Climate change litigation

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Presentation outline

- Areas of climate litigation:
  - Tort law
  - Nuisance
  - Negligence
  - Trade Practices
  - Administrative law

Climate change is here to stay, whether our politicians like it or not
Litigation?

- In US and Australia - cases about climate change argued in courts for over 15 years
- In Australia this is because of the failure to sign the Kyoto Protocol until 2007 and the failure to implement laws to reduce greenhouse gas emissions

Tort law - Nuisance

- Public nuisance is inconvenience or damage to rights of public
- Private nuisance relates to interference with enjoyment of private land
- Most public nuisances cases relating to climate change have occurred in USA

Tort – Nuisance cases

**Connecticut v American Electric Power**
- Case brought by 12 States and 3 NGOs
- Sued 5 coal fired power stations responsible for 10% of US emissions
- Governments sued to protect public land and public health
- Dismissed on basis non-justiciable
- On appeal decision vacated as said reasonable to seek limit to emissions of power stations
Tort cases – public nuisance cont’d

*People v State of California v General Motors*
- California sued 6 of World’s largest manufacturers of automobiles for impacts on climate change
- Sought damages for adaptation
- Court again determined the grounds were non-justiciable and appealed
- Appeal dismissed in 2009 due to greater US action on climate change

Tort law – Kivalina v Exxon Mobil
- Native inhabitants of Kivalina commenced nuisance claim against 9 oil companies, 14 power companies and coal company
- Because of erosion villagers are being forced to relocate their village and seeking compensation
- Case was struck out on the basis of non-justiciable questions and plaintiffs lacked standing
- Now been appealed

Negligence
- Defendants in most negligence claims will be producers and users of fossil fuels
- Could be claims in nuisance or negligence against poorly constructed sea walls that shift problems to other locations
- Problem in many cases involving climate change will be establishing duty of care and also causation
Negligence hurdles

*Corner v Murphy Oil*

- Case arose out of Hurricane Katrina
  - Defendants: 9 oil companies, 31 coal companies, & 4 coal companies saying endangered environment, and public health as well as private property
  - Court dismissed said no standing and non-justiciable
  - On appeal found did have standing and did not present a political question

Trade Practices

- Trade Practices Act, similar to Fair Trading Act
- Makes it an offence to engage in misleading or deceptive conduct
- ACCC (regulatory authority in Australia) brought action against environmental claims
  - Air conditioner said environmentally friendly
  - SAAB who claimed their cars were carbon neutral
  - Prime carbons claims about soil sequestration for carbon reduction

Administrative Law

- Most common way that climate change litigation has occurred in Australia
- First wave of decisions challenged approvals of new power stations and coal mines
- More recently climate risks from flooding and other issues have become an issue
Key US cases

*Massachusetts v EPA*
State of Massachusetts, 11 other states and NGOs sought review of denial by EPA to regulate emissions from CO2 under *Clean Air Act.*
EPA argued decision not to regulate car emissions not significant but Court felt that view that small incremental steps could not be regulated was erroneous as while regulation would not solve the problem it would slow the impacts.

Other recent US decisions

- Several US cases have set aside environmental impacts that have not considered climate change.
- Rejected new coal fired power station in Georgia (*Friends of Chattahoocher Inc & Sierra Club v EPA & Longleaf Energy*), Wisconsin (*decision of Wisconsin Public Service Commission*).
- Clean Air Act makes harder to build new coal fired power stations.

Recent UK decision

*Queen v Secretary of State for Transport*
Recent case of High Court in UK on third runway at Heathrow Airport. Partly succeeded on basis of failure to consider up to date information on climate change impacts of increased aviation travel, as well as natural
Key Australian cases

**Australian Conservation Foundation v La Trobe City Council**
- VCAT found that GHG emissions from new coal fields to provide coal for power station were relevant to assessment.

**Gray v Minister for Planning**
- Land and Environment Court found that emissions from burning of coal must be considered in environmental assessment of new coal mine.

Key Australian Administrative law cases

**Walker v Minister for Planning**
- Land and Environment Court held that climate change flood risk for new development must be considered in approval of the project.
- Overturned on Appeal to Court of Appeal although Court did say over time the public interest will require decision makers to consider climate change.
- Court since found must take into climate change in planning decisions –*Aldous v Taree Council*.

Administrative law challenges in NSW

$2bn beer battle
Sartor sued over brewery site approval
Merits review

*Charles Howard v Redland Shire Council* - Queensland Court
- Held condition requiring dwelling to be located in an area less flood prone was valid

*Gippsland Coastal Board v South Gippsland Shire Council & Myers v South Gippsland Shire Council*
- VCAT found that storm risk and sea level changes justified rejection of new development in coastal area

Merits decisions

*Taralga Landscape Guardians v Minister for Planning*
- Court approved wind farm on the basis of benefits of providing renewable energy outweighed other impacts
- Court noted need to consider intergenerational

Environmental assessment

*Prunerov II Coal fired plant in Czech republic objections of Federated States of Micronesia*
- Using EU Law on Transboundary assessment requirements and Czech law in Environmental Impact Assessment, FSM arguing new coal plant’s carbon emissions are direct threat to its future and to consider them in assessment.
Pollution laws

Gray v Macquarie Generation
- Arguing that carbon dioxide is a waste and in breach of NSW pollution laws as not licenced to emit CO2.
- MacGen has responded saying it has an implied licence to pollute because it can’t operate the power station without CO2 emissions