of appeal in Western Australia, an acknowledgment of this sort is unlikely without assistance. This is due to the Minister being responsible for determining appeals whilst also having engaged in the section 45 process. Significant criticism has been levelled at this process, describing the appeal

determination as a ‘precursor’ to a decision made in accordance with the interests of other decision making authorities in the section 45 process.

The other key development of the Anvill Hill case was the development of ESD. Pain J’s judgment contains a detailed consideration of the role both intergenerational equity and the precautionary principal play in structuring the process of EIA. It was through these principles that her Honour insisted GHG emissions were within the scope of the legislation.

Her Honour found that ESD was relevant to her review by way of considering how they applied to the objectives of the relevant State legislation, which encouraged ESD.158 It was found that intergenerational equity required that an assessment consider the cumulative impacts of the project on the environment and this included the emissions produced from the ‘use’ of the coal. Accordingly, the indirect impacts of the mine were required to be considered in the assessment of the project.

In considering the impact of the precautionary principal, her honour highlighted the fact that the purpose of EIA is to provide the decision maker with provisional information in order to assess potential impacts of the proposal. It is then appropriate that the assessment includes information to enable consideration of any scientific uncertainties regarding serious or irreversible environmental harm that has been identified.159

158 Ibid at 291.
159 Ibid 295-6.
For adequate consideration of both principles her honour concluded that indirect emissions are the kind of knowledge required for any decision involving large releases of GHG emissions due and their impacts being ‘cumulative, on going and long term’.\textsuperscript{160} Only with this information is the Minister then able to determine adequate measures to be considered to prevent environmental degradation as a result of the project. Accordingly, a failure to include this information is a failure to consider the precautionary principal.\textsuperscript{161}

Further, The Anvil Hill decision is also relevant to the argument presented in this paper in favour removing restrictions related to standing in judicial review. In that decision, the applicant was a 28 year old male named Peter Gray who sought judicial review of the decision to approve the mine. Mr Gray’s only ‘special interest’ was on account of his being a member of the Rising Tide organisation who’s purpose is to address matters related to climate change.

If Mr Gray had raised such a case here in Western Australia, it is reasonable to assume he, like the example of the Lewin society discussed above,\textsuperscript{162} would have had difficulty satisfying the common law standards of ‘special interest’. In New South Wales s 123 of the \textit{Environmental Planning and Assessment Act}\textsuperscript{163} grants standing to ‘any person, without exception’. The case of Anvil highlights the importance of litigation and removing standing limitations which would hinder its operation.

\textsuperscript{160} Ibid 296.
\textsuperscript{161} Ibid 296-7.
\textsuperscript{162} Judicial review was discussed on page 25.
\textsuperscript{163} \textit{Environmental Planning and Assessment Act 1979} (NSW) s 123.
2. *Massachusetts v Environmental Protection Agency*

The case of *Massachusetts v Environmental Protection Agency* (‘*Massachusetts’*)\(^{164}\) was a judicial review involving the State of Massachusetts together with 11 other states, three cities, two United States territories and several environmental groups who sought review of the denial by the Environmental Protection Agency (‘EP Agency’) of a petition to regulate GHG emissions under the *Clean Air Act*. The petition related to the discretion of the EP Agency to regulate air pollution reasonably anticipated to endanger public health or welfare.

The EP Agency denied that GHG were air pollutants and also raised procedural challenges once the litigation commenced. This included challenging the petitioners standing.

With relation to Standing, the US Supreme Court held that the State of Massachusetts should succeed. The court applied a three-part test requiring that:

1) The plaintiff has suffered ‘an injury in fact’ which is both concrete and particularised, and actual and imminent, as opposed to conjectural or hypothetical.

2) The injury is fairly traceable to the challenged action of the defendant.

3) There is a likelihood that the injury can be redressed by a favourable decision, as opposed to this being merely speculation.

The court accepted these elements were met particularly as the State was the ‘owner’ of its coastal land from which it would receive injury through sea level rise as a result of anthropogenic climate change.\textsuperscript{165}

The court’s approach to causation is also noteworthy. Whilst the EP Agency did not contest the link between GHG emissions and climate change, it did argue that the harm as a result of the vehicles was so insignificant to the plaintiff that it could not be challenged in court.\textsuperscript{166} The court did not accept this, stating

it’s argument rests on the erroneous assumption that a small, incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action. Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop.\textsuperscript{167}

Finally, with relation to the question of interpreting if GHG emissions were air pollutants per the \textit{Clean Air Act}, the court affirmed that they were. This had the result of requiring the EP Agency to exercise their discretion as to if the emissions were reasonably anticipated to endanger public health or welfare and if so to regulate them accordingly.

One of key developments to come from \textit{Massachusetts} was the Supreme Court’s approach to Standing. The case has set a precedent in the U.S for standing requirement in common law actions. This is distinguishable from the common law

\textsuperscript{165} \textit{Massachusetts v Environmental Protection Agency} 549 US 497, 519 S.Ct. (2007).
\textsuperscript{166} Ibid.
\textsuperscript{167} Ibid.
‘special interest’ test applied in Western Australia, however the courts accepting of the test in *Massachusetts* could be presented as persuasive in a climate change context.

Both these cases are also examples of executive action on climate change spurred through litigation. Following the case of *Gray*, the NSW government introduced a State Environmental Planning Policy to ensure that indirect emissions from natural resource exploitation projects were considered in the decision making process.\(^{168}\) Similarly, the EP Authority in the U.S has published a finding acknowledging GHG emissions as endangering ‘the public health and welfare of current and future generations’.\(^{169}\) Note the relation this has to the principle of intergenerational equity. As of 2007, GHG emissions from stationary sources have also undergone a permit based regulatory process.\(^{170}\)

These cases highlight the role of the court in re-interpreting existing environmental legislation to encompass the effects of climate change. They are strong examples of how regulatory action can be effected in Western Australia under the EP Act and the important role litigation could play in this process.

\(^{168}\) *State Environmental Planning Policy* (Mining, Petroleum Production and Extractive Industries) 2007 (NSW), S 14.


3. Developing the Climate Change Debate

This section will outline how climate change litigation has developed the law with relation to causation and cumulative impacts. These developments then evidence the importance of litigation as a response to climate change.

1. Considering Causation

Causation has been a significant sticking point for challenging decisions to approve GHG intensive projects such as coalmines. The reason for this is that whilst the development of a project may produce substantial GHG emissions, these emissions are not ‘significant’ in respect to global emissions. The ability to establish a causal relationship between greenhouse gas emissions, climate change and environmental harm has been essential to the question of significance as required by EIA.\footnote{171}{See discussion of significance at page 10.}

The courts have been prepared to rule in favour of considering the potential impacts of climate change in two cases litigated in Australia. Firstly, in an early case involving the extension of the life of the coal-fired Hazelwood power station, the VCAT was required to consider whether the emissions the plant would generate were relevant to amending a planning scheme necessary to authorise the proposal.\footnote{172}{Peel, above n 17, 958.} It was found that such matters were relevant and that the approval would
Make it more probable that the Hazelwood Power Station will continue to operate beyond 2009; which in turn, may make it more likely that the atmosphere will receive greater greenhouse gas emissions than would otherwise be the case; which may be an environmental effect of significance.\textsuperscript{173}

\textit{Gray} is another example. Despite the proposal producing an estimated 10.5 million tonnes of Coal annually,\textsuperscript{174} with greenhouse gas emissions averaging 12 414 387 tonnes of CO\textsubscript{2} equivalent per annum, it was argued that these emissions would have a significant local impact.\textsuperscript{175}

To the contrary it was argued that as this only consisted of 0.04 per cent of global emissions, the impact of the project was not significant. Pain J of the NSWLEC accepted the applicant’s argument that GHG emissions from the burning of coal should be considered in the proponent’s environmental assessment due to their potential contribution to climate change.\textsuperscript{176} Importantly to the debate of causation, her honour found that despite there being many contributing factors globally to climate change, the contribution from a single large source such as the Anvil Hill Project should not be ignored.\textsuperscript{177} Consequently her honour held that

\begin{quote}
there is a sufficient proximate link between the mining of a very substantial reserve of thermal coal in NSW, the only purpose of which is the use as fuel in power stations, and the emissions of GHG which contribute to climate change/global warming, which is impacting now and likely to continue to do so on the Australian
\end{quote}

\textsuperscript{173} \textit{Australian Conservation Foundation v Latrobe City Council} (2004) 140 LGERA 100, 110.
\textsuperscript{174} David Farrier, ‘The Limits of Judicial Review: Anvil Hill in the Land and Environment Court’ in Tim Bonyhady and Peter Christoff (eds), Climate Law in Australia (2007) 189.
\textsuperscript{175} \textit{Gray v Minister for Planning} (2006) 152 LGERA 258, 255.
\textsuperscript{176} Ibid 260.
\textsuperscript{177} Ibid 287.
and consequently NSW environment, to require assessment of that GHG contribution of the coal when burnt in an environmental assessment…\textsuperscript{178}

The approach taken to the issue of causation in both these cases reflects a broader, global trend of climate change litigation.\textsuperscript{179} As noted above in the case of \textit{Massachusetts v Environmental Protection Authority}, the U.S Supreme Court accepted that a sufficient causal link between greenhouse emissions from cars in the US and global climate change existed that the Environmental Protection Agency was required to regulate these emissions.\textsuperscript{180} The majority held that the six percent contribution of the transport sector to worldwide emissions was a meaningful contribution to greenhouse gas concentrations and should be addressed regardless of what happens elsewhere.\textsuperscript{181}

Acceptance of a causal link between emissions in Australia and climate change is however far from certain. Many judgments have accepted and applied narrow approaches to causation in line with reasoning of \textit{de minimus}; that the law requires more than trivial or a significant contributing factor.

This approach is reflected in the reasoning of Dowsett J in the \textit{Wildlife Whitsunday case} when approaching the review of two coal-mines in the Bowen Basin.\textsuperscript{182} It was found that under the Federal \textit{Environmental Protection and

\textsuperscript{178} Ibid 288.
\textsuperscript{179} Peel, above n17, 955.
\textsuperscript{181} Ibid 526 (Stevens J for Stevens Kennedy, Souter, Ginsburg and Breyer JJ).
**Biological Conservation Act**\(^{183}\) (‘EPBC Act’), that the mines were not likely to have a significant impact on areas of ‘National Significance’. With respect to causation, his honour stated

I have proceeded upon the basis that the greenhouse gas emissions consequent upon the burning of coal mined in one of these projects might arguably cause in impact upon a protected matter, which impact could be said to be an impact of the proposed action . . . however, I am far from satisfied that the burning of coal at some unidentified place in the world, the production of greenhouse gases from such combustion, its contribution towards global warming and the impact of global warming upon a protected matter, can be so described.\(^{184}\)

It should be noted that under the EPBC, the Minister is required to consider the impact of the proposal not on the ‘environment’ generally, as is required by State Acts, but rather the impact on specific matters of ‘National Significance’.\(^{185}\) In this case the area was the Great Barrier Reef. This extra link in the reasoning process requires that GHG emissions impact specifically on the Great Barrier Reef, a step Justice Dowsett was not prepared to accept. This does however make the decision arguably distinguishable in its application to questions of causation.

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\(^{183}\) *Environment Protection and Biodiversity Conservation Act 1999* (Cth).


\(^{185}\) *Environment Protection and Biodiversity Conservation Act 1999* (Cth) pt 3 div 1.
2. **Accounting for Indirect and Cumulative Impacts**

There have also been developments in extending the scope of EIA to encompass the downstream emissions of proposals.\(^{186}\) The *Hazlewood case* is one example where the court was prepared to find that these downstream effects were required to be considered due to their impact on climate change.\(^{187}\) In that case Justice Morris reasoned that submissions on climate change grounds should not be precluded due to their being an indirect impact. His Honour proposed the test for assessing the environmental impacts of the proposed scheme should be

> Whether the effect may flow from the approval of the amendment; and if not, whether, having regard to the probability of the effect and the consequences of the effect (if it occurs), the effect is significant in the context of the amendment.\(^{188}\)

It is unclear if the EIA process encompasses a consideration of cumulative impacts.\(^{189}\) Through its very nature attempts to consider climate change in the EIA process requires a holistic approach. Through this we can see the law developing as a result of climate change litigation and the arguably beneficial outcome this has on environmental jurisprudence generally.

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\(^{189}\) Peel, above n 17, 961.
4. *Closer to Home: Examining Planning Decisions of the State*

*Administrative Tribunal*

This section will examine the SAT’s implementation of environmental considerations with relation to the PD Act. In Preston’s article ‘Climate Change in the Courts’ he makes the point that an analysis of ESD principles in case law provides an insight as to how matters related to climate change may be addressed in specific jurisdictions.\(^{190}\) This analysis of SAT decisions proceeds on a similar notion.

By examining the consideration of environmental considerations in planning disputes, we are able see how the substantive law of planning has been developed by the SAT’s decisions. This draws attention to the important precedents created by the SAT which, it is argued, demonstrate it’s ability to develop climate change jurisprudence should the SAT be assigned responsibility of determining appeals under the EP Act.

1. *An Introduction to the Planning and Development Act*

The functions of planning and environmental protection are interrelated yet intrinsically different.\(^{191}\) The essence of planning law is determining the best use of natural resources in accordance with the objectives, the criteria and the methodology of decision making prescribed by the legislation.\(^{192}\) Environmental protection on the other hand aim is to reduce or regulate the risk of environmental


degradation that are perceived to be the consequence of specifically identifiable operational activities.¹⁹³

Upon enactment, the PD Act continued the statutory planning system that had existed in Western Australia since the enactment of the *Town Planning and Development Act 1928* (WA). One important change however was the inclusion of a statement of purpose in section 3, which requires to ‘sustainable use and development of land in the State’.¹⁹⁴ Section 3(1)(c) has been important in influencing State Planning Policies and its inclusion suggests that environmental considerations, as well as planning considerations, were to be considered in making decisions under the Act.

It will be noted that this objective is similar to the principles of ESD found in the objectives of the EP Act.¹⁹⁵ The SAT’s consideration of this objective is then important as it illustrates the SAT developing the law in a manner similar to the development of ESD with respect to environmental protection legislation.

¹⁹³ Ibid 273.
¹⁹⁴ *Planning and Development Act 2005* (WA), s 3(1)(c).
¹⁹⁵ *Environmental Protection Act 1986* (WA) s 4.
2. *The Nexus Between Planning and Environmental Principles*

The role of environmental considerations in the PD Act is important for two reasons. Firstly, it evidences the SAT developing the law to consider environmental factors, a process not originally contemplated by the Act. Secondly, the inclusion of environmental considerations demonstrates an ability of the SAT to extend these environmental considerations further to matters surrounding climate change.

Doug Fisher explores the possibility of existing state planning and environmental legislation to address climate change is his article ‘The Statutory Relevance of Greenhouse Gas Emissions in Environmental Regulation.’¹⁹⁶ Fisher argues that in the absence of specific climate change legislation, the scope and language of state environmental planning and protection legislation will determine if GHGs are able to fit within existing provisions.

The significance of Fisher’s work to this paper is that both arguments aim to imply an ability in existing legislation to respond to climate change. For Fisher, while the planning function of the legislation makes no specific reference to GHG emissions, their consideration can be implied through the requirement for consideration of environmental values. Fisher’s argument then supports the notion that planning and protection law in Western Australia is capable of addressing climate change matters, due to the required consideration of environmental values.

This paper further builds upon this notion, arguing that the SAT’s inclusion of environmental consideration evidences their ability to develop the law, an essential feature in the context of this paper and an approach to climate change.

The SAT and its predecessor, the Town Planning Appeal Tribunal (‘TPAT’) have developed a body of decisions in review proceedings which incorporate environmental concerns into planning decisions under the PD Act. This suggests that as environmental concerns are able to be considered, the PD Act can address issues related to climate change. The first case to confirm the requirement of environmental consideration in planning disputes was JE Squarcini and Milano Pty Ltd v State Planning Commission.\(^{197}\)

The case involved a developer appealing the refusal of the TPAT to uphold a subdivision appeal. Central to the refusal of planning permission was concern over the impact the sub development would have on a wetland corridor. Relevant to the discussion of environmental values was the tribunal’s comments that the ‘deleterious effect on the environment of the subdivision’ outweighed ‘the suitability of the land for subdivision’. When the case reached the Supreme Court, the developer argued that the TPAT’s weighting of the developers concerns against those of public interest were an error at law and it was unprecedented in Western Australia for deciding a town planning case on conservation and environmental issues as opposed to town planning principles. The Supreme Court dismissed the appeal. In making their decision the court noted that the TPAT derives its authority form the wording of S 5AA of the Town

\(^{197}\) Unreported, Supreme Court of Western Australia (1996) in BC9601331 Act No. 32 of 1978 Section 3.
Planning And Development Act 1928 (WA). This section is the predecessor of and equivalent to Part 3 in the PD Act and S 5AA ss (3) relevantly provides:

In the preparation of a Statement of planning policy the Commissions shall have regard to

a) demographic, social and economic factors and influences;

b) conservation of natural or cultural resources for social, economic, environmental, ecological and scientific purposes;

c) characteristics of land;

d) characteristics and disposition of land use; and

e) amenity and environment.

The consideration of these factors in planning policy closely reflects the consideration of ESD. Specifically, the reference to economic, social, environmental and ecological factors suggests that environmental considerations should be incorporated into decision making similar to a consideration of ESD under the EP Act. This suggests that consideration of climate change can be inferred from the legislation, particularly those referring to ESD.

3. Ecologically Sustainable Development in Planning Policy

Section 3 has resulted in the implementation of environmental considerations into policies of the Western Australian Planning Commission. The importance of the following decisions to the discussion of this paper is that they display an existing precedent from which the SAT is able to apply to climate change disputes. This is an important feature which the current Appeal Convenor process lacks. It is the
position of this paper that this precedent is essential to the ongoing management of climate change.

The SAT has employed the terminology of ESD into its decisions and a good example of this is the case of *Moore River Company Pty Ltd and WAPC*.\(^{198}\) The case involved another subdivision application, this time however the proceedings were ‘called in’ by the Minister for Planning under what is now s 246(2)(b) of the PD Act. This requires the SAT to conduct a hearing and make recommendations to the Minister for the final decision.

The land proposed to be to subdivide was near Moore River, a coastal settlement north of Perth. Among other contentions was the ‘sustainability’ of the development which was to follow the subdivision. In forming their view as to the requisite sustainability, the SAT relied upon s 241(1) of the PD Act which requires the tribunal consider relevant state planning policies in reaching their decision.

Specifically, the tribunal relied upon the ‘*State Planning Policy 3 Urban Growth and Settlement*’, which ‘requires the integration of social, economic and environmental consequences of land use’.\(^{199}\) This definition of course reflects that of ‘sustainable development’ which founded the development of ESD.

The tribunal went on to comment that sustainability and environmental considerations do not by themselves provide a basis for refusing the application.

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\(^{198}\) [2007] WASAT 98.

\(^{199}\) Ibid 41.
However, ‘if those considerations lead to a conclusion that the concentration of residential developments should occur elsewhere in the region, and in a location where a lesser environmental impact would result, then the loss of valuable coastal vegetation of the site would provide a further reason for rejecting the proposal’.

Another case considering the principles of ESD is *WA Development Pty Ltd and Western Australian Planning Commission*. The case involved a challenge to the conditions of approval which required a central boundary between the proposed properties to be re-aligned so as to avoid harm to rare flora known as the ‘tall donkey orchid’.

In response to the Applicant’s challenge on grounds of unreasonableness of the condition the SAT again referred to the purpose of the PD Act as set out in s 3(1)(c) which promotes ‘the sustainable use and development of land in the State’. The tribunal also recognised the decision of *Moore River Company* discussed above as having acknowledged the important role planning cases play in facilitating sustainability, includes ecological sustainability, as an important objective of proper urban and regional planning.

The court went further to align the West Australian decision making in respect to ecologically sustainable development with the substantial body of jurisprudence emanating from the New South Wales Land and Environment Court.

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200 Ibid 53.
202 Ibid 12.
203 Ibid.
Specifically, the tribunal relied upon the reasoning of Justice Preston in the case of *Telstra Corporation Ltd V Hornsby Shire Council* (discussed above) as the foundation of ESD per the Bruntland report (also noted above). This reasoning was also the basis for applying the precautionary principle relating to uncertainty of future harm with relation to the rare flora.

The above cases provide a strong foundation for ESD in decision making in Western Australia. It is the argument of this section that the ongoing development of jurisprudence around ESD in Western Australia is essential in responding to matters relating to climate change. This is a key point in support of assigning the appeal under the EP Act to the SAT as part of a larger approach to the ongoing management of climate change.
4. The State Administrative Tribunals’ Consideration of Climate Change in Planning Decisions

The final case considered in this section is the 2014 decisions of *Wattleup Road Development Company Pty Ltd v Western Australian Planning Commission*. In that case the tribunal was required to conduct a hearing and provide advice to the Minister under s 246(2)(b) - the ‘call in’ provisions of the PD Act. It will be recalled that the ‘call in’ process involves the Minister requestion the SAT hear the matter and make a recommendation to him or her for consideration in making the final decision. The dispute related to a refusal of approval for a subdivision application in the area of Hammond Park.

The relevance of the case is the SAT’s consideration of climate change as a ground for recommending refusal of the application. Central to the case was concern was that the land was located approximately 1.2 kilometres northeast of an area used for drying/disposing of bauxite residue resulting from alumina production and close to a sand quarry. The Tribunal was then required to consider the potential impacts of residue blown from the alumina production site to the land being assessed for subdivision.

The first point of interest is the tribunal’s consideration and application of the precautionary principle. As noted in the case of *More River* above, the SAT has developed a body of cases applying the principle to planning disputes. In this case the tribunal noted that

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204 [2014] WASAT 159.
under the precautionary principle, it must be assumed that the threat of serious or irreversible environmental damage is no longer uncertain but is a reality, precluding subdivisions until adequate monitoring of air quality on the site demonstrates the acceptability of the proposal is a proportionate, appropriate and cost-effective measure to ensure that the incoming population will not be exposed to unacceptable health or amenity impacts.  

The tribunal’s consideration of climate change in determining the adequacy of the applicants monitoring is then of interest, as it noted that

the applicants' air quality monitoring could not reasonably be relied upon to demonstrate that the subdivisions were acceptable in relation to the health and amenity impacts of dust in the future, because it is unlikely that relevant conditions during the monitoring year are representative of the future. These relevant considerations were the impact of climate change on wind and rain patterns in the area.

These observations coupled with the eventual recommendation to the Minister not to approve the decision demonstrate an ability and aptitude by the tribunal to address matters related to climate change in decision making. The case also demonstrates a considered application of the precautionary principle in relation to climate change and a precedent to guide future decisions.

The fact this case was a ‘call in’ hearing compared to an ultimate decisions is also relevant as it outlines ability of the Minister to retain decision making control whilst ensuring the hearing process is conducted in a transparent manner. This is

relevant to the recommendations made below which advocate for the engagement of the SAT in relation the appeal under the EP Act. It is suggested that such appeal could operate in a similar fashion, retaining the Minister’s control whilst ensuring the consideration and development of matters related to climate change.

It should also be noted this case was appealed. The applicant sought to challenge the recommendations made by the tribunal on the grounds they were in not a ‘decision’ as required by s 105 of the State Administrative Tribunal Act. The tribunal dismissed this appeal, affirming the operation of the ‘call in’ provisions of the PD Act and its role in assisting the decisions making process.

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206 State Administrative Tribunal Act 2004 (WA).
V. RECOMMENDATIONS

The following section will examine options for amending the right to review under the EP Act. This examination will be made with consideration of what Brian Preston calls the ‘Desirable Dozen’, which are the key benefits Preston attributes to the operation of the Land and Environment Court in New South Wales.207

It is acknowledged that given the State’s reliance on natural resource development, the government is unlikely to divest complete control of appeal to the SAT or a specialised environmental court. The following examination then is made with consideration of this limitation and arrives at final recommendation with consideration of both practical and theoretical merits.

1. **Option 1: Greater Procedural Guidance for the Appeal Convener Process**

The first option considered is retaining the current Appeal Convener model but providing greater procedural guidance for the process of managing appeals. This option is likely to be most politically palatable and is the closest suggestion to the current model.

The key recommendation is greater procedural guidance being placed on the discretion of the Appeal Convener. These procedures could be modeled on those currently used by the SAT.208 This would involve a structured mediation process

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208 State Administrative Tribunal Rules 2004 (WA).
that would be available to all concerned parties, including full disclosure to all parties of documents relied upon in the mediation process. As noted in Part II of this paper, the current process often entails separate meetings between the Convenor and parties and often creates the impression of a breach of natural justice.

Preston includes the ‘facilitation of access to justice’ as one the ‘desirable dozen’, specifically with focus upon practices and procedures of the court or in this case convener. Preston argues that inclusive clear procedural rules facilitate access to justice and removes barriers to public participation.

The importance of public participation has been advocated in Part III of this paper. The added scrutiny placed on decisions makers coupled with the inherent complexity of climate change suggest public participation is important to developing a response to climate change. Such as response is also consistent with a ‘bottom up’ approach.

This recommendation is consistent with the arguments of Doherty who notes that procedural amendments to the Appeal Convenor Model would serve as a preliminary step in a medium to long-term approach to amending the appeal provisions. Doherty suggests also that the role of the Convenor should be undertaken by a retired magistrate or senior lawyer with environmental and planning law expertise.

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209 Preston, above n 207, 428.
210 Doherty, above n 24, 129.
This argument is consistent with Preston’s second benefit of the ‘desirable dozen’ which is specialization. Given the polycentric nature of environmental disputes, Preston argues that such an appointment would ensure effectiveness and efficiency. He also argues that due to the ongoing professional development requirements on the legal profession, assigning the role to a lawyer or retired magistrate would develop the technical base of knowledge within the role and improve decision making.\(^{211}\)

The main weakness, of this approach however is that it does not ensure the role is performed with adequate independence from government. This is the fifth benefit discussed by Preston and one not able to be avoided in the Appeal Convenor model due to the Minister deciding the selectee. It is however arguable that the training of a senior legal practitioner or magistrate would enable their impartiality in the role.

In line with this recommendation is the option of amending the Part IV process so as to provide greater opportunity for public comment on reports prepared by the EPA. By providing a draft copy of the EPA advice before its submission to the Minister, issues as to the content of the report can be negotiated prior to its finalization. This would improve public perception of this process and potentially reduce the number of appeals.\(^{212}\)

This recommendation was made by the Environmental Stakeholder Advisory Group in their report commissioned in 2009 to provide more effective, timely and

\(^{211}\) Preston, above n 207, 425.

coordinated assessment and decision making.\textsuperscript{213} Whilst not directly related to reforming the appeal provisions of the EP Act, this recommendation does support public participation within the decisions making process and is accordingly supportive of the argument presented in this paper.

\textsuperscript{213} Ibid p19.
2. **Option 2: Assigning Responsibility to the State Administrative Tribunal**

The key benefits of assigning responsibility of appeal to the SAT are its technical specialty and ability to develop a body of jurisprudence from which to guide future decisions and decision makers.

Specialization is one of the ‘desirable dozen’ Preston argues is important to addressing environmental disputes. The technical capacity of the SAT to address environmental and climate change issues are evidenced by the SAT decisions outlined in Part IV. These examples also evidence what Preston calls a ‘critical mass’ of cases which assist in decision making.\(^{214}\)

This paper presents two ‘levels’ of assigning responsibility for appeal to the SAT. The first is as the ultimate decisions maker with respect to merit review appeals under Part VII of the Act..

Providing the SAT with ultimate decision making would resolve the conflict inherent in the Minister’s dual roles. This is particularly true with relation to the determining of appeals to the contents of the EPA report to the Minister and criticisms that the Minister’s final decisions operates as a ‘precursor’ to the decision of cabinet via the section 45 process.

It is also then possible to assign final decisions making power to limited responsibilities under Part VII. Specifically, the determining of appeals to the contents of the EIA report is important to the argument of this paper as it is

\(^{214}\) Preston, above n 207, 425.
suggested measure to consider GHG emissions in the EIA process are able to be considered here. This is consistent with the decision of *Gray v Minister for Planning*\(^{215}\) and while it is acknowledged that the regulatory impact of *Gray* has not resulted in the refusal of new coal mines, the inclusion of GHG emissions as an environmental consideration is certainly part of the directional approach advocated in Part III.

Given the history of government sovereignty with relation to large projects surrounding the exploitation of natural resources it is likely a more limited role would be palatable

This second recommendation involves a ‘call in’ process similar to s 246 of the PD Act. As explained above, this process involves the SAT conducting the hearing and making an informed ‘decision’ as advice to the Minister who makes the final decision.

Doherty argues that the inclusions of s 246 in the PD Act was the ‘first step towards reform of the planning system in Western Australia, which previously allowed appellants to elect to have appeals determined by the Planning Minister instead of the Town Planning Appeals Tribunal (the precursor to the SAT).’\(^{216}\)

Development of a model that engages the SAT presents the important benefit of retaining its independence from government. While the tribunal is not technically a body of the judiciary, it is still preferable to the Appeal Convenor model.

\(^{215}\) *Gray v Minister for Planning* (2006) 152 LGERA 258, 255.

\(^{216}\) Doherty, n 24, 130.
Independence from government is one of Preston’s ‘desirable dozen’ and questions relating to the impartiality of the current Appeal Convenor process are a significant hindrance to the perception of natural justice.

The perceived breach of natural justice is another criticism presented in Part II of this paper. Hearings conducted by the SAT would enable a more inclusive and transparent process and also foster confidence by participants who are impacted by decisions. Such as process also better engages public participation and ensures decisions benefit from an increased level of scrutiny and local knowledge.

In conclusion, engaging the SAT in one or both of the manners described above would improve decisions making without significantly reducing government control of the decisions making process. Assigning appeal responsibility to the SAT is also a comparatively simply transition compared to the establishing of a specialized court. The SAT’s jurisdiction already covers by more than 150 enabling Acts including the PD Act\(^{217}\) and determinations under the EP Act would then benefit from this broad knowledge base.

\(^{217}\) *Planning and Development Act* (2005) s 246(2)(b).
3. *Option 3: A Specialized Environmental Court*

The creation of a specialized environmental court is the ideal solution from an environmental regulation point of view. This would enable the full range of benefits Preston advocates as having resulted from the LEC’s incorporation more than a quarter of a century ago. Specific benefits relevant to this argument’s focus on climate change are as follows:

*Rationalization*

Preston uses this term to describe the centralization of jurisdiction of environmental matters.\(^{218}\) He argues this creates economic efficiencies by lowering per capita transaction costs associated with disputes and encourages public awareness and engagement with environmental decision making.\(^{219}\)

This benefit is important to climate change matters as this awareness and authority of the court provides an important foundation for challenging and developing the law.

*Independence from Government*

A specialized court would achieve a stronger level of independence from the government compared to either of the previous suggested models due to it not

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\(^{218}\) Preston, above n 197, 429.  
\(^{219}\) Ibid.
being an ‘organ of the executive branch of government’ and a ‘fundamental aspect of the rule of law’.  

As discussed in Part III, the risks of climate change are often seen as remote when compared to concrete benefits of development. Retaining an independent body to determine disputes is essential then for ensuring adequate weight is attributed to climate change factors. This point is especially significant in the context of the section 45 process in Western Australia.

The Development of Environmental Jurisprudence

Central to the argument of this paper has been the need to facilitate the development of the law with relation to ESD and climate change. As noted above, any model dependent on the Appeal Convenor would lack this essential component. Preston argues that the establishment of an environmental court, with a centralized jurisdiction, would lead to an increased number of disputes being heard and an increased breadth of jurisprudence accordingly.

The instances of climate change litigation discussed in Part IV demonstrate the developments achievable through engaging matters in the courts. Of note is the fact that both Telsta and Taralga were heard in the LEC. Also noted in Part IV is that the precedent set in those cases has had implications for decisions of the SAT here in Western Australia. These examples suggest an ability to litigate matters.

220 Preston, above n 207, 427.
related to climate change would result faster and more significant developments in the law with response to climate change.

In conclusion, the benefits of a specialized court are significant however it is unlikely such a development would proceed in Western Australia. Further, the SAT is already in the process of engaging with planning disputes and is well positioned to assist in dealing with disputes under the EP Act.

As noted above, the assigning of a ‘call in’ option in the Planning and Development Act has been strongly attributed to the SAT being afforded a more substantial role in determining appeals under that Act. It is then suggested that an incremental approach, beginning with the SAT would establish confidence in such a system and lead to an eventual transition in favor of the SAT gaining ultimate decisions making authority with regards to appeals under the EP Act.

4. Judicial Review

Following from the criticisms raised above, there is a substantial role in addressing climate change which can result from judicial review. The cases of Gray and Massachusetts illustrate this. Relaxing requirements around standing is essential to enabling cases to be heard and to develop jurisprudence accordingly.

Legislative measures should then be taken to provide a more open right to judicial review. Ideally this would follow the ‘any person, without exception’ stance taken in New South Wales, however, attaching a conditional requirement for

222 Environmental and Assessment Act 1979 (NSW) s 123.
participation within the consultation and decision making process would be adequate.
This paper has outlined the key criticisms of the Environmental Protection Act’s appeal provisions and how they inhibit the ability of the Environmental Impact Assessment process to encompass climate change considerations. It has been suggested that the responsibility for hearing appeals should be partially if not entirely assigned to the State Administrative Tribunal. This would address many if not all of the criticisms identified above with minimal impact on government decisions making sovereignty.

Such an approach has not been suggested as an ultimate solution, but rather a step in the right direction. This directional shift is consistent with key international literature advocating a ‘bottom up’ approach to climate change and acknowledges the significant challenges climate change poses to governance. Public participation has been presented as an important response to meeting these governance challenges and ensuring adequate scrutiny is afforded to decision making.

Climate change litigation has also been discussed and its role in developing regulatory responses both within Australia and abroad. The ability to use these developments to benefit Western Australia’s environmental decisions making is dependent on the partial, if not entire removal of responsibility in determining appeals under the Environmental Protection Act from the Minister to a tribunal or court.
As the State Administrative Tribunal is already hearing planning matters it has developed a body of jurisprudence which will allow it to develop responses to climate change in line with Ecologically Sustainable Development and the precedents of other jurisdictions.

Relaxing access to judicial review has also been suggested as another important step that would facilitate attempts to address climate change. The combination of both these steps would allow the incremental development of the law in response to community participation. This is in line with international literature promoting a ‘bottom up’ approach to climate change and the recommendations of local commentators with knowledge specific to Western Australia.

In conclusion this paper has presented a number of important benefits in amending the appeal provisions of the Environmental Protection Act. Many of these benefits are not new, however all of them are required to improve environmental decision making meet the governance challenges of climate change in Western Australia. Accordingly, climate change is catalysis for reforming the appeal provisions of the Environmental Protection Act and enabling a meaningful response to climate change.
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