

Climate change litigation

by

The Hon. Justice Brian J Preston
Chief Judge
Land and Environment Court of NSW

A paper presented to:

Judicial Conference of Australia Colloquium

**11 October 2008
Marriott Resort, Gold Coast**

INTRODUCTION

The Intergovernmental Panel on Climate Change found in its latest assessment report that climate patterns have changed significantly in the 20th century and the second half of the century brought the warmest years on record.¹ The causes of climate change are largely anthropogenic, leading many environmental groups to call on governments to tackle these causes. As some effects of climate change are already noticeable, such as increased coastal hazards, adaptive measures are also needed.

A comprehensive and action-forcing international treaty, ratified by all the major contributors to global warming, is regarded as the preferable choice to address the global warming phenomenon, as collective action taken by all states is what is required in order to meaningfully combat climate change.² However, international negotiations in this field are not advancing, hence presenting litigation as an attractive path, despite some drawbacks. While litigation might eventually force governments to take some action³, it might also mean that the results would be piecemeal. Ultimately litigation is unlikely to have a great overall effect on climate change.⁴ Despite this assessment of litigation, environmental groups and affected individuals and groups have nonetheless taken up the challenge and brought climate change related actions before the courts. These lawsuits have mainly, but not solely, targeted unresponsive governments, through their agencies or departments,⁵ or companies that are major greenhouse gas (GHG) emitters, such as car manufacturers or power plants.⁶

Climate change litigation is a fairly new phenomenon. The first significant US court decision relating to climate change dates from 1990,⁷ and the first Australian one from 1994.⁸ Since then there has been an increase in the number of cases where issues relating to climate change are being litigated, more or less successfully. It is only in recent years that climate change as a phenomenon has been more widely accepted by the courts,⁹ though there are still cases where the science of climate change is challenged.¹⁰ Taking climate change into account when deciding upon the merits of a development proposal is similarly a new development.¹¹

Plaintiffs have used the legal avenues available to them to bring climate change-related actions before the courts, from actions based on the law of torts to domestic statutes and international conventions. These actions are not always based on environmental legislation, but also other provisions applicable nationally or internationally. This

¹ IPCC, *Climate Change 2007 Synthesis Report: Summary for Policymakers* (2007) at 2.

² Posner E, "Climate Change and International Human Rights Litigation: A Critical Appraisal" (2007) 155 *University of Pennsylvania Law Review* 1925 at 1925.

³ Sax J L, *Defending the environment: A handbook for citizen action* (1971) p xviii and p 152.

⁴ Posner, note 2 at 1925-1926. See also Meltz R, *Report for Congress: Climate Change Litigation: A Growing Phenomenon* (2007, Congressional Research Service) at 33 and Huggins A, "Is climate change litigation an effective strategy for promoting greater action to address climate change? What other legal mechanisms might be appropriate?" (2008) 13 *Local Government Law Journal* 184.

⁵ *Massachusetts v EPA*, 549 US 1 (2007); *Walker v Minister for Planning* (2007) 157 LGERA 124.

⁶ *Connecticut v American Electric Power*, 406 F Supp 2d 265 (SDNY, 2005); *Genesis Power Limited v Greenpeace New Zealand Inc* [2008] 1 NZLR 803.

⁷ *City of Los Angeles v National Highway Traffic Safety Administration*, 912 F 3d 478 (DC Cir, 1990) in Meltz, note 4 at 15.

⁸ *Greenpeace Australia v Redbank Power Company* (1994) 86 LGERA 143 in Bonyhady T, "The New Australian Climate Law" in Bonyhady T, Christoff P (eds), *Climate Law in Australia* (2007) at 11.

⁹ *Environmental Defence Society (Incorporated) v Auckland Regional Council and Contact Energy Limited* [2002] 11 NZRMA 492, *Gray v Minister for Planning* (2006) 152 LGERA 258, *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* (2007) 161 LGERA 1, *Walker v Minister for Planning* (2007) 157 LGERA 124.

¹⁰ *Re Xstrata Coal Queensland Pty Ltd* [2007] QLRT 33 (15 February 2007).

¹¹ *Walker v Minister for Planning* (2007) 157 LGERA 124, *Gray v Minister for Planning* (2006) 152 LGERA 258.

explains the variety of both causes of action which have been employed and fora which have heard climate change or air pollution actions.

This paper provides a conspectus of the avenues that have been used or could be used to litigate issues relating to climate change.

At the national level, plaintiffs have used tort law. Causes of action include the traditional actions of nuisance, both public and private, and negligence, as well as less common actions such as civil conspiracy.

Misrepresentation as to the environmental credentials of goods and services can give rise to claims by customers who have suffered loss by relying on the misrepresentation. Claims may be in the torts of deceit and negligence (negligent misstatement), in contract (including sale of goods) or in trade practices for false or misleading conduct or representations.

Litigants have also used administrative law to bring climate change issues before the courts. In particular, litigants have instituted judicial review and merits review proceedings to challenge administrative decisions or conduct relating to environmental issues, such as planning proposals and their impacts.

Constitutional law grounds have also been employed, through the enforcement of a constitutional right, including a right to life generally or a right to a clean and healthy environment in particular.

At the international level, environmental disputes have been litigated before a range of international fora, including regional human rights courts, the International Court of Justice, the World Trade Organisation Appellate Body, the International Tribunal for the Law of the Sea and the World Heritage Committee.

TORT

Tort actions, either at common law or in continental legal systems, are one of the ways in which remedies for environmental damage resulting from climate change could be sought. The causes of action employed or likely to be employed are in nuisance, negligence and conspiracy. Misrepresentation in tort, contract and trade practices is also likely to be employed.

Nuisance

The word nuisance derives from *nocumentum* meaning hurt, inconvenience or damage. Nuisance generally covers acts unwarranted by law which cause inconvenience or damage to the public in the exercise of rights common to all subjects (public nuisance), acts connected with the occupation of land which injure another person in the use of land or interfere with the enjoyment of land or some right connected therewith (private

nuisance), and acts or omissions declared by statute to be a nuisance (statutory nuisance).¹²

Actions in public nuisance have been brought in the United States by state and local governments. The targets of these suits have been large, industrial contributors to global warming, in the transportation energy and power sectors.¹³

In *Connecticut v American Electric Power*,¹⁴ 12 states, a municipality and three environmental non governmental organisations sued five electric power companies which, through their fossil-fired electric power plants, emitted around 10% of all carbon dioxide in the US. The plaintiffs sought a permanent injunction requiring the defendants to cap their carbon dioxide emissions and to commit to yearly reductions over at least ten years. The government plaintiffs sued on their own behalf to protect public lands (eg the hardwood forests of the Adirondack park in New York) and as *parens patriae* on behalf of their citizens and residents to protect public health and well-being.

In *People of the State of California v General Motors*,¹⁵ 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 constitute a public nuisance and sought monetary damages.

Both the *General Motors* and *American Electric Power* suits were dismissed by the respective District Courts on grounds of non-justiciability, the courts stating that it was impossible to decide the matters without making an initial policy determination of a kind clearly for non-judicial discretion.¹⁶ The plaintiffs have appealed in both matters.

In *Kivalina v ExxonMobil et al*,¹⁷ the native Inupiat village of Kivalina in Alaska has commenced a public nuisance suit against nine oil companies, 14 power companies and a coal company. 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 seek monetary damages from the defendants for their contribution to climate change.

An action in private nuisance may also be available to an affected private person. Private nuisance involves an act or omission which is an interference with, disturbance of or annoyance to a person in the exercise or enjoyment of his or her ownership or occupation of land or some easement, profit or right in connection with the land.¹⁸

Circumstances where a private nuisance might be caused include the undertaking of works to mitigate the effects of climate change. For example, a public authority might construct rock walls or levee banks to control or mitigate increased sea or water levels caused by climate change. If such works are poorly located, designed or constructed,

¹² Walker DM, *The Oxford Companion to Law* (1980) p 894.

¹³ See Pava M and Krass K, "Global Warming as a Public Nuisance" (2004-2005) 16 *Fordham Environmental Law Review* 207; Alek K, "A period of consequences: Global warming as public nuisance" (2007) 26A/43A *Stanford Journal of International Law* 77 and Hunter D and Salzman J, "Negligence in the Air: The Duty of Care in Climate Change Litigation" (2007) 155 *University of Pennsylvania Law Review* 1741 at 1788-1794.

¹⁴ 406 F Supp 2d 265 (SDNY, 2005).

¹⁵ 2007 WL 2726871 (NDCal, 2007).

¹⁶ *Connecticut v American Electric*, 406 F Supp 2d 265 (SDNY, 2005) at 274 and *People of the State of California v General Motors*, 2007 WL 2726871 (NDCal, 2007) at 5-13; Alek K, note 13 at 91; Meltz, note 4 at 24.

¹⁷ 08-CV-1138 (NDCal, filed on 26 February 2008).

¹⁸ *Clerk & Lindsell on Torts* (19th ed, 2006) [20-01] p 1162 and *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903.

they may exacerbate the problem they were intended to remedy or shift the problem to other locations.¹⁹ An action in private nuisance by affected land owners may lie against the public authority, subject to any statutory immunities or defences.

In *Open Space Inst. v American Electric Power Co*²⁰, three environmental non-governmental organisations who owned and preserved land in the state of New York sued five electric power companies which, through their fossil-fired electric power plants, were allegedly the five largest carbon dioxide emitters in the US. The suit was joined with the *Connecticut v American Electric Power* suit discussed earlier and was also dismissed on grounds of non-justiciability.

Negligence

To succeed in negligence, a plaintiff must prove that: the defendant owed the plaintiff a duty, recognised by law, requiring the defendant to adhere to a certain standard of conduct; the defendant breached that duty; the plaintiff suffered loss; the loss was caused by the defendant's breach of duty; and the loss suffered by the plaintiff was not too remote.²¹

An action in negligence by a person who has suffered damage or loss by a climate change-induced event could potentially be brought in relation to a failure to mitigate or to adapt to climate change, although the former is more problematic than the latter.

In a negligence action for failure to mitigate, the defendants would likely fall into three categories: first, producers of fossil fuels whose combustion increases GHG emissions (including oil, gas and coal companies); second, the users of fossil fuels that cause GHG emissions (including electricity power generators, steel, aluminium and other metal mills and the transport industry); and third, manufacturers or marketers of products whose use contributes to climate change (such as automobile manufacturers). Any negligence action by a plaintiff against defendants of these kinds is, however, likely to face considerable hurdles.

The first hurdle is establishing the defendant owed the plaintiff a duty of care. Duties of care are not owed in the abstract.²² Rather, a duty of care is relational; a duty is owed to another person or class of persons, not to the world at large: "a duty of care involves a particular and defined legal obligation arising out of a relationship between an ascertained defendant (or class of defendants) and an ascertained plaintiff (or class of plaintiffs)"²³. Because the obligation arises out of a particular relationship, the scope of the obligation may vary – be more or less expansive – depending on the relationship in question.²⁴ Hence, ascertaining the scope or content of the duty of care depends on ascertaining the particular relationship between the defendant and the plaintiff. Further,

¹⁹ McDonald J, "A risky climate for decision-making: The liability of development authorities for climate change impacts" (2007) 24 *Environment and Planning Law Journal* 405 at 414.

²⁰ 04-CV-05670 (SDNY, filed on 21 July 2004).

²¹ *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1997) 77 FCR 307 at 322.

²² *Roads and Traffic Authority of NSW v Dederer* (2007) 238 ALR 761 at 772 [43] per Gummow J with whose reasons on the nature and extent of the duty of care Hayden J (at 826 [283]) and Callinan J (at 824 [270]) agreed. See also *Palsgraf v Long Island Railroad Company*, 162 NE 99 (NY, 1928) at 99 per Cardozo J.

²³ *Roads and Traffic Authority of NSW v Dederer* (2007) 238 ALR 761 at 773 [44].

²⁴ *Roads and Traffic Authority of NSW v Dederer* (2007) 238 ALR 761 at 772 [43]- 773 [44].

all duties of care, whatever their scope, impose an obligation to exercise reasonable care; they do not impose a duty to prevent potentially harmful conduct.²⁵

Where there is a relationship between the defendant and the plaintiff, which falls into a category which the law has, in prior cases, held to give rise to a duty of care, a duty of care will exist. In cases that do not fall within established categories, the approach of the court is incremental and operates by analogy with established categories.²⁶ For other cases, not within an established category or analogous to cases in an established category, no single accepted test for determining when a duty of care will exist has emerged.²⁷ The Court must engage in “a multifactorial or ‘salient features’ analysis”²⁸ to determine the existence of a duty of care in a particular case. At the minimum, there needs to be reasonable foreseeability: a defendant must know or ought reasonably to know that its conduct is likely to cause harm to the person or the tangible property of the plaintiff unless the defendant takes reasonable care to avoid the harm.²⁹ However, reasonable foreseeability may not be sufficient in itself to always give rise to a duty of care.³⁰

The difficulty that has arisen is ascertaining what, if any, further requirements need to be satisfied before the law will impose a duty of care. Proximity or neighbourhood had been suggested as a determinant of a duty of care, but it has now been rejected as a determinant³¹, although it remains as a salient feature to be considered. Other factors have been suggested,³² but no consensus has emerged.

In the climate change context, the relationship between potential defendants of the kinds earlier noted and persons who might suffer damage or loss as a result of climate change-induced events neither falls into any established category in respect of which the law has held a duty of care to arise, nor is analogous to cases in which a duty of care has been held to exist. An analysis of the salient features of the relationship is therefore required.

At the outset, there is a difficulty in actually identifying a relationship between an ascertained defendant (or class of defendants) and an ascertained plaintiff (or class of plaintiffs). As Hunter and Salzman note, “climate change is essentially a global environmental tort”³³. Defendants and plaintiffs are indeterminate. In relation to the defendant, no individual defendant of the kinds earlier identified is likely to have a relationship with any person who might suffer damage or loss by a climate change-induced event. It is, therefore, necessary to identify a class of defendants. However, this too would be difficult. At the broadest, the class would be all persons who cause

²⁵ *Roads and Traffic Authority of NSW v Dederer* (2007) 238 ALR 761 at 767 [18], 772-773 [43], 775 [51].

²⁶ *Sutherland Shire Council v Heyman* (1984) 157 CLR 424 at 481; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at [93]-[94] 217.

²⁷ *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 210 [76], 216-217 [93].

²⁸ See the summary in the joint judgment in *Sullivan v Moody* (2001) 207 CLR 562 at 579 [50]-[51]. See also *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 198 [27], 254 [201], 302 [333] and 326 [406]; *Graham Barclay Oysters Pty Ltd v Ryan and Others* (2002) 211 CLR 540 at 597 [149], 624 [236]-[237]; *Hunter Area Health Service v Presland* (2005) 63 NSWLR 22 at 27 [9].

²⁹ *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 208 [70] and see also s 5B(1)(a) of the *Civil Liability Act 2002* (NSW).

³⁰ See, for example, *Sullivan v Moody* (2001) 207 CLR 562 at 576 [42].

³¹ *Hill v Van Erp* (1997) 188 CLR 159 at 176-177, 210, 237-239; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 198 [27], 209-210 [74], 283-284 [280], 300-302 [330]-[331]; *Sullivan v Moody* (2001) 207 CLR 562 at 578-579 [48]; and *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 433 [28] and 444-445 [66].

³² See *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 194 [10]-195 [15], 231 [133], 254 [201], 275 [259], 303 [335], 326 [406].

³³ Hunter and Salzman, note 13 at 1748.

GHG emissions (directly or indirectly). Such a class has a vast membership, including producers of fossil fuels, users of fossil fuels and manufacturers or marketers of products whose use contributes to climate change. Membership of the class is also distributed globally. Although members of the class are unified by being contributors to climate change, the differences in the nature and capabilities of members of this vast class would be immense.

Turning to the plaintiff, identifying in advance either any individual plaintiff or the class of which the plaintiff is a member would also be problematic. Climate change is liable to affect all of humanity to varying degrees. Hence, membership of the class would include all of humanity.

Next, problems are likely to arise in relation to reasonable foreseeability and proximity. What risks are reasonable foreseeable and which plaintiffs are within the zone of foreseeable risk? Even though the test of reasonable foreseeability is often expressed in the undemanding terms of not being far fetched or fanciful,³⁴ establishing the test may prove extremely hard. Is it reasonably foreseeable that a particular defendant's conduct, such as emitting GHGs by using fossil fuels in the course of its business, could result in a specific climate change-induced event, such a greater tidal inundation that, in turn, harms a resident or their property in a coastal community? And when did such foreseeability arise?³⁵ The criterion of proximity, whether expressed as spatial or temporal proximity, is also unlikely to be satisfied. The defendant and the plaintiff may be in spatially remote locations, and the cause (GHG emissions) and effects (damage from climate change-induced events) may be temporally distant. Other salient features of the relationship might also tend against establishing a relevant relationship between the defendant and plaintiff.³⁶

These difficulties in identifying a relationship between an ascertained plaintiff (or class of plaintiffs) and an ascertained defendant (or class of defendants), in turn, impede framing "a particular and defined legal obligation" that could arise out of the relationship. The scope of the duty cannot be to prevent potential harmful conduct; it must be to take reasonable care in a particular defined way, arising out of the relationship in question. This cannot readily be formulated.

The second hurdle is establishing that the defendant breached any duty of care. Determining breach of duty customarily entails undertaking the task described by Mason J in *Wyong Shire Council v Shirt* of asking what a reasonable person in the defendant's position would have done by way of response to the foreseeable risk of harm to the plaintiff (or class of plaintiffs).³⁷ In an action for failure to mitigate, it would involve consideration of the magnitude of the risk of damage or loss by a climate change - induced event being caused by the defendant's GHG emissions, the degree of probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action (such as stopping all production causing GHG emissions or completely offsetting its GHG emissions) and any other conflicting responsibilities the defendant may have. Balancing such considerations may tend against any conclusion of breach of duty by the defendant.

³⁴ *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47.

³⁵ See Hunter and Salzman, note 13 at 1745, 1769.

³⁶ See further Hunter and Salzman, note 13 at 1745-1749.

³⁷ *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48, affirmed as still being the proper approach in *NSW v Fahy* (2007) 81 ALJR 1021.

The third hurdle is establishing that the defendant's particular breach of duty was, in a common sense way³⁸, causative of the damage or loss suffered by the plaintiff. Causation for a climate change-induced event resulting in loss or damage to a plaintiff is confused by there being myriad and diffuse contributors of GHG emissions, distributed globally and over long time frames, with delays between the emission of GHGs and the consequence of climate change and any particular adverse effect of climate change.

The fourth hurdle concerns remoteness of damage. There is a policy question raised by the spectre of defendants being exposed to "a liability in an indeterminate amount for an indeterminate time to an indeterminate class", to use Cardozo J's words in *Ultramares Corp v Touche*³⁹.

These hurdles in a negligence action for failure to mitigate were encountered in *Comer v Murphy Oil*.⁴⁰ Comer and 13 other individuals harmed by Hurricane Katrina in the USA sued nine oil companies, 31 coal companies and four chemical companies, including in negligence. They claimed the defendants had "a duty to conduct their business in such a way as to avoid unreasonably endangering the environment, public health and public and private property, as well as the citizens of Mississippi" and that they breached their duty "by emitting substantial quantities of greenhouse gases, knowing such emissions would unreasonably endanger the environment, public health, and public and private property interests".⁴¹ The court dismissed the claim summarily on the defendant's motion stating that the plaintiffs do not have standing and that the claims are non-justiciable pursuant to the political question doctrine.⁴²

Actions in negligence in relation to a failure to adapt to climate change, however, might fare better. These actions would likely be based on more conventional ways of establishing liability and negligence, particularly against public authorities. An action in negligence might challenge:

- (a) the appropriateness of development approvals in flood prone, coastal zone or bushfire prone areas;
- (b) the adequacy of building standards to withstand extreme weather events, as their area and frequency increases;
- (c) the responsibility for erosion, land slides, flooding, etc, resulting from extreme weather events;
- (d) the adequacy of emergency procedures when more frequently put to the test and over a greater area;
- (e) the failure to undertake disease prevention programmes, as the area and frequency of diseases spread; and

³⁸ *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506 at 515, 522, 524.

³⁹ *Ultramares Corp v Touche* 174 NE 441 at 444 (NY, 1931) cited in *Bryan v Maloney* (1995) 182 CLR 609 at 618.

⁴⁰ *Comer v Murphy Oil*, No 1:05-CV-436 (S.D Miss, 18 April 2006); Hunter and Salzman, note 13 at 1754.

⁴¹ The claims are quoted in Hunter and Salzman, note 13 at 1754-1755.

⁴² *Comer v Murphy Oil*, No 1:05-CV-436 (S.D Miss, 18 April 2006) dismissed on 30 August 2007.

(f) the failure to preserve public natural assets in the face of climate change.⁴³

To date, there have not yet been any successful actions in negligence for damage or loss caused by climate change, but the potential exists.⁴⁴ Liability of public authorities for negligence can be limited by statute.⁴⁵

Conspiracy

Conspiracy consists in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means.⁴⁶ The tort of conspiracy takes two forms: conspiracy to use unlawful means and conspiracy to injure. The second does, but the first does not, require a predominant purpose to injure.⁴⁷ Hence, conspiracy is actionable if the predominant purpose is disinterested harm, or unlawful means are used to secure it, but not if the predominant purpose is legitimate, such as to secure a larger market share.⁴⁸

Prior to being used in climate change litigation, claims of civil conspiracy were used in lawsuits against tobacco companies, where it was argued that tobacco companies had conspired to deceive the public about the dangers of cigarettes.⁴⁹ The first climate change case to rely on conspiracy is *Kivalina v ExxonMobil et al.*⁵⁰ The plaintiffs have included “claims for civil conspiracy and concert of action for certain defendants’ participation in conspiratorial and other actions intended to further the defendants’ abilities to contribute to global warming”. The plaintiffs argue that a number of defendants participated in an agreement to mislead the public with regard to the science of global warming. The purpose of this conduct was to delay public awareness of global warming and its effects, which delay would allow the defendants to pursue their activities as contributors to GHG emissions and global warming without being pressured into a costly change of their current behaviour. The plaintiffs also allege that the defendants are engaging in concert with each other over the creation of global warming, giving substantial assistance or encouragement to each other to so conduct themselves.

Misrepresentation

Businesses represent their products or services to be environmentally-friendly – they put them in a “green light”. Products or services are sometimes promoted as having “low carbon emission”, others as having had their carbon emission offset by the business promoting them, or in other cases, the consumer is given the opportunity to offset the emissions in a certain way organised by the seller. Such representations may be false

⁴³ England P, “Heating up: Climate change law and the evolving responsibilities of local government” (2008) 13 *Local Government Law Journal* 209 at 217.

⁴⁴ Hunter and Salzman, note 33; Lipman Z and Stokes R, “Shifting sands: The implications of climate change and a changing coastline for private and public authorities in relation to waterfront land” (2003) 20 *Environmental and Planning Law Journal* 405; McDonald J, “The adaptation imperative: Managing the legal risks of climate change impacts” in Bonyhady and Christoff, note 8 at 124; McDonald, note 19 and England, note 43.

⁴⁵ In New South Wales, the liability of local councils is limited through the *Local Government Act 1993* (NSW) with respect to coastal hazards (s 744) and Part 5 of the *Civil Liability Act 2002* (NSW).

⁴⁶ *Mulcahy v R* (1868) LR 3 HL 306 at 317.

⁴⁷ Clerk & Lindsell on Torts, note 18 at p 1611.

⁴⁸ Walker, note 12 at p 276.

⁴⁹ Faris S, “Climate conspiracy?”, *Australian Financial Review* (27 June 2008) at 9.

⁵⁰ 08-CV-1138 (NDCal, filed on 26 February 2008).

or misleading and give rise to a claim by the customer against the representor in the torts of deceit or negligence or contract, as appropriate.

The tort of deceit involves making a false representation, knowing it to be false, or without honest belief in its truth, or recklessly, not caring whether it be true or false, with the intention that another should rely on the representation and act to their detriment and with the result that the other does so act.⁵¹

Negligent misstatement is a form of negligence. A person may owe a duty to take reasonable care not to cause purely economic loss by giving misleading information or advice. If another person, in a relationship with the giver of information or advice that the law recognises as sufficient, relies on that misleading information or advice and suffers loss as a result, the giver may be liable for that loss.⁵²

Misrepresentation can also arise in contract. Misrepresentation is a false statement of fact, or of mixed fact and law, made by one party to the other party with the object, and having the result, of inducing the other to enter into a contract or similar relationship with the representor. It may be made by statement or other action, or by concealment but not by mere omission, silence or inaction except where such omission, silence or inaction would distort the natural inference from other facts or where, exceptionally, there is a positive duty to disclose all relevant facts.⁵³

TRADE PRACTICES

Misrepresentations as to the environmental credentials of products and services may also be actionable under trade practices law. The *Trade Practices Act 1974* (Cth), for example, regulates:

- (1) Misleading or deceptive conduct under s52(1): “A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.”
- (2) False or misleading representations under s53: “A corporation shall not, in trade or commerce, in connexion with the supply or possible supply of goods or services or in connexion with the promotion by any means of the supply or use of goods or services:
 - (a) falsely represent that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use;
 - (aa) falsely represent that services are of a particular standard, quality, value or grade;
 - (c) represent the goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have.”

⁵¹ Walker, note 12 at p 341 and see also Clerk & Lindsell on Torts, note 18 at Ch 18.

⁵² *Halsbury's Laws of Australia*, Butterworths, [300-10], pp 547,077-547,083.

⁵³ Walker, note 12 at p 844.

- (3) False or misleading representations about land under s53A(1): “A corporation shall not, in trade or commerce, in connexion with the sale or grant, or the possible sale or grant, of an interest in land or in connexion with the promotion by any means of the sale or grant of an interest in land:
- (b) make a false or misleading representation concerning the nature of the interest in the land, the price payable for the land, the location of the land, the characteristics of the land, the use to which the land is capable of being put or may lawfully be put or the existence or availability of facilities associated with the land.”

The Australian Competition and Consumer Commission (ACCC), the regulatory body with responsibility for administering the *Trade Practices Act*, has investigated and reported on environmental claims of business. It has released two reports this year *Green Marketing and the Trade Practices Act*⁵⁴ and *Carbon Claims and the Trade Practices Act*⁵⁵.

The Green Marketing Report contains guidelines aimed at businesses using environmental claims as part of their marketing campaigns. The purpose of the report is to educate businesses about their obligations under the *Trade Practices Act* to avoid misleading and deceptive conduct and false or misleading representations as to the environmental credentials of their products. Consumers are to be provided with accurate information in order to make informed decisions.

The Carbon Claims Report addresses issues surrounding carbon offset and neutrality claims. The purpose of the report is to inform businesses and consumers as to their obligations and rights under the *Trade Practices Act* in relation to such claims. The report emphasises the need to provide accurate, clear, substantiated information about their products, so as to develop a credible and transparent carbon offset market by having good marketing practices.

The ACCC has been active in scrutinising environmental claims made by businesses to ensure that they comply with the *Trade Practices Act*. Three examples are the ACCC actions concerning the environmental claims by De Longhi, Goodyear and Saab that their products are climate change friendly.

The ACCC challenged the unqualified claim by De Longhi that the refrigerant component gas R290 used in its portable air conditioners was “environmentally friendly”. De Longhi provided court-enforceable undertakings that it would refrain from using unqualified claims and amended its advertising to specify that “R290 is the most environmentally friendly refrigerant gas currently available for use in domestic portable air conditioners”.⁵⁶

⁵⁴ Published 8 February 2008. The Report can be found at <http://www.accc.gov.au/content/item.phtml?itemId=815763&nodeId=69646a6d15e7958a41b40ab5848c6968&fn=Green%20marketing%20and%20the%20Trade%20Practices%20Act.pdf> (21 August 2008).

⁵⁵ Published 27 June 2008. The Report can be found at <http://www.accc.gov.au/content/item.phtml?itemId=833279&nodeId=14e6d4cd90c85705b681de797365c53d&fn=Carbon%20claims%20and%20the%20Trade%20Practices%20Act.pdf> (21 August 2008).

⁵⁶ ACCC, “De Longhi alters ‘environmental friendly’ claims” (Media release no 112/08, 30 April 2008) at <http://www.accc.gov.au/content/index.phtml/itemId/825883/fromItemId/810627> (21 August 2008).

The ACCC challenged a number of unsubstantiated representations made by Goodyear during 2007 and 2008 in relation to the Goodyear Eagle LS2000 tyre, including that the Eagle LS2000 is "environmentally-friendly", has "minimal environmental impact", its production process results in reduced carbon dioxide emissions and that the BioTRED technology "increases the life" of the tyre and "improves fuel economy". Goodyear gave a court-enforceable undertaking that it would offer partial refunds as compensation to customers who relied on the unsubstantiated environmental claims during 2007 and 2008 with regard to this range of tyres. Goodyear also issued a corrective notice.⁵⁷

The ACCC has challenged the "green" claims by GM Holden Ltd in the advertising of Saab cars. Saab advertised that "Grrrrrreen, Every Saab is green", "Carbon emissions neutral across the entire Saab range" and "Switch to carbon neutral motoring" to promote the green credentials of its motor vehicles. The advertisements also stated that Saab would plant 17 native trees in the first year after a Saab vehicle purchase as a carbon offset. ACCC considers such claims to be misleading because:

- (a) there would, in fact, be a net release of carbon dioxide into the atmosphere by the operation of any motor vehicle in the Saab range.
- (b) planting 17 native trees would not provide a carbon dioxide offset for any period other than a single year's operation of any motor vehicle in the Saab range, and
- (c) Saab vehicles do not have any attribute or attributes which contribute to reduced carbon dioxide emissions by those vehicles compared with Saab vehicles supplied prior to the publication of the advertisement.⁵⁸

The ACCC commenced proceedings in the Federal Court and obtained declarations that GM Holden had breached ss 52 and 53(c) of the TPA.⁵⁹ In addition, GM Holden accepted a court enforceable undertaking to refrain from re-publishing the original advertisements and to train its marketing staff in relation to misleading and deceptive green marketing claims.⁶⁰ GM Holden advised the ACCC that it will plant 12,500 native trees which it believes to be sufficient to offset the carbon emissions for the life of all Saab motor vehicles sold during the advertising campaign.⁶¹

ADMINISTRATIVE LAW

Issues relating to climate change can arise in judicial review and merits review proceedings.

⁵⁷ ACCC, "Goodyear Tyres apologise, offer compensation for unsubstantiated environmental claims" (Media release no 181/08, 26 June 2008) at <http://www.accc.gov.au/content/index.phtml/itemId/833219/fromItemId/810627> (21 August 2008).

⁵⁸ ACCC, "ACCC takes action against GM Holden Ltd over Saab 'green' claims" (Media release 8/08, 18 January 2008) at <http://www.accc.gov.au/content/index.phtml/itemId/808355/fromItemId/810627> (21 August 2008).

⁵⁹ *Australian Competition and Consumer Commission v GM Holden Ltd* (ACN 006 893 232) [2008] FCA 1428 (18 September 2008) at [16] and [10].

⁶⁰ *Australian Competition and Consumer Commission v GM Holden Ltd* (ACN 006 893 232) [2008] FCA 1428 (18 September 2008) at [16] and [10] setting out the undertaking given to ACCC by GM Holden for the purposes of s 87B of the TPA at paras 22-23.

⁶¹ *Australian Competition and Consumer Commission v GM Holden Ltd* (ACN 006 893 232) [2008] FCA 1428 (18 September 2008) at [16] and [10] setting out the undertaking given to ACCC by GM Holden for the purposes of s 87B of the TPA at para 17. See also ACCC, "Saab 'Grrrrrreen' claims declared misleading by the Federal Court" (Media release no 267/08, 18 September 2008) at <http://www.accc.gov.au/content/index.phtml/itemId/843395>.

Judicial Review

Standing

The legality or validity of administrative decisions and action may be reviewed by the courts on numerous grounds relating to climate change issues. However, at the outset, the person seeking review must have standing to sue. Plaintiffs have had mixed success in establishing standing to sue in climate change litigation particularly in the United States.⁶²

A breakthrough came with the US Supreme Court's decision last year in *Massachusetts v EPA*.⁶³ The state of Massachusetts, together with 11 other states, three cities, two US territories and several environmental groups sought review of the denial by the Environment Protection Agency (EPA) of a petition to regulate the emissions of four GHGs, including carbon dioxide, under s202 (a)(1) of the Clean Air Act. Section 202 (a)(1) of the Clean Air Act 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 Supreme Court held that Massachusetts had standing to challenge the EPA's denial of their rulemaking petition. The Supreme Court applied the three part test for standing in *Lujan v Defenders of Wildlife*,⁶⁴ namely:

- (a) The plaintiff has suffered "an injury in fact" which is both concrete and particularised, and actual and imminent, as opposed to conjectural or hypothetical;
- (b) The injury is fairly traceable to the challenged action of the defendant;
- (c) There is a likelihood that the injury can be redressed by a favourable decision, as opposed to this being merely speculation.

The Supreme Court held that 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.⁶⁵ The fact that other states suffered similar injuries did not disqualify Massachusetts.⁶⁶

In relation to causation, the EPA did not contest the link between GHG emissions and climate change. However, the EPA argued that its decision not to regulate GHG emissions from new motor vehicles contributes so insignificantly to the petitioner's

⁶² Examples where standing has been denied include *Center for Biological Diversity v Abraham*, 218 F Supp 2d 1143 (ND Cal, 2002) and *Korsinsky v US EPA*, 2005 US Dist LEXIS 21778 affirmed *Korsinsky v US EPA*, 2006 US App LEXIS 21024 (2d Cir NY, 2006) while standing was upheld in *City of Los Angeles v National Highway Traffic Safety Administration*, 912 F2d 478 (CADC, 1990); *Friends of the Earth Inc v Watson*, 2005 WL 2035596 (ND Cal, 2005); 35 Env'tl L Rep 20,179 and *Natural Resources Defense Council v EPA*, 464 F 3d 1 (CADC, 2006);.

⁶³ 549 US 1 (2007).

⁶⁴ 504 US 555 (1992).

⁶⁵ 549 US 1 (2007) at 19-20.

⁶⁶ 549 US 1 (2007) at 19.

injuries that it cannot be challenged in court.⁶⁷ The Supreme Court held against the EPA stating that:

“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.”⁶⁸

The Supreme Court found that reducing domestic automobile emissions, a major contributor to GHG concentrations, is “hardly a tentative step”.⁶⁹

In relation to redressability, the Supreme Court held that while the remedy sought by the plaintiffs, regulating motor vehicle emissions, would not reverse global warming, it might slow down or reduce its effects.⁷⁰

The issue of standing does not present the same procedural barrier in states where statutes have open standing provisions. For example, in New South Wales, many planning and environment statutes have open standing provisions – any person may bring proceedings to remedy or restrain a breach of the statute.⁷¹ Judicial review of administrative action relating to climate change is thereby facilitated.

Grounds of review

Administrative decisions and action raising issues relating to climate change could conceivably be challenged on many of the grounds of judicial review. However, the more likely grounds would be:

- (a) under the rubric of illegality, misdirection as to the applicable law or failure of the repository of power to have a required state of mind before exercising the administrative power;
- (b) under the rubric of irrationality, failure of the repository of power to consider relevant matters or making a manifestly unreasonable decision; and
- (c) under the rubric of procedural impropriety, failure of the repository of power to comply with some procedure in the statute, such as a requirement for environmental impact assessment, or for consultation.

Error of Law

Judicial review for error of law will lie where the administrative decision-maker misinterprets or misdirects itself as to the applicable law or question to be determined.

⁶⁷ 549 US 1 (2007) at 20.

⁶⁸ 549 US 1 (2007) at 21.

⁶⁹ 549 US 1 (2007) at 21-22.

⁷⁰ 549 US 1 (2007) at 22.

⁷¹ For example, see *Environmental Planning and Assessment Act 1979* (NSW), s123.

In *Massachusetts v EPA*⁷², the US Supreme Court found that the EPA's reading of the applicable statutory provision, s202(a)(1) of the Clean Air Act, was erroneous. GHGs are "air pollutants" and the statutory provision authorised the EPA to regulate GHG emissions from new motor vehicles in the event that it formed the judgment that such emissions contribute to climate change.⁷³

Failure to have requisite state of mind

The statute reposing power may require, as a condition precedent, that the decision-maker consider certain facts and form some opinion, satisfaction or belief that such facts exist. Failure to do so will entitle the court to review the decision-maker's decision as being *ultra vires*.

An example is the provision of an environmental planning instrument that a consent authority not grant consent unless satisfied that carrying out the development is consistent with the objectives of the zone. The zone objectives might be to prevent development which would adversely affect, or be adversely affected by, coastal processes. Development of land that is susceptible to coastal erosion, exacerbated by climate change, may not be consistent with such zone objectives.⁷⁴

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.⁷⁵

Examples of express relevant matters are provisions in local environmental plans requiring consideration of the effect of coastal processes and coastal hazards and potential impacts, including sea level rise, on a proposed development or arising from a proposed development.⁷⁶

More commonly, the statute does not expressly state the matters relating to climate change and it is necessary to ascertain, from the subject matter, scope and purpose of the statute, whether the statute impliedly requires consideration of matters relating to climate change. Most of the climate change litigation has involved this task.

In *Australian Conservation Foundation v Latrobe City Council*,⁷⁷ the Victorian Civil and Administrative Tribunal held that the environmental effects of GHG emissions that were likely to be produced by use of the Hazelwood Power Station were relevant to the proposed amendment to the planning scheme to facilitate mining coal fields to supply coal for the power station.⁷⁸

In *Gray v Minister for Planning*,⁷⁹ the Land and Environment Court held that GHG emissions from downstream use (burning) of coal mined from the proposed coal mine

⁷² 549 US 1 (2007).

⁷³ 549 US 1 (2007) at 25-26, 29-30.

⁷⁴ For example, see Byron Local Environmental Plan 1988, cl9(3).

⁷⁵ See *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 at 39-40, 55.

⁷⁶ See Standard Instrument (Local Environmental Plans) Order 2006, cl5.5 (2).

⁷⁷ (2004) 140 LGERA 100.

⁷⁸ (2004) 140 LGERA 100 at 109 [43]-110 [47].

⁷⁹ (2006) 152 LGERA 258.

were relevant matters to be considered in the environmental assessment of the mine⁸⁰ and in the Director-General's decision to accept the environmental assessment as adequately addressing the environmental assessment requirements of the Director-General.⁸¹

In *Walker v Minister for Planning*,⁸² the Land and Environment Court held that climate change flood risk for a project for the subdivision and residential development of land on a flood constrained coastal plain was a relevant matter to be considered by the Minister in determining to approve a concept plan for the project.⁸³

On appeal, the NSW Court of Appeal, although reversing the Land and Environment Court's decision to void the Minister's decision in that case, nevertheless held that the Minister must consider the public interest in fulfilling functions under the *Environmental Planning and Assessment Act 1979* (NSW).⁸⁴

The Court of Appeal held that "in respect of a consent authority making a decision in accordance with s 79C of the *EPA Act*, and a court hearing a merits appeal from such a decision, consideration of the public interest embraces ESD."⁸⁵

Further, the Court of Appeal held "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 avoiding decisions."⁸⁶

In *Natural Resources Defense Council v Kempthorne*,⁸⁷ the Court held that data about climate change that may adversely affect a threatened species of fish and its habitat was a relevant matter to be considered in the biological opinion of the US Fish and Wildlife Service.⁸⁸

Weight to be attributed to objects or relevant matters

Although generally the weight to be attributed to objects or relevant matters is within the discretion of the decision-maker, this general rule is subject to any statutory indication of the weight to be given. In an environmental context, statutes are increasingly providing an indication of the weight that a decision-maker is required to give to certain relevant considerations or the priority that should be accorded to certain objects of the statute or certain purposes for which the power may be exercised.⁸⁹

⁸⁰ (2006) 152 LGERA 258 at 288 [100], 294 [125].

⁸¹ (2006) 152 LGERA 258 at 291 [115], 294 [126], 296 [135].

⁸² (2007) 157 LGERA 124.

⁸³ (2007) 157 LGERA 124 at 192 [166].

⁸⁴ *Minister for Planning v Walker* (2008) 161 LGERA 423 at 450[39].

⁸⁵ *Minister for Planning v Walker* (2008) 161 LGERA 423 at 451[42].

⁸⁶ *Minister for Planning v Walker* (2008) 161 LGERA 423 at 454[56].

⁸⁷ 506 F Supp 2d 322 (EDCal, 2007)

⁸⁸ 506 F Supp 2d 322 at 368-370.

⁸⁹ Examples where there is a statutory indication of the weight or priority to be given to aspects of ecologically sustainable development are *Coastal Protection Act 1979* (NSW), s37A; *National Parks and Wildlife Act 1974* (NSW), s2A(1); *Water Management Act 2000* (NSW), s9(1); *Fisheries Management Act 1994* (NSW), s3(2); and Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005, cl2(1).

Where the statute does indicate the weight to be given to a relevant consideration or the priority that should be accorded to a certain object or purpose, a reviewing court can intervene to set aside a decision if the decision-maker fails to accord the required weight or priority.

Non-compliance with procedural requirements

Many planning and environment statutes require, as a pre-condition to the exercise of power to approve a development, compliance with certain procedures. These include undertaking an 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. Considerable climate change litigation has seized on this aspect of procedural impropriety.

Two examples are in Australia. In *Minister for the Environment and Heritage v Queensland Conservation Council*⁹⁰, a relevant impact of a controlled action under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) was broadly interpreted to mean the influence or effect of an action. The impact could readily include the indirect consequences of an action and might include the results of acts done by persons other than the principal actor.⁹¹ Applied to the facts of that case, the relevant impacts of the proposed action of constructing the Nathan Dam on the Dawson River in Queensland could include the impacts of the use of the water impounded by the dam for growing and ginning cotton downstream of the dam.⁹² In *Gray v Minister for Planning*⁹³, both direct and indirect effects of mining and subsequent use of the coal from the proposed coal mine were required to be considered in the environmental assessment.⁹⁴

In four north American decisions, courts have held environmental impact assessments to be inadequate for failure to consider climate change impacts. In *Border Power Plant Working Group v Department of Energy*,⁹⁵ the environmental impact assessment for proposed electricity transmission lines was held inadequate for failure to discuss the CO₂ emissions from new power plants in Mexico, which would be connected by the proposed electricity transmission lines with the power grid in southern California.⁹⁶

*Mid States Coalition for Progress v Surface Transportation Board*⁹⁷ concerned an environmental impact assessment for a proposed rail line. The line would provide a less expensive route by which low-sulphur coal could reach electricity power plants and hence it would likely be utilised more than other routes. This would increase the supply

⁹⁰ (2004) 134 LGERA 272, Full Federal Court decision upholding Kiefel J's decision in *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463 (19 December 2003).

⁹¹ (2004) 134 LGERA 272 at 287 [53]-288 [55].

⁹² (2004) 134 LGERA 272 at 288 [60]. See Fisher D E, "The meaning of impacts – The Nathan Dam Case on Appeal" (2004) 21 EPLJ 325; McGrath C, "Key concepts of the *Environment Protection and Biodiversity Conservation Act 1995* (Cth)" (2005) 22 EPLJ 20 at 36; Sommer N, "Queensland Conservation Council Inc v Minister for the Environment and Heritage [2003] FCA 1463 ('Nathan Dam Case')" (2004) 9 AJNRLP 145.

⁹³ (2006) 152 LGERA 258.

⁹⁴ See also *Australian Conservation Foundation v Latrobe City Council* (2004) 140 LGERA 100 at 110.

⁹⁵ 260 F Supp 2d 997 (SD Cal, 2003).

⁹⁶ 260 F Supp 2d 997 at 1028–1029 [42], 1033.

⁹⁷ 345 F 3d 520 (8th Cir, 2003).

of coal to the power plants and hence their consumption of coal. Greater consumption of coal by the power plants would increase the adverse effects of burning coal, including greenhouse gas emissions and climate change. The court held the environmental impact assessment to be inadequate for failure to consider the possible effects of an increase in coal consumption.⁹⁸

In *Center for Biological Diversity v NHTSA*,⁹⁹ the environment impact assessment of making a rule setting the corporate average fuel economy standard for light-duty trucks was held inadequate for failure to consider the effect of greenhouse gas emissions from light duty trucks on climate change.¹⁰⁰

In *Pembina Institute for Appropriate Development v Attorney General of Canada*,¹⁰¹ the Federal Court of Canada upheld a judicial review challenge to a Joint Review Panel's report on the environmental impact assessment of the Kearl oil sands mine in northern Alberta. The court held that the Panel failed to explain in its report why the potential impacts of greenhouse gas emissions of the project will be insignificant and also failed to provide any rationale as to why the intensity based mitigation proposed to be adopted would be effective to reduce greenhouse gas emissions, equivalent to 800,000 passenger vehicles, to a level of insignificance.¹⁰²

Merits review

Merits review involves a court (or tribunal) re-exercising the power of the original decision-maker. The court is not confined to the evidentiary material that was before the original decision-maker but may receive and consider fresh evidence in addition to or substitution of the original material.

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.

In *Charles & Howard Pty Ltd v Redland Shire Council*,¹⁰³ the Planning and Environment Court of Queensland held that the impact of climate change on sea levels on an area of flood prone land proposed to be filled for residential development justified a condition requiring the proposed dwelling to be relocated to an area less prone to tidal inundation. In *Northcape Properties Pty Ltd v District Council of Yorke Peninsula*,¹⁰⁴ the Environment Resources and Development Court of South Australia held that changes in flood patterns and sea levels by global warming would erode a buffer zone and prevent public access to the coast, making coastal land subdivision unacceptable. In *Gippsland Coastal Board v South Gippsland Shire Council*,¹⁰⁵ the Victorian Civil and Administrative Tribunal held that the likely increase in severity of storm events and sea level rise due to the effects of climate change created a reasonably foreseeable risk of inundation of the land and proposed dwellings, which was unacceptable.

⁹⁸ 345 F 3d 520 at 549-550 [29].

⁹⁹ 508 F 3d 508 (9th Cir, 2007).

¹⁰⁰ 508 F 3d 508 at 552 [20]-558 [22].

¹⁰¹ 2008 FC 302 (5 March 2008).

¹⁰² 2008 FC 302 at [73]-[75], [78], [79].

¹⁰³ (2007) 159 LGERA 349.

¹⁰⁴ [2008] SASC 57 (4 March 2008).

¹⁰⁵ [2008] VCAT 1545 (29 July 2008).

In a different context, courts in planning appeals have weighed in the balance the public interest in addressing climate change against narrower private interests, both in carrying out development or objecting to development.

In *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd*,¹⁰⁶ the Land and Environment Court of New South Wales approved a large wind farm. Local residents of a nearby village, Taralga, and its surrounds had objected to the proposed wind farm on a variety of grounds, including visual impact and noise. The wind farm was, however, beneficial in providing renewable energy with no greenhouse gas emissions, which could be substituted in part for non-renewable, fossil fuel energy with greenhouse gas emissions. The conflict was between the geographically narrower concerns of the residents and the broader public good of increasing the supply of renewable energy.¹⁰⁷ The Court noted that increasing the supply of renewable energy involved promoting sustainable development, including intergenerational equity.¹⁰⁸ On balance, the Court concluded that “the overall public benefits outweigh any private disbenefits either to the Taralga community or specific landowners”.¹⁰⁹

In a similar case, *Perry and others v Hepburn Shire Council and others*,¹¹⁰ the Victorian Civil and Administrative Tribunal also approved a wind farm. The Tribunal took into account “the benefits to the broader community of renewable energy generation as well as the contribution of the proposal to reducing greenhouse gas emissions”.¹¹¹

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.

In India, the constitutional right to life (Art 21) has been held to include the right to enjoy pollution-free water and air for full enjoyment of life and as providing a basis for sustainable development and intergenerational equity.¹¹² In Pakistan, the constitutional right to life (Art 9) has been held to include a right to have a clean atmosphere and unpolluted environment.¹¹³ In Kenya, the constitutional right not to be deprived of life save by court sentence (s71(1)) has been held to include a denial of a wholesome environment in which to live.¹¹⁴ In the Philippines, the right to a balanced and healthful ecology in accord with the rhythm and harmony of nature (Art II, s16) has been held to

¹⁰⁶ (2007)161 LGERA 1. A subsequent application to modify the development was dealt with by the New South Wales Land and Environment Court in *RES Southern Cross v Minister for Planning and Taralga Landscape Guardians Inc* [2008] NSWLEC 1333 (21 August 2008).

¹⁰⁷ (2007)161 LGERA 1 at 3[3].

¹⁰⁸ (2007)161 LGERA 1 at 12[73] and [74].

¹⁰⁹ (2007)161 LGERA 1 at 41[352].

¹¹⁰ (2007) 154 LGERA 182.

¹¹¹ (2007) 154 LGERA 182 at 189 [27].

¹¹² *MC Mehta v Union of India* AIR 1988 SC 1037; *Vellore Citizens Welfare Forum v Union of India* AIR 1996 SC 2715; (1996) 5 SCC 647; *AP Pollution Control Board v Prof MV Nayudu* (ret'd) [1999] 1 LRI 185 and *MC Mehta v Kamal Nath* AIR 2000 SC 1997.

¹¹³ *Shehla Zia v WAPDA* PLD 1994 SC 693; *General Secretary, West Pakistan Salt Miners Labour Union, Khewra, Jhelum v Director of Industries & Mineral Development, Punjab* 1994 SCMR 2061.

¹¹⁴ *Waweru v Republic* (2006) 1 KLR (E&L) 677.

be a deduction from, if not a reiteration of, the constitutional right to life provision (Art III, s1).¹¹⁵

Such constitutional rights have the potential to found a challenge by an affected citizen against the government (or its instrumentalities) responsible for contributing to climate change and its effects. This is a vertical challenge. Rarely do such constitutional rights enable a horizontal challenge by the affected citizen against another citizen (including private industry) responsible for contributing to climate change and its effects.¹¹⁶

Whilst there have been a number of actions, based on constitutional rights to life, addressing the effects of air pollution,¹¹⁷ there has not yet been litigation focused on GHG emissions or climate change, although there is the potential.¹¹⁸

INTERNATIONAL HUMAN RIGHTS

Human rights under international conventions and instruments may provide a source for climate change litigation. Environmental litigation has occurred under two such instruments, the European Convention for the Protection of Human Rights and Fundamental Freedoms, before the European Court of Human Rights (ECtHR),¹¹⁹ and the American Convention on Human Rights, before the Inter-American Commission for Human Rights (IACHR).

ECtHR decisions

There have been three cases before the European Court of Human Rights concerning the infringement of human rights by air pollution. None of them addressed climate change, but these cases illustrate the potential for climate change litigation.

In *Lopez Ostra v Spain*,¹²⁰ the applicant lived metres away from and suffered for 3 years from smells, noise and polluting fumes caused by a sewerage plant treating liquid and solid waste. The responsible municipal and other authorities adopted a passive attitude to her entreaties. The ECtHR held Spain had breached Art 8 (right to respect for private and family life) in that the authorities did not strike a fair balance between the town's

¹¹⁵ *Minors Oposa v Factoran, Secretary of the Department of Environment & Natural Resources* 33 ILM 173 (1994); 224 SCRA 792 (1994).

¹¹⁶ See Alston P (ed), *Human Rights Law* (1996) p xii-xiii, and for an international human rights perspective see Steiner H, Alston P, Goodman R (eds), *International human rights in context: law, politics, morals: text and materials* (2008) at 58-59.

¹¹⁷ See, for example, *MC Mehta v Union of India and Shriram Food and Fertiliser Industries* AIR 1987 SC 965 (Oleum Gas Leak case I); AIR 1987 SC 982 (Oleum Gas Leak case II); AIR 1987 SC 1026 (Oleum Gas Leak case III); AIR 1987 SC 1086 (Oleum Gas Leak case IV); *Indian Council for Enviro-Legal Action v Union of India* (1996) 3 SCC 212; AIR 1996 SC 1446; *MC Mehta v Union of India* WP13381/1984 (30 December 1996); AIR 1997 SC 734 (Taj Trapezium case).

¹¹⁸ Horn L, "Climate Change litigation actions for future generations" (2008) 25 *Environmental and Planning Law Journal* 115 at 131.

¹¹⁹ Similar cases, based on the European Convention for Human Rights (ECHR), can arise before the European Court of Justice (ECJ), the judiciary arm of the European Community. The ECJ has long recognised human rights and the ECHR specifically as being part of European Community Law (case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhrund Vorratsstelle fr Getreide und Futtermittel* [1970] ECR 1125; case 4/73, *Nold, Kohlen und BarstoffgroBhandlung v Commission of the European Communities* [1974] ECR 491 at 507; case 36/75, *Roland Rutili v Minister for the Interior* [1975] ECR 1219 at 1232). Also, once the *Charter of Fundamental Rights of the European Union* enters into force, the ECJ will also have recourse to a right to environmental protection (Art 37 of the Charter), a provision which has no counterpart in the ECHR.

¹²⁰ ECtHR judgment of 9 December 1994, Series A no 303.

need for a sewerage plant and the applicant's right under Art 8.¹²¹ The ECtHR held that the actions of the authorities in resisting judicial decisions and otherwise prolonging the situation amounted to a breach of the applicant's right to respect for private and family rights.¹²²

In *Fadeyeva v Russia*,¹²³ the applicant alleged that the operation of a steel plant (the largest iron smelter in Russia) in close proximity to her home endangered her health and well-being due to the state's failure to protect her private life and home from severe environmental nuisance from the plant, in violation of Art 8 of the Convention. The ECtHR held that while the Convention does not contain a right to nature preservation as such, Art 8 could apply if the adverse effects of the environmental pollution had reached a certain minimum level. This threshold had been reached as the average pollution levels were way over the safe concentrations of toxic elements and local courts had recognised the applicant's right to resettle.¹²⁴ The ECtHR held Russia to be in breach of Art 8 and awarded damages and costs.¹²⁵

In *Okay v Turkey*,¹²⁶ the applicants sought to stop the operation of three thermal power plants situated in the Aegean region of Turkey. The plants used low quality lignite coal. Sulphur and nitrogen emissions from the sites affected the air quality of a large area, while activities incidental to the plant's operation adversely affected the region's biodiversity. The applicants brought proceedings in local courts seeking to stop the operation of the plants, arguing that the plants did not have the required licences to function lawfully. They relied on the right to a healthy, balanced environment in Art 56 of the Turkish Constitution, as well as provisions of the Environment Act requiring authorities to prevent pollution or ensure its effects are mitigated. The local courts upheld their appeal, finding that the plants did not have the required licences and ordered the plants stop operating. The Turkish authorities refused to enforce the local court decisions. The applicants complained to the ECtHR that their right to a fair hearing under Art 6 of the Convention had been breached by the authorities' failure to enforce the local courts' decisions to halt the operation of the power plants. The ECtHR found Turkey had violated Art 6 and awarded the applicants compensation.¹²⁷

IACHR decision

In 2005, the Inuit, indigenous people in the Arctic region, filed a petition against the United States alleging human rights violations resulting from the US's failure to limit its emissions of GHGs and therefore reduce the impact of climate change. The petitioners invoked the right to culture, the right to property, the right to the preservation of health, life and physical integrity. The Inter-American Commission for Human Rights rejected the petition in 2006 without giving reasons. However, on the request of the petitioners, the Commission agreed to a hearing of the matter in 2007.¹²⁸

¹²¹ Ibid at §58.

¹²² Ibid at §56.

¹²³ Application no 55723/00, ECtHR 2000-II.

¹²⁴ Ibid at §80, §84 and §86.

¹²⁵ Ibid at §134, §138 and §149-150.

¹²⁶ Application no 36220/97, ECtHR 1997-II.

¹²⁷ Ibid at §74-75 and §79.

¹²⁸ Earthjustice, "Nobel Prize Nominee Testifies About Global Warming" (press release, 1 March 2007) at <http://www.earthjustice.org/news/press/007/nobel-prize-nominee-testifies-about-global-warming.html> (21 August 2008).

INTERNATIONAL LAW

Transboundary environmental damage

Many types of environmental damage do not stop at national boundaries or respect other states' sovereignty. In recent years, climate change has proved to be one of the best examples. Examples of transboundary environmental incidents causing air pollution or other environmental damage in more than one state include:

- (a) the air pollution leading to the Trail Smelter arbitration¹²⁹ between Canada and the United States in 1906;
- (b) the Chernobyl incident which took place in 1986, when a radioactive leak from a nuclear power plant in the former USSR (currently the Ukraine) was carried off over a number of European states harming human health and damaging ecosystems¹³⁰; and
- (c) haze from Indonesian forest fires noticeable in a number of neighbouring countries and going as far as Australia in 1999.¹³¹

Climate change is a form of transboundary environmental harm. Various fora have been put forward as having a role to play in resolving disputes arising out of climate change, including the International Court of Justice, the World Trade Organisation Appellate Body, the International Tribunal for the Law of the Sea and the World Heritage Committee.

International Court of Justice

The International Court of Justice (ICJ), the judicial body of the United Nations, had an important role in shaping the law of this area. It first held, in the 1949 Corfu Channel case¹³², that a state had a duty "not to allow knowingly its territory to be used for acts contrary to the rights of other states".¹³³ This was interpreted to be the recognition of a duty on a State to warn others when the danger is located on the State's territory.¹³⁴ The case however did not deal with air pollution, but with the loss of an English ship due to mines found in Albanian territorial waters.

¹²⁹ *Trail Smelter* case (United States-Canada) [1941] 3 RIAA 1907; 3 UN Rep Int; 1 Arb Awards (1941). Sulphur-dioxide fumes from a British Columbia (Canada) smelter damaged apple crops in the State of Washington (United States). In 1930, for example, 300-350 tons of sulphur were emitted from the smokestacks of the smelter.

¹³⁰ McClatchey D, "Chernobyl and Sandoz one decade later: The evolution of state responsibility for international disasters, 1986-1996" (1996) 25 *Georgia Journal of International and Comparative Law* 659.

¹³¹ Tan A K-J, "Forest fires of Indonesia: State Responsibility and International Liability" (1999) 48 *International and Comparative Law Quarterly* 826 and Laode M Syarif, "Orang-utans can't wear smoke masks: Indonesia's legal response to forest fires" (paper presented at the Second Asian Law Institute Conference, "The Challenge of Law in Asia: From Globalisation to Regionalisation", Bangkok, Thailand, 26-27 May 2007). For a discussion on possible legal avenues to engage the responsibility of the Indonesian state in international law, see Laode M Syarif, *Regional Arrangements for Transboundary Atmospheric Pollution in ASEAN Countries* (Doctor of Philosophy thesis, University of Sydney, 2006) 218-226 and 233-239.

¹³² *Corfu Channel* case (UK v. Albania), 1949 ICJ 4 (1949).

¹³³ McClatchey, note 130 at 664.

¹³⁴ McClatchey, note 130 at 665.

The ICJ has not had many opportunities to decide on environmental matters. The main cases so far¹³⁵ have stopped short of giving a detailed exposition on environmental law.¹³⁶

In 2002, after the United States of America and Australia refused to ratify the Kyoto Protocol to the United Nations Framework Convention on Climate Change, the Pacific island-state of Tuvalu threatened to take action in the ICJ against countries who have not ratified the treaty.¹³⁷ Tuvalu never commenced proceedings. However, this potential litigation highlighted some of the difficulties which arise in bringing proceedings before the ICJ. These difficulties stem mainly from the way in which the rules of the Court are framed, in accordance with principles of public international law. Only state parties to the United Nations Charter can bring disputes before the ICJ.¹³⁸ This means that individuals or organisations need to persuade a government to bring a claim in their name, which is not always an achievable task. Also, the parties to a dispute have to accept the jurisdiction of the Court.¹³⁹ This requirement makes states such as the United States, which has rescinded its acceptance of the compulsory jurisdiction in the 1980s, unlikely to be easily brought before this court.¹⁴⁰ Alternatively, the parties have to agree to bring the dispute before the court,¹⁴¹ which is not always a likely outcome on an issue as sensitive as GHG emissions constituting a violation of international environmental law.¹⁴² Finally, parties can agree to bring disputes before the ICJ under a treaty which is in effect between them.¹⁴³ In Tuvalu's case, its only treaty with the United States, the *Treaty of Friendship*¹⁴⁴, does not contain such a clause.

World Trade Organisation

The World Trade Organisation (WTO) Appellate Body has had an opportunity to deal with some environmental matters. In particular, Article XX of the General Agreement on Tariffs and Trade (GATT) provides parties with the opportunity to raise environmental issues as justification for not complying with an obligation under GATT. Article XX provides:

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

¹³⁵ Judgment in the Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia), 1997 ICJ 3 (Sept 25), reprinted in 37 ILM 162 (1998); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ 226 (July 8), reprinted in 35 ILM 809 (1996); Nuclear Tests (New Zealand v France) 1995 ICJ 228 (Sept 22)).

¹³⁶ Sands P, “International Environmental Litigation and Its Future” (1999) 32 *University of Richmond Law Review* 1619 at 1633.

¹³⁷ For more articles on Tuvalu and global warming, see <http://www.tuvaluislands.com/warming.htm> (21 August 2008).

¹³⁸ *Statute of the International Court of Justice*, art 34(1) and 35(1).

¹³⁹ *Statute of the International Court of Justice*, art 36.

¹⁴⁰ Strauss A, “The Legal Option: Suing the United States in International Forums for Global Warming Emissions” (2003) 33 *ELR* 10185 at 10185-10186.

¹⁴¹ *Statute of the International Court of Justice*, art 36(1).

¹⁴² Strauss, note 140 at 10186.

¹⁴³ Strauss, note 140 at 10186.

¹⁴⁴ *Treaty of Friendship between the United States of America and Tuvalu*, signed on 9 February 1979, 2011 UNTS 79 (entered into force on 23 Sept 1983) available at < http://untreaty.un.org/unts/120001_144071/27/3/00022289.pdf > (5 August 2008).

- ... (b) necessary to protect human, animal or plant life or health;
- ... (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; “

While this provision has not been employed in respect of climate change, it has proven a source of environmental litigation before the WTO.¹⁴⁵ In the shrimp/turtle dispute¹⁴⁶, the chapeau as well as paragraphs (b) and (g) to Article XX were accepted as a basis for the imposition of a unilateral ban by the United States on shrimp imports from certain south Asian countries ostensibly to protect an endangered species of sea turtle, listed under CITES.¹⁴⁷ However, the ban failed the chapeau on grounds of discrimination. In the case of climate change litigation, it would seem more likely that paragraph (b) of the chapeau to Art XX would be invoked.

One of the arguments that has been suggested that parties to a dispute could use, would be that failure to ratify the Kyoto Protocol to the UNFCCC constitutes a state subsidy to the firms registered in that state, in breach of the relevant provisions of the GATT.¹⁴⁸

International Tribunal for the Law of the Sea

Another possible international forum for climate change litigation is the International Tribunal for the Law of the Sea (ITLOS), established under the UN Law of the Sea Convention.¹⁴⁹ This body has also seen some environmental related litigation.¹⁵⁰ Under the Law of the Sea Convention, another agreement was negotiated in 1995, the *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea 10 Dec 1982 Relating to the Conservation and Management of Straddling Fish Stocks and High Migratory Fish* (UNFSA). This is a more likely legal framework in which to bring disputes relating to climate change.

Fish are very susceptible to changes in the temperature of oceans¹⁵¹, which means that they, and consequently, the commercial fisheries sector, may be profoundly affected by

¹⁴⁵ Environmental or human health issues were the basis for non-compliance with GATT and for the subsequent challenge by the trade affected party in the EC-Hormones case (EC – Measures concerning meat and meat products (hormones), WT/DS26&48/AB/R (Appellate Body Report adopted by the Dispute Settlement Body (DSB) on 13 February 1998)); France-Asbestos case (European Communities – Measures affecting asbestos and asbestos-containing products, WT/DS135/AB/R (Appellate Body Report adopted by the DSB on 5 April 2001)); United States-Reformulated Gasoline case (United States – Standards for reformulated gasoline (Appellate Body Report adopted by the DSB on 20 May 1996)); Australia-Salmon case (Australia – Measures affecting the importation of salmon, WT/DS18 (Appellate Body Report and Panel Report as modified adopted by the DSB on 6 November 1998; Compliance Panel Report adopted by DSB on 20 March 2000)) and Brazil-Retreaded Tyres case (Brazil – Measures affecting imports of retreaded tyres, WT/DS332/AB/R (Appellate Body Report adopted by the DSB on 19 December 2007)); Japan – Apples case (Japan – Measures affecting the importation of apples, WT/DS245/AB/R (Appellate Body Report adopted by the DSB on 10 December 2003; Appellate Body and Panel Compliance Reports adopted by the DSB on 20 July 2005)).

¹⁴⁶ US – Import prohibition of certain shrimp and shrimp products, WT/DS58/AB/R. Appellate body report adopted on 6 Nov 1998.

¹⁴⁷ Sands, note 136 at 1635-1636.

¹⁴⁸ Burns W, “The Exigencies that Drive Potential Causes of Action for Climate Change at the International Level” (2004) 98 *American Society for International Law Proceedings* 223 at 227.

¹⁴⁹ Strauss, note 140 at 10188 and, drawing on that article, see also Burns W, note 148.

¹⁵⁰ Southern Bluefin Tuna Cases (Australia v Japan; NZ v Japan) (1999).

¹⁵¹ Burns W, “A voice for the fish? Litigation and potential causes of action for impacts under the United Nations Fish Stocks Agreement” (2008) 48 *Santa Clara Law Review* 605 at 617.

climate change.¹⁵² The agreement has a broad application given the number of parties that have adhered to it, 71, including large GHG emitters such as the United States and India, and the fact that it covers one fifth of the total marine catch.¹⁵³ The advantage that the UNFSA presents is that it provides for a binding dispute resolution mechanism. While the Agreement's main objective is the long-term conservation and sustainable use of straddling fish stocks and highly migratory species, it also envisages other activities that would imperil conservation.¹⁵⁴ One argument that could be put forward is that activities resulting in the emission of GHGs could be considered to hinder conservation efforts because of the link between GHG concentrations in the atmosphere and climate change, and climate change's impact on fish stock conservation. However, such an argument has not yet been presented in a dispute under the UNFSA.

World Heritage Committee

Numerous cases have also been commenced before the International Committee for the Protection of the Cultural and Natural Heritage of Outstanding Universal Value (World Heritage Committee), part of the United Nations Educational, Scientific and Cultural Organisation (UNESCO). These petitions requested that various designated world heritage sites be placed on the list of world heritage sites in danger owing to the impact of climate change on these sites. This was a bid to ensure that the parties to the World Heritage Convention, including large GHG emitters like the United States of America or Canada, abide by their obligation under the Convention and "do all [they] can...to the utmost of [their] own resources"¹⁵⁵ to protect and conserve natural heritage within its boundaries, namely that they reduce their GHG emissions in order to limit climate change and its impacts on natural heritage.¹⁵⁶ The sites covered in the petitions are the Waterton-Glacier International Park (USA/Canada), Sagarmatha National Park (Nepal), Belize Barrier Reef Reserve System (Belize), Huascarán National Park (Peru) and the Great Barrier Reef (Australia).¹⁵⁷

In 2005, the World Heritage Committee recommended that a group of experts analyse the situation and report to the following annual meeting of the Committee on their findings in regards to the effects of climate change on World Heritage Sites.¹⁵⁸ At the following session, in 2006, the Committee limited itself to endorsing the "Strategy to assist State Parties to implement appropriate management responses"¹⁵⁹ and requested that State parties implement the strategy¹⁶⁰. The Strategy refers generally to mitigating

¹⁵² Burns, note 151 at 607.

¹⁵³ Burns, note 151 at 608.

¹⁵⁴ Burns, note 151 at 635-636.

¹⁵⁵ *Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 16 Nov 1972, 15 UNTS 511, art 4 (entered into force 17 Dec 1975).

¹⁵⁶ See Thorson E, Stasch A, Scott C, Gibel K, McCoy K, *Petition to the World Heritage Committee Requesting Inclusion of Waterton-Glacier International Peace Park on the List of World Heritage in Danger as a result of Climate Change and for Protective Measures and Actions* (2006) at vii-viii.

¹⁵⁷ Meltz, note 7 at 30.

¹⁵⁸ World Heritage Committee, Decision 29 COM 7B.a in *Decisions adopted at the 29th session of the World Heritage Committee*, WHC-05/29.COM/22 (Durban 2005), p 36 at §7.

¹⁵⁹ World Heritage Committee, Decision 30 COM 7.1 in *Decisions adopted at the 30th session of the World Heritage Committee*, WHC-05/29.COM/22 (Vilnius 2006), p 7 at §6.

¹⁶⁰ World Heritage Committee, Decision 30 COM 7.1 in *Decisions adopted at the 30th session of the World Heritage Committee*, WHC-05/29.COM/22 (Vilnius 2006), p 7 at §8.

and adaptive measures that can be taken to limit the effects of climate change on world heritage sites, but does not present as a document that imposes any particular actions to be taken¹⁶¹, to the disappointment of the petitioners¹⁶².

CONCLUSION

Even if many of the attempts to litigate climate change are unsuccessful, there is a consensus among commentators that there is value in the attempts themselves. While courts are bound by domestic or international norms in their activity, and cannot bring about dramatic change, climate change litigation has proved to be a vehicle through which matters that are important to communities are being brought to the attention of the governments and, hence, act as a catalyst for executive action.¹⁶³ Another important effect of litigation is that such actions raise the defendants' and the public's awareness of the implications of climate change¹⁶⁴ and, sometimes, solutions are reached at a much faster pace by commencing proceedings.¹⁶⁵

Not only will there be a more frequent use of the avenues of litigation covered in this paper, but it is likely that the avenues used to litigate climate change-related matters will continue to expand. As governments are likely to implement new legislation to tackle climate change, such as carbon emissions trading schemes, this could also provide litigants with new ways in which to challenge climate change-inducing actions.

¹⁶¹ World Heritage Committee, "Strategy to assist State Parties to implement appropriate management responses", WHC-06/30.COM/7.1 (adopted on 17 July 2006), p 1-2 at §B.9 and §C.10.

¹⁶² See "World Heritage Committee Fails to Act" (20 July 2006), available at <<http://www.climatelaw.org/cases/country/intl/unescobelize/2006Jul20/>> (7 August 2008).

¹⁶³ Sax J L, *Defending the environment: A handbook for citizen action* (Vintage Books, 1971), p xviii and p 152. See also Preston B J, 'The role of public interest environmental litigation' (2006) 23 EPLJ 337 at 339.

¹⁶⁴ Harper B, "Climate change litigation: The federal common law of interstate nuisance and federalism concerns" (2006) 40 *Georgia Law Review* 661 at 697.

¹⁶⁵ See, for example, Harper, note 164 at 697.