

Shaping the Next Generation of Australian Climate Litigation

Report on a Melbourne Law School Workshop, 17 November 2016

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On 17 November 2016, an invited group of approximately 30 participants - drawn from the judiciary, legal practice, environmental NGOs, advocacy organisations and academia - gathered at the Melbourne Law School for a workshop on strategic climate change litigation. This event was convened as part of Professors Jacqueline Peel and Hari Osofsky's Australian Research Council Discovery Project, *Transition to a Clean Energy Future: The Role of Climate Change Litigation in Shaping our Regulatory Path*. The workshop sought to explore new and innovative avenues for future strategic climate change litigation in Australia against the background of the significant achievements of Australian climate change litigation to date.

This report summarises some of the central issues considered at the workshop including:

- the concept of next generation climate change litigation;
- potential causes of action for next generation climate cases; and
- barriers and enablers for next generation climate litigation.

The report also records highlights from the interactive discussion of participants at the workshop. As the workshop was conducted pursuant to Chatham House rules there is no attribution of comments to individual participants. The final part of the report suggests next steps for taking forward strategic climate change litigation in Australia.

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What is 'next generation' climate change litigation?

A key question raised by the workshop concerned the nature of 'next generation' climate change litigation, including how it differs from past climate cases ('first generation') and whether the first generation/next generation distinction is a useful one for considering the role and impact of litigation on climate change policy and regulation.

Strategic climate change litigation generally involves the use of the law and court action to advance beneficial outcomes for addressing climate change.

In Australia, the predominant model for strategic climate litigation to date has been challenging government decision-making under planning and environmental legislation. For example, a significant body of cases have been brought challenging decisions to approve coal-fired power and coal mines on the basis of associated greenhouse gas emissions (GHG). There have also been challenges to decisions to approve development projects on the basis of their potential exposure to climate change impacts such as sea level rise. These cases have raised awareness of climate change as a key environmental issue in the public, business, professional and government sectors and consolidated the practice of including climate change considerations in environmental impact assessment. While some *adaptation* cases have led to outright rejection or major revisions of development proposals, in a *mitigation* context, this litigation has resulted in fewer court 'wins', although the indirect impacts from the cases have still been significant.

In other jurisdictions, particularly the United States but also various European and Asian countries, a range of different litigation strategies have been pursued in recent years to advance beneficial climate change outcomes. Many of these approaches and the resulting decisions have been heralded as potentially transformative in the way they have catalysed far-reaching responses by government and the private sector. These include:

- **Statutory avenues** – For example, the 2007 US Supreme Court decision in *Massachusetts v EPA* that required the Environmental Protection Agency to either regulate motor vehicle GHG emissions under the *Clean Air Act*, or better justify its refusal to do so, and which has led to the introduction of a regulatory regime for motor vehicles and stationary sources such as power plants.

- **Common law (or equivalent civil law) avenues in nuisance, negligence and using the Public Trust Doctrine** – For example, the 2015 decision of the Hague District Court in the Netherlands finding that the Dutch government’s 2020 emissions reduction target was inadequate in light of international climate science and international climate policy, and ordering the government to increase its target in fulfilment of a duty of care to its citizens to safeguard them from the effects of climate change.
- **Human Rights avenues** – For example, the 2015 filing of a petition to the Philippines Commission on Human Rights by Greenpeace Southeast Asia, together with local groups and individuals, claiming that major contributors to climate change, including the fifty largest fossil fuel companies, are violating Filipinos’ fundamental human rights.
- **Company & Financial law avenues** – For example, recent regulatory investigations (and related shareholder actions) in the United States into the corporate reporting practices of major fossil fuel companies, alleging misleading disclosure of the business risks posed by climate change and/or breach of director’s duty.

These new litigation strategies and trends represent a shift from project-specific challenges of governmental decision-making to an accountability model whereby legal interventions are designed to hold governments and corporations to account for climate change impacts. They also represent a broadening of the types of parties pursuing climate change related litigation and the motivations behind this action. Parties may not be pursuing actions to advance beneficial outcomes for addressing climate change as a primary goal; rather they may be driven by commercial motives, however the end result is potentially beneficial to addressing climate change. These shifts capture the essence of what ‘next generation’ climate change litigation involves.

In light of international developments in climate change litigation, and with the Paris Agreement coming into force in 2016, there has been considerable interest in the Australian legal and advocacy communities in shaping a new strategic climate change litigation agenda that engages with these different litigation avenues and emulates recent overseas lawsuits.

This workshop invited participants to explore a number of questions about what this ‘next generation’ climate change litigation in Australia might involve, including:

- What causes of action should be pursued and which might offer the best prospects of success in an Australian legal context?
- What are the potential enablers of, and barriers to, bringing next generation climate change cases?
- Is there a need for a next generation of novel climate change lawsuits or are efforts to launch such cases better viewed as an extension of first generation litigation, building on the strategies and lessons developed through that experience?

A range of speakers from legal practice and academia were invited to present their thoughts on these topics to stimulate discussion among the broader group of lawyers, judges, advocates and academics. The following section attempts to capture the highlights of this discussion.

What causes of action should be pursued and which might offer the best prospects of success in an Australian legal context?

The workshop heard the following presentations on potential avenues for future climate litigation in Australia:

Public trust and rights-based litigation avenues – *Jacqueline Peel, Melbourne Law School; Hari Osofsky, University of Minnesota Law School*

The common law public trust doctrine and rights-based arguments offer two relatively novel avenues for climate change litigation. The United States has seen a wave of environmental claims in the last few years based on arguments that government failures to adequately constrain greenhouse gas emissions breach a public trust obligation to safeguard natural resources in the public interest. Constitutional rights claims have not previously featured in U.S. climate litigation though lawsuits based on rights' arguments regarding climate change are beginning to emerge in other countries. This presentation discussed the recent U.S. case of *Juliana v US* in which youth plaintiffs are suing the U.S. Government for violations of their constitutional due process rights and the public trust. The presenters examined the latest court ruling in this case – issued on 10 November 2016 – and considered the implications of this decision for climate change litigation in Australia.

Climate torts: An Australian *Urgenda*? – *Tim Baxter, University of Melbourne*

This presentation discussed the possibilities and hurdles to a successful claim in tort against government actors. A claim in tort represents the most straightforward means to enjoin the government against the infliction of harm on its citizens. Tim detailed some of the obstacles to success as well as means by which they may be bypassed. His research suggests that there is a real likelihood of success in an Australian context with a meaningful remedy available, even without establishing past damage.

Corporations & Securities laws: emerging options and comparisons with prior litigation models -

Sarah Barker, Special Counsel, MinterEllison

Sarah outlined emerging litigation trends against corporations and their directors for misleading disclosure and a breach of directors' duties. She provided an overview of actions on foot in the United States (including regulatory investigations into ExxonMobil's disclosure practices, and a shareholder class action against its directors) and the UK (FRC investigations into disclosure practices of SOCO and Cairn Energy), and considered how they may translate in an Australian law context.

Adaptation Litigation going forward - *Tayanah O'Donnell, University of Canberra*

The impacts of a changing climate on the Australian coast have given rise to instances of litigation which demonstrate complexities associated with governing contested spaces like the Australian coast. Climate litigation in Australia has to date largely remained the purview of development and land use administrative review. In this presentation Tayanah discussed the Vaughan litigation to illustrate land use planning and governance challenges for coastal climate change adaptation. From an adaptation perspective, locally focussed legal challenges offer a nuanced analysis, relevant to considerations of next generation climate litigation.

Reflections on Queensland Coal Litigation – a continuing role for statutory & administrative avenues? – *Sean Ryan, EDO Qld*

In this presentation, Sean discussed the incremental advances achieved through various challenges to coal mine proposals in Queensland, focusing particularly on administrative review at the state and federal levels of decisions made under environmental assessment and mining legislation. Sean argued that although none of these challenges have succeeded in outright refusal of the project at issue, over time these cases have led to significant findings that: climate change science is accepted; Scope 3 emissions are relevant, and are linked to climate change; single projects can be significant in their impact relative to the overall global warming challenge; and emissions must be assessed on a cumulative basis. He argued that advances in climate science and also changing economic conditions for fossil fuel development mean that the basis for merits-based litigation against coal mines is strengthening. Sean made a strong case for continuing to focus on administrative law avenues to address the root causes of climate change.

Discussion Highlights

Clear potential for new cases in negligence and using company/finance law: The two litigation avenues that received the most positive attention in discussion as potentially viable options for strategic litigation in an Australian context were:

- A common law suit in negligence along the lines of the *Urgenda* litigation; and
- Pursuing company and financial law avenues against corporations, particularly high-emitting energy companies and their financial backers or insurers.

Both of these avenues are consistent with a shift from project specific challenges to an accountability model, a strong theme of the discussion of ‘next generation’ climate litigation at the workshop.

An Australian Urgenda? There was considerable interest among the group in the potential to bring a common law claim in negligence against a governmental party for a failure to take sufficient action to prevent dangerous climate change. Following Tim Baxter’s presentation, the group discussed potential variations on this approach in terms of choosing the right plaintiffs and subject matter, the key elements of such a claim, and potential remedies (e.g. including the potential for the court to award an injunction compelling a party to meet its duty of care).

While participants noted that first attempts at using this avenue may have low chances of success, positive parallels were drawn to other examples of major developments in common law, including in the law of negligence, whereby judges have been instrumental in developing new legal frameworks to facilitate the application of basic legal principles to new contexts. Advances in climate science, particularly in the ability to attribute climate change impacts to particular fossil fuel projects and activities was seen as a crucial evidence basis for pursuing an action in negligence to overcome hurdles of proving causation (see further discussion below).

Potential challenges associated with this approach include the lack of a specific administrative law structure in which decisions are made at a macro level – e.g. to set targets and outline strategies to meet international commitments under the Paris Agreement. However, participants also noted that by participating in international climate negotiations and ratifying climate treaties, including the most recent Paris Agreement, a clear assumption of a duty of care by national governments could be

argued. Further, while the test for causation was met in the *Urgenda* case where the court was prepared to accept the argument that although the actions of one nation state alone had not caused global climate change, the partial contribution was enough to attribute causation, there was some questioning of how this argument would be received by Australian courts. As Sean Ryan's presentation emphasised, no Australian court has yet been prepared to recognise fully similar arguments to find that emissions from a particular project will play their part in causing global climate change.

Suing Corporations? Given the similarities between legal frameworks for corporations and investment law in Australia, the United States and the United Kingdom, there was much interest from the broader group in emulating similar litigation pathways here in Australia. The discussion focused on the potential for suing companies and their directors for misleading disclosure of business risks associated with climate change and related breaches of directors' duties to exercise due care and diligence.

Australian regulators in this area were noted as being timid and unlikely to pursue companies proactively for disclosure or other breaches involving climate change risks presently. However, it was noted that shareholders and larger scale investors are increasingly sophisticated and active, asking questions and bringing resolutions at company AGMs around how management is approaching climate change risks. If the right factual situation arises (e.g. a sudden stock price drop or a company decision to invest significantly in potentially 'stranded' fossil fuel assets), it seems likely it will only be a matter of time before we start seeing similar shareholder actions in Australia to those now emerging in the United States.

Actions in company and financial law seem set to play a key role in future climate litigation in Australia. The increasing focus on these options illustrates that there has indeed been a significant shift in public (and business) perceptions that climate change is no longer merely an ethical, environmental consideration, but a serious commercial consideration for all manner of businesses. For conceptualising 'next generation' climate litigation, it is important to note the way in which these litigation avenues engage different types of parties (shareholders, investors) with a different nature of interest. While the direct interests of parties in bringing litigation may be commercial, the potential outcomes of this litigation could be to drive better consideration of climate change risks in business decision-making and the eventual uptake of clean energy practices.

An ongoing role for project specific challenges / administrative law avenues: Workshop

participants confirmed their support for continuing to mount project-specific legal challenges in planning and environmental law, particularly in opposition to major coal mine projects, which represent Australia's biggest emissions impact. In light of the incremental but important successes achieved so far using this litigation strategy, particularly in Queensland (as outlined by Sean Ryan in his presentation), it may well be that we are close to a tipping point, where courts will take a significant leap forward in the way that they treat legal arguments and scientific evidence on climate change, leading to court decisions which catalyse fundamental change in the approach of decision-makers to considering climate change impacts.

Participants noted a number of factors that are likely to drive more successful judicial and merits review of decisions around specific projects going forward. These include:

- Scientific advances that strengthen arguments around causation, for example, better understanding of cumulative impacts and attribution of climate change impacts such as sea level rise and temperature extremes;
- Better understanding of the social and economic costs of climate change and also of the flaws in economic arguments for continuing business as usual, that may help to sway the balance away from carbon-intensive projects in the application of public interest tests by decision-makers and courts.

The discussion also noted the need for scientists involved in legal proceedings to be supported and trained for legal communication and presentation of evidence in court to ensure there is high quality evidence to support legal arguments around cumulative impacts, causation, and scope three emissions. It was noted however, that good quality scientific evidence alone is not always enough – e.g. in the Adani case, good scientific evidence was available regarding the impacts of this particular mining project that was accepted by the court.

The future of adaptation litigation: Less time was devoted at the workshop to the discussion of adaptation litigation. Understandably, many participants prioritised discussion of litigation strategies with the potential to achieve climate change mitigation outcomes. The case study of the Vaughan Litigation in northern NSW presented by Tayanah O'Donnell did however provide a good indication of potential trajectories of adaptation litigation in Australia. This case study suggested that this area of litigation is likely to be dominated by local, place-based challenges to decisions or inaction by local

and state planning authorities brought by private parties whose property rights are affected or potentially affected by climate change impacts or adaptation measures.

The group discussed the considerable pressure that these litigation trends will place on local government authorities particularly, who are likely to be involved in litigation (or influenced by the threat of litigation) brought by parties with different and potential conflicting motivations: those who seek to have climate change impacts taken into account and addressed; those who seek recompense for loss and damage suffered through climate change impacts; and also by those who seek to have development proceed without restrictions imposed to manage potential climate change impacts.

The group also noted the possibility that litigation trends in this area may emphasise protection of private interests, potentially to the detriment of public interest considerations. For example, in the Vaughan litigation, which was settled, the end result was a decision by council to override its longstanding planned retreat policy (which sought to protect the beach for both public amenity and environmental conservation reasons) in favour of constructing a sea wall to protect the private property interests of a small group of landholders. In the absence of a well-balanced regulatory regime for adaptation planning which manages competing public and private interests through planning and other measures, it may be important to explore strategic adaptation litigation avenues that seek to assert and protect public interest environmental values.

What are the potential enablers of, and barriers to, bringing next generation climate change cases?

The workshop heard the following presentations regarding potential enablers and barriers for pursuing different litigation strategies:

Using climate change science in litigation – *Professor David Karoly, University of Melbourne*

David presented a brief update on the latest information on climate change science, including carbon budgets and attribution of impacts of climate change. This was used to describe the potential for an end-to-end evidence chain linking responsibility for greenhouse gas emissions to partial responsibility for some specific impacts of current and future climate change.

Procedural issues, courts, substantive causes of action, building networks – *Ariane Wilkinson, Environment Justice Australia*

Ariane discussed the current focus of her role at Environmental Justice Australia on scoping new litigation opportunities that seek to hold governments to account for their failure to take meaningful action to prevent dangerous climate change. She referenced the range of procedural challenges (e.g. finding a claimant with standing, securing pro bono legal representation, potential for adverse costs orders) that remain serious barriers to strategic climate change litigation in Australia. However, momentum is building to find ways to surmount these barriers in order to bring novel and potentially far reaching lawsuits.

Strategic Partnering and Facilitative Litigation – *Dr Anita Foerster, University of Melbourne*

New types of strategic partnership opportunities are emerging for public interest environmental lawyers and NGOs engaged in climate change litigation. By partnering with commercial players with aligning interests in clean energy transition or adaptation, environmental groups can become active in new areas of law and facilitate innovative legal interventions to influence climate change decision-making. This presentation looked at opportunities for strategic partnering and facilitative litigation that are being pursued in comparable jurisdictions in the fields of competition law and company/investment law. By partnering with clean energy technology companies and long term investors, environmental NGOs are overcoming restrictions of standing / access to justice and pursuing the clean energy transition agenda in new and potentially effective ways. However, this

approach also comes with its own challenges of maintaining independence and strategy when not all interests align.

Discussion Highlights

Science driving new litigation opportunities: The group was positive about the litigation opportunities that would stem from recent advances in climate science and increasing legal literacy among scientists involved in giving evidence in cases – both for continuing and building upon project-specific administrative law actions and for new litigation strategies, such as common law claims in negligence. David Karoly noted the areas in which there is particularly strong scientific evidence linking particular climate change impacts to the emission of GHG - sea level rise and temperature extremes – and how this evidence could be used to design strong legal arguments and associated cases. The group also noted the importance of building a good evidence base on the value of ecosystem services that stand to be impacted by climate change and also the socio-economic impacts of climate change.

Overcoming procedural hurdles: In terms of procedural hurdles, a number of legal practitioners emphasised that while these hurdles are relatively well-known for the types of environmental and planning law challenges that have characterised climate litigation in Australia to date, there is considerable uncertainty around these issues for ‘next generation’ litigation avenues. Participants were keen to emphasise the importance of these procedural considerations – a good cause of action is only one relatively small ingredient to getting a case up and running. However, the attendance at the workshop by a group of highly respected legal practitioners from the Victorian Bar and from diverse commercial and public interest firms suggests that networks are indeed developing to help overcome some of the procedural barriers for bringing a next generation of climate change cases.

There was also some discussion about the need for targeted training for judges, particularly outside of specialist environmental courts, to brief them on the litigation trends in comparable jurisdictions and the way in which climate science and other relevant evidence has been handled by courts to date, to ensure the best possible reception for ‘next generation’ style lawsuits in Australian courts.

The pros and cons of partnering: Finally, the group discussed whether there are likely to be options for partnering with commercial players in an Australian context along the lines of the European examples presented by Anita Foerster. There was some reticence expressed about further stretching the limited resources of NGOs, getting involved in areas where other (commercial) parties should

ideally be taking the lead, and taking the focus off what some considered to be the main game of challenging coal developments. However, some participants also expressed the view that public interest environmental lawyers could and should engage to some extent in areas of law where parties with aligning interests are not currently active, particularly where this is of strategic value. The most likely area for partnering approaches in the near future appeared to be with shareholders and investors in bringing legal interventions in company and investment law. In terms of the potential to explore competition law avenues in partnership with commercial players such as clean energy companies, it was noted that the major renewable energy providers in Australia are actually large and diversified energy companies with major fossil fuel elements to their business with very different interests to pure-play renewables or other clean energy technology companies. Further investigation of Australian competition law frameworks and the range of energy market players would be required to scope opportunities for partnering in competition law interventions.

Is there a need for a next generation of novel climate change lawsuits or are efforts to launch such cases better viewed as an extension of first generation litigation, building on the strategies and lessons developed through that experience?

The workshop discussion confirmed that Australian climate change litigation is entering a new phase – many of the new litigation avenues discussed at the workshop are being actively considered and pursued. Participants also agreed that there is an important distinction between early litigation approaches and the types of legal interventions that are now emerging. Perhaps the most significant theme of ‘next generation’ climate litigation is the shift from project-specific legal challenges to an accountability model that seeks to hold governments and corporations to account for their failure to act to prevent dangerous climate change and for the damage and loss that can be attributed to climate change.

The increasing emphasis on company and financial law avenues also illustrates a broadening in the types of parties involved in climate change litigation and their various motivations for this action. It may be a point for debate as to whether litigation brought by commercial parties (shareholders, investors, market competitors) fits the mould of *strategic* climate change litigation, with its emphasis on using legal interventions to advance beneficial outcomes for addressing climate change. While the potential outcomes of these approaches broadly align with the desired outcomes of previous legal approaches (preventing dangerous climate change, transitioning to clean energy), the motivations and types of parties involved are quite different in terms of intersecting or perhaps overriding commercial, private interests that are driving legal interventions. It will be interesting to observe the role that public interest environmental lawyers and advocacy groups play in this type of litigation in Australian in the future, and particularly whether opportunities for strategic partnering emerge and are pursued.

While ‘next generation’ climate litigation trends were clearly recognised by workshop participants, there was also a strong and broadly held view that these developments should not be taken to require an abandonment of previous litigation strategies. Rather, it is important that resources continue to be devoted to pursuing administrative law challenges to major coal projects - these approaches should be seen as mutually reinforcing, and, as far as possible, all available litigation avenues should be explored and tested.

Many participants commented more broadly on the importance of litigation in influencing public debate, moving constituencies and in turn shifting governmental and corporate decision-making. To

this end, it was noted that success in the courtroom is not necessarily required in order for a case to have impact; ‘losing’ cases can also contribute to shifting narratives, especially when accompanied by strategic campaigning and advocacy.

Where to from here?

The workshop convenors intend to continue the conversation with workshop participants on this important topic - to help inform future research agendas and also, potentially, to facilitate the development of other supportive activities which were canvassed at the workshop, such as a targeted judicial training program. It is our intention to hold a follow-up workshop and potentially also to develop a series of publications in 2017, if possible together with those that presented at the Melbourne workshop and other academic colleagues from around Australia.

Proposed follow-up actions include:

- pursuing publication of the discussion paper prepared by the authors of this report for the workshop;
- convening a follow-up workshop with participation from Hari Osofsky during her proposed visit to Australia in 2017;
- exploring avenues for judicial training regarding climate change litigation, with a focus on judges serving in commercial law and generalist courts; and
- exploring avenues, with interdisciplinary colleagues from the University of Melbourne, for better supporting climate scientists and other experts to take part and provide evidence in climate change cases.