

# INTERGENERATIONAL EQUITY IN LAW AND PRACTICE

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## I. Introduction

Over the last forty years, environmental law has grown to deal with the special issues created by geographically disparate damage and causes.<sup>1</sup> The evolution of international legal instruments such as the *United Nations Framework Convention on Climate Change* is a testament to the growing capacity of environmental law to address geographically complex legal situations. It has become increasingly apparent that environmental damage is hardly more containable in a temporal sense than it is in a geographic sense. Environmental harm can be long lasting<sup>2</sup> or irreversible,<sup>3</sup> or can remain unrecognised for many years after the practices causing it are recognised as environmentally damaging.<sup>4</sup> In other words, some environmental harm is not only spatially but also temporally disconnected from its causes. Climate change presents a clear example: the harm likely to be caused by climate change in the future will be far removed in time from its causes (which include greenhouse gas emissions dating from the time of the Industrial Revolution).<sup>5</sup> An awareness of the geographical peculiarities of environmental problems, therefore, is only part of what environmental law must

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<sup>1</sup> See generally Birnie et al. (2009). Witness the uneven effects of climate change across the globe: see IPCC 2007; Stern 2006. On the trans-boundary nature of environmental damage see generally Birnie et al (2009).

<sup>2</sup> The gas disaster in Bhopal and the nuclear disaster in Chernobyl are examples of long-term environmental damage from a single event.

<sup>3</sup> The extinction of a species, for example.

<sup>4</sup> For example, the harmful effects of the use of DDT were not widely recognised for many years after the chemical was first introduced as pesticide.

<sup>5</sup> Before the Industrial Revolution, carbon dioxide concentrations in the atmosphere had been at a constant 280 ppm for the past 500,000 years. CO<sub>2</sub> concentrations rose steeply following the industrial revolution to approximately 390 ppm today. See IPCC (2007) check page.

achieve. A better capacity to deal with the *temporally* disparate nature of the causes and effects of environmental damage is long overdue.<sup>6</sup>

The temporal characteristics of environmental problems can present a particular challenge when it comes to finding an appropriate legal remedy. Environmental solutions conceived under the common law, such tort actions in nuisance or negligence, have traditionally been reactive rather than preventative.<sup>7</sup> Moreover, with respect to climate change, the temporal disconnection between the causes of global warming (carbon dioxide emissions) and the damage it causes (for example, in extreme weather events) appears to contribute to the difficulty plaintiffs face in proving causation in negligence suits.<sup>8</sup>

Statutory environmental law, which has attained increasing prominence across the common law world since the 1970s,<sup>9</sup> has its own deficiencies when dealing with the long-term and temporally disjointed nature of environmental problems. Legislation is subject to the short-term demands of the political cycle. Once again, climate change provides an apt example: governments around the common law world (with some notable exceptions<sup>10</sup>) have thus far failed to enact comprehensive legislation to reduce greenhouse emissions effectively. This legislative failure is complicated, of course, but appears to owe much to effective lobbying by powerful groups whose short-term interests are best served by an absence of restrictions or

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<sup>6</sup> But note the development of the precautionary principle and the notion of sustainable development. Am I saying that these are ineffective? Or that they don't contribute to the law's development of a 'better capacity to deal with the temporally disparate nature of the causes and effects of environmental damage'? Although the Superfund in the US and other legal regimes (in UK and Australia?) create strict liability for the landowner from whose land pollution emanates (check), forward looking environmental law is limited.

<sup>7</sup> Environmental Law Bell – check

<sup>8</sup> Eric Posner and Cass Sunstein, *Climate Change Justice*, U of Chicago Law & Economics, Olin Working Paper No. 354 U of Chicago, Public Law Working Paper No. 177, posted August 23, 2007, pp 25-6.

<sup>9</sup> Bell & McGillivray?

<sup>10</sup> The UK, as a member of the European Union, has been a leader in legislation to combat climate change; New Zealand has also been an early adopter of greenhouse gas emissions reduction through the introduction of a national carbon dioxide trading scheme.

costs on carbon dioxide emissions. The advantages of climate change legislation will be felt over the long-term, but in the short-term, putting a price on carbon dioxide is likely to have the effect of increasing fuel and energy prices. In short, the temporal nature of climate change makes it more difficult for legislatures to address.

Acknowledging the difficulties that the temporal characteristics of some environmental problems pose for both common law and statutory legal solutions, the purpose of this paper is to explore the concept of *intergenerational equity* as a legal mechanism for dealing with situations where the reasonably identifiable interests of future generations conflict with the interests of current generations in relation to the solution to a particular environmental problem.

At its most basic level, the concept of intergenerational equity is the idea of equity between members of different generations. Thus principles of intergenerational equity, in a general sense, are principles that define equitable relationships between generations. As with any application of equity, what constitutes an equitable relationship in an intergenerational context is essentially a normative question. That is to say, the principles of intergenerational equity should address such issues as whether all people have equal moral status (or, practically speaking, whether future generations' interests should be discounted), and what distributive principles should apply between generations.<sup>11</sup> Clearly, therefore, the content of a principle or principles of intergenerational equity is open to debate, and indeed a variety of formulations of the principle exist.<sup>12</sup> This paper interrogates a formulation of a principle of intergenerational equity that has been considered in domestic case law in Australia. This principle is stated as follows:

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<sup>11</sup> See Simon Caney, 'Climate Change and the Future: Discounting for Time, Wealth and Risk' 40(2) *Journal of Social Philosophy* 163-186, 165.

<sup>12</sup> Compare Edith Brown Weiss; *Minors Oposa*; Simon Caney...

the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.<sup>13</sup>

This particular definition makes no explicit statement about the moral status of future generations or distributive principles: these essential concerns have been left to the judiciary to determine through case law.<sup>14</sup>

Scholarship on intergenerational equity over the years has been largely normative in character – it seeks to explain why a principle of intergenerational equity is desirable<sup>15</sup> and what the principle should require.<sup>16</sup> Much less work has been done to see what implications the application of esoteric principles of intergenerational equity have had in *practice*,<sup>17</sup> when applied by courts to factual situations. This paper seeks to fill that gap. In order to do so, it examines the limited common law exemplars available, which are cases from Australia.<sup>18</sup> The use of Australian cases to elucidate the nature and requirements of the principle should not be construed as limiting the arguments and implications of this work to the Australian context. On the contrary, the issues raised in this paper are relevant to all common law jurisdictions and go to the heart of humanity's prospects for addressing long-term environmental problems.

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<sup>13</sup>

<sup>14</sup> See Preston article.

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<sup>17</sup> Scholarship on the *Minors Oposa* case is an exception in a civil law country. In this case, the Philippines Supreme Court found that ---. But some authors have argued that this is not a significant finding....

<sup>18</sup> Several cases from outside of Australia have made reference to a principle of intergenerational equity, but the courts have not discussed the nature and implications of the principle under Indian law: see Jona Razzaque, 'Human Rights and the Environment: the national experience in South Asia and Africa', Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, 14-16 January 2002, Geneva: Background Paper No. 4. In the Indian case of *S. Jagannath v. Union of India* (1999) 2 SCC 87, the court found that environmental impact assessment should consider intergenerational equity, but did not expand upon what that would entail. A principle of intergenerational equity has similarly been mentioned but not explained in two Bangladeshi cases: W.P. no. 300 (1995) and W.P. no. 278 (1996): see Razzaque above.

The paper proceeds as follows. Section II outlines where the principle of intergenerational equity is situated within both international law and domestic jurisdictions. Section III looks at how courts have given effect to the principle in practice, focusing on the Australian context, where the most relevant cases appear. Three cases from the Land and Environment Court in New South Wales are analysed: *Gray v Minister for Planning*, *Taralga Landscape Guardians Inc v Minister for Planning*, and *Walker v Minister for Planning*, all of which have contributed to the nascent practical formulation of the principle of intergenerational equity. Finally, section IV discusses the implications of these decisions for environmental law both in Australia and beyond.

## II. Intergenerational Equity

Over the last thirty years, a number of more forward-looking, preventative legal approaches to environmental problems have been introduced to common law jurisdictions around the world.<sup>19</sup> Of these, the concept of intergenerational equity (which is sometimes described as a principle,<sup>20</sup> and other times merely a concept or theory<sup>21</sup>) presents a potential solution to environmental problems whose effects are likely to be spread unevenly over time, or across generations, because of its explicit

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<sup>19</sup> For example laws requiring environmental impact assessments prior to certain activities, such as the *National Environment Policy Act* 1969 (US): see William H. Rodgers, Jr., 'the Seven Statutory Wonders of U.S. Environmental Law: Origins and morphology' 27 *Loy. L.A. L. Rev.* (1994) 1009, at 1010.

<sup>20</sup> See eg, the Australian Intergovernmental Agreement on the Environment 1994 (Cth); see also Edith Brown Weiss.

<sup>21</sup> In the Rio Declaration, the concept of intergenerational equity forms part of the concept of sustainable development under international law. While sustainable development was first described explicitly as a 'principle' in the *Danube Dam* case, the same has not yet occurred for the concept of intergenerational equity under international law: *Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* 37 ILM (1998) 162 (*Danube Dam*); see Bell & McGillivray 58 (2008).

reference (in its several definitions) to future generations.<sup>22</sup> However, the terms of the concept, as they appear in Principle 3 of the Rio Declaration ('the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations'),<sup>23</sup> are so wide that their effect is diminished. This formulation of the concept immediately raises a number of questions, including what ought to happen if members of different generations prefer different outcomes to the same problem; the Rio Declaration's notion of intergenerational equity disregards the autonomy of members of a generation, treating a generation as a sentient being.<sup>24</sup> The question of how effect might be given to such terms, and whether they indicate something more than mere aspiration, is addressed below.<sup>25</sup>

This section examines the legal status of the concept of intergenerational equity. It does so in two steps. First, the legal sources of the concept are explored at the international and domestic levels, with a particular focus on Australian law. While the term 'intergenerational equity' *per se* does not appear in any international agreement, references to concern for future generations in some of international agreements suggest that the a concept (and perhaps even a principle) of intergenerational equity exists; these are discussed briefly (subsection A1). The term intergenerational equity also appears infrequently within domestic legislation in several jurisdictions around the globe (subsection A2). Australia is one country in

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<sup>22</sup> These definitions are discussed below.

<sup>23</sup> See Birnie et al. 120 (3<sup>rd</sup> ed, 2009), stating that 'inter-generational equity is explicitly referred to in Principle 3 of the 1992 Rio Declaration... and is reiterated in the same terms in the 1993 Vienna Declaration on human rights.' Art. 3(1) of the 1992 Convention on Climate Change also refers to inter-generational equity, calling for it to be taken into account in decisions of the parties.

<sup>24</sup> See Birnie et al. 119-122 (3<sup>rd</sup> ed. 2009).

<sup>25</sup> In this vein, Birnie et al. 121 (3<sup>rd</sup> ed. 2009) note that 'the essential point of the theory [of intergenerational equity], that mankind has a responsibility for the future, and that this is an inherent component of sustainable development, is incontrovertible, however expressed. The question then becomes one of implementation.'

which the term has found its way into a number of domestic legislative instruments, and for that reason Australian legislation becomes the focus of this section (subsection A3). In Australian legislation, the concept is referred to as ‘the principle of intergenerational equity’, and that terminology is adopted when referring to the Australian context.

The second part of this section aims to describe the content of the Australian principle of intergenerational equity. The first part of this section introduces the cases in which parties have appealed to the principle (subsection 2A). Even within the Australian context, legislative reference to the principle is very limited, leaving judges to elaborate its characteristics; the implications of judicial lawmaking in this field are therefore discussed (subsection 2B). Two significant themes arising from the examination of judgments, cumulative impact and the temporal focus of the Australian principle of intergenerational equity, are set out and analysed in subsection 2C.

#### **A. International Legal Sources of Intergenerational Equity**

An analysis of the legal sources of intergenerational equity should begin within the broader framework of international environmental law principles. Although the notion of intergenerational justice and the related principle of intergenerational equity are not concerned exclusively with environmental issues, the promotion of intergenerational equity does require, at a fundamental level, the appropriate management of natural resources and concern more broadly for the environment.<sup>26</sup> From an empirical

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<sup>26</sup> In any case, as Birnie et al (2009) note, international environmental law ‘is not a separate or self-contained field of law. In some respects it is simply the application of well-established rules, principles and processes of general international law to the resolution of international environmental problems and disputes’ (p 106). In this sense, any principle of intergenerational equity that exists at international law need not be seen as an exclusively environmental concept, but rather as a principle that demands, amongst other things, appropriate environmental behaviour.

perspective, those legal instruments (both international and domestic) that make reference to a concept of intergenerational equity (or something similar) are largely concerned with environmental issues.<sup>27</sup> The concept of intergenerational equity at international law forms part of the principle<sup>28</sup> of sustainable development.<sup>29</sup> The concept's central function is one of increasing time horizons of development decision-making in order to take into account the interests of future generations. In doing so, it provides the essential temporal dimension to the principle of sustainable development.

International environmental law is characterised by a number of rules and principles that aim to safeguard the protection of the environment.<sup>30</sup> These include the precautionary principle, the polluter pays principle, and the principle of sustainable development, which are reasonably well-established.<sup>31</sup> These, and other rules and principles of international environmental law, receive differing levels of acceptance by states.<sup>32</sup> The status of some rules and principles of international environmental law remains controversial,<sup>33</sup> and development of this area of law is ongoing.<sup>34</sup> As the most significant, widely accepted statement of states' rights and obligations with respect to the environment, the Rio Declaration on Environment and Development ('the Rio Declaration'), adopted at the United Nations Conference on Environment and Development in 1992, provides a starting point for the elucidation of international

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<sup>27</sup> However, the concept of intergenerational equity also appears in the Vienna Declaration on Human Rights (1993).

<sup>28</sup> Sustainable development was first described explicitly as a 'principle' in the *Danube Dam case: Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* 37 ILM (1998) 162 (*Danube Dam*); see Bell & McGillivray 58 (2008).

<sup>29</sup> See eg, Bell & McGillivray 58 (2008).

<sup>30</sup> Bell and McGillivray (2008) 53-71; Birnie et al (2009) p 106.

<sup>31</sup> See, eg, Bell and McGillivray (2008) 53-71; but note that authors do not agree unanimously on the names, status and strength of these principles (Palmer, 1992).

<sup>32</sup> For example, the US has studiously avoided commitment to the precautionary principle in international agreements; some developing countries has avoided commitment to the polluter pays principle: see Birnie et al. (2008) 111;

<sup>33</sup> Birnie et al (2009) p 107. See also Bell and McGillivray (2008) 54.

<sup>34</sup> Birnie et al (2009) p 108.

environmental law principles.<sup>35</sup> While the Declaration itself is not enforceable, it does have some value: it provides evidence of what states' stated beliefs are with respect to what the law is or what it should be.<sup>36</sup> Most relevantly here, it gives some insight into the way that states regard future generations with respect to development.

The Rio Declaration notes (in Principle 3) that there is a right to development, and that this right 'should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations.' A number of scholars have pointed to this as an explicit reference to the notion (if not the phrasing) of intergenerational equity.<sup>37</sup> Most elements of the principle deal with the various contemporaneous balancing processes that must occur in order for sustainable development to succeed. In invoking the interests of future generations, the concept of intergenerational equity provides a temporal dimension to the principle of sustainable development. As we shall see below, the association of the notion of intergenerational equity with the concept of sustainable development appears to have influenced domestic legislation with respect to intergenerational equity in Australia.

In addition to the Rio Declaration, the concept of equity between generations has appeared elsewhere in international legal instruments, for example in the 1993 Vienna Declaration on Human Rights<sup>38</sup> and in article 3(1)<sup>39</sup> of the 1992 Convention on Climate Change. Indeed, the concept appeared as early as the Stockholm

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<sup>35</sup> See Birnie et al (2009) p 112.

<sup>36</sup> Birnie et al (2009) p 112.

<sup>37</sup> Birnie et al (2009) 120; see also Bell and McGillivray 63.

<sup>38</sup> Art. 11 states that '[t]he right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations. The World Conference on Human Rights recognizes that illicit dumping of toxic and dangerous substances and waste potentially constitutes a serious threat to the human rights to life and health of everyone.'

<sup>39</sup> Art. 3 states that '[i]n their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided' by a number of principles including art 3(1): '[t]he Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.'

Declaration, in Principles 1 and 2.<sup>40</sup> As Birnie et al. note, while these international declarations ‘indicate the importance now attached in international policy to the protection of the environment for future generations’,<sup>41</sup> they are not enforceable.<sup>42</sup> Their legal value is limited to their ability to demonstrate states’ understanding of and aspirations for the law with respect to development.

Along these lines, Catherine Redgwell argues that ‘while intergenerational equity has not yet achieved the status of a binding rule (or perhaps more accurately, set of rules) under international law, a process of “creeping intergenerationalisation” may be observed’ within international law (Redgwell, 1999). According to Redgwell, an increasing focus on intergenerational issues is entering international law in two ways. First, many preambles to international treaties make reference to future generations.<sup>43</sup> While such references are not in themselves legally binding, judges are able to use them in the interpretation and application of substantive treaty provisions. Second, elsewhere in international environmental law there are substantive principles which contain an intertemporal dimension. In addition to the principle of sustainable development, Redgwell argues<sup>44</sup> that intergenerationalisation may be seen within the common heritage of humankind principle,<sup>45</sup> the principle of custodianship or stewardship,<sup>46</sup> the precautionary principle<sup>47</sup> and the principle of common but differentiated responsibilities.<sup>48</sup> It is worth noting that not all of these references

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<sup>40</sup> See David Wirth, ‘The Rio Declaration on Environment and Development: Two steps forward and one back, or vice versa’ 19 *Ga. L. R.* 599, 625-6 (1995).

<sup>41</sup> Birnie et al (2009) 120.

<sup>42</sup> Birnie et al (2009) 120.

<sup>43</sup> Redgwell (1999) 126.

<sup>44</sup> Redgwell (1999) 127.

<sup>45</sup> Redgwell (1999) 129-132. See also K. Balsar, *The Concept of the Common Heritage of Mankind In International Law* (the Hague, 1998).

<sup>46</sup> Redgwell (1999) 132-138.

<sup>47</sup> Redgwell (1999) 138-140.

<sup>48</sup> Redgwell (1999) 140-142.

to the concept of intergenerational equity are completely consistent;<sup>49</sup> this could affect how the concept comes to be applied.

## **B. Domestic Legal Sources of Intergenerational Equity (legislation)**

A survey of national legislation throughout the common law world shows that the concept of intergenerational equity has gained little legislative traction in most jurisdictions. Neither the UK nor the US appears to have invoked the principle in legislation. Israel created an office of Commissioner for Future Generations within the Israeli parliament, the Knesset. However, a motion passed to abolish this office shortly after the term of the first Commissioner, retired judge Schlomo Shaham ended.<sup>50</sup> In Canada, the term only appears in Quebec's provincial Sustainable Development Act.<sup>51</sup> Of all common law jurisdictions, Australian legislation refers most widely to the concept of intergenerational equity.<sup>52</sup> Indeed, it goes further, by describing the concept as a 'principle' – one of the 'principles of ecologically sustainable development' that have been introduced in most Australian states and territories.<sup>53</sup>

In Australia, the *Rio Declaration*, along with the *Intergovernmental Agreement on the Environment*,<sup>54</sup> an agreement between the Commonwealth, States and Territories of Australia and the Australian Local Government Association, and the *National Strategy for Ecologically Sustainable Development*<sup>55</sup> created the impetus for Australian legislation on sustainable development.<sup>56</sup> The *Intergovernmental Agreement on the Environment* provides (at section 3.5) a number of principles that

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<sup>49</sup> See David Wirth at 627-629.

<sup>50</sup> Alon (2006).

<sup>51</sup> [Reference – maybe insert the quebecois definition].

<sup>52</sup> RSQ, Chapter c. D-8.1.1, see art. 6(b).

<sup>53</sup> See section IIIA3 below.

<sup>54</sup> (1992) Cth.

<sup>55</sup> (1992) Cth – check reference style.

<sup>56</sup> See *Walker v Minister for Planning* [2007] NSWLEC 741 per Biscoe J [insert para ref].

‘should inform policy making and program implementation’ in order to promote an ecologically sustainable approach to development. These include (at section 3.5.2) the principle of intergenerational equity, which is stated as follows:

the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.

The principle is appears (with this same definition) in various state and territory legislation (in the Australian Capital Territory,<sup>57</sup> Queensland,<sup>58</sup> New South Wales,<sup>59</sup> South Australia,<sup>60</sup> Victoria,<sup>61</sup> and Western Australia<sup>62</sup>) and in commonwealth legislation<sup>63</sup>. In total, 105 Australian legislative instruments made reference to the principle of intergenerational equity at the time of writing.<sup>64</sup> Only the Northern Territory and Tasmania do not make reference to the principle in their own legislation.

The *Intergovernmental Agreement* alsoSimilarly, the *National Strategy for Ecologically Sustainable Development*, created as a result of the *Intergovernmental Agreement*, sets the broad strategic and policy framework for cooperative action on ecologically sustainable development (ESD) by Australian governments. The *National Strategy* does not create legally binding rules for governments, but it does set out a strategy for implementing the mutually agreed upon goals of the *Intergovernmental Agreement*. The *National Strategy*’s ‘goal’ is ‘[d]evelopment that

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<sup>57</sup> See, eg, Planning and development Act (ACT) 2007, s 9.

<sup>58</sup> See, eg, National Environment Protection Council (QLD) Act 1994, Schedule, s 3.5.2.

<sup>59</sup> See, eg, Protection of the Environment Administration Act (NSW) 1991 - SECT 6(2)(b).

<sup>60</sup> See, eg, National Environment Protection Council (SA) Act 1995 – Schedule 1, s 3.5.2.

<sup>61</sup> Environment Protection (VIC) Act 1970, s 1D.

<sup>62</sup> Environmental Protection Act 1986, s 4A(2).

<sup>63</sup> See, eg, National Environmental Protection Council Act (Cth)1994, Schedule: Intergovernmental Agreement on the Environment Section 6(3.5.2).

<sup>64</sup> Based on a search of the Austlii Australian legislation databases, using the search terms ‘intergenerational equity’ and ‘inter-generational equity’.

improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends'. The 'Core Objectives' of the strategy include aims 'to enhance individual and community well-being and welfare by following a path of economic development that safeguards the welfare of future generations' and 'to provide for equity within and between generations'.

The abundant presence of the principle of intergenerational equity within Australian legislation is, unfortunately, not matched by depth in its description. As in relevant international legal instruments, the principle is described in the vague terms. While the principle as it appears in Australian legislation requires the present generation to 'ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations', there is no indication as to *how* this should occur. For example, who within the present generation is responsible for future generations? Which aspects of health, diversity and productivity of the environment should be prioritised? What processes should be put into place in order to ensure that this occurs? And how should the interests of future generations be balanced against those of the current generations? These uncertainties have significant implications for the content of the principle. In effect, it means, in the absence of further legislation, that how the principle is applied in a particular setting remains largely up to judges.

To summarise, international law provisions, both preambular and substantive, that have been discussed in this section, certainly make reference to future generations and their equitable treatment. To this extent, they indicate that some states support a notion of intergenerational equity. The Australian legislative provisions go further, often explicitly stating that ecologically sustainable development requires the principle of intergenerational equity to be taken into account. Neither the international

nor the domestic provisions, however, elaborate on how effect is to be given to their aims. As intergenerational equity remains a nascent concept at law, it may not be possible at this stage to overcome all of the ambiguity with which the term is imbued. Nonetheless, if any progress is to be made at solidifying the legal conception of intergenerational equity, it is essential to understand as much as possible about the substantive content of the concept. In the legal context, the substantive nature of the term must be gleaned from case law.

### **C. Content of the Principle of Intergenerational Equity (Australian Case Law)**

While the principle of intergenerational equity appears frequently within Australian legislation, the legislation is silent on how effect should be given to the principle. As noted above, this has the effect of giving judges a great deal of responsibility over the evolution of the principle. In this vein, Justice Preston, writing in an academic context about the concept of sustainable development more generally, states that ‘international, national, provincial and local law and policy-making bodies may have been reticent in explicating their meaning, circumstances of application and the precise details of the means of implementation. The judiciary, particularly at a national level, is therefore faced with the task of explicating the law of sustainable development, case by case. Incrementally a body of environmental jurisprudence will emerge’ (April 2008).<sup>65</sup> Similarly, Biscoe J notes in *Walker* that ‘ESD and its supporting principles are concepts which the legislature has left the courts to flesh out’.<sup>66</sup> Through the cases that deal with the ESD principle of intergenerational equity in any depth, *Gray*, *Taralga* and *Walker*, a nascent jurisprudence can be seen.

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<sup>65</sup> Preston (2008) 2.

<sup>66</sup> *Walker v Minister for Planning*, NSWLEC 741 Para 81.

A number of Australian decisions make reference to the principle of intergenerational equity.<sup>67</sup> Generally, the principle is merely mentioned in passing. There are, however, a number of cases that discuss the principle with some degree of detail. The cases in which the principle has been examined in the most detailed fashion include the recent decisions of *Gray v Minister for Planning*,<sup>68</sup> *Taralga Landscape Guardians Inc v Minister for Planning*,<sup>69</sup> and *Walker v Minister for Planning*,<sup>70</sup> all heard by the New South Wales Land and Environment Court. Each of these cases centres upon disputes over administrative planning decisions.

### **1. *Gray v Minister for Planning***

*Gray v Minister for Planning* was a 2006 case concerning the decision of the Director-General of the Department of Planning to grant permission to Centennial Hunter Pty Ltd (Centennial) to commence development of a coalmine at Anvil Hill in New South Wales. In *Gray*, the Applicant, an environmental activist, argued amongst other things that the Director-General had failed to take into account principles of ecologically sustainable development ('ESD principles'), including the principle of intergenerational equity, in his decision to accept Centennial's environmental impact assessment for public display.<sup>71</sup> Justice Nicola Pain found that the Director-General had failed to take ESD principles into account in his decision to accept Centennial's environmental impact assessment, and declared that the decision was void. Noting that 'intergenerational equity has received relatively little judicial consideration in this Court in the context of the requirements for environmental assessment under the EP&A Act,'<sup>72</sup> Justice Pain drew upon an academic article written by Justice Brian

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<sup>67</sup> A search for the term "intergenerational equity" on the Australasian Legal Information Institute (AustLII) caselaw databases reveals 46 cases as at 15 July 2010: see <http://www.austlii.edu.au/>.

<sup>68</sup> [2006] NSWLEC 720.

<sup>69</sup> [2007] NSWLEC 59.

<sup>70</sup> [2007] NSWLEC 741.

<sup>71</sup> *Gray v Minister for Planning and Ors* [2006] NSWLEC 720, see paras 35-45 per Pain J.

<sup>72</sup> *Gray v Minister for Planning and Ors* [2006] NSWLEC 720, see paras 118 per Pain J.

Preston (and influenced by the writings of Edith Brown Weiss)<sup>73</sup> in order to elucidate the principle of intergenerational equity. Her Honour stated that Preston's article pointed to 'three fundamental principles underpinning the principle of intergenerational equity'<sup>74</sup>:

- (i) The conservation of options principle which requires each generation to conserve the natural and cultural diversity in order to ensure that development options are available to future generations;
- (ii) The conservation of quality principle that each generation must maintain the quality of the earth so that it is passed on in no worse condition than it was received;
- (iii) The conservation of access principle which is that each generation should have a reasonable and equitable right of access to the natural and cultural resources of the earth.'<sup>75</sup>

In doing so, Justice Pain anchored the beginnings of Australian jurisprudence on the principle firmly within the model set out by Edith Brown Weiss.<sup>76</sup>

## ***2. Taralga Landscape Guardians Inc v Minister for Planning***

*Taralga Landscape Guardians Inc v Minister for Planning*<sup>77</sup> was a 2007 case involving a dispute between a group of rural residents and a wind energy company over the company's development proposal for a wind farm that would be visible from the residents' properties. The case required the balancing of local interests (the appearance, noise and impact upon local flora and fauna of the wind farm, considered unacceptable by local residents)<sup>78</sup> with wider interests (the advantages to the community at large of provision of wind energy, a low carbon-emitting energy). The presiding judge, Preston CJ, found that the interests of the broader population in having a clean energy source at the site outweighed those of the local residents:

Resolving this conundrum – the conflict between the geographically narrower concerns of the [residents] and the broader public good of

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<sup>73</sup> These three principles of intergenerational are taken from Edith Brown Weiss (insert citation), see Preston [insert page number].

<sup>74</sup> Gray (2006) para 119.

<sup>75</sup> Gray (2006) para 118-9.

<sup>76</sup> Edith Brown Weiss has been heavily influential in the development of a principle (or principles) of intergenerational equity. See for example *In Fairness to Future Generations*, ].

<sup>77</sup> Taralga [2007] NSWLEC 59.

<sup>78</sup> Taralga [2007] NSWLEC 59 at [97-114]

increasing the supply of renewable energy – has not been easy. However, I have concluded that, on balance, the broader public good must prevail.<sup>79</sup>

Most relevantly to this paper, Preston CJ drew upon the concept of intergenerational equity, arguing that in the context of energy production, intergenerational equity requires two things: first, sustainable extraction and use, with respect to both the resource and the environment surrounding the resource; and second, the increasing substitution of cleaner energy sources for existing, dirtier ones.<sup>80</sup> His Honour stated that ‘the attainment of intergenerational equity in the production of energy involves meeting at least two requirements’<sup>81</sup>:

1. ‘[M]ining of and subsequent use in the production of energy of finite, fossil fuel resources need to be sustainable. Sustainability refers not only to the exploitation and use of the resource (including rational and prudent use and the elimination of waste) but also to the environment in which the exploitation and use takes place and which may be affected. The objective is not only to extend the life of the finite resources and the benefits yielded by exploitation and use of the resources to future generations, but also to maintain the environment, including the ecological processes on which life depends, for the benefit of future generations’; and
2. ‘[A]s far as is 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 way, the present generation reduces the adverse consequences for future generations.’

*Taralga* is noteworthy in that it brings the principle of intergenerational equity out of abstraction, applying it in a specific, concrete context (energy production). In this context, the Court found that the principle not only demands that the process of production and use of energy occur in a manner which accounts for the requirements of future generations, but also requires new types of clean energy production to be substituted increasingly for old, emissions-intensive methods. The extent to which the outcomes of this element of the case can be generalised for future cases is likely to be

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<sup>79</sup> *Taralga* at para 3.

<sup>80</sup> *Taralga* [2007] NSWLEC 59 at [74].

<sup>81</sup> *Taralga* [2007] NSWLEC 59 at [74].

limited – it seems fanciful to expect that *Taralga* on its own will present any real challenge to the construction of, for example, new coal-fired power plants. Nonetheless, Preston CJ’s focus in this case on the long-term interests both of the environment and future generations in the context of energy production is remarkable.

More generally, and indeed more importantly, *Taralga* involved a situation in which narrow, immediate interests (those of the local residents) were in conflict with broader, long-term interests (those of the wider community over a long time-frame). This case demonstrates that the Australian principle of intergenerational equity (in this case in combination with other principles of ESD) has the potential to protect the interests of members of future generations, when they conflict with the interests of members of the current generation.

### ***3. Walker v Minister for Planning***

The case of *Walker v Minister for Planning* (‘*Walker*’) concerned a concept plan for a development proposal for a retirement village on a coastal plain in New South Wales. The Applicant, Jill Walker, challenged the NSW Minister for Planning’s decision to approve the concept plan, arguing that the approval was invalid because the Minister had failed, amongst other things, to take into account the principles of ESD.<sup>82</sup> At first instance, in the New South Wales Land and Environment Court, Biscoe J found that the Minister was ‘under an obligation to consider the public interest, including ESD, when making decisions’ under the relevant NSW planning legislation.<sup>83</sup> However, on appeal, the Court of Appeal overturned Biscoe J’s ruling, finding instead that while the public interest is a mandatory consideration for the Minister under the relevant planning legislation, the consideration of ESD principles is not.<sup>84</sup> Instead, the Court of

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<sup>82</sup> Walker at para 1-2.

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<sup>84</sup> Minister for Planning v Walker (2008) 161 LGERA 423, 450-4 (Hodgson J); Campbell and Bell JA agreed: at 455.

Appeal found that consideration of ESD principles is relevant to demonstrating that due regard has been given to the public interest in decision-making:

‘the “mandatory” requirement that the Minister have regard to the public interest does not of itself make it mandatory ... that the Minister have regard to any particular aspect of the public interest, such as one or more of the principles of ESD. Whether or not it is mandatory to have regard to one or more principles of ESD must depend on statutory construction.’<sup>85</sup>

Nonetheless, the Supreme Court of New South Wales stressed the importance to the public interest of the consideration of ESD principles in this context.<sup>86</sup> Following that judgement, Jill Walker applied for leave to appeal to the High Court, but the application was refused.<sup>87</sup> Despite the ultimate lack of success by the Applicant, the original NSW Land and Environment court decision has helped to advance judicial construction of the principle of intergenerational equity. Biscoe J conducted an extensive review of cases dealing with the principle of intergenerational equity. In addition to rehearsing the judges’ treatment of intergenerational equity in *Gray*, *Taralga*, and several other cases, Biscoe J commented that the principle of intergenerational equity ‘has endured as the fundamental principle of ESD.’<sup>88</sup>

## **VI. Implications**

The cases described in the preceding section are significant to this paper less for their specific outcomes than for the contribution they have made to the elucidation of the principle of intergenerational equity under Australian law (and, potentially, to law internationally). In combination with several other cases and academic writing, these cases have contributed to the beginnings of judicial understanding of the principle of intergenerational equity under Australian law. Three central themes can be drawn

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<sup>85</sup> Minister for Planning v Walker at para 44.

<sup>86</sup> Hodgson JA stated with respect to the substantive planning decision in this case that ‘[i]t may be that failure to [consider ESD principles] could, having regard to the content of this judgment, be considered evidence of failure to take into account the public interest’ at para 63. Campbell JA agreed at para 65, but Bell JA reserved judgment on this particular point (at para 66).

<sup>87</sup> Walker v Minister for Planning HCA Transcript 50 (13 March 2009) per curiam.

<sup>88</sup> Walker v Minister for Planning [2007] NSWLEC 741 at Para 51.

from these cases on intergenerational equity. The first two suggest that the principle of intergenerational equity is extending the temporal reach of environmental law. The third is less encouraging. First, the fact that the Australian legal system relies on judges to elaborate the content of the principle of intergenerational equity is profound. It is argued here that the strong judicial role in developing the content of the principle could lead to a requirement of genuine consideration of the interests of future generations in relevant decision-making (IVA). Second, the cases indicate that the principle of intergenerational equity requires decision-makers to consider a development's cumulative impacts on the environment. This seems to indicate a judicial interest in long-term environmental consequences and is represents an encouraging departure from myopic interpretations of environmental law. Third, the cases underline the propensity for administrative law actions to advance environmental law interests. However, they also raise the question of the extent to which the decisions rely on basic administrative law principles, rather than newer environmental law principles. In other words, if a principle of administrative law had been at odds with the relevant ESD principle, which would have prevailed? Biscoe J in particular gave the impression that administrative procedures lie at the heart of the outcomes of these decisions.

#### **A. Intergenerational equity as a judge-made principle**

It is important to stress the significance of the strong role judges have in determining the content of the principle of intergenerational equity. In an academic article, Justice Ronald Sackville notes the increasing range and depth of Australian judicial lawmaking in recent times.<sup>89</sup> This phenomenon, he argues,

has less to do with the particular reforming proclivities of Australian judges than with the far-reaching changes in Australian society and the structure of

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<sup>89</sup> Ronald Sackville, 'Continuity and Judicial Creativity – Some observations' (1997) 20 UNSWLJ 145.

the legal system itself... the social welfare state has left a legacy in the form of reliance on legislation as the means of regulation and a source of rights.<sup>90</sup>

Noting that legislation underpins the relatively new legal field of environmental law, Sackville notes that '[p]aradoxically perhaps, the greater the degree of legislative intervention, the more extensive the discretionary power conferred on courts and the greater the range of politically sensitive decisions the courts are obliged to make.'<sup>91</sup>

This certainly appears to be the case with respect to judges' discretion about the content of principles of ESD. The simple wording of the principle of intergenerational equity under Australian law provides a wide interpretative scope for judges:

the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.<sup>92</sup>

If we consider how judges might, hypothetically, interpret this provision over time, it is clear that there is a wide range of potential outcomes. On the one hand, the legislative requirement has the potential to create a very onerous burden on current generations. Ensuring that environmental conditions are *enhanced*, in particular, could be interpreted judicially to require not only that the current generation refrain from taking certain polluting actions, but also that they take positive actions to improve the health, diversity and productivity of the environment. On the other hand, the legislative provision could be interpreted as requiring only a light burden on current generations in order to *maintain* current environmental conditions, potentially allowing the status quo. As the Australian population grows, this could result in de facto reduced environmental standards for future generations, assuming that a greater

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<sup>90</sup> Ronald Sackville, 'Continuity and Judicial Creativity – Some observations' (1997) 20 UNSWLJ 145 at 152.

<sup>91</sup> Ronald Sackville, 'Continuity and Judicial Creativity – Some observations' (1997) 20 UNSWLJ 145 at 152.

<sup>92</sup> See Intergovernmental Agreement on the

population with the same environmental resources results in a lower per capita environmental quality.<sup>93</sup>

Furthermore, the principle has the potential to be applied in a wide range of legal contexts. While the cases discussed in this paper mainly consider the notion of intergenerational equity within the context of determining the adequacy of environmental impact assessment, there is no reason that the judicial application of the principle should be so limited in the future. This is particularly so given that the principles of ESD are foreseen as applicable in a wide range of circumstances under the various schedules of the *Intergovernmental Agreement on the Environment*.<sup>94</sup> The nine schedules to the *Intergovernmental Agreement* provide information on the implementation and application of the principles of sustainable development, including the principle of intergenerational equity. One of these schedules (schedule 3) deals with environmental impact assessments, but the other eight deal with a wide range of situations: (1) data collection and handling; (2) resource assessment; (4) national environment protection measures; (5) climate change; (6) biological diversity; (7) national estate; (8) world heritage; and (9) nature conservation. Presumably, therefore, the principle of intergenerational equity could arise with respect to any of these scheduled contexts.

In short, the scope for judicial lawmaking here is wide, and raises the question of whether the judiciary is properly placed to make the decisions that, as the cases show, may involve balancing the competing interests of current and future generations. Judicial lawmaking is, of course, a matter which has often been the cause

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<sup>93</sup> This is, of course, a complex issue the full examination of which is beyond the scope of this paper. For some nuanced views on the interaction between population growth and environmental degradation, see for example Maureen Cropper and Charles Griffiths, 'The Interaction of Population Growth and Environmental Quality' 84(2) *American Economic Review* (1994) 250 at 250-254.

<sup>94</sup> List the situations to which the schedules suggest the ESD principles apply.

of deep political debate.<sup>95</sup> In the US, Justice Antonin Scalia has described how judges interpret legislation as ‘a question utterly central to the existence of democratic government.’<sup>96</sup> For many, the question as to how and to what extent the current generation should foster the environmental interests of future generations would be best left up to a democratically elected body to decide, rather than to judges, who are unaccountable to the electorate. This is the sort of judicial philosophy championed<sup>97</sup> by some of the US Supreme Court Judges for the early 20<sup>th</sup> Century, including Oliver Wendell Holmes, Brandeis and Stone whose opposition to judicial lawmaking ‘revolved around the supposed superiority of democratic – that is, legislative – choice mechanisms’.<sup>98</sup> Relevantly to the present context, such a preference for democratic environmental decisions might be inferred from the approach that Brown Weiss suggests for the implementation and enforcement of the principle of intergenerational equity (see section IIB above). Brown Weiss, whose writing has influenced not only academics<sup>99</sup> but also judges<sup>100</sup> in this field, has argued that each member of the current generation acts as a ‘guardian’ of the planet, holding it on trust for members of the future generation (a concept she refers to as the ‘Planetary Trust’).<sup>101</sup> This approach assumes that all members of the current generations will accept a role as guardian. It also leaves unsaid, what should occur if member of the current generation hold different views as to what their guardianship entails. It seems reasonable to

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<sup>95</sup> See Kmiec; Selway; Wachtler at 2.

<sup>96</sup> Scalia, *A Matter of Interpretation* p 133 – check.

<sup>97</sup> Although it should be noted that the debate about judicial lawmaking has been going on at least since Montesquieu developed the doctrine of separation of powers: see Sol Watchler, ‘Judicial Lawmaking’ 65(1) *New York University Law Review* 1 (1990) at 4.

<sup>98</sup> Robert M. Cover, ‘Origins of Judicial Activism in the Protection of Minorities’ 91 *Yale Law Journal* (1982) 1287 at 1287.

<sup>99</sup> See eg Linda Collins (2007) at 93; Sunstein & Rowell (2007) at 35; Lee Godden; Godden and Peel, see also Justice Brian Preston in an academic context.

<sup>100</sup> See *Gray v Minster for Planning* at ---. Brown Weiss’s ideas were imported into the judgment indirectly when Pain J cited Justice Preston’s academic article.

<sup>101</sup> Edith Brown Weiss, *In Fairness to Future Generations* 96 (1989).

deduce that Brown Weiss's theory would require members of the current generation to take a democratic approach to deciding how best to manage the environment.

However, as past and indeed present environmental performance in democratic countries around the world indicates, a democratic approach to management of the environment is by no means a safeguard of the interests of the environment itself. Nor is an approach which leaves environmental decisions to the most vocal or powerful people. The recent attempt by the Australian Government to introduce a tax on mining profits not only saw off Prime Minister Kevin Rudd, but also demonstrated the ability of a tiny but vocal minority of Australians (mining industry leaders) to turn public opinion against an idea that was, at least in theory, to the benefit of the vast majority of Australians. With respect to enforcement of 'planetary rights'<sup>102</sup>, Weiss has suggested that parliaments appoint a planetary ombudsman<sup>103</sup> who can ensure that the Planetary Trust is upheld: in fact, this has occurred in Hungary and Israel; in neither place has the outcome been as Weiss might have hoped.<sup>104</sup>

By contrast, judges, who are reasonably isolated from political pressure through tenured positions,<sup>105</sup> are in a unique position to make decisions that could prove unpopular with vocal members of the community. While the Parliament has little incentive to promote the interests of future generations where they conflict with interests of current constituencies, judges are not beholden to the same concerns. For this reason, judges have a more realistic potential to protect the interests of future

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<sup>102</sup> Edith Brown Weiss, *In Fairness to Future Generations* 96-103 (1989).

<sup>103</sup> Edith Brown Weiss, *In Fairness to Future Generations* 109 (1989).

<sup>104</sup> The Hungarian ombudsman for future generations is really an environmental ombudsman: private conversation with Hungarian Ombudsman for Future Generations; in Israel the first Ombudsman for Future Generations, Judge Schlomo Shaham, was vocal about a wider range of issues – his position has not been refilled as a result of opposition within the Israeli parliament: private conversation with Judge Schlomo Shaham.

<sup>105</sup> Note, though that judicial isolation from political pressure is by no means complete: see Michael Kirby, 'Attacks on Judges – a universal phenomenon' 81(6) *Judicature* 238 (1998) at 242.

generations, who, though addressed in the legislative principle of intergenerational equity, are unable voice their concerns in the political arena. It was line of reasoning that led Justice Weeramantry of the International Court of Justice to say in the *Nuclear Tests Case* that ‘this Court must regard itself as a trustee of the interests of an infant unable to speak for itself’.<sup>106</sup>

As it currently stands, judges have the main role in shaping the character of the principle of intergenerational equity in Australia. For now judges have the opportunity to give effect to the principle of intergenerational equity, and in doing so may shift the balance in environmental responsibilities between current and future generations in ways that prove to be unpopular with some members of the community. It remains to be seen at what point Parliament would intervene. More broadly, the effects of judicial interpretation of the principle of intergenerational equity may have force beyond the courtroom; they may play a role in the formation of social norms with respect to the timeframe of interests considered in environmental decision-making. As Marcia Mulkey notes, ‘the judiciary’s upholding of appropriate and well-grounded environmental protection laws and actions to implement them adds materially to their acceptance by society at large.’<sup>107</sup>

### **B. Cumulative Impact: a longer timeframe?**

The principle of intergenerational equity is fundamentally different to other principles of ESD (and indeed other legal principles more generally)<sup>108</sup> in that its focus is on justice not between contemporaries but between members of different generations. Its temporal characteristic is the essential feature of the principle of intergenerational

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<sup>106</sup> *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests Case (New Zealand v. France)* (1995) ICJ Rep. 288.

<sup>107</sup> Marcia E. Mulkey, ‘Judges and Other Lawmakers: Critical Contributions to Environmental Law Enforcement’ 4 *Sustainable Development Law and Policy* 9 (2004) at 8.

<sup>108</sup> See generally Janna Thompson (check page).

equity. Whilst the precautionary principle requires decision-makers to act prudently with respect to potential future environmental problems, the principle of intergenerational equity is the only ESD principle that requires the balancing of future generations' interests with those of the current generation. The notion of cumulative impact emphasizes the principle's long-term focus: cumulative impacts are, by nature, significant over either a wider space or a longer time frame. Cumulative impact is, by definition, not relevant to a specific site, but rather becomes relevant in a broader context. The notion of cumulative impact represents a shift from a site-specific, spatially and temporally narrow view of environmental harm, to a more universal view of environmental impact.

The treatment of the principle of intergenerational equity in *Gray, Traralga* and *Walker*, as well as several other Australian cases reveals a judicial view that the principle of intergenerational equity requires administrative decision-makers to consider the *cumulative impact* on future generations of proposed developments. In *Gray*, Justice Pain argued that in an

environmental impact assessment which takes into account the principle of intergenerational equity..., one important consideration must be the assessment of cumulative impacts of proposed activities on the environment. As I stated in *BT Goldsmith*,<sup>109</sup> failure to consider cumulative impact will not adequately address the environmental impact of a particular development where often no single event can be said to have such a significant impact that it will irretrievably harm a particular environment but cumulatively activities will harm the environment.<sup>110</sup>

Chief Justice Preston echoed this line of reasoning in *Taralga*, arguing that in the context of energy production, the principle of intergenerational equity requires:

as far as is 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*

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<sup>109</sup> *BT Goldsmith Planning Services Pty Ltd v Blacktown City Council* [2005] NSWLEC 210, para 90.

<sup>110</sup> *Gray* (2006) para 122.

effects caused by anthropogenic climate change. In this way, the present generation reduces the adverse consequences for future generations.<sup>111</sup>  
[Emphasis added]

In a different context, Justice Pain argued that intergenerational equity required cumulative impact assessment in the context of cultural impact in *Anderson and Anor v Director-General of the Department of Environment and Conservation*<sup>112</sup>, stating in that case that the principle of intergenerational equity requires ‘an assessment of the cultural significance of a particular area in the context of whether its destruction would mean there was less opportunity for future generations of Aboriginal people to enjoy the cultural benefit of the site’.<sup>113</sup> Part of Justice Pain’s reasoning concerned ‘the need to assess the cumulative impact of allowing the destruction of aboriginal objects in a particular area.’<sup>114</sup> It should be noted that the relevance of cumulative impact assessment may be limited in cases where the relevant cumulative impact includes impacts that are ‘hypothetical’ or ‘potential’.<sup>115</sup>

Despite these caveats, the endorsement by several judges of the importance of cumulative impact to the principle of intergenerational equity is significant in that it indicates an awareness of the long-term impact of multiple instances of environmental damage, something which is highly relevant to the interests of future generations. It is all the more significant as it appears to depart from the (mistaken) assumption that some legal academics<sup>116</sup> (and to a lesser extent, members the judiciary<sup>117</sup>) take in asserting that the principle of intergenerational equity and the principle of

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<sup>111</sup> *Taralga* (2007) 161 LGERA 1, 12 (Preston CJ).

<sup>112</sup> (2006) 144 LGERA 43 para 199. See Gray (2006) para 123.

<sup>113</sup> *Anderson v Director-General of the Department of Environment and Conservation and Ors* (2006) 144 LGERA 43 para 199.

<sup>114</sup> Gray [2006] at para 126

<sup>115</sup> See *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* (2007) 243 ALR 784, 795 (per Stone J).

<sup>116</sup> Eg Brown Weiss; cf those that argue for intragenerational equity such as Gosseries.

<sup>117</sup> The judges in these cases tend to fall into the trap of equating the two notions; check where this mistake originates from.

*intragenerational equity* are mutually reinforcing.<sup>118</sup> This view appears to originate from principle 3 of the *Rio Declaration*, which states that ‘the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.’ The conflation of interests of current and future generations was not, however, carried forth into the *Intergovernmental Agreement on the Environment*. It is worth noting that the tendency to bundle together in an unproblematic fashion these two notions of equity appears to afflict legal academics more than others such as economists,<sup>119</sup> presumably because it is lawyers who have replicated the wording of the *Rio Declaration* in judgments and academic papers.

Whilst the principles of intergenerational equity and intragenerational equity are not necessarily completely incompatible, the assumption that they are mutually reinforcing is certainly misguided. The notions of equity as between non-contemporaries and contemporaries can quickly be distinguished. The former requires thought about levels of savings of natural and other assets over time.<sup>120</sup> The latter is inherently connected to distributive politics between contemporaries. The notion of distributive justice between contemporaries is a highly contested area, of course, and presents a great potential constraint on the exercise of the principle of intergenerational equity.<sup>121</sup> Those who, like Edith Brown Weiss, and the authors of the *Rio Declaration*, mention the two notions within one breath, are oblivious to the

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<sup>118</sup> Academics who argue actively that the two notions of intergenerational and intragenerational equity are complementary include Edith Brown Weiss, see (2008) at 618; (1992) at 21-22; other academics group the two notions of intergenerational and intragenerational equity together without analysing their potential to conflict, see for example Godden (2009) at 556.

<sup>119</sup> See Barresi; Doran (2008) at 242, who argues that ‘[i]n sharp contrast to the intragenerational distribution of wealth - where government policy plays an active and commanding role in transferring resources between and among different groups - the intergenerational distribution of wealth is determined mainly by decisions of private actors that fall outside government policy and that may blunt or even reverse the distributional effects of government policy’; Gosseries.

<sup>120</sup> See Dobson.

<sup>121</sup> See for example Axel Gosseries, who argues that intergenerational wealth redistribution should never occur where it impinges upon intragenerational wealth redistribution.

deep-seated potential for conflict between them. If more than lip-service is to be paid to either principle, then they must be distinguished from one another. Legal academics and judges would do better to draw out the distinction between the two terms and consider both their competing and complementary requirements in any given case.

On a final note, while the two concepts roll quite glibly off the tongue together, after a moment's consideration it seems somewhat odd that the notions of intergenerational and intragenerational equity terms should be associated in the first place. Common law legal systems are infused to their very core with the notions of equity and fairness between contemporaries.<sup>122</sup> Indeed, one might argue that the entire field of equity is based upon the quest for intragenerational equity, and has been since the Middle Ages.<sup>123</sup> Intergenerational equity, however, offers something different – an attempt to facilitate a level of justice between members of *different* generations, and in doing so presents a potential key to the instigation of a longer-term decision-making process. This is something that common law legal systems have not prioritised in the past (and understandably so: not only is the structure of the common law legal system inimical to such an approach, but also achieving justice between contemporaries is hard enough in itself).<sup>124</sup> However, the long-term nature of complex environmental problems creates the need for innovation within the legal system. The notion of intergenerational equity, while fraught with challenges, presents an opportunity for the law to take a new approach to justice over the long-term. The fact that Australian judges have taken a cumulative approach to assessing impacts upon future generations indicates an appreciation for the central temporal quality of the

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<sup>122</sup> This is true of theories of justice more generally: Thompson (2009).

<sup>123</sup> Quote someone like Blackstone.

<sup>124</sup> See Janna Thompson (and others).

principle of intergenerational equity.

### **C. Administrative Law as Environmental Governance**

The judgements that consider intergenerational equity in any depth under Australian law are grounded in administrative law. More specifically, they tend to deal with administrative decisions concerning environmental impact assessment. They form part of a broader ascension of administrative law as a tool for environmental legal challenge in Australia.<sup>125</sup> Bell and McGillivray note that that ‘environmental law has not been developed as a self-contained discipline, but has simply borrowed concepts from other areas of law.’<sup>126</sup> When new types of environmental problem, such as climate change, arise, environmental solutions must take whatever form they can.<sup>127</sup> The use of administrative law as a form of environmental redress has both advantages and limitations in the context of the principle of intergenerational equity.

In addition to being a well-established area of law, administrative law has the advantage of offering preventative, rather than reactive, forms of redress. Administrative law provides the opportunity for the principle of intergenerational equity to be applied preventatively. By allowing parties to challenge administrative decisions affecting the environment that have failed to consider ESD principles, the administrative law approach facilitates the *prevention*, rather than the retrospective compensation for environmental harm. This is essential in order to give proper effect to the notion of intergenerational equity, which requires that the interests of future generations be taken into account in decision-making.<sup>128</sup>

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<sup>125</sup> Godden?

<sup>126</sup> see Bell & McGillivray, *Environmental Law 10* (7th Ed, 2008). See also Fisher et al., arguing that environmental law is sometimes seen as a series of solution-oriented principles.

<sup>127</sup> See BELL & MCGILLIVRAY, *ENVIRONMENTAL LAW 10* (7<sup>th</sup> Ed, 2008).

<sup>128</sup> Contrast Edith Brown Weiss (1989), who suggests more traditional remedies like breach of ‘Planetary Trust’, at p 109 (check page).

Administrative law also has a number of limitations as a means for facilitating the principle of intergenerational equity. First, judges conducting administrative review of decision-making are usually limited in the extent to which they may look at the merits of a case.<sup>129</sup> As Biscoe J noted of the New South Wales Land and Environment Court in *Walker*:

This Court's ESD decisions have been mainly in its civil jurisdiction. Its civil decisions on ESD have sometimes been in judicial review cases (like the present case), which are restricted to determining the legality of administrative decisions.<sup>130</sup>

This means that the extent to which judges are able to contribute to the evolution of principles of law is limited. Administrative law decisions generally to turn on the adequacy of the decision-making *process*, rather than on the merits of the decision itself. This point of view is supported by Jagot J's refusal to accept an application based on *Gray* in the case of *Drake-Brockman v Minister for Planning*.<sup>131</sup> In that case, the applicant tried unsuccessfully to rely on *Gray* in order to argue that an environmental impact assessment was inadequate because it did not include a quantitative analysis of greenhouse gas emissions. Jagot J distinguished *Gray* on the grounds that, essentially, it was the process of decision-making that had been flawed in *Gray*, rather than the substance of the decision itself:

what appeared to have been critical in *Gray* was the disjunction between what the Director-General required ... and what the Director-General accepted as adequate... *Gray* does not stand for a general proposition that Pt 3A of the EPA Act requires any particular form of assessment of greenhouse gas emissions for each and every project to which that Part applies.<sup>132</sup>

The foregoing suggests that putative decisions on ESD principles by administrative courts are in reality decisions upon more established principles of administrative law.

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<sup>129</sup> See *Walker* (2007) paras 81-84 (Biscoe J).

<sup>130</sup> Citation! *Walker* (2007)

<sup>131</sup> [2007] NSWLEC 490.

<sup>132</sup> *Drake-Brockman* Para 131 (Jagot J).

A related potential drawback to the use of administrative law to further the principle of intergenerational equity is the risk that the principle will come to be treated as a procedural step in development decisions rather than a principle of wide applicative scope. In *Bentley v BGP Properties Pty Ltd*,<sup>133</sup> a case, once again, dealing with the requirements of an environmental impact assessment, Preston J stated that the requirement for

prior environmental impact assessment and approval enables the present generation to meet its obligation of intergenerational equity by ensuring the health, diversity and productivity of the environment is maintained and enhanced for the benefit of future generations'.<sup>134</sup>

This view, if read as describing the exhaustive role of the principle of intergenerational equity, greatly diminishes the scope of the principle. A preferable view would be that prior environmental impact assessment is a necessary but insufficient requirement of the notion of intergenerational equity in the specific context of some planning decisions under the relevant legislation.

## **VII. Conclusion**

This paper has considered the capacity of the concept of intergenerational equity to provide a solution to problem of how to ensure that the interests of future generations are considered in environmental decisions bearing upon them, particularly where those interests might conflict expressed current interests. Environmental problems have complex temporal effects, making their legal solution difficult: environmental harm can span a very long time period, be irreversible, or be temporally divorced from its causes (as the problem of climate change shows). Neither the common law (and in particular tort law) nor much legislation is ideally suited to dealing with the long-term effects of environmental problems, including their impact on future

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<sup>133</sup> (2006) 145 LGERA 234.

<sup>134</sup>

generations, because both of these sources of law are most concerned with immediate problems. For these reasons, the concept of intergenerational equity, which in all of its various guises emphasises the interests of future generations, presents a point of departure from the normal temporal reach of environmental law. At the same time, the notion of intergenerational equity, as expressed both in international law and domestic law, remains vague in expression. This paper has therefore taken three cases from Australia, where the principle of intergenerational equity has become a feature of domestic law, as exemplars in order to elucidate the workings and potential of the principle in practice.

While the jurisprudence with respect to the principle remains limited, the cases on intergenerational equity demonstrate that judges may give effect to the principle by including the interests of future generations within current decision-making. Judges have done this in various ways: they have stressed that, for example, that greenhouse gas emissions present a threat to future individuals' well-being (*Gray, Taralga, Walker*), and that the interests of future generations in cleaner energy sources can at times outweigh the interests of current plaintiffs who must put up with the inconveniences caused to their community by the cleaner energy source (*Taralga*). They have recognised one temporal feature of environmental problems that is often ignored, which is that over time, environmental harms that seem negligible on their own may together have a significant cumulative impact. In both *Gray* and *Taralga*, the judges found that the principle of intergenerational equity required cumulative impact of environmental harm to be taken into account. More generally, when discussing the principle of intergenerational equity, the judges referred explicitly to the interests of future generations in the contexts of the case at hand. This in itself represents a radical rethinking of the legal treatment of environmental harm.

The exemplars used here suggest, therefore, that the inclusion of the principle of intergenerational equity in environmental law has the potential to lengthen the time-horizon for environmental decision-making.

Legislatures have a crucial role in implementing environmental legislation that has a longer-term focus, such as the principle of intergenerational equity. While several international law instruments have made reference to the interests of future generations, this has occurred in few domestic jurisdictions thus far. However, as this paper has demonstrated, when it has been done, the role of judges in explicating the content of the principle and giving effect to it cannot be underestimated. Notwithstanding the tendency of the common law to be reactive and backward looking, the judiciary is in some sense insulated from the most pressing short-term political demands faced by legislators. In the context of environmental problems, relevant time horizons are often long. While judges in common law jurisdictions are, of course, bound by precedent and interested primarily in solving the case between the individuals before them, the cases explored in this paper show that judges nonetheless have the potential to look at the longer term interests involved in the present case. As such, the potential for environmental protection to grow out of judge-made law is significant.

Finally, while this paper has explored the concept of intergenerational equity within an environmental law context (and indeed, it is in the environmental context that it is most often found), the concept has wide-ranging potential. This paper has argued that not only environmental law but also the legal enterprise as a whole is largely reactive and short-term focused. As a result, a legal principle of intergenerational equity has the potential to have an impact outside of the environmental context. In particular, a principle of intergenerational equity could

require judges to consider the impact current decisions have on future generations' interests in a variety of contexts, including fiscal policy, pension fund regulation and financial regulation more generally. In each of these contexts, the interests of future generations of taxpayers, retirees and investors may differ sharply from the interests of current generations. While the existence of the principle would not mean necessarily that future generations' interests are prioritised over current generations' interests, it would mean that those interests are made explicit, something which does not currently happen. In making the interests of future generations an explicit consideration in contexts where these interests differ from those of the current generation, a principle of intergenerational could present a marked departure from common law jurisdictions' short-term focused legal past.