Response to Justice Preston QUT Lecture 30 July 2025

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I am grateful to Amanda Kennedy for inviting me to respond to this thoughtful presentation by Justice Brian Preston.

Typically, he has provided us with a useful frame for thinking about our response to climate change, linking that, rigorously, to global commitments and international legal obligations. The frame of solidarity reminds us we are all in this together, and we have a collective interest in responding adequately to the existential threat posed by climate change.

I want to pick up on a couple of aspects of solidarity that Justice Preston identified.

The first is solidarity in leadership. Justice Preston has shown this himself, as a lawyer and as a judge. I admire his ongoing fearlessness to write and speak extra judicially. This is a path most judges fear to tread. Here at a tertiary institution, it is right to acknowledge the enormous role Justice Preston has played in educating the lawyers to come – those who will be left to sort out the consequences of the decisions we make, or fail to make, today. If only all parliamentarians and administrative decision makers also had the benefit of this exposition.

But I want to talk about a more remarkable form of leadership, that, at least in our times, is peculiar to climate change. In the culture of both Australia's First Nations people and its colonisers, and perhaps in all cultures, we look to our elders for guidance, inspiration, confidence about the way forward – in short, we look to our elders for leadership. But, in climate change litigation, it is the young who have best demonstrated leadership.

It was a group of young people, including Anjali Sharma, who argued the Minister for Environment owed the young people of Australia a duty of care in deciding whether to grant environmental approval for a coal mine.[1] It was a group of young people, who called themselves Youth Verdict, who successfully objected to the Waratah Coal mine in Qld.[2] There are many other examples, mostly in foreign jurisdictions or the international sphere. And it was a group of young law students from the University of the South Pacific, mentored by their teacher, who built an international coalition that led to the General Assembly of the United Nations requesting, and the International Court of Justice delivering, an Advisory Opinion on the Obligations of States in respect of Climate Change.[3] And isn't that magnificent! Both the decision itself, and the backstory. I cannot wait for the documentary. That is a story of intergenerational solidarity.

Of course, climate litigation is not the sole preserve of the young, and in Australia, Torres Strait Island people and Tiwi Islanders have taken on responsibility that belongs with government – to protect country and culture. However, litigation by young people asserting the rights of future generations is a central theme, and a recurring feature of climate litigation, and this transcends while complementing and intersecting with

[1] Minister for the Environment v Sharma [2022] FCAFC 35
[2] Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6) [2022] QLC 21
[3] *Obligations of States in Respect of Climate Change* (Advisory Opinion) [2025] ICJ Rep

cultural rights. It is the young people who have given meaning to the environmental principle of intergenerational equity, drawing ever stronger links between environmental and human rights law.

Not all that litigation has succeeded, if success is judged by whether their claims were upheld. Yet there is a form of success in failure too because the failures have exposed the role the law currently plays in relation to climate change decision making. It acts as a gatekeeper, protecting different rights – commercial and property rights and interests, using rules devised in a different time when we did not appreciate fully the consequences of our activities.

So, I doff my hat to Justice Preston for his steady learned leadership. And I also do so to those courageous determined young people who have taken the lead in testing the limits of the law. As the Head of the School of Law and Social Sciences, University of the South Pacific said, the ICJ opinion is a defining moment in the evolution of international environmental law. I wonder what we each can do to show solidarity in leadership. The take home message from the Vanuatuan law students is that we all have a sphere of influence, and it might be much greater than we think. It just takes courage and imagination to act.

That brings me to the second aspect of solidarity I want to respond to. That is solidarity in action. The form of action I am interested in, is action in law reform. Sure, you might say, I am the Chair of the Qld Law Reform Commission. But there is plenty for us to do, and we have no climate change reference. I do not expect one soon.

That saddens me because there is an urgent need to reform our laws to achieve another form of solidarity that I offer to Justice Preston for his taxonomy – interdisciplinary solidarity – specifically between science and the law. Our law should facilitate decision making that responds to what the science tells us we must do. Far from facilitating decision making informed by the best available science, our law notes it and holds it at bay. The two fields, science and the law, are not aligned, and they need to be. I challenge you to think of a climate case in Australia in the last decade or so, where there has been any serious contest about the science.

In Sharma, the Commonwealth called no expert evidence and did not contest the expert evidence led by Anjali Sharma and her colleagues. In Waratah, I received a joint expert report which contained no disagreements of substance. In the Living Wonders case[4], again, there was little contest about either the causes of climate change or the relevance of GHG emissions, at least from a scientific perspective. In the recent Pabai Pabai case,[5] although there was some disagreement about attribution science or the precise degree of local impacts of climate change, the foundational propositions were not in contest. The same is true internationally, with the 3 recent advisory opinions – ITLOS, Inter-American Court of Human Rights and the International Court of Justice - all proceeding on the uncontested findings on the best available science, documented by the Intergovernmental Panel on Climate Change. Given the rigour of that scientific process,

[4] Environment Council of Central Queensland Inc v Minister for the Environment and Water [2024] FCAFC 56

[5] Pabai v Commonwealth of Australia (No 2) [2025] FCA 796

and the role of governments in signing off on the implications for policy makers, the lack of contest is unsurprising.

Nearly every judgment addressing climate change in Australia begins with a recitation of sobering and agreed facts about climate change, such as these.

- The science on climate change, its causes and (at a global scale) its effects, is largely settled.
- There is a near lineal relationship between GHG emissions and increased global temperature.
- The greater the increase in global temperature the more severe the impacts.
- Every tonne of emissions matters, or as Justice Wigney put in in Pabai Pabai, every fraction of every tonne of emissions matters.

Yet, by and large, such recitations are followed by the reasons why, ultimately, the claim must fail at law.

I am conscious that Justice Preston and I are amongst a very few Australian judicial officers who have undertaken merits review of decisions with climate change implications. In both cases, climate change consequences counted against the mine proceeding. Merits review is not discretion at large. A merits reviewer must apply the law that governs the decision. But there is greater decisional scope when dealing with concepts like public interest. Merits review allows for science informed decision making about where the public interest lies. Although the ground of illegality holds out some promise for judicial review, to date that promise has not been realised. And the turn to the common law in Australia has faltered on the doctrinal difficulties in establishing a novel duty of care.

Tonight is not the occasion for examining the legal arguments that led to the claims failing in Sharma and Pabai Pabai or for exploring whether there could have been a different outcome in the Living Wonders case. I do recommend you read Justice Wigney's decision in Pabai Pabai, particularly his reasoning about the adequacy of Australia's nationally determined contributions under the Paris Agreement.[6] This was the subject of one of the claims in the Pabai Pabai case. He closely considered expert evidence about three methods of calculating what would be a fair contribution to global efforts to reduce GHG emissions - *equality* (that is on a per capita basis), *historical responsibility* (recognising a country's historical emissions) and *grandfather* (which give historical polluters more leeway to make the transition to net zero smoother). Grandfathering is, clearly, most generous to those who are largely responsible for the problem. As far as I am aware, this is the first time this evidence has been explored in a climate change case in Australia.

Happily, for the prospects of law reform, I detect a degree of discomfort in some judicial reasoning in recent cases, perhaps even regret that the law is as it stands.

Take this from the primary judgment of Chief Justice Mortimer and Justice Colvin in the Living Wonders case:

> "[140] Notwithstanding our conclusions on the grounds of appeal, the arguments on this appeal do underscore the ill-suitedness of the present legislative scheme

[6] Ibid [326]-[359]

> of the EPBC Act to the assessment of environmental threats such as climate change and global warming and their impacts on MNES in Australia…[144]…This proceeding, and the merits decision-making underlying it, might be said to raise the question whether the legislative scheme is fit for purpose in this respect."[7]

I hesitate to paraphrase, but what I hear when I read this passage is this - the original decision was a poor one, but the Act ties our hands.

And this from Justice Wigney in the Pabai Pabai decision:

> '[1275] The applicants' primary case against the Commonwealth failed not so much because there was no merit in their factual allegations concerning the Commonwealth's emissions reduction targets. Rather, it failed because the law in Australia as it currently stands provides no real or effective avenue through which the applicants were able to pursue their claims. …That will remain the case unless and until the law in Australia changes, either by the incremental development or expansion of the common law by appellate courts, or by the enactment of legislation…Until then, the only recourse that those in the position of the applicants and other Torres Strait Islanders have is recourse via the ballot box.'[8]

Justice Wigney's message does not need much reframing – for goodness' sake reform the law!

I agree.

So, my version of Justice Preston's solidarity in action is development and reform of the law, to align law and science – an interdisciplinary solidarity where the law works with, not against, the science, to facilitate wise decision making.

There are some tough questions. Chief among them is the role of the Courts. In Pabai Pabai, and in Sharma, the justiciability of climate change decisions, whether about policies (as in the case of Pabai Pabai) or individual developments (as in the case of Sharma) proved critical. The assertion of core or high policy, grounded in the separation of powers, is unlikely to be resolved by incremental development of the common law. In the absence of legislative reform there will need to be a Mabo type leap in adapting the law of negligence.

But resolving that demarcation dispute will only take us so far. I have an ever-growing shopping list of topics that could be explored to improve the functionality of the law as it relates to climate change:

- The relationship between international and domestic law.
  - As we celebrate the clear and sound reasoning of the ICJ in its advisory opinion, I am hesitant about its influence in Australian litigation.
- The role and limits of causal reasoning and aligning legal concepts of significance and materiality with scientific assessment.

[7] Environment Council of Central Queensland Inc v Minister for the Environment and Water [2024] FCAFC 56 [140], [144]
[8] Pabai v Commonwealth of Australia (No 2) [2025] FCA 796 [1275]

How to reconcile a scientific finding that every fraction of every tonne of GHG emitted matters with a test of causation that is inapt to deal with cumulative, incremental expression of the consequences of millions of contributions over time and place.

Better equipping decision makers to make qualitative as well as quantitative decisions.

Recognising that significance is not merely about size or scale. This could change the way arguments that a contribution is de minimis plays out.

Assessing the contribution of Australia's products when consumed in other countries – the scope 3 argument.

On this point I note the recent judicial leadership by the NSW CA in the Mt Pleasant mine case. I believe this is the first Australian appellate court decision to reject the argument that scope 3 emissions are irrelevant when assessing environmental impacts.

These topics are tricky as the law stands but can be resolved if we reform law to align with science to better serve the law's function. As the honourable James Allsop said in an address to the NSW Bar Association:

> "Self-evident wrongs that cannot be recognised or dealt with by the law's rules may reasonably leave people with a sense of injustice. A legitimate sense of injustice should not be the product of the rule of law."[9]

Thankyou Justice Preston, for your address and your solidarity in both leadership and action. You have inspired me, and I am sure many others here tonight, to contemplate what aspect of solidarity we will explore in these crucial few years ahead.

[9] Allsop AC James, Harvey Ryan *The Serious Challenges of Causation for Anthropogenic Climate Change* presentation New South Wales Bar Association, Sydney 18 November 2024