Editorial

Heritage protection in Australia: a consideration of the New South Wales Heritage Act Review; developments in legislating dam safety in India and legal reforms; procuratorial environmental public interest litigation in China; the development of a jurisprudence on sustainable development in India; and the pursuit of ‘net-zero by 2060’ and China’s energy security dilemma

1 APJEL IN THE ASIA-PACIFIC REGION

This second issue of APJEL in the 2022 volume – APJEL’s 25th – features environmental law scholarship, both in specific states, and generally, in the Asia-Pacific region. The five articles in this issue follow the first five of the 2022 volume, nine in the 2021 volume, eight in 2020 and 13 in the 2019 volume. Our articles over those years have concerned environmental law developments in Australia, Bangladesh, China, India, Indonesia, the Maldives, Malaysia, New Zealand, Papua New Guinea, Russia, the Philippines, Singapore, the South China Sea region, the South Pacific region generally, Sri Lanka and Thailand.

We remain confident that APJEL continues to make a valuable contribution in advancing environmental law knowledge and scholarship in the region. APJEL’s aim continues to be to publish closely edited, carefully researched, peer-reviewed scholarship on a wide range of environmental law-related issues in the Asia Pacific region.

2 DELAYS IN PUBLICATION

APJEL has been affected in many ways through the years 2020 to 2022 by various issues related to commissioning, editing, reviewing and rewriting of submitted articles. We have not yet recovered from the delay and this second issue of 2022 is appearing a little later than we had hoped it would. Once again, to our contributors and our readers we offer apologies – we do anticipate that the next issue, the first of 2023, will be published on time.

3 THE ARTICLES IN THIS ISSUE

3.1 Heritage protection in Australia: a consideration of the New South Wales Heritage Act Review, 2021

Like many states and countries worldwide, Australia has significant heritage – both cultural and natural – that is threatened by factors ranging from the purely natural (floods, droughts, storms, earthquakes) through quasi-natural (the exacerbation of natural disasters by climate change) to the activities of humans (careless or deliberate).
Specific threats to both natural and build heritage include, as examples: alien invasive species; changing fire regimes; clearance of native vegetation; development in many different forms; increased use of natural resources; worsening droughts; urban expansion; and anthropogenic climate change.

On the positive side, there is increasing recognition in Australia of the value of natural and humanmade heritage. Australia does accord legal protection to heritage at multiple levels – from World Heritage Sites to local planning permission requirements. National protection, in Australia’s federal system of governance, is comparatively limited, however, and it is to the States that we must often turn to see what protections might be in place.

The first article in this issue, by Kirk Gehri, considers critically some recent developments relevant to built heritage and Aboriginal/Indigenous heritage in the State of New South Wales. The government of the State of New South Wales in Australia published a discussion paper in April 2021 prior to commencing a review of the Heritage Act 1977 (NSW). The paper was based on three main themes: ‘making heritage easy’; ‘putting heritage to work’; and ‘making heritage relevant’.

An inquiry into the review was referred to the Legislative Council Standing Committee on Social Issues to report on. Multiple public submissions to the standing committee criticized the government’s policy themes for not including guiding principles for the Heritage Act. Such principles could have included protection, conservation and celebration of the State’s cultural heritage. Other stakeholders have suggested, however, that the architecture of the Heritage Act does not require reform. The main concern of the National Trust of New South Wales is that any future amendments to the Heritage Act result in better heritage outcomes, rather than a weakening of heritage protection.

This article suggests that greater attention should have been given to reforming the National Parks and Wildlife Act 1974 (NSW), as NSW remains the only State in Australia without dedicated (‘standalone’) legislation aimed at preserving Aboriginal cultural heritage. Further, the Environmental Planning and Assessment Act 1979 (NSW) can be used to override any protection afforded under the Heritage Act if the project is deemed to be ‘State Significant Development’. The NSW government has so far refused to support reform of this exception in its response to the standing committee’s final report. The result of this review should be of concern for all those who wish to preserve both treasured older-style buildings and green space in NSW.

### 3.2 Dam safety in India and legal reforms

According to the International Commission on Large Dams, more than 58,000 dams are listed in the Register it holds – with the roles of dams covering matters such as provision of water for agricultural irrigation, for hydro-electric power for multiple purposes, for mining and industry, for navigation, for control of flood waters.

1. The core statute at Commonwealth level is the Environment Protection and Biodiversity Conservation Act, 1999 (Cth).

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Unfortunately, dams worldwide face many threats – ranging from the threat of cracking walls as dams age, to the threat of catastrophic weather events – potentially worsened by the effects of climate change – with elderly dams often not designed to withstand the effects of threats that are either worse or different to those than might have been anticipated in the past.

The second article in the present issue, by Tony George Puthucherril, considers legal reforms related to the safety of dams in India.

Given the potential for catastrophic environmental impacts on people, property and environments, both short-term and long-term, for the failure of dams, safety is critical. India has a very high number of dams, ranking third after the US and China. The vast majority of India’s large dams are more than a quarter of a century old, and more than 200 dams are more than a century old. These ‘geriatric’ dams continue to function but raise serious safety concerns, with a classic example being the 127-year-old Mullaperiyar Dam. India’s track record in respect of dam safety does appear, on the whole, to be generally satisfactory, but there have been examples of poor maintenance and several failures have occurred.

Under India’s Constitution, water is a matter under the primary authority of India’s States, India recently enacted the Dam Safety Act, 2021, at national level. Criticism has been levelled at this new statute for being ‘anti-federal’. This article evaluates the law on dam safety in India by highlighting the salience of India’s Dam Safety Act. The core argument made is that, given legislative laxity on the part of many of India’s States in adopting dam safety measures, and the limitations on a State to legislate beyond its borders, the Union did need to intervene via the Dam Safety Act. By enacting this statute, the Union has not usurped the States’ powers. Instead, it has fortified cooperative federalism by creating institutional structures at the central and State levels to ensure that dam safety is not compromised; and that people do not have to lose their lives unnecessarily.

3.3 Procuratorial environmental public interest litigation in China

States worldwide are increasingly recognizing that merely having criminal laws ‘on their books’ in the environmental field is insufficient. Effective enforcement of environmental laws will depend upon many different factors – ranging from the capacity of the state to implement effective sanctions to the extent to which society ‘buys into’ the importance of environmental protection.

China has in recent years begun to recognize the value of involving non-governmental organizations in environmental law enforcement. Increasingly, within the field of environmental public interest litigation (EPIL) in China, certain ‘qualified environmental non-governmental organizations’ are being permitted ‘to file litigation to protect the public interest in safeguarding the environment and natural resources from pollution and ecological destruction’.7

The third article in the current issue, by Yun Ma and Wenzhen Shi, canvasses some of the difficulties which China is facing in implementing an effective procuratorial EPIL system.

6. ‘Developments in legislating dam safety in India: a tale of ifs and buts?’.
8. ‘Procuratorates at the crossroad: performance, controversies and prospects of procuratorial EPIL in China’.

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It is argued in this article that procuratorial environmental public interest litigation (EPIL) has shown value in China in addressing environmental concerns through the channel of PIL and has gained momentum in the state’s agenda-setting. Procuratorial activism is ‘signalled and revealed’ by mobilizing procuratorates at all levels, activating PIL in all types of litigation, and achieving breakthroughs in new fields.

It is noteworthy that the efficacy of procuratorial EPIL may be somewhat diluted due to the possibility of ‘cherry-picking’ occurring during the case screening process. Caution should be exercised in respect of ‘procuratorial activism’, which may risk excluding NGOs from the process if there is a shift in policy focus towards criminal prosecution, with civil EPIL becoming incidental; and intruding administrative discretion with a low threshold for initiating administrative EPIL and tightened judicial review. Procuratorial EPIL, ought, to be most efficient, to be founded on a rational design of procuratorates’ role in the overall EPIL system with coordination between the dual roles of EPIL litigants and the constitutionally entrenched role of legal supervisions. Connecting mechanisms amongst different types of PIL should be established in order to bring each of these into full play with the goal being to enhance effective synergies. Both enhanced legal empowerment and top-down design should be adopted in order to reduce discrepancies and to increase cohesion.

3.4 The development of a jurisprudence on sustainable development in India

According to the United Nations, the 17 Sustainable Development Goals are ‘a call for action by all countries – poor, rich and middle-income – to promote prosperity while protecting the planet’ in recognition that:

- ending poverty must go hand-in-hand with strategies that build economic growth and address a range of social needs including education, health, social protection, and job opportunities, while tackling climate change and environmental protection. More important than ever, the goals provide a critical framework for COVID-19 recovery.9

Of course, the Sustainable Development Goals (SDGs) in and of themselves are not going to effect the change desired. This will require major efforts, on a scale of cooperation never before achieved, at international level; and, likewise, the transformation of laws, economies and societies at national level. So vast a transformative effort is almost impossible to imagine – where does a state even begin to begin? Much of the value of the 17 goals must lie in providing blueprints, yardsticks, against which commentators can measure the legislative and enforcement performance levels of governments and the jurisprudential development efforts of judiciaries.

9. Un.org, ‘17 Goals to Transform Our World’ (und.) <www.un.org/sustainabledevelopment/>. The goals are:

no poverty; zero hunger; good health and well-being; quality education; gender equality; clean water and sanitation; affordable and clean energy; decent work and economic growth; industry, innovation and infrastructure; reduced inequalities; sustainable cities and communities; responsible consumption and production; climate action; life below water; life on land; peace, justice, and strong institutions; and partnerships for the goals.

UN Department of Economic and Social Affairs Disability, ‘17 goals to transform the world’ (und.) <www.un.org/development/desa/disabilities/envision2030.html>.
The fourth article in the current issue,10 by Florian Müller, considers the development of environmental jurisprudence in Supreme Court judgments in India, measured against the SDGs.

The article begins by noting that the adoption in 2015 of Agenda 2030 with its 17 SDGs arguably represents a new global approach to promoting sustainable development. This article considers the potential openness of the Supreme Court of India to utilizing rhetoric drawn from Agenda 2030, through considering recent developments in case law in the Court. Landmark cases are analysed, where it is considered that these have advanced the Court’s understanding of sustainable development.

Against this background, it is argued in the article that the Court’s 2019 ruling in Hanuman Laxman Aroskar v Union of India marks a critical step towards implementation of the SDGs in a domestic context. In light of this recent development, the Court’s jurisprudence on sustainable development is evaluated critically. The article concludes with an outlook on potential future paths for integrating the SDGs further into the Court’s case law.

3.5 The pursuit of ‘net-zero by 2060’ and China’s energy security dilemma

In September 2020, speaking to the United Nations General Assembly, President Xi Jinping of the People’s Republic of China advised that China intended to see its carbon dioxide emissions peak before 2030 and that it would ‘reach carbon neutrality by 2060’.11 Tay has suggested that ‘Climate Action Tracker’,12 an independent organization that tracks countries’ commitments to the 2015 Paris agreement on climate change, has estimated that if China can achieve carbon neutrality by 2060, it could lower global warming projections by around 0.2–0.3 °C by 2060 which ‘would represent the largest and most significant reduction by any country’.13 This has become known as the ‘net-zero by 2060’ target.

In the fifth and final article in the current issue,14 Cynthia Yuan engages with the commitment and with strategies which China might adopt in order to meet it. The People’s Republic of China’s economy is a rapidly emerging one, and one that has developed an increasing reliance on fossil fuel imports. Because its energy demand outstrips its ability to generate supply, China’s energy security challenges are persistent and ongoing. China has, over the years, sought to address energy security risks through various strategies, including diversification, self-sufficiency and energy conservation. None of these strategies have, however, solved China’s energy security dilemma.

The key issue considered in this article is how China’s pursuit of carbon neutrality, exemplified by its recent announcement that it will try to meet a target of net-zero emissions by 2060, will have impacts on the ongoing energy security challenges presented by China’s energy systems. Considering the relationship between the two objectives of ‘energy security’ and ‘emissions reductions’, this article seeks to test whether energy security is in fact restrictive of sustainable economic and social development.

10. ‘Mapping and assessing the Supreme Court of India’s jurisprudence on sustainable development in light of the SDGs: from Vellore Citizens Welfare Forum to Hanuman Laxman Aroskar’.
13. Ibid.
14. ‘The pursuit of “net-zero by 2060”: A “silver bullet” for China’s energy security dilemma?’.
Through consideration of the legislative and policy instruments which govern the transformation of China’s energy grid, it is argued that the characterization of energy security and emissions reduction as being ‘dichotomous’ is antiquated. The pursuit of net-zero by 2060, through decreasing China’s overreliance on fossil fuel imports and increasing the diversity of energy sources within the energy mix to encompass more non-fossil fuel sources, has the potential to be a ‘silver bullet’ for China’s energy security challenges.

4 COMMENT

As inadequate a thank you as it always is included here, we will once again conclude by affirming our belief that the scholarship contained in peer-reviewed journals such as APJEL always represents a true partnership between authors, anonymous reviewers, editors and publishers. To that list we should add also audiences – the students, scholars and other interested readers who give research and publishing so much of its value. The editorial team would like to record our gratitude to all who contributed to this issue – as always, we are grateful!

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