Law Council of Australia
Eminent Environmental Lawyer Award for Excellence
Fleur Kingham
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I join with Charlotte in acknowledging the Turrbal and Jagera peoples, the traditional custodians of Meanjin and Maiwar and its surrounds. I also acknowledge the Quandamooka people, of Minjerriba, Stradbroke Island, and their inspirational poet and activist, Oodgeroo Noonuccal who said:

"Let no-one say the past is dead. The past is all about us and within."

I came across that quote not long after the Voice Referendum. I was reflecting on the outcome. That was disappointing. But more important for me was the public debate, which was devastating in its gross ignorance of our history and its disregard for the legacy of the past. It seemed to me that most of us do not or choose not to know our history.

I have had so many conversations with friends about what to do about this. My choice is to use my voice. Whenever I speak publicly, I will share something about our history in the spirit of promoting awareness and empathy. You might want to join me in this public act of learning and sharing, or not. But I urge you to find some way to respond personally to the generous invitation of the Uluru Statement from the Heart to forge a better future together.

Tonight, I am sharing some information about a place the Turrbal people call Barrambin, now accepted as one of the oldest and most important Aboriginal cultural sites in Brisbane. Barrambin, (also known as Victoria Park) means "windy place." It included a series of waterholes around which there was a substantial Turrbal camp. The British called the wetland area York's Hollow, after an elder named Daki Yakka, who the British called the Duke of York. It was also the watershed for the Roma St reservoir, a critical source of water for the town. There were various conflicts in this area during the early days of free settlement. However, it remained a Turrbal settlement, until the demands of the growing town directly conflicted with the Turrbal occupation and use of the land. In December 1862, there was a declaration to clear Yorks Hollow. By then the Turrbal population was very small. Most had been pushed out to Breakfast Creek and Enoggera by successive raids starting in the 1850s. Barrambin was drained through the 1870s and 1880s to ensure a consistent water supply for Brisbane. The wetlands were filled in for parkland and the first Exhibition was held at the new Exhibition Ground in 1876. So, think about that, next time you go to the Ekka.

This early story of dispossession and dislocation occurred just up the road from where we are meeting. It is about contest over water, as well as land. I am pleased that we now routinely acknowledge the traditional custodians of the land. However, for this public act to be meaningful, I think we should also acknowledge what was done to prevent them from continuing to care for country. In that way, the past will not be dead. It will be all about us and within and will guide us in our decisions about our future.

I want to thank the Australian Environment and Planning Law Group of the Law Council of Australia for awarding me this unexpected honour. I can think of many more worthy recipients. This award has special significance for me, because it comes from my profession, which has been so supportive to me in my various roles.

I also thank Corrs Chambers Westgarth for hosting this event in this impressive facility.

It is unsettling to be described as eminent. I worry this might have created a false expectation I will scatter about small pearls of wisdom in this address. I have done my best to lower the bar through this title to my speech:

If the answer is 42, what was the question?

Those of you who are a certain age probably got the reference. For those who are confused, some context.

Once upon a time, there was a brilliant satirist, Douglas Adams, who composed what he marketed as an increasingly misnamed trilogy in 5 parts, the first part of which is the excellent The Hitchhiker's Guide to the Galaxy.

A central character is the ultimate analytical machine called Deep Thought, which was asked for a "simple answer" to the Ultimate Question - the meaning of life, the universe and everything. After 7½ million years she answered 42.

When challenged by the descendants of her creators, Deep Thought assured them she had checked the answer very carefully but in her view the question was too broadly based, and they had never actually known what the question was.

In search, then, of the Ultimate Question, Deep Thought designed a new computer, the Earth, and the programmers embarked on a ten-million-year program to discover the Ultimate Question.

Enter the Vogons, “one of the most unpleasant races in the galaxy – not actually evil, but bad tempered, bureaucratic, officious and callous,” with "as much sex appeal as a road accident" and the distinction of being the authors of "the third worst poetry in the universe".

The Vogons applied to an intergalactic planning authority for permission to construct a hyperspace bypass. Five minutes before the earth was to reveal the Ultimate Question it was destroyed to make way for the bypass.

This satire is an apt metaphor at the dawn of the Anthropocene as we face the triple planetary crisis of climate change, pollution, and biodiversity loss.

In that context, I pose 2 questions about environmental decision making in the courts: Do we ask courts the Ultimate question? And should we?

Do we ask the courts the ultimate question? – Not really

Tonight, my focus is on how courts are engaged by the primary federal environment Act, the Environmental Protection and Biodiversity Conservation Act, or, for those who know and hate it, the EPBC Act. Simply stated, the courts are engaged by way of judicial review, and do not consider the merits of the decision. This comes as an unpleasant surprise to the layperson.

In his review of that Act, Graeme Samuel said the lack of merits review results in a focus on technical process compliance, sometimes with no change in outcome. For example, he referred to one case in which [1] the judicial review succeeded because some documents were

[1]Tarkine National Coalition Inc v Minister for Sustainability, Environment, Water, Population and Communities [2013] FCA 694

not attached to a ministerial decision brief. The result? The decision was remade with the same environmental outcome.

It would be unfair to characterise all judicial review of environmental decisions in that way. Some cases have illuminated important procedural obligations, such as consultation rights. Some judges have considered whether a decision is so irrational, given the information about the application, as to be illegal. But illegality is a high bar to clear, and Samuel's conclusion has merit and deserves consideration.

Is this national regime of judicial review an appropriate response to the triple planetary crisis? Implementation is the greatest challenge for environmental law. The gulf between the aspirations and outcomes demands we make the best use our institutions, including the judiciary. We must ask the right question, to avoid answers as meaningless as 42, or make sure you attach all documents to the brief.

Samuel recommended a limited form of merits review under the Act. I have reservations about his design, but that is for another day. I appreciate he grappled with the topic. I hope you will too.

For me, the Ultimate Question for courts is whether the executive has made the best or preferable decision. That is, merits review. I am using terms like courts and judges, but the same applies for specialist tribunals and their members. If you want a learned exploration merits review under the Act, I commend to you a recent report by Professor Kim Rubenstein and Associate Professor Joel Townsend, who conclude merits review has benefits in terms of individual decisions, improved decision making more generally, and public confidence in decision making. Because they argue the why, and do it so well, I thought I would answer my question with another question - why not.

So why not ask courts the Ultimate Question?

I only have time to touch on two arguments, which I call: Stay out of my sandpit and Judges don't have a crystal ball.

Stay out of my sandpit

This argument suggests the difference between judicial and merits review is a demarcation dispute between the executive and the judiciary. It is interesting to me that so many executive decisions are merits reviewed, but environmental ones have a special status in the federal system.

Is this mistrust of the judiciary or a view that this is outside scope? I don't know. I suspect there is a concern about judges making value judgments. That sits uncomfortably with me. We live in the age of statutes, but our roots remain in the common law developed by the judiciary, even if there has been some coyness about whether law is discovered or made. It is undeniable that judges have shaped and continue to shape the law by reference to contemporary values. When Justice Brennan, as he then was, declared the principle of terra nullius was not only false in fact, but also contrary to contemporary values, that was not strictly a matter of proof.

However, merits review under the Act would not require a judge to decide what are the contemporary values about the environment. The legislature has chosen what environmental

values to give legislative force. That is, the democratically elected institution, has decided to embed the principles of ecologically sustainable development in our federal environmental statute.

There is a difference between a judge exploring what a value means and how it should apply in a particular case, on the one hand, and making up a value, on the other. The system of precedent provides a brake on arbitrary decision making and recourse to personal values.

Nevertheless, some environmental values are said to raise matters of high policy that belong with the parliament not the courts. Climate change is a current example, especially whether we should consider the scope 3 emissions of an activity.

As I see it, the values of our environmental law lead rather than follow the opinions of some in our community. ESD marks a shift from anthropocentric to ecocentric values; from humans dominating nature to humans co-operating with and conserving it.

Environmental law is not unique, the same can be said about discrimination and other human rights laws.

It is always open to parliament to carve out matters of high policy. Where that is not done, why should a different approach be taken to implementing environmental values than is taken to implementing the values legislated in other areas of the law?

The integration principle, one of the 5 principles of ESD in the Act, provides that decision-making processes should effectively integrate both long-term and short-term, economic, environmental, social and equitable considerations. Judges have sustained experience in undertaking that kind of judging in other areas of the law. Before I turn to that, though, I will highlight a particular challenge for environmental decision-makers.

While they have the benefit of expert advice, it is not always helpful. I have encountered a dissonance between the environmental law values and the values inherent in some expert evidence. Cost benefit analysis is a stark and urgent example.

Stark, because it is so obvious. Traditional CBA uses a discounting method that favours the benefits to the current generation over the costs and risks for future generations. Yet it is served up to decision makers, routinely, as a reasoned estimation that can be relied upon. How does the decision maker integrate economic, environmental, social, and equitable factors, which they are required to do, if the economic assessment undermines a key value such as intergenerational equity?

Urgent, because it still the primary method for assessing economic considerations for a project, despite this clash of values.

This is only one example. But this clash of values presents the same difficulty, whoever makes the decision.

In an ideal world, an application is rigorously assessed when the decision is made. We don't live in an ideal world. And if a decision is reviewed, why limit that review to technical process compliance?

Judges are well practised in evaluative decision making.

The criminal law provides some good illustrations in bail, sentencing, and probation decisions. I will just touch on sentencing, because the High Court has explained and described the as one of instinctive synthesis.[2] The judge identifies all the relevant factors, discusses their significance, and then makes a value judgment about the appropriate sentence given all those factors. By definition, instinctive synthesis will produce outcomes upon which reasonable minds will differ.

Another illustration is human rights law, where proportionality reasoning is central to the judicial function. If an act or decision will limit a human right, a judge must ask several questions. What is the nature of the right and the purpose of the limitation? Is there a pressing need for the limitation? Are there other ways to achieve the purpose without limiting the right, or to the same extent? How important is preserving the right and how important is the purpose of the limitation? These are substantive questions. Not a secondary review of the decision-making process, but the primary consideration of the merits of the act itself.

Whether using instinctive synthesis in sentencing an offender, assessing the proportionality of a limitation on a human right, or applying the principles of ESD in an environmental case, a judge is engaged in the same type of exercise. Conferring an evaluative function on the judiciary is no less legitimate in an environmental case than it is in a criminal or human rights case.

Turning to the other argument I will talk to Judges don't have a crystal ball. This is undoubtedly true, but does that matter? Is the judiciary less suited to the evaluative task than the executive when faced with uncertainty?

We are all most comfortable with fact finding about the past. The rules of evidence, developed over centuries, help judges use the most reliable evidence to decide what *has* happened. But judges are also adept at hypotheticals.

Looking back, for example in a negligence claim, one question is what *would* be the situation if not for something that has, in fact, happened. Take a car accident, the question might be, what if the driver was *not* speeding when they lost control of the car. This is a counterfactual. We know that did not happen. We know the driver was speeding. The purpose of asking the question is to allocate responsibility and compensation. Judges have been dealing with the uncertainty about past hypotheticals for centuries.

Looking forward, in an environmental case, the question is what *might* happen. We know it has not happened….at least not yet.

In assessing future likelihoods or possibilities, any environmental decision maker must look to experts from other disciplines for assistance. Lawyers like certainty, which is amusing given our key tool is language, with all its wondrous ambiguity. However, an expert, addressing a future scenario, must make a prediction, whatever they may call it.

Some predictions, although not beyond doubt, are so well grounded in science they provide a high level of confidence. For example, the amount of carbon released by burning a certain quality of coal.

[2] *Markarian v The Queen* 228 CLR 357 at [51]

Other predictions are closer to speculation, say the future demand for a certain quality of coal for electricity generation in a rapidly changing market. To predict the level of demand, the expert must make predictions about other matters: future demand for electricity; the future policy environment for use of fossil fuel; the availability of other sources of energy. I could go on.

The more variables, the more likely the prediction will be based on some speculation. And what is speculation? Guessing answers to a question without having enough information to be certain.

The sting of speculation is in the guessing. The more informed the guess, the better the speculation. Not all experts will be transparent about how much guessing they have done, or how many assumptions they have made. In recent decades, Courts have smartened up procedures for expert evidence to promote its independence, integrity, and utility, and to probe the foundation for an expert's opinion.

And, again, that is not a novel function for a judge.

Think of compensation for compulsory acquisition of land. In deciding what the government pays for the land, a judge must decide the current market value of the land, considering its highest and best use, including a potential future use, not its current use. That could involve several questions about demographics, future demand for that type of use, the views of the planning authority, and the potential profitability of the proposed use. Another example is the loss of opportunity case, where the person claims compensation for the loss of future profits. Assessing that claim requires a judge to evaluate the nature of the opportunity, the likelihood of it being realised, if not for the intervening act; and how profitable it might have been.

So, there is nothing inherently unusual about a judge assessing future uncertainty. And some of the disciplines involved in these types of cases are the same – economics, accounting, potential environmental impacts, land valuation and market behaviour.

> "Absolute confidence or clarity is the privilege of fools and fanatics. The rest of us must do the best we can; we must choose among all the substantive views on offer by asking which strikes us, after reflection and due thought, as more plausible than the others."[3]

That is a quote from Ronald Dworkin, writing on values and morality. It is also a handy formula for decision making in the face of uncertainty.

A Judge conducting an evaluative judgment in the face of future uncertainties is not required to decide what *will* happen. Hypotheses and possibilities may be speculative and not capable of proof on the balance of probabilities; but they can be evaluated as a matter of informed estimation of future risks and benefits[4].

Deciding what to do in the face of future uncertainty is more taxing than deciding what happened last year, but judges are up to the challenge; they have the discipline, methodology and procedure to do that well; and they already do this in other types of legal disputes. They operate transparently in a system that holds them to account through an appeal process that

[3] Ronald Dworkin, 2013, *Justice for Hedgehogs*, Harvard University Press at p 95
[4] *Berry v CCL Secure Pty Ltd* 271 CLR 151 at [32], [36]).

recognises human fallibility. This all promotes confidence in decision making, despite the uncertainty.

And that brings me back to the HHGG and another demarcation dispute. The Amalgamated Union of Philosophers, Sages, Luminaries and Other Thinking Persons, opposed Deep Thought answering the Ultimate Question. Magikthese made this compelling submission:

> "You want to check your legal position, you do, mate. Under law the Quest for Ultimate Truth is quite clearly the inalienable prerogative of your working thinkers. Any bloody machine goes and actually 'finds' it and we're straight out of a job, aren't we? ""That's right," shouted another member of the union, Vroomfondel, "we demand rigidly defined areas of doubt and uncertainty!"

And on that note, I say - bring on merits review under the EPBC Act. Judges are working thinkers, and I defend their right to work in rigidly defined areas of doubt and uncertainty.