

CLIMATE CHANGE LITIGATION: A COMPARISON BETWEEN CURRENT AUSTRALIAN AND INTERNATIONAL JURISPRUDENCE*

Climate change has been described as a 'global-global' problem¹. Whereas other environmental issues, such as over fishing and deforestation are global in scope, the solutions, such as conserving particular forests or capping fish hauls, are solutions which occur at a local or regional level. By contrast, climate change is a global problem which requires a concerted global response.

While there have been significant advancements at the international level to address climate change,² in many countries there has continued to be a significant gap between international agreements and domestic policy. Prompted by this slow pace of development, litigation has emerged across the globe as a mechanism to pressure governments and industry into responding to the threat of climate change.

The phrase 'climate change litigation' is understood here to refer to legal cases where climate change is the central focus.³ Broadly, climate change litigation seeks to apply existing legal rights to effect outcomes that will either reduce, mitigate, or result in enhanced adaptation to climate change.

This presentation compares the current static status of climate change litigation in Australia to the more dynamic form of that litigation being pursued internationally, and concludes by offering a number of potential directions for the future.

CLIMATE CHANGE LITIGATION IN AUSTRALIA

Australia is a common law country, having inherited its legal system largely from the United Kingdom. As a consequence, there are few, if any, environmental common

* I gratefully acknowledge the research and assistance of my tipstaff, Mr John Zorzetto, in the preparation of this paper.

¹ Alexander Zahar, Jacqueline Peel and Lee Godden, *Australian Climate Law in Global Context* (Cambridge, 2013) 13.

² See, for example, United Nations Framework Convention on Climate Change, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994), Kyoto Protocol to the United Nations Framework Convention on Climate Change, opened for signature 16 March 1998, 37 ILM 22 (1998) (entered into force 16 February 2005), Paris Agreement, opened for signature 22 April 2016, 62 TPP (entered into force 4 November 2016).

³ See Hari M Osofsky and Jacqueline Peel, 'The role of litigation in multilevel climate governance: possibilities for a lower carbon future' (2013) 30 *Environmental and Planning Law Journal* 303, 304. However, Osofsky and Peel note that establishing the outer boundaries of what constitutes climate change litigation is more difficult.

law rights which exist in Australia.⁴ Further, there are no protections for the environment contained in the Commonwealth Constitution, nor does the federal government have a specific head of power to regulate the environment. Rather, the federal government relies primarily on the corporations power and the external affairs power to legislate in respect of the environment.⁵

In Australia existing barriers to successful litigious climate change outcomes include:

- (a) in tort law - establishing the causal link (the 'but for' test) between the emissions of a single emitter and the impacts of climate change, understood as causing an increase in the magnitude and frequency of severe weather occurrences;⁶
- (b) in consumer law - while an individual or corporation may be sued for false or misleading environmental claims (for example, the emissions claims made by Volkswagen), compensation is only awarded to consumers, with no remedial benefit to the environment;
- (c) in administrative review – in judicial review actions the best outcome for a litigant challenging a decision is that the decision is held to be invalid but it is sent back to the decision-maker to be made again, only this time properly; and
- (d) there are no constitutionally enshrined human or environmental rights at either a federal or State level.

⁴ "The common law does not regard, and never has regarded, harm to the environment per se to be worthy of a remedy at common law" Gerry Bates, *Environmental Law in Australia* (Lexis Nexis, 9th ed, 2016) 77 [3.17]. For a discussion on how the common law has been used to protect the environment see, eg, Bates, above n 4, Ch 3 and H Marlow Green, 'Common law, property rights and the environment: A comparative analysis of historical developments in the United States and England and a model for the future' (1998) 30(2) *Cornell International Law Journal* 541.

⁵ *Constitution* s 51(xx) and (xxix). The extent of these heads of power were discussed in *Commonwealth v Tasmania* [1983] HCA 21; (1983) 158 CLR 1 ('*Tasmanian Dams Case*') and *New South Wales v Commonwealth of Australia* [2006] HCA 52; 229 CLR 1 ('*The Work Choices Case*').

⁶ See, for example, M L Parry, O F Canziani, J P Palutikof, P J van der Linden and C E Hanson (eds) *Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, 2007* (Cambridge University Press, 2007) 128; R Garnaut, *The Garnaut Review 2011: Australia in the Global Response to Climate Change* (Cambridge University Press, 2011) 6.

In Australia success in climate change litigation has largely been limited to challenging executive decision-making, primarily in administrative law proceedings by way of judicial review. It is important to emphasise that administrative law proceedings are confined to ensuring that the decision-maker approving the proposed activity made the decision according to law. In judicial review proceedings it is generally not for the Court to evaluate the merits of the proposed action, nor can the Court substitute its own opinion of what should be the outcome.

The first climate change litigation in Australia was brought in 1994 in *Greenpeace Australia v Redbank Power Company*.⁷ In that case Greenpeace tried to argue that there was no demand for a new power station and that it would result in a net increase of CO₂ emissions contrary to Australian and international policies. The Court dismissed the action on the basis that the legislation under review did not restrict the building of new power stations.

One of the earliest successful climate change cases was *Gray v Minister for Planning*.⁸ That case concerned a proposal by Centennial Hunter Pty Ltd (“Centennial”) to build an open cut coal mine in the Hunter Valley, in New South Wales. As part of the development consent process, Centennial had to provide the Director-General with an assessment of “air quality - including a detailed greenhouse gas assessment”. Centennial's report only addressed Scope 1 and 2 emissions, namely, the emissions emitted under its control, but failed to address Scope 3 emissions, that is to say, emissions generated by third parties burning the coal produced from the mine.

Justice Pain held that while it was for the Director-General to conclude whether the report was adequate, his discretion had to be exercised in accordance with the objects of the *Environmental Planning and Assessment Act 1979* (NSW) (“EPAA”), which was the relevant planning legislation under which the project was being assessed. The objects of the EPAA included the principles of ecologically sustainable development (“ESD”). Significantly, the Court held that the principle of intergenerational equality and the precautionary principle necessitated consideration

⁷ (1994) 86 LGERA 143.

⁸ [2006] NSWLEC 720, (2006) 152 LGERA 258. For a discussion of this case see David Farrier, ‘The limits of judicial review: Anvil Hill in the Land and Environment Court’ in Tim Bonyhady and Peter Christoff (eds), *Climate Law in Australia* (Federation Press, 2007) 189.

of the cumulative impacts of the proposed activities on the environment, and this required reporting on the mine's Scope 3 emissions.⁹ Ultimately, this was done and the mine was approved.

*Minister for Planning v Walker*¹⁰ is another early climate change litigation case. Mr Walker challenged the grant of development consent for a subdivision and residential development of land in a flood risk area.

Under s 79C of the EPAA, the Minister was required to take into account in determining whether or not to grant approval whether the development is in the “public interest”.¹¹ Mr Walker alleged that the Minister had failed to consider the public interest because, part of the public interest included the principles of ESD, and these in turn required a consideration of the impacts of climate change. He particularly asserted that the flooding impacts would be compounded by climate change. At first instance, Mr Walker was successful and the approval was held to be invalid.¹²

On appeal the decision was reversed. The Court of Appeal found that in 2006, when the Minister had granted approval for the development, the public interest had not evolved to include the principles of ESD. The approval was therefore held to be valid. However, the Court of Appeal considered that the public interest was continuing to evolve and “that the principles of ESD are likely to come to be seen as so plainly an element of the public interest, in relation to most if not all decisions, that failure to consider them will become strong evidence of failure to consider the public interest and/or to act bona fide in the exercise of powers granted to the Minister, and thus become capable of voiding decisions.”¹³

This has now occurred.

In *Barrington - Gloucester - Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure* the Court stated that “the time has come that the principles of ESD

⁹ *Gray v Minister for Planning* [2006] NSWLEC 720; (2006) 152 LGERA 258 at [122] and [134].

¹⁰ [2008] NSWCA 224; (2008) 161 LGERA 423.

¹¹ *Environmental Planning and Assessment Act 1979* (NSW) s 79C(1)(e).

¹² *Walker v Minister for Planning* [2007] NSWLEC 741; (2007) 157 LGERA 124.

¹³ *Minister for Planning v Walker* [2008] NSWCA 224; (2008) 161 LGERA 423 at [56].

can now be seen as so plainly an element of the public interest".¹⁴ Consequently, the executive must consider ESD principles when assessing a project, which, following on from *Gray v The Minister for Planning*, arguably means that the principle of intergenerational equality and the precautionary principle demands the consideration of all emissions in the context of climate change (Scope 1, 2 and 3).

However, more recent climate change litigation in Australia illustrates the limits of what is achievable.

In *Coast and Country Association of Queensland Inc v Smith*¹⁵ there was a challenge to the decision of the Queensland Land Court ("Land Court") not to recommend to the Minister for the Environment and Heritage Protection that the Alpha Coal Mine be refused.

One issue was whether Scope 3 emissions had to be taken into account pursuant to s 269(4)(j) of the *Mineral Resources Act 1989* (Qld), which concerned "any adverse environmental impact caused by those operations". The Land Court held that Scope 3 emissions did not need to be taken into account because the words "those operations" confined the relevant considerations to emissions caused by mining only (Scope 1), and did not extend to the transportation of the coal to the port or to the burning of coal in power stations overseas. This finding was affirmed by the Queensland Court of Appeal.¹⁶

The Land Court also held that the Scope 3 emissions would not adversely affect the "public interest" under s 269(4)(k) of the *Mineral Resources Act* because, as a matter of fact, if the Alpha Coal Mine did not proceed, the same quantity of coal would still be extracted from other mines and burned at overseas power stations, and hence, there would be no difference in the amount of Scope 3 emissions produced. Because this was a finding of fact, it was not reviewable on appeal.

¹⁴ [2012] NSWLEC 197; (2012) 194 LGERA 113 at [170]. The judicial development of this concept may be traced through the following cases: *Walker v Minister for Planning* [2007] NSWLEC 741; (2007) 157 LGERA 124, *Minister for Planning v Walker* [2008] NSWCA 224; 161 LGERA 423, *Kennedy v NSW Minister for Planning* [2010] NSWLEC 240 at [77]-[78], *Australians for Sustainable Development Inc v Minister for Planning* [2011] NSWLEC 33; (2011) 182 LGERA 370 at [239]-[242], *Hunter Environmental Lobby Inc v Minister for Planning* [2011] NSWLEC 221 at [21] and *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48; 194 LGERA 347 at [77].

¹⁵ [2016] QCA 242.

¹⁶ *Coast and Country Association of Queensland Inc v Smith* [2016] QCA 242 at [31]-[33].

*Australian Conservation Foundation Inc v Minister for the Environment*¹⁷ is another illustration of an unsuccessful challenge to an approval in respect of a coal mine – the proposed Adani Coal mine. Australian Conservation Foundation Incorporated (“ACF”) contended that the Minister was required to consider, as an indirect impact of the mine, the Scope 3 emissions which would contribute to climate change and threaten the Great Barrier Reef, and which were, moreover, inconsistent with Australia’s obligations to protect the Reef. Whether this could constitute an indirect impact for the purpose of s 627E of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (“EPBC Act”) depended, in part, on whether the combustion of coal from the mine was a substantial cause of global warming. In his reasons granting approval, the Minister determined that the indirect impact of the mine on climate change was speculative because the quantity of overseas gas emissions was subject to a range of variables. Justice Griffiths found that the Minister’s reasons demonstrated that in granting the approval he had in fact considered the combustion of coal from the mine but had decided that this did not constitute an indirect impact for the purpose of 627E of the EPBC Act.¹⁸ No reviewable error arose because it was for the Minister, and not the Court, to determine whether the combustion of coal from the mine would cause the identified impact.

CLIMATE CHANGE LITIGATION OVERSEAS

By contrast, there have been a number of recent successful climate change cases internationally.

The Netherlands

One of the most significant decisions in 2016 was the decision in *Urgenda Foundation v The State of the Netherlands (Ministry of Infrastructure and the Environment)*.¹⁹ It is the first successful climate change negligence case brought against a State (it should be noted that the decision has been appealed).

¹⁷ [2016] FCA 1042.

¹⁸ *Australian Conservation Foundation Inc v Minister for the Environment* [2016] FCA 1042 at [140]-[147] and [161]-[162].

¹⁹ C/09/456689/ HA ZA 13-1396. See Jolene Lin, ‘The first successful climate negligence case: A comment on *Urgenda Foundation v The State of the Netherlands (Ministry of Infrastructure and the Environment)* (2015) 5(1) *Climate Law* 65.

The Urgenda Foundation (“Urgenda”) made three claims. Most significantly was the first claim that the State owed a duty of care to mitigate the causes of climate change because it would otherwise be in breach of the Dutch Civil Code.

The Hague District Court accepted the evidence contained in a number of international reports on climate change and held that “the chances of dangerous climate change should be considered as very high ... with serious consequences for man and the environment, both in the Netherlands and abroad.”²⁰ Further since 1992, when the *United Nations Framework Convention on Climate Change* (“UNFCCC”) was negotiated, and certainly since 2007, following the release of the *Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, knowledge that climate change will cause harm has been foreseeable. Third, the Court held that the State was liable because, while it was not directly responsible for emissions, it was nevertheless indirectly responsible for establishing the legal framework facilitating the transition towards reduced greenhouse gas emissions, as evidenced by ratifying the *Kyoto Protocol*.

The “drop in the ocean” argument, namely, that Dutch emissions reflected only a tiny proportion of global emissions was rejected. The Court noted that “it has been established that any anthropogenic greenhouse gas emission, no matter how minor, contributes to an increase of CO₂ levels in the atmosphere and therefore to hazardous climate change.”²¹ The Court held that the standard of care owed by the State was to ensure mitigation measures were taken to achieve an atmospheric concentration of CO₂ of 450 ppm.

Finally, in relation to causation, the Court did not apply the “but for” test. Had the “but for” test been applied (that is, but for its emissions the people of the Netherlands would be faced with significant threats resulting from climate change), the State would not have been found liable because climate change has been caused by all global emissions. Rather, the Court held that because the causes of climate change are cumulative, the correct test was that individual parties are liable for their share of

²⁰ *Urgenda Foundation v The State of the Netherlands (Ministry of Infrastructure and the Environment)* C/09/456689/ HA ZA 13-1396 at [2.30]-[2.33] and [4.65].

²¹ *Urgenda Foundation v The State of the Netherlands (Ministry of Infrastructure and the Environment)* C/09/456689/ HA ZA 13-1396 at [4.79].

the cause of harm. Thus, the Dutch government was liable for the State's share of greenhouse gas emissions.

Ultimately, the Court ordered that the State reduce its greenhouse gas emissions to 25% of 1990's levels, the minimum amount agreed to by reason of the State being a signatory to the UNFCCC and other international climate change agreements.

Two other factors influencing the Court's decision were, first, art 21 of the Dutch Constitution which requires the State "to protect and improve the environment." And second, the principle that domestic law should be interpreted in conformity with international law. Both these matters contributed to the Court's decision to extend the law of negligence to the State and to order the State to reduce its emissions.

United Kingdom

In the United Kingdom there have been a series of cases brought by ClientEarth against the government for its failure to comply with the *Air Quality Directive (2008/50/EC)* ("Air Quality Directive").

Article 13 of the Air Quality Directive imposes limit values on certain emissions and sets the date for compliance with this limit value to 2010. Where a country is unable to meet the limit value, art 22 provides that a five year extension can be granted upon a State producing an Air Quality Plan detailing how the State will meet the limit value. Article 23 requires that the Air Quality Plan "set out appropriate measures, so that the exceedance period can be kept as short as possible".

In 2011 ClientEarth commenced proceedings against the Secretary of State for the Environment, Food and Rural Affairs ("the Secretary") alleging that the Air Quality Plans it had released were not compliant with the Air Quality Directive, because the date of compliance of 17 of the 43 zones which the UK was divided into exceeded 2015. The Secretary accepted that the government was in breach of art 13.

However, it was held at first instance, and on appeal, that art 22 was discretionary and that making a mandatory order raised serious political and economic questions which were not justiciable.²² Further, it was also held that there would be no utility in

²² *R (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2011] EWHC 3623 (Admin) and *R (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2012] EWCA Civ 897.

making a declaration in circumstances where the Secretary had conceded the breach.

In *R (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs*²³ the Supreme Court upheld ClientEarth's appeal. It found that there was utility in making the declaration because, a breach of art 13 having been established, the declaratory relief made it clear that the government's failure was open to immediate enforcement action at a national or European level.²⁴ The Supreme Court then proceeded to refer to the Court of Justice of the European Union questions relating to whether national courts could compel government action.²⁵

The Court of Justice held that where a State failed to comply with art 13, a national court could take any necessary measure, such as making an order in appropriate terms, to ensure compliance. On this basis, in 2015, upon the return of the case to the Supreme Court, the Court made an order requiring the Secretary to prepare a new air quality plan.²⁶ Lord Carnwath stated in his reasons that: "The new Government, whatever its political complexion, should be left in no doubt as to the need for immediate action to address this issue [comply with art 13]."²⁷

In December 2015 UK the government published its second Air Quality Plan. The plan had a compliance date of 2020 (except for London, which had a compliance date of 2025), with forecasts based on a modelling methodology widely used throughout Europe. However, actual data challenged the assumptions underpinning the modelling, suggesting that the assumptions were incorrect.

The High Court of England and Wales in *ClientEarth (No 2) v Secretary of State for the Environment, Food, and Rural Affairs*²⁸ held that art 23 imposed an obligation on the government to achieve compliance by the earliest date possible, and that it was improper for the government to have set a date for compliance based on cost. Rather, where one method for compliance was quicker, the faster method was

²³ [2013] UKSC 25.

²⁴ *R (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2013] UKSC 25 at [37].

²⁵ *The Queen, on the application of ClientEarth v The Secretary of State for the Environment, Food and Rural Affairs* (Court of Justice of the European Union, C-404/13, 19 November 2014).

²⁶ *R (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28.

²⁷ *R (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28 at [31].

²⁸ [2016] EWHC 2740 (Admin).

required to be adopted. Setting the compliance date for 2020 (and 2025 for London) was held to be too far away and was inconsistent with the government's obligation under art 23.²⁹ Further, given that the modelling was wrong, the plan was found to have failed to identify measures which would keep the exceedance period "as short as possible".³⁰ For both these reasons, the Air Quality Plan was quashed and the government was ordered to produce a plan that would comply with the Air Quality Directive.

Pakistan

Last year in Pakistan, the High Court of Lahore decided *Ashgar Leghari v The Federation of Pakistan*³¹. Mr Leghari, a farmer reliant on agriculture for his livelihood, successfully challenged the Pakistani government's failure to implement either its *National Climate Change Policy 2015* or the *Framework for Implementation of Climate Change Policy (2014-2030)*. The Court, after recognising that "Climate change is a defining challenge of our time" went on to observe that:

From Environmental Justice, which was largely localized and limited to our own ecosystems and biodiversity, we need to move to Climate Change Justice. Fundamental rights lay at the foundation of these two overlapping justice systems. Right to life, right to human dignity, right to property and right to information under articles 9, 14, 23 and 19A of the Constitution read with the constitutional values of political, economic and social justice provide the necessary judicial toolkit to address and monitor the Government's response to climate change.³²

Consequently, the Court ordered the creation of a Climate Change Commission to oversee the effective implementation of both the climate change policy and the implementation framework.³³

The Court granted the Commission broad powers, including powers of compulsory examination and the ability to seek assistance from Federal or Provincial

²⁹ *ClientEarth (No 2) v Secretary of State for the Environment, Food, and Rural Affairs* [2016] EWHC 2740 (Admin) at [49]-[52], [69] and [73].

³⁰ *ClientEarth (No 2) v Secretary of State for the Environment, Food, and Rural Affairs* [2016] EWHC 2740 (Admin) at [85]-[86].

³¹ WP No 25501/2015.

³² *Ashgar Leghari v The Federation of Pakistan* WP No 25501/2015, Court Orders dated 4 September 2015 at [7].

³³ *Ashgar Leghari v The Federation of Pakistan* WP No 25501/2015, Court Orders dated 14 September 2015 at [11].

government ministries and departments, with its expenses paid for by the Minister of Climate Change.³⁴

The case is interesting because it demonstrates the expediency between constitutionally enshrined human rights and the use of these rights to promote environmental protection, a theme that is increasingly being borne out in climate change litigation.

India

One of the seminal Indian climate change cases is *MC Mehta v Union of India*,³⁵ commonly referred to as the *Delhi Pollution Case*, where the Indian Supreme Court held that art 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".³⁶ Famously, to combat the air pollution in the city, the Court ordered that all bus engines be converted to compressed natural gas by March 2001.

Significantly, India has created a separate environment court, the National Green Tribunal. It has the status of a civil court and has jurisdiction to hear both first instance complaints in addition to appeals from various government agencies under various environmental laws. Importantly, appeals from the National Green Tribunal lie to the Supreme Court of India, and other civil courts are precluded from hearing matters over which the National Green Tribunal has jurisdiction.³⁷

Both the Supreme Court and the National Green Tribunal have been involved in a number of attempts to improve air quality in India. These judicial fora have ordered that:³⁸

- (1) all diesel vehicles older than 10 years be de-registered;

³⁴ *Ashgar Leghari v The Federation of Pakistan* WP No 25501/2015, Court Orders dated 14 September 2015 at [11].

³⁵ (1987) SCR (1) 819.

³⁶ *MC Mehta v Union of India* (1987) SCR (1) 819 at 839.

³⁷ *National Green Tribunal Act 2010* (India) ss 14, 22 and 29.

³⁸ *MC Mehta v Union of India* Supreme Court of India, Writ Petition(Civil) No 13029/1985; Writ Petition (Civil) No 817 of 2015; Writ Petition (Civil) No 116 of 2013; and Writ Petition (Civil) No 728 of 2015. Orders made on 16 December 2015, see orders made 12 August 2016; *Lawyers Environmental Awareness Forum v State of Kerala* 2016 SCC OnLine NGT 163, 23-05-2016.

- (2) the government is prevented from registering new, private diesel vehicles of 2,000cc and above (although this has now been lifted following manufacturers agreeing to pay a 1% environmental impost (cess)); and
- (3) vehicles are restricted from entering Dehli.

While these cases are primarily concerned with air pollution, it is axiomatic that reducing car emissions assist in combatting climate change.

There is also an increase in climate change litigation being brought before the National Green Tribunal. For example, in 2015 in *Indian Council for Enviro-legal Action v MoEFCC*,³⁹ the National Green Tribunal made orders requiring industries to stop manufacturing HCFC-22 (a refrigerant gas) and to cease emitting HFC-23, categorised as a greenhouse gas under the Kyoto Protocol.

Philippines

In the Philippines Greenpeace Southeast Asia has recently lodged a petition with the Commission on Human Rights of the Philippines against a class of defendants, collectively described as 'Carbon Majors' (the top 50 CO₂ emitters in the world, collectively accounting for 21.71% of the world's CO₂ emissions between 1751 and 2010).⁴⁰

Unlike *Urgenda* and the *Children's Trust litigation* in the United States of America (see below), Greenpeace is not seeking orders requiring the government to limit emissions, nor is it seeking prescriptive orders against the named corporate entities. Rather, if the Commission on Human Rights finds that there has been a violation of human rights, the relief sought is:⁴¹

- (1) an investigation by the Commission into the human rights implications of climate change and ocean acidification;

³⁹ *Indian Council for Enviro-legal Action v Ministry of Environment, Forest and Climate Change*, Application No. 170 of 2014, judgment dated 10 December 2015.

⁴⁰ Petition filed with Commission on Human Rights of the Philippines on September 22, 2015. Available at

http://www.greenpeace.org/seasia/ph/PageFiles/735232/Climate_Change_and_Human_Rights_Petition.pdf.

⁴¹ Petition filed with Commission on Human Rights of the Philippines, above n 29, 61-62.

- (2) a request of the corporate entities to provide plans detailing how the human rights violations resulting from climate change will be eliminated and remedied; and
- (3) that the Commission make recommendations to policy makers and legislators in relation to both corporate reporting on such human rights issues, as well as avenues for corporate accountability.

United States of America

The recently filed case of *Juliana v United States of America*⁴² is also worth noting. This is a challenge brought by 21 plaintiffs from across the United States, aged between 8 and 19, seeking, amongst other things, declaratory relief to the effect that the defendants have violated, and are violating, the plaintiffs' constitutional rights to life, liberty and property without due process protected under the Fourteenth Amendment, by substantially causing or contributing to a hazardous concentration of CO₂ in the atmosphere which dangerously interferes with climate stability.

Additionally, the plaintiffs seek orders requiring the defendants, including the federal government and various federal departments and agencies, for example, the United States Environmental Protection Agency, to prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and reduce excess atmospheric CO₂.

Central to the plaintiffs' claim is that minors, as well as future generations, will suffer greater harm, both economic and social, than current generations who are deriving short term economic benefits from carbon intensive industry. This is, in essence, an intergenerational equity argument.

On 8 April 2016 Judge Coffin rejected motions by the defendants and intervenors to dismiss or alternatively strike out the proceedings, holding that at a preliminary level the plaintiffs' challenge was justiciable.⁴³

Some of the Court's more significant findings included, first, in relation to standing, that the Court should be loath to decline standing to persons suffering an alleged

⁴² Case 6:15-cv-0517-TC, filed August 12, 2015.

⁴³ *Juliana v United States of America* (6:15-cv-0517-TC) motion filed 4 August, 2016.

concrete injury of a constitutional character, even if the injury was shared by most of the population and future population. Second, the Court was satisfied that the injury could be redressed, and it cited *Urgenda* as an example of a court ordering the reduction of emissions. And third, in relation to the constitutional claim, his Honour held that where government action or deliberate indifference creates a danger, this suffices to establish that due process has not been followed, meaning the plaintiffs' claim was at least arguable.⁴⁴

This decision was unsuccessfully appealed. The appeal was handed down on 10 November 2016.⁴⁵ In upholding Judge Coffin's decision, Judge Aiken reiterated that the case did not breach the separation of powers doctrine by posing a non-justiciable political question. Rather, her Honour opined that, first, "the separation of powers might, for example, permit the Court to direct defendants to ameliorate plaintiffs' injuries but limit its ability to specify precisely how to do so."⁴⁶ Second, Judge Aiken agreed the action was redressible, explaining that the possibility that some other individual or entity might later cause the same injury was a separate, unconnected inquiry to whether the injury caused by the defendant could be redressed.⁴⁷ Finally, in relation to whether the right to life, liberty and property encompassed limiting CO₂ emissions, her Honour noted that it remained possible to establish new fundamental rights, and went on to observe that, "I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society."⁴⁸

It is important, however, to emphasise that these rulings are preliminary only, and will likely be re-agitated at a final hearing.

FUTURE DIRECTIONS IN CLIMATE CHANGE LITIGATION

From this brief survey of climate change litigation in Australia and overseas, a number of factors emerge. First, climate change litigation is utilising existing legal concepts to try and prompt State action on climate change. In Australia, the primary vehicle is judicial review. However, this is limited to finding legal error in the decision-

⁴⁴ *Juliana v United States of America* (6:15-cv-0517-TC) motion filed 4 August, 2016 at 7, 11 and 16.

⁴⁵ *Juliana v United States of America* (6:15-cv-0517-TC) motion filed 11 October 2016.

⁴⁶ *Juliana v United States of America* (6:15-cv-0517-TC) motion filed 11 October 2016 at 17.

⁴⁷ *Juliana v United States of America* (6:15-cv-0517-TC) motion filed 11 October 2016 at 27.

⁴⁸ *Juliana v United States of America* (6:15-cv-0517-TC) motion filed 11 October 2016 at 32.

making process, and Courts are generally not empowered to substitute their own determinations in place of the decision-makers'.

Second, the overseas cases demonstrate, by contrast, that where human and environmental rights are constitutionally protected, there is greater scope to achieve positive climate and environmental outcomes through the vehicle of litigation. Therefore, integral to the ability of domestic courts overseas to facilitate such outcomes appears to be constitutionally enshrined environmental rights.

Third, there is an increasing trend to reference international environmental law in domestic decisions, such as in *Urgenda* and the *Children's Trust litigation*. This is a positive development given the extensive subject matter of operative international environmental law and treaties.

Having surveyed the case law, it is appropriate to suggest three changes that, if made, would facilitate more positive environmental outcomes in climate change litigation.

The first is reversing the onus of proof in environmental litigation, so that those who are carrying out development must prove that the activity will not harm the environment. Accordingly, in a case like *Coast and Country Association v Smith*, rather than require the not-for-profit organisation to demonstrate the adverse impacts of the Scope 3 emissions, the onus would be on the proponent, typically better resourced, to establish that Scope 3 emissions from its coal mine would not have a negative impact on the global climate.

The second is to have open standing. The experience of the Land and Environment Court of New South Wales, which has jurisdiction over most of the State's environmental and planning laws, is that open standing is an overwhelmingly positive factor. It facilitates an environmental rule of law insofar as it increases the likelihood that breaches of environmental laws will be brought before the Court. It also leads to better and more transparent decision-making. It does not lead to, as the experience of the Land and Environment Court of NSW demonstrates, floodgates litigation.

The third change is to adopt a different test of causation if the onus of proof cannot be reversed.

But, in Australia at least, all three proposed changes require legislative action and, crucially, political will.

**The Hon Justice Rachel Pepper
Land and Environment Court of NSW**

12 November 2016