

# Climate Change Litigation: A Comparison Between Current Australian and International Jurisprudence

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The Hon Justice Rachel Pepper  
Land and Environment Court of NSW

# Climate Change Litigation

- Climate change is a 'global-global' problem
- In many countries there continues to be a significant gap between international agreements and domestic policy
- Climate change litigation has emerged as a mechanism to pressure governments and industry into responding to climate change
- Climate change litigation:
  - Refers to legal cases where climate change is the central focus
  - Seeks to apply existing legal rights to effect outcomes that will either reduce, mitigate, or result in enhanced adaptation to climate change

# Barriers to Successful Litigious Climate Change Outcomes in Australia

- Tort law - establishing the causal link between the emissions of a single emitter and the impacts of climate change is very difficult ('drop in the ocean' argument)
- Consumer law - while an individual or corporation may be sued for false or misleading environmental claims, compensation is only awarded to consumers, with no remedial benefit to the environment
- Administrative law – in judicial review the remedy is a declaration of invalidity, but the decision is sent back to the decision-maker to be made again
- There are no constitutionally enshrined human or environmental rights at either a federal or State level in Australia

# *Gray v Minister for Planning*

- Centennial had to provide the Director-General with an assessment of air quality, including a detailed greenhouse gas assessment for the Anvil Hill coal mine
- Issue: whether the failure to address Scope 3 emissions voided the assessment
- Held:
  - It was for the Director-General to determine whether the report was adequate, but the discretion had to be exercised in accordance with the objects of the EPAA
  - ESD principles were included in the objects of the EPAA. The principle of intergenerational equality and the precautionary principle required a consideration of the cumulative impacts of CO<sub>2</sub>. This required reporting on the mine's Scope 3 emissions
- Orders: that the assessment report on Scope 3 emissions

# *Minister for Planning v Walker*

- Development consent for a subdivision and residential development of land in a flood risk area
- Section 79C of the EPAA required the Minister to determine whether the development was in the “public interest”
- Issue: whether the public interest required a consideration of the principles of ESD, which in turn required a consideration of the impacts of climate change
- Held:
  - When the Minister granted approval, the “public interest” had not evolved to include the principles of ESD
  - “The principles of ESD are likely to come to be seen as so plainly an element of the public interest ... that failure to consider them will become strong evidence of failure to consider the public interest...”
- BUT “The time has come that the principles of ESD can now be seen as so plainly an element of the public interest“: *Barrington - Gloucester - Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure*

# *Coast and Country Association of Queensland Inc v Smith*

- Challenge to the Queensland Land Court's decision not to recommend that the Alpha Coal Mine be refused
- Issues:
  - Whether s 269(4)(j) of the Act which was concerned with “any adverse environmental impact caused by those operations”, required Scope 3 emissions to be taken into account
  - Whether Scope 3 emissions would adversely affect the “public interest” under s 269(4)(k) of the Act
- Held:
  - The words “those operations” confined the relevant considerations to emissions caused by mining only (Scope 1)
  - Scope 3 emissions would not adversely affect the “public interest” because if the mine did not proceed, the same quantity of coal would still be extracted from other mines and burned at overseas power stations

# *Australian Conservation Foundation Inc v Minister for the Environment*

- Challenge to the Minister for the Environment's decision to approve the Adani Coal mine
- Issue: whether the Scope 3 emissions of the mine constituted an indirect impact for the purpose of s 627E of the EPBC Act (Cth) because the Scope 3 emissions would contribute to climate change and threaten the Great Barrier Reef
- Held:
  - The Minister's reasons demonstrated that he had considered the combustion of coal but that he had found that this did not constitute an indirect impact
  - No reviewable error arose because it was for the Minister, and not the Court, to determine whether the combustion of coal would cause the identified impact

# *Urgenda Foundation v The State of the Netherlands*

- The first successful negligence case brought against a State
- Issue: whether under the *Dutch Civil Code* the State owed a duty of care to mitigate the causes of climate change
- Held:
  - The chances of dangerous climate change were very high and this risk was foreseeable
  - While the State was not directly responsible for all Dutch emissions, it was responsible for establishing the legal framework to reduce emissions
  - All anthropogenic GHG emissions, no matter how minor, contribute to an increase of CO<sub>2</sub> levels. The standard of care owed by the State was to ensure mitigation measures to achieve an atmospheric concentration of CO<sub>2</sub> of 450 ppm
  - Because the causes of climate change are cumulative, the “but for” test does not apply. Rather the principle that individual parties are liable for their share of the causes of any harm was the correct test of causation
- Orders: that the State reduce its greenhouse gas emissions to 25% of 1990s levels

## *ClientEarth (No 2) v Secretary of State for the Environment, Food, and Rural Affairs*

- The UK produced an Air Quality Plan to reduce emissions by 2020, because it could not comply with art 13 of the European Union *Air Quality Directive*
- Article 23 required that the plan set out appropriate measures so that the exceedance period was kept as short as possible
- Issue: whether the UK government was doing enough to meet its obligations under *Air Quality Directive*
- Held:
  - Article 23 required the UK to achieve compliance by the earliest date possible, 2020 was too far away
  - The compliance date should have been based on the earliest time within which the UK could achieve compliance, and not on cost
  - The plan was based on erroneous modelling
- Order: the plan be redone to ensure the shortest compliance period possible

# *Ashgar Leghari v The Federation of Pakistan*

- Issue: Whether the Pakistani government had failed to implement either:
  - *The National Climate Change Policy 2015*
  - *The Framework for Implementation of Climate Change Policy (2014-2030)*
- Held:
  - The government had failed to implement the policies
- Orders:
  - Created the Climate Change Commission to oversee the implementation of the policies
  - The Climate Change Commission has broad powers, including those of compulsory examination and the ability to seek assistance from Federal and Provincial government agencies and departments

# *MC Mehta v Union of India*

- Held:
  - Article 21 of the Indian Constitution, which guarantees the right to life, must be interpreted as including “the right to live in a healthy environment with minimal disturbance of ecological balance”
- Orders (in *MC Mehta* and in subsequent cases):
  - All bus engines be converted to compressed natural gas
  - All diesel vehicles older than 10 years to be de-registered
  - Prohibition on registering all new, private diesel vehicles of 2,000cc and above (lifted following manufacturers agreeing to pay a 1% environmental impost (cess))
  - Restriction on vehicles entering Delhi
- The National Green Tribunal:
  - Status of a civil court - other civil courts are precluded from hearing environmental matters
  - Appeals lie to the Supreme Court
  - Formidable power

# *Greenpeace Southeast Asia v The Carbon Majors*

- Petition to the Commission on Human Rights of the Philippines
- Issue: whether the top 50 CO<sub>2</sub> emitters in the world between 1751 and 2010 (collectively accounting for 21.71% of the world's CO<sub>2</sub> emissions) have violated, or threaten to violate, rights to life; the highest attainable standard of physical and mental health; food; water; sanitation; adequate housing; and self-determination
- Relief sought:
  - An investigation by the Commission into the human rights implications of climate change and ocean acidification
  - A request to the corporate entities to provide plans to remedy the human rights violations resulting from climate change
  - Legislative and policy recommendations in relation to both corporate reporting on human rights issues and corporate accountability relating to climate change

# *Kelsey Cascade Rose Juliana v USA*

- 21 plaintiffs, aged between 8 and 19
- Minors, as well as future generations, will suffer greater harm than current generations who are deriving short term economic benefits from the carbon intensive economy
- Relief sought:
  - Declaratory relief that the plaintiffs' constitutional rights to life, liberty and property are threatened by hazardous concentrations of CO<sub>2</sub> in the atmosphere which dangerously interferes with climate stability
  - Orders that the defendants prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions
- Interlocutory motion to dismiss and strike out the proceedings rejected:
  - At a preliminary level the plaintiffs' case was justiciable
  - A court should be loath to decline standing to persons suffering an alleged constitutional injury, even if the injury was shared by most of the population
  - The injury was redressable, citing *Urgenda*
  - Where government action or deliberate indifference creates a danger, this suffices to establish that due process has not been followed

# Future Directions in Climate Change Litigation

- Emerging factors:
  - Most climate change litigation is currently utilising existing legal concepts to try and prompt State action on climate change with mixed success
  - The ability of domestic courts to facilitate positive climate change litigation outcomes are greatly enhanced by constitutionally enshrined environmental rights
  - There is an increasing trend to reference and apply international environmental law in domestic decisions
- Future directions:
  - Reverse the onus of proof in environmental litigation
  - Open standing
  - Implement a principle of non-regression in the promulgation of domestic environmental law