Mapping litigation to enforce climate change obligations of states and enterprises

The Hon Justice Brian J Preston

Chief Judge

Land and Environment Court of NSW

Introduction

- Climate change litigation has increasingly been brought in courts and tribunals across the world to enforce the climate change related obligations of nation-states and enterprises.
- Such litigation has led courts and tribunals to: compel the implementation of mitigation and adaptation measures, redress the inadequate assessment and consideration of climate change in decision-making and determine that particular activities or developments with unacceptable climate change consequences are unlawful.

Climate change litigation causes of action

- Public interest litigants have relied upon a wide range of causes of action to enforce the climate change obligations of nation-states and enterprises including:
  - Tort
  - Public trust
  - Administrative law
  - Constitutional law
  - Human rights
  - International law
  - European Union law

The Oslo Principles on Global Climate Change Obligations

- "No single source of law alone requires States and enterprises to fulfil these Principles. Rather, a network of intersecting sources provides States and enterprises with obligations to respond urgently and effectively to climate change in a manner that respects, protects, and fulfils the basic dignity and human rights of the world's people and the safety and integrity of the biosphere. These sources are local, national, regional, and international and derive from diverse substantive canons …" (p. 3)

- A number of climate change obligations that have been recognised and enforced by courts and tribunals are reflected in the Oslo Principles.

Overview

- This presentation will demonstrate how climate change litigation has sought to enforce various obligations on nation-states and enterprises that are embodied in the following Oslo Principles:
  - Principle 6 – Mitigation measures to achieve global temperature target
  - Principle 7 – GHG emissions reduction without additional cost
  - Principle 8 – Prohibition of new activities causing excessive GHG emissions
  - Principle 11 – Rule against the de minimis argument
  - Principle 27 – The enterprise disclosure rule
  - Principle 29 – Environmental impact assessment for new facilities

Principle 6 – Mitigation Measures

- "States and enterprises must take measures, based on Principle 1, to ensure that the global average surface temperature increase never exceeds pre-industrial temperature by more than 2 degrees Celsius.
  - a. The extent of the measures legally required must be determined in light of the Precautionary Principle …
  - b. The permissible quantum of GHG emissions that a State or enterprise may produce in a specific year must be determined in accordance with this Principle."

Principle 6 – Mitigation Measures

- Public interest litigants have sought to enforce the obligation under Principle 6 to mitigate GHG emissions through various causes of action.
- This presentation will show how this obligation has been considered by courts and tribunals under the following causes of action:
  - Negligence
  - Public Nuisance
  - Public Trust
  - Judicial Review
  - Constitutional Law
  - EU Law
  - Human Rights
  - Civil Enforcement

Negligence: Failure to mitigate

- A negligence action by a person who has suffered damage or loss by a climate change-induced event may be brought for failure to mitigate climate change.
- Defendants would likely fall into four categories:
  - **Producers** of fossil fuels whose combustion increases GHG emissions (eg oil, gas and coal companies)
  - **Users** of fossil fuels that cause GHG emissions (eg electricity power generators)
  - **Manufacturers or marketers** of products whose use contributes to climate change (eg automobile manufacturers)
  - **Governments** that regulate GHG emissions

Negligence: Failure to mitigate

- A negligence action by a plaintiff against defendants of these kinds for failure to mitigate is likely to face considerable hurdles:
  - Establishing the defendant **owed** the plaintiff **a duty of care**
  - Establishing the defendant **breached** any **duty of care**
  - Establishing that the defendant's **breach** of duty **caused** the plaintiff's **damage or loss**
  - **Remoteness** of damage

Negligence: Failure of Government

Urgenda Foundation v Netherlands (District Court, The Hague, Case C/09/456689 / HA ZA 13-1396)

- In November 2013, the Dutch foundation Urgenda and 886 co-plaintiffs sued the Dutch Government initially requesting:
  - A declaration that global warming of > 2°C will lead to fundamental violation of human rights worldwide.
  - A declaration that the Dutch State is acting unlawfully by not contributing a proportional share to prevent global warming.
  - Orders that the Dutch State reduce Dutch emissions by 40%, or at least 25%, by 2020 below 1990 levels.

Negligence: *Urgenda*

- In April 2015, the case was heard before the District Court in The Hague (Case C/09/456689 / HA ZA 13-1396)
- On 24 June 2015, the District Court in the Hague ordered the Dutch state to limit annual greenhouse gas emissions to 25% below 1990 levels by 2020 finding that the government's pledge of a 17% reduction was insufficient.

Negligence: *Urgenda*

- "Due to the severity of the consequences of climate change and the great risk of hazardous climate change occurring – without mitigating measures – the court concludes that the State has a duty of care to take mitigation measures. The circumstances that the Dutch contribution to the present global greenhouse gas emissions is currently small does not affect this": at [4.83].
- The Court concluded that "the State … has acted negligently and therefore unlawfully towards Urgenda by starting from a reduction target for 2020 of less than 25% compared to the year 1990": at [4.93].

Public Nuisance: Electric Power Companies

- In *Connecticut v American Electric Power* 406 F Supp 2d 265 (SDNY 2005) reversed 582 F 3d 309 (2nd Cir 2009):
  - States and environmental NGOs sued five **electric power companies** which, through their fossil-fired electric power plants, emitted around 10% of all CO_2 in the US.
  - The plaintiffs sought a permanent injunction requiring the defendants to **cap their CO_2 emissions** and to commit to yearly reductions over at least ten years.
- The states sued on their own behalf to **protect public lands** and as ***parens patriae*** on behalf of their citizens and residents to protect public health and well-being.
- NGOs sued to **protect private conservation lands**.

Public Nuisance: General Motors

- In *People of the State of California v General Motors* (NDCal, C06-05755 MJJ, 17 September 2007):
  - California sued six of the world's largest **manufacturers of automobiles** based on the alleged contributions (past and present) of their vehicles to **climate change impacts in the state**.
  - The suit alleged these impacts constituted a **public nuisance** and sought **monetary damages**.

Public Nuisance: Justiciability

- Both the *American Electric Power* and *General Motors* suits were dismissed by the District Court on grounds of non-justiciability, the courts stating that it was impossible to decide the matters "without an initial policy determination of a kind clearly for non-judicial discretion."
- The plaintiffs in the *American Electric Power* suit appealed successfully. The Court of Appeals (582 F 3d 309 (2nd Cir, 2009)) held the plaintiffs' actions did not present non-justiciable political questions and the plaintiffs had standing.
- In December 2010, US Supreme Court (131 S Ct 813 (2010)) granted certiorari to American Electric Power.
- In 2011, US Supreme Court (131 S Ct 2527 (2011)) dismissed the suits and held that the Clean Air Act displaces the federal common law of nuisance. The Court, by an equally divided court, ruled that at least some petitioners had standing and did not overrule the CoA's ruling on justiciability.

Public Nuisance: Kivalina

- In *Kivalina v ExxonMobil et al* 663 F Supp 2d 863 (ND Cal 2009) the native Inupiat village of Kivalina in Alaska brought a **public nuisance** suit against **oil, power** and **coal companies.**

Kivalina coastal erosion

Public Nuisance: Kivalina

- The village suffers from the melting of Arctic ice which used to protect its coasts from severe weather and, hence, erosion. The current erosion of coastal areas means the village has to relocate or be abandoned.
- The plaintiffs sought **monetary damages** from the defendants for their contribution to climate change.
- The District Court **dismissed** the plaintiff's federal common law nuisance claim holding it was **non-justiciable** and the plaintiff **lacked standing** (663 F Supp 2d 863 (NDCal, 2009).

Public Nuisance: Kivalina

- In 2012 the CoA (696 F 3d 849 (9th Cir, 2012)) affirmed that decision, applying the Supreme Court's decision in *American Electric Power* and holding that the Clean Air Act displaced the federal common law of nuisance.
- However, these decisions do not imply that **state** nuisance law is displaced.
- In 2013 the Supreme Court (133 S Ct 2390 (2013)) denied a petition by Kivalina for a writ of certiorari.

Public Trust

- The public trust doctrine has its origins in Roman law, specifically in the property concept of res communis. These are things which, by their nature, are part of the commons that all humankind has a right in common to access and use, such as the air, running water, the sea and the shores of the sea, and that cannot be appropriated to private ownership.
- Ownership of these common natural resources is vested in the state as trustee of a public trust for the benefit of the people. The state, as trustee, is under a fiduciary duty to deal with the trust property, being the communal natural resources, in a manner that is in the interests of the general public, who are the beneficiaries of the trust.
- Climate change litigants have sought to rely upon the public trust doctrine as a foundation for enforcing an obligation on governments and enterprises to mitigate GHG emissions.

Public Trust

- *Kanuk v State of Alaska*, 335 P.3d 1088, 2014 (Sup Ct Alaska):
  - Alaskan children's claim that State had violated public trust doctrine under Alaskan Constitution (Art VIII) by failing to take steps to protect the atmosphere from effects of climate change.
  - Standing and justiciability upheld.
  - Claim seeking declaratory judgment that atmosphere was public trust resource failed to present actual controversy appropriate for judicial determination.
  - Court noted, "past application of public trust principles has been as a restraint on the State's ability to restrict public access to public resources, not as a theory for compelling regulation of those resources".

Public Trust

- *Sanders-Reed v Martinez,* 350 P 3d 1221 (NM Ct App, 2015):
  - Affirms 2013 trial court decision and rules that Courts could not require the State to regulate GHG emissions based on the public trust doctrine.
  - The common law doctrine was not an available cause of action because a public trust obligation to protect natural resources, including the atmosphere, had been incorporated into New Mexico Constitution (Art XX, s 21) and Air Quality Control Act, and the common law must now yield to the governing statutes.

Public Trust

- *Chernaik v Brown* No. 16-11-09273 (Or. Cir. Ct. opinion and order May 11, 2015)
  - Action arguing that the public trust doctrine compelled the State of Oregon to take action to establish and enforce limitations on GHG emissions to reduce CO_2 in atmosphere.
  - Court ruled that the State's public trust doctrine applied only to submerged and submersible lands, and not to the atmosphere.
  - Court questions "whether the atmosphere is a 'natural resource' at all, much less one to which the public trust doctrine applies".
  - Court further declares that State does not have "fiduciary obligation to protect submerged and submersible lands from the impacts of climate change", only that the public trust doctrine restricts the ability of the State to entirely alienate such lands.
  - The plaintiffs appealed the decision on 7 July 2015 and a decision is expected in late 2016.

Public Trust

- *Foster v Washington Department of Ecology* (Wash Super Ct, No 14-2-25295-1, 19 November 2015)
  - Judicial review proceedings challenging the Department's refusal of a public interest petition seeking the adoption of a proposed rule mandating a particular State GHG emission cap claimed to be consistent with scientific assessments of required mitigation.
  - The court reaffirmed that the State Constitution imposes a "constitutional obligation to protect the public's interest in natural resources held in trust for the common benefit of the people of the State".
  - The court rejected the Department's argument that the public trust doctrine was restricted to 'navigable waters' and did not apply to the atmosphere. "The navigable waters and the atmosphere are intertwined and to argue a separation of the two … is nonsensical".
  - The court ultimately held that the Department was fulfilling its public trust obligations because it was engaging in rulemaking to address GHG emissions. As its process of rulemaking in this respect was not "arbitrary or capricious", it was beyond the Court's judicial review power to assess the merits of the Department's approach.

Judicial Review

- The legality or validity of government decisions and action, including the failure to make decisions or take action, relating to climate change mitigation may be reviewed by the courts on numerous grounds.
- In some countries, judicial review has been sought of government decisions to deny petitions to regulate GHG emissions.

Rulemaking to mitigate GHG emissions: *Massachusetts v EPA*, 549 US 497 (2007)

- The state of Massachusetts, together with 11 other states, 3 cities, 2 US territories and several environmental groups sought review of the EPA's denial of a petition to regulate the emissions of four GHGs, including CO_2 , under s 202 (a)(1) of the Clean Air Act.
- This requires that the EPA shall by regulation prescribe standards applicable to the emission of any air pollution from any class of new motor vehicles which in the EPA's judgment causes or contributes to air pollution reasonably anticipated to endanger public health or welfare.
- The US Supreme Court, at 549 US 497 (2007), held that Massachusetts had standing to challenge the EPA's denial of their rulemaking petition.

Rulemaking to mitigate GHG emissions

- The Supreme Court applied the three part test for standing in *Lujan v Defenders of Wildlife* 504 US 555 (1992):
  - **Injury in fact**: Massachusetts had suffered an injury in fact as owner of the state's coastal land which is and will be affected by climate change induced sea level rise and coastal storms: at 19-20.
  - **Causation**: reducing domestic automobile emissions, a major contributor to GHG concentrations, is "hardly a tentative step": at 21-22.
  - **Remedies**: regulating motor vehicle emissions sought would not reverse global warming, it might slow down or reduce its effects: at 22.

Rulemaking to mitigate GHG emissions

- The Supreme Court held that the Clean Air Act empowered the EPA to regulate GHG emissions from new motor vehicles providing that the EPA determined that these GHG emissions contribute to climate change.
- Moreover, the Supreme Court held that the EPA could only avoid regulating new vehicle GHG emissions if it determined the converse or if it could reasonably justify why it should not exercise its discretion to make any determination on this fact.

Rulemaking to mitigate GHG emissions

- *Foster v Washington Department of Ecology* (Wash Super Ct, No 14-2-25295-1, 29 April 2016)
  - As above, the Court determined on 19 November 2015 that as the Department was engaging in rulemaking to mitigate climate change, judicial review could provide no remedy to the petitioners.
  - However, in February 2016, the Department withdrew its proposed rule for mitigating GHG emissions.
  - Given these "extraordinary circumstances", the Court vacated parts of its earlier order and ordered the Department to both establish a GHG emission rule by the end of 2016 and recommend this rule to the legislature in 2017.

Rulemaking to mitigate GHG emissions

- (cont'd)
  - "The reason I'm doing this is because this is an urgent situation. This is not a situation that these children can wait on. Polar bears can't wait, the people of Bangladesh can't wait. I don't have jurisdiction over their need in this matter, but I do have jurisdiction in this court, and for that reason I'm taking this action" (p. 20 [13]-18]).

Constitutional law

- Constitutions or statutes may provide for certain rights such as a right to life or right to a healthy environment.
- Such rights may provide a source for climate change litigation.
- Examples: constitutional rights in India, Pakistan, Kenya, Philippines.

Constitutional law: Court orders directing Governments to mitigate climate change

- *Ashgar Leghari v Federation of Pakistan* (Lahore High Court, WP No 25501/2015)
  - Pakistan had two climate-related policies for which on ground implementation had not taken place:
    - *National Climate Change Policy*, 2012
    - *Framework for Implementation of Climate Change Policy (2014-2030)*
  - A petitioner submitted to the Lahore High Court that the inaction offended his fundamental rights, in particular the constitutional principles of social and economic justice.

Leghari v Pakistan

- The Lahore High Court ordered the establishment of a Climate Change Commission to effectively implement the *National Climate Change Policy* and the *Framework for Implementation of the Climate Change Policy (2014-2030).* The Court assigned 21 members to the Commission from various government Ministries and Departments and ordered that it file interim reports as and when directed by the Court.
- "For Pakistan, climate change is no longer a distant threat – we are already feeling and experiencing its impacts across the country and the region."

Constitutional law: Court orders directing governments to mitigate air pollution

- Courts may order governments to take air pollution mitigation measures to remedy contraventions of environmental and public health related constitutional obligations.
- Strong parallels can be drawn between the approach taken by courts in adjudicating constitutional law based air pollution proceedings and the role of courts in adjudicating climate change litigation. In particular, the history of court orders directing governments to implement air pollution mitigation measures may foreshadow similar court orders in future climate change litigation.
- Additionally, air pollution mitigation related court orders can have ancillary benefits for climate change mitigation.

Constitutional law: Court orders directing governments to mitigate air pollution

- *Farooque v Government of Bangladesh* (2002) 22 BLD 345 Supreme Court of Bangladesh:
  - While the Government had both legislated and taken some policy action to control vehicle air pollution, it was submitted that the Government had failed to safeguard the "fundamental constitutional rights" of citizens by allowing vehicular pollution to pose a "deadly threat to city dwellers".
  - The Court ordered the Government to undertake "urgent preventative measures" to control the "emission of hazardous black smoke" including phasing out "2 stroke wheelers" and enforcing international petroleum standards.

Air pollution in Dhaka

Constitutional law: Court orders directing governments to mitigate air pollution

- *Prakash Mani Sharma v HMG Cabinet Secretariat* (11 March 2003) Supreme Court of Nepal (WP No 3440 of 1996):
- The Court held that the Government had a constitutional public health obligation to reduce vehicular air pollution. To remedy the inadequate implementation of air pollution reduction measures, the Court ordered the Government to "enforce essential measures" to reduce vehicular pollution in Kathmandu Valley.

Kathmandu Valley

Constitutional law: Court orders directing governments to mitigate air pollution

- *Gbemre v Shell Petroleum Development Company Nigeria Limited* (2005) AHRLR 151 Federal High Court of Nigeria: The Court ordered Shell to cease polluting by way of gas flaring on the basis that this gas flaring contravened the constitutional right to a "clean, poison-free, pollution-free healthy environment".

Constitutional law: Court orders directing governments to mitigate air pollution

- *Mansoor Ali Shah v Government of Punjab* (2007) CLD 533 Lahore High Court
- It was uncontested that the constitutional right to life required the Government to protect citizens in Lahore from vehicular pollution. The Government submitted that it was, however, "making all efforts to cure air pollution". In earlier proceedings, the Court had ordered the establishment of a commission to report on how to address vehicular pollution.
- The parties consented to the Court directing the Government to implement a suite of air pollution reduction measures recommended by the commission including the phasing out of 'dirty' buses and "Autocab Rickshaws", the creation of bus lanes, the enforcement of the ban on registering two stroke rickshaws and the setting of air quality and fuel standards.

Constitutional law: Court orders directing governments to mitigate air pollution

- *M.C. Mehta v Union of India* - Supreme Court of India – Writ Petition No. 13029 of 1985:
- 30 year history of Court orders compelling Indian governments to take air pollution mitigation measures to comply with public health and environmental constitutional obligations.
- The Court ordered on 5 April 2002 that diesel buses in Delhi be converted from diesel to cleaner natural gas.
- On 16 December 2015, the Court made further orders including, for example, the prohibition of the registration of 'luxury' diesel cars and SUVs in Delhi and green taxes/toll-based measures to stop diesel trucks entering rather than bypassing Delhi.

EU Law – Court orders directing Governments to mitigate air pollution

- *R. v Secretary of State for the Environment, Food and Rural Affairs* (C-404/13) [2015] 1 CMLR 55 and *R. v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28; [2015] CMLR 15.
  - The United Kingdom Government was in breach of art 13 of EU Directive 2008/50 for failing to comply with various nitrogen dioxide limits throughout the UK by the directive deadline of 2010.
  - Rather than applying under art 22 of the Directive for an extension of time for compliance, the Government produced plans under art 23 which anticipated complying with the limits by 2025.
  - ClientEarth commenced proceedings seeking an order that the Government be directed to apply for an extension of time under art 22 and commit to securing compliance, pursuant to art 22, by 1 January 2015.
  - The decision at first instance ultimately reached the Supreme Court on appeal, which requested a preliminary ruling from the European Court of Justice on whether the Government was obligated to seek an extension of time, limited to a maximum deadline of 1 January 2015, under art 22.

ClientEarth air pollution cases

- The ECJ held that art 22 required the Government to make an application for an extension of time when it became apparent that compliance would not occur by the original deadline. Contrary to the High Court and Court of Appeal, the ECJ also held that compliance with the emission limits, and therefore art 13, could be compelled by national courts (rather than by the European Commission exclusively).
- Ultimately, the Supreme Court determined the appeal in April 2015, by which time the maximum time limit extension in art 22 (1 January 2015) had already expired, with the effect that art 22 was "of no practical significance". However, the Supreme Court, in order to remedy the serious and sustained breach of art 13, ordered the Government to, by 31 December 2015, produce new plans pursuant to art 23 delineating how it intended to secure compliance "as soon as possible".

Human rights

- Human rights under international conventions and instruments may provide a source for climate change litigation.
  - European Convention for the Protection of Human Rights and Fundamental Freedoms and European Court for Human Rights (ECtHR)
    - **Right to life**: *Öneryildiz v Turkey* No 48939/99, ECtHR 2004-XII
    - **Right to a fair trial**: *Okyay v Turkey* No 36220/97, ECtHR 2005-VII
    - **Right to respect for family & private life**: *Giacomelli v Italy* No 59909/00, ECtHR 2006-XII; *Fadeyeva v Russia* No 55723/00, ECtHR 2005-IV; *Guerra and Others v Italy,* ECtHR 1998-I (19 February 1998); *Lopez Ostra v Spain*, ECtHR judgment of 9 December 1994, Series A no 303.
  - Inter-American Commission on Human Rights (IACHR): *Inuit v USA*.

Human rights

- *Fadeyeva v Russia No 55723/00, ECtHR 2005-IV*
  - The Court held that the Government's failure to enforce environmental standards or take measures to protect Fadeyeva from steel plant generated air pollution, violated her right to respect for her home and private life. The Court awarded Fadeyeva damages of €6000 and ordered the Government to "take appropriate measures to remedy" her situation.
  - The Court also observed that it was not its role to "dictate precise measure which should be adopted by States in order to comply" with their human rights obligations
  - Analogy to Principle 10 of the Oslo Principles which allows a country or enterprise flexibility in selecting measures to be used to meet obligations.

Civil enforcement: mitigation

- *Gray v Macquarie Generation* [2010] NSWLEC 34 concerned proceedings to restrain alleged contravention of s 115(1) of *Protection of the Environment Operations Act* 1997 (NSW) by existing Bayswater Power Station wilfully or negligently disposing of waste by the emission of CO_2 into the atmosphere in a manner that harms or is likely to harm the environment.
- Defence under s 115(2) if waste disposed of with lawful authority (such as Environment Protection Licence).

Bayswater Power Station

Civil enforcement: Mitigation

- Application for **summary dismissal**:
  - **upheld** for primary claim of absence of lawful authority to emit CO_2 as Environment Protection Licence authorised combustion of carbon based fuels (including coal) and hence emission of CO_2 which is a necessary consequence of activity authorised by licence.
  - **not upheld** for alternative claim that if licence authorised emission of CO_2 , it only authorised emission in a way that has reasonable regard and care for people and the environment and such limitation is to be implied in the licence.

Civil enforcement: Mitigation

- Application to **amend summons**:
  - In *Gray v Macquarie Generation (No 3)* [2011] NSWLEC 3 leave was granted to amend the summons on basis that it was reasonably arguable that the licence was subject to an implied/common law limitation preventing the emission of CO_2 in excess of the level achieved by having "reasonable regard and care for the interests of other persons and/or the environment".
  - In *Macquarie Generation v Hodgson* [2011] NSWCA 424 the NSW Court of Appeal upheld Macquarie's appeal and set aside the orders granting leave to amend.

Principle 7 – GHG emissions reductions without additional cost

- "All States and enterprises must reduce their GHG emissions to the extent that they can achieve such reduction without additional cost. Relevant measures include … elimination of broad fossil-fuel subsidies, including tax exemptions for certain industries, such as air transportation."

International law

- Many types of environmental damage have transboundary effects. Examples are:
  - Sulphur dioxide fumes in *Trail Smelter arbitration* (United States-Canada [1941] 3 RIAA 1907)
  - Chernobyl radioactive leak in USSR
  - Air pollution from Indonesian forest fires.
- Climate change is a form of transboundary environmental harm.

International law: Air Transport case

- *Air Transport Association of America & Ors v Secretary of State for Energy & Climate Change* (C-366/10) [2011] ECR 0:
  - Example of polluter challenging laws that limit its polluting.
  - In 2009, US Air Transport Association and three airlines challenged the validity of EC Directive 2008/101 and respective UK Regulations that brought aviation activities of aircraft operators operating flights arriving at and departing from European Community aerodromes within the EU ETS.
  - Judicial review initially brought in UK alleging the Directive and Regulations contravened four principles of customary international law, the Chicago Convention, the Open Skies Agreement and the Kyoto Protocol.

International law: Air Transport case

- In 2011, the CJEU made a preliminary ruling:
- The EU was not bound by the Chicago Convention ([71]-[72]) and the Kyoto Protocol was not 'unconditional and sufficiently precise so as to confer on individuals the right to rely on it in legal proceedings in order to contest the validity' of the Directive ([77]-[78]);

International law: Air Transport case

- Insufficient evidence to establish that the 4th principle of customary international law applied to aircraft flying over the high seas; and
- Three principles of customary international law and the Open Skies Agreement could be relied on to assess validity of the Directive ([111] and [158]) but the Court found that these principles and provisions did not affect the validity of the Directive ([157], [158]).

Principle 8 – Prohibition of new activities causing GHG activities

- "States and enterprises must refrain from starting new activities that cause excessive GHG emissions, including, for example, erecting or expanding coal-fired power plants, without taking countervailing measures, unless the relevant activities can be shown to be indispensable …"

Judicial Review

- The legality or validity of government decisions to approve new activities causing excessive GHG emissions have been reviewed by the courts on numerous grounds.
- One such ground is a failure to consider relevant matters:
  - A decision-maker will be bound to take into account matters that the statute expressly or by implication from the subject matter, scope or purpose of the statute require the decision-maker to consider: *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 at 39-40, 55.

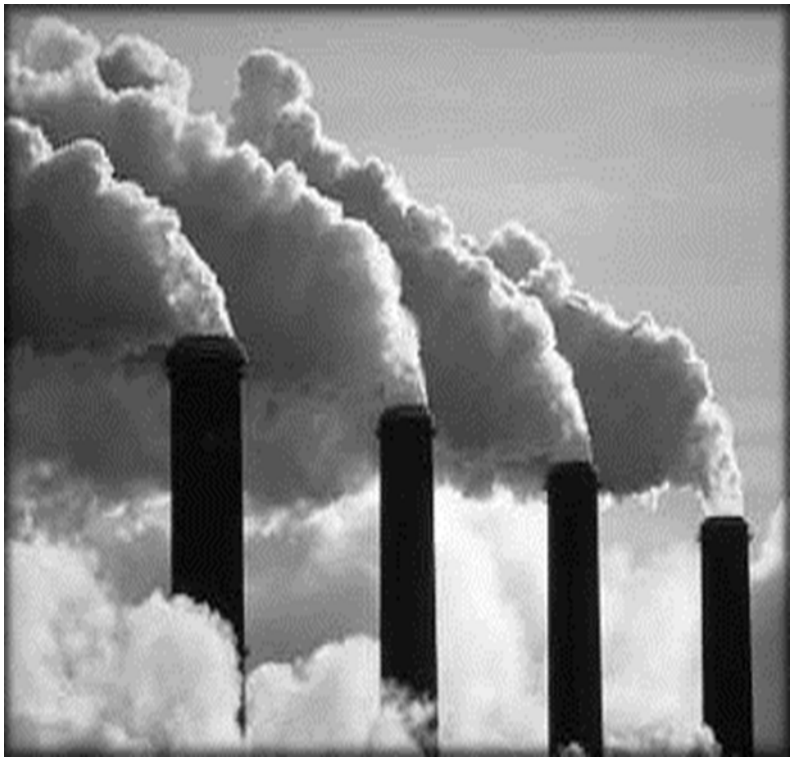
Implied relevant matters: Examples

- *Australian Conservation Foundation v Latrobe City Council* (2004) 140 LGERA 100:
- Environmental effects of GHG emissions that were likely to be produced by the coal-fired Hazelwood Power Station relevant to proposed amendment to planning scheme to facilitate mining coal fields to supply coal for the power station.

Hazelwood Power Station

Implied relevant matters: Examples

- *Gray v Minister for Planning* (2006) 152 LGERA 258:
- Challenge to approval for proposed Anvil Hill coal mine for failure to consider GHG emissions from downstream use (burning) of coal mined.



Implied relevant matters: Examples

- *Haughton v Minister of Planning* (2011) 185 LGERA 373: challenge to approval of new Bayswater 2 coal-fired power station for alleged failure to consider ESD and anthropogenic climate change as an element of public interest.
- Challenge dismissed on basis that ESD considered to extent required and anthropogenic climate change not a mandatory consideration.

Implied relevant matters: Examples

- *Barbone v Secretary of State for Transport* [2009] EWHC 463 (Admin): GHG emissions from increased intensity of Stansted airport was relevant matter but taken into account (affirmed by Court of Appeal).
- *R (on application of Hillingdon LBC) v Secretary of State for Transport and Transport for London* [2010] EWHC 626 (Admin): GHG emissions from expansion of Heathrow airport and recent developments in climate change policy were relevant matters that would need to be considered in the forthcoming Airports National Policy Statement.
- *West Coast Ent Inc v Buller Coal* [2014] NZSC 87: climate change effects from burning of exported coal outside functions of regional councils re resource consents for coal mine.

Administrative Law - Merits review

- Merits review involves the court (or tribunal) re-exercising the power of the original administrative decision-maker.
- The courts in merits review appeals have considered the effects a proposed development might have on climate change and the effects climate change might have on a proposed development.

Merits review: Balancing public and private interests

- Courts have weighed the public interest in addressing climate change against private interests in carrying out or objecting to development:
  - *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* [2007] NSWLEC 59; (2007) 161 LGERA 1
  - *Genesis Power Ltd v Franklin District Council* [2005] NZRMA 541
  - *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2009] EWHC 1729 (Admin);[2010] P&CR 19

Merits review: Balancing public and private interests

Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd [2007] NSWLEC 59; (2007) 161 LGERA 1 at [74].

- "The attainment of intergenerational equity in the production of energy involves meeting at least two requirements."
- "The first requirement is that the mining of and the subsequent use in the production of energy of finite, fossil fuel resources need to be sustainable. Sustainability refers not only to the exploitation and use of the resource (including rational and prudent use and the elimination of waste) but also to the environment in which the exploitation and use takes place and which may be affected. The objective is not only to extend the life of the finite resources and the benefits yielded by exploitation and use of the resources to future generations, but also to maintain the environment, including the ecological processes on which life depends, for the benefit of future generations."

Merits review: Balancing public and private interests

- (Cont'd) "The second requirement is, as far as is practicable, to increasingly substitute energy sources that result in less greenhouse gas emissions for energy sources that result in more greenhouse gas emissions, thereby reducing the cumulative and long-term effects caused by anthropogenic climate change. In this way, the present generation reduces the adverse consequences for future generations."

Taralga Wind Farm

Merits review: Balancing public and private interests

- *Genesis Power Ltd v Franklin District Council* [2005] NZRMA 541: benefits of addressing climate change and use and development of renewable energy outweigh adverse visual, noise and other impacts.

Merits review: Conditions of approval

- *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221; *Hunter Environment Lobby Inc v Minister for Planning (No 2)* [2012] NSWLEC 40.
- A coal mine was approved with conditions to offset Scope 1 & 2 GHG emissions.
- The Applicant proposed conditions requiring particular offsetting of scope 1 GHG emissions.
- As the global problem of GHG emissions from large emitters was being addressed by a national climate change mitigation scheme, the proposed conditions were unnecessary and unwarranted. *Hunter (No 2)* at [15]-[17].

Principle 11 – Rule against the "de minimis" argument

- "No Country or enterprise is relieved of its obligations under these Principles even if its contributions to total GHG emissions are small."

Genesis Power v Franklin District Council

- "With regard to the agreed benefits, Mr Gould emphasised in his cross-examination and his submission, the "de minimis" argument: that the contribution of the proposed wind farm to reduce greenhouse gas input … is in percentage terms minimal.
- Climate change is a silent but insidious threat that scientists tells us threatens to improperly deprive future generations of their ability to meet their needs. We accordingly do not accept the 'de minimis' argument" - *Genesis Power Ltd v Franklin District Council* [2005] NZRMA 541 at 587-588.

Urgenda Foundation v Netherlands

- To repeat the statement of the Court in *Urgenda:*
  - "Due to the severity of the consequences of climate change and the great risk of hazardous climate change occurring – without mitigating measures – the court concludes that the State has a duty of care to take mitigation measures. The circumstances that the Dutch contribution to the present global greenhouse gas emissions is currently small does not affect this": at [4.83]. (emphasis added).

Massachusetts v EPA

- "EPA nevertheless maintains that its decision not to regulate greenhouse gas emissions from new motor vehicles contributes so insignificantly to petitioners' injuries that the Agency cannot be haled into federal court to answer for them. For the same reason, EPA does not believe that any realistic possibility exists that the relief petitioners seek would mitigate global climate change and remedy their injuries. That is especially so because predicted increases in greenhouse gas emissions from developing nations, particularly China and India, are likely to offset any marginal domestic decrease.
- But EPA overstates its case. Its argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action. Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop … They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed … That a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law." (at 1457)

Gray v Minister for Planning (2006) 152 LGERA 258

- "The Director-General's test that the effect is significant, is not unlikely to occur and is proximate also raises issues of judgment. Climate change/global warming is widely recognised as a significant environmental impact to which there are many contributors worldwide but the extent of the change is not yet certain and is a matter of dispute. The fact there are many contributors globally does not mean the contribution from a single large source such as the Anvil Hill Project in the context of NSW should be ignored in the environmental assessment process. The coal intended to be mined is clearly a potential major single contributor to GHG emissions deriving from NSW given the large size of the proposed mine. That the impact from burning the coal will be experienced globally as well as in NSW, but in a way that is currently not able to be accurately measured, does not suggest that the link to causation of an environmental impact is insufficient. The "not likely to occur" test is clearly met as is the proximate test for the reasons already stated." (at 287)

Principle 27 – Enterprise Disclosure

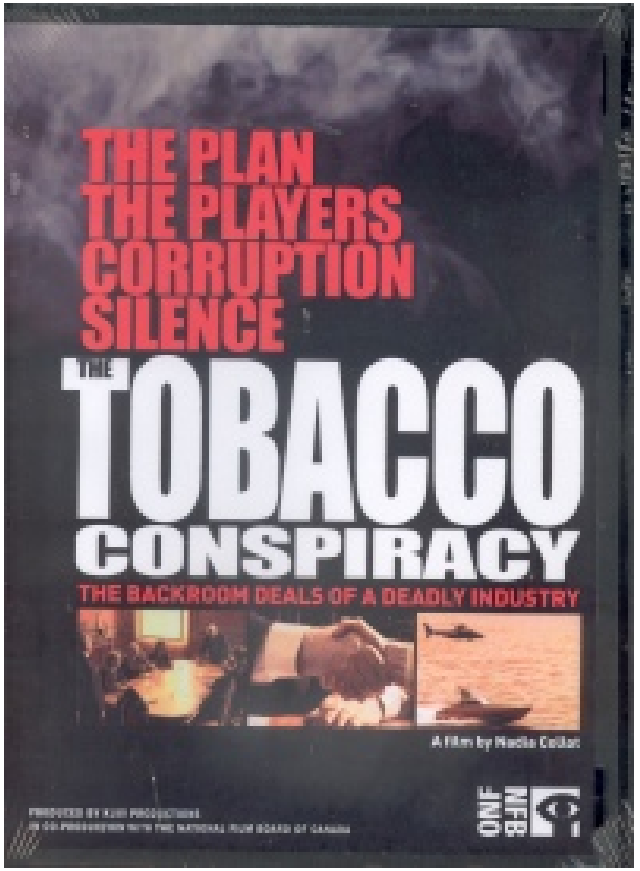
- "Enterprises must assess their facilities and property to evaluate their vulnerability to climate change; the financial effect that future climate change will have on enterprises; and their enterprises' efforts to increase their resilience to future climate change. Enterprises must publically disclose this information and ensure , in particular, that it is readily accessible to those who are, or are likely to be, directly or indirectly affected by their activities, including investors, clients, and securities regulators." (emphasis added)

Conspiracy: Nature

- Conspiracy consists in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means.

Conspiracy: Tobacco litigation

- Prior to being used in climate change litigation, claims of civil conspiracy were used in lawsuits against tobacco companies, that they had conspired to deceive the public about the dangers of cigarettes.



Conspiracy: Comer

- In *Comer v Murphy Oil USA* 585 F 3d 855 (5th Cir, 2009), the plaintiffs who had suffered damage and loss from Hurricane Katrina sued oil, coal and chemical companies in various causes of action, including nuisance, trespass, negligence, unjust enrichment, civil conspiracy and fraudulent misrepresentation.

Hurricane Katrina

Conspiracy: Comer

- The **civil conspiracy claim** asserted that the defendants were aware for many years of the dangers of GHG emissions, but they **unlawfully disseminated misinformation** about these dangers in furtherance of a civil conspiracy **to decrease public awareness** of the dangers of global warming.
- US District Court (SD Miss, 1:05-CV436LGRHW, 30 August 2007) and Court of Appeals (585 F 3d 855 (5th Cir, 2009)) **dismissed** the civil conspiracy claim for plaintiff's **lack of standing**.

Conspiracy: Comer

- In 2011, a new lawsuit was filed in the US District Court (839 F Supp 2d 849 (SD Miss, 2012)). The Court dismissed the plaintiffs' case holding that the doctrines of res judicata and collateral estoppel barred all of the plaintiffs' claims. The Court held in the alternative that the plaintiffs did not have standing, that the lawsuit was a non-justiciable political question and that all the plaintiffs' claims were pre-empted by the Clean Air Act.
- In 2013, the US Court of Appeals (718 F 3d 460 (5th Cir, 2013)) affirmed the US District Court's decision on grounds of res judicata.
- See also *Kivalina v Exxon Mobil* 663 F Supp 2d 863 (ND Cal 2009).

Conspiracy: climate change misinformation

- In 2015, the state of New York began investigating Exxon Mobil regarding whether it lied to the public about risks associate with climate change or lied to its investors about how such risks might impact the oil business.
- See New York Times: Justin Gillis and Clifford Krauss, 'Exxon Mobil investigated for possible climate change lies by New York Attorney General' (online, 5 Nov 2015).

Conspiracy: climate change misinformation

- *Horner v Rector & Visitors of George Mason University* (Va Cir Ct App, No CL15-4712, 22 April 2016)
  - The Competitive Enterprise Institute submitted a freedom of information request seeking production by George Mason University of records allegedly showing that Professor Horner had used his expertise to help potential litigants who sought to pursue fossil fuel companies for deceiving the public on climate change.
  - The Court held that the University's searches had been inadequate and that the records sought did relate to "the transaction of public business".
  - (Information sourced from Sabin Center for Climate Change Law Climate Law Update #86)

Principle 29 – Environmental impact assessment

- "Before committing to plans to build any major facilities, enterprises must conduct environmental impact assessments. Such an assessment must include an analysis of the proposed facility's carbon footprint and ways to reduce it and the potential effects of future climate change on the proposed facility."

Non-compliance with procedural requirements

- Many planning and environmental statutes require, as a pre-condition to the exercise of power to approve a development, compliance with certain procedures. These include environmental impact assessment (EIA) of the proposed development.
- The **EIA may be inadequate** for failure to consider the impact of a proposed development on climate change or the impact climate change might have on a proposed development.
- A failure to comply with such procedural requirements may be judicially reviewed on the ground of procedural impropriety.

Inadequate EIA: Examples

- *Gray v Minister for Planning* (2006) 152 LGERA 258 Anvil Hill Coal Mine case- EIA inadequate for failure to consider GHG emissions from downstream burning of coal mined.

Inadequate EIA: Examples

- *Border Power Plant Working Group v Dep't of Energy* 260 F Supp 2d 997 (SDCal 2003): EIA inadequate for failure to discuss CO_2 emissions from new power plants in Mexico which would be connected by the proposed electricity transmission lines with the power grid in Southern California.
- *Mid States Coalition for Progress v Surface Transportation Board* 345 F 3d 520 (8th Cir, 2003): EIA inadequate for failure to consider, when approving a proposed rail line which would provide a less expensive and hence a likely more utilised route by which low-sulphur coal could reach power plants, the possible effects of an increase in coal consumption, including climate change.

Inadequate EIA: Examples

- *Centre for Biological Diversity v California Department of Fish and Wildlife* 361 P 3d 342, 195 (Cal 2015): Environmental Impact Report inadequate for concluding that a proposed substantial mixed use development project would not have a significant impact on GHG emissions without sufficient evidentiary support.
- *Friends of Highland Park v City of Los Angeles* (Cal Ct App, No B261866, 1 December 2015): Initial study for 'transit village' development inadequate for, amongst other reasons, not attempting to quantify GHG emissions or revealing what raw evidence was relied upon with respect to the assessment of GHG emissions.


CLIMATE CHANGE
IS FREQUENT FLOODS