GLOBAL TRENDS IN CLIMATE LITIGATION

Prof. Jacqueline Peel, Melbourne Law School
Expert Panel on Super Funds, Climate, and the Law
Melbourne, 22 August 2018
OVERVIEW

1. Emergence and growth of climate litigation
2. Global trends in climate litigation
3. Situating the REST case in the context of global climate litigation
CLIMATE LITIGATION

- What do we mean by “climate litigation”?
- Sabin Center:
  - “Climate change litigation” = cases brought before administrative, judicial and other investigatory bodies that raise issues of law or fact regarding the science of climate change and climate change mitigation and adaptation efforts.
- Can also include cases where climate change more peripheral issue
- Climate litigation may have many different objectives e.g. challenging projects, forcing disclosure, improving regulation, recovering loss

GROWTH OF CLIMATE LITIGATION

• 24 countries plus EU across 6 continents
• 700+ cases filed in US, and over 250 filed in other jurisdictions
• Most litigation has involved statutory pathways, esp. in US
• Primary focus on governments but increasing interest in suits against corporate actors
• Emerging HR/constitutional rights avenues
• Most cases deal with climate change mitigation but emerging body of cases on adaptation issues
EPICENTRE– UNITED STATES

- Statutory Interpretation
  - Clean Air Act: *Mass v EPA*, Challenges to Implementation, and Potential Implementation Action
  - Environmental Review (Coal Challenges)
  - Adaptation Cases under Clean Water Act and State Environmental /Energy Law
- Common Law/Constitutional Law
  - Nuisance: *AEP v Connecticut*
  - Public Trust: *Kelsey Cascade Rose Juliana v US*
  - Dormant Commerce Clause Challenges
  - Takings and Adaptation (*Borough of Harvey Cedars v. Karan*)
SIGNIFICANT JURISPRUDENCE - AUSTRALIA

- Mitigation focus on coal-fired power and coal mines
  - Hazelwood
  - Anvil Hill
  - Ackland coal mine
  - Adani coal mine
- Adaptation cases focus on range of impacts, especially coastal
  - *Walker v Minister for Planning*
  - *Gippsland Coastal Board*
EMERGING LITIGATION IN OTHER PARTS OF THE WORLD

- **Netherlands**: Court found Dutch government violated duty of care to citizens through inadequate emissions reduction targets.

- **Pakistan**: Court found breach of citizens’ fundamental constitutional rights including the right to life due to adaptation failures.

- **South Africa**: Court required environmental assessment to include climate change for prospective coal plant.

- **Colombia**: Court ordered Colombian government to present action plan to reduce deforestation in Amazon region.
TRENDS - ACCOUNTABILITY

- Suits against government and corporate actors seeking accountability for actions/omissions with respect to climate change
- Lawsuits seeking climate justice for “victims” of climate change have often targeted corporations, particularly those in the energy sector
  - Tortious and human rights claims pursued
CARBON MAJOR LAWSUITS
TRENDS – CORPORATE CLIMATE RISK THEME

• Actions based on company law and fiduciary duties especially around disclosure of climate business risk
• Driver: Gradual shift in corporate culture, accelerated by Paris Agreement, to view climate change in financial risk terms
• Bolstered by TCFD release of Recommendations (June 2017)
• Opinions of commercial law barristers supporting potential liability

CBA LAWSUIT

- CBA shareholders sued CBA arguing CC poses material financial risks to bank’s business that should have been disclosed to investors
- Proceedings discontinued after subsequent CBA annual report acknowledged climate as material financial risk and promised to undertake climate scenario analysis of business
- Bank ruled out lending to Adani Carmichael mine
WHERE DOES REST CASE FIT?

- Part of ‘corporate’ trend in climate litigation
- Focused on different subset of private sector actors: institutional investors (super and pension funds)
- Using tools under applicable business laws for climate purposes
- Strategic pressure in other jurisdictions e.g. ClientEarth letters warning of legal action against 14 of UK’s biggest pension funds

• Research funding from ARC, DP160100225, Devising a Legal Blueprint for Corporate Energy Transition (Peel, Osofsky and McDonnell with A. Foerster)