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Global Warming, the Environment and Litigation: A Commentary

by

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Common to the three papers in this session by Stephen Hockman QC¹, Simon Molesworth AM, QC², and Matt Casey QC³ is the recognition of the globalisation of environmental law. Globalisation is occurring in a number of ways. I identify eight.

First, international law leads to municipal or domestic law of the nation states of the world. International environmental conventions have resulted in national laws. This occurs not only in dualist states, where incorporation by municipal law of the state is necessary for the international law to have domestic operation, but where municipal law is necessary to effect the machinery to implement in practice the norms and principles of the international convention. In Australia, for example, the Commonwealth has legislated to adopt and implement conventions, such as the Convention on Wetlands of International Importance, especially as Waterfowl Habitat (the Ramsar Convention), the Convention for the Protection of the World Cultural and Natural Heritage (the World Heritage Convention), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), various bilateral migratory bird treaties and the Convention on Biological Diversity (the Biodiversity Convention). Today, these conventions find their source in Australian law in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

Insofar as each nation state who is a party to these international environmental conventions does likewise, the norms and principles of the conventions are spread through the law of nations across the globe.

Second, this globalisation of international environmental law is not restricted to hard-law – the conventions and treaties; it also extends to soft-law. There are numerous declarations and statements of principles agreed to by the international community, which have not found their way into the hard law of conventions or treaties, but are

¹ Hockman QC, S, 'The Case for an international court for the environment', Paper presented at the Fifth World Bar Conference, Sydney, 4 April 2010.

² Molesworth AM, QC, S, 'The extent to which Environmental Courts are responding to climate change by adopting a precautionary approach', Paper presented at the Fifth World Bar Conference, Sydney, 4 April 2010.

³ Casey QC, M, 'Whether climate change is likely to result in more "greenhouse litigation" and how effective this will be', Paper presented at the Fifth World Bar Conference, Sydney, 4 April 2010.

nevertheless solemn commitments by nation states, although not of a binding character. An example would be the Rio Declaration on the Environment and Development done in Rio de Janeiro in June 1992. Amongst the principles in the Rio Declaration are a number of the principles of ecologically sustainable development (“ESD”). One is Principle 15 concerning the precautionary principle. This provides relevantly that “[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”. Nation states and communities (such as the European Community (“EC”)) have adopted and incorporated into national or community law these principles, including the precautionary principle. In Australia, the precautionary principle has been incorporated in environmental statutes at Commonwealth, State and Territory level. Indeed in New South Wales (“NSW”), the formulation of the precautionary principle in over 55 different State statutes or regulations⁴ is in essentially similar terms as Principle 15 of the Rio Declaration. The EC has also adopted the precautionary principle in the same terms. In this way also, principles of environmental law are spreading globally.

Third, the movement of norms and principles is not along a one way street, from international law to municipal law. It is true that the flow of traffic this way has been predominate. But there are examples of a counter flow from municipal law to international law. The precautionary principle, about which I have been speaking, is an example. It has its origins in German municipal law⁵. German negotiators in the North Sea conferences introduced the precautionary principle in negotiations and ultimately it was accepted and referred to by the parties in the Declarations of the Second and Third North Sea Conferences in 1987 and 1990 respectively. This process led to its inclusion in the Convention on the Protection of the Marine Environment of the North-East Atlantic in 1992. The principle was also incorporated in 1992 into the Biodiversity Convention and the Framework Convention on Climate Change, as well as in the soft-law of the Rio Declaration and Agenda 21.

Fourth, the flow of norms and principles between international and municipal law, and their global spread, has lead to a harmonisation of environmental law between international and municipal law, and between municipal laws of different nation states. One consequence of this global spread of international hard law and soft law into municipal law of nation states is convergence of previously disparate municipal legal systems, including common law systems and civil law systems. The environmental law of NSW and the EC, for example, now have elements of similarity, in relation to the principles of ESD, that in the past would not have existed. The adoption of the precautionary principle in essentially similar terms by NSW and the EC facilitated reference to judicial decisions of courts in the EC on the precautionary principle when I was determining the meaning, scope and application of the precautionary principle in *Telstra Corp Ltd v Hornsby Shire Council*⁶, a decision to which Simon Molesworth has referred. This would not have been possible if there had not been the globalisation of the precautionary principle.

⁴ As at November 2007 according to Biscoe J in *Walker v Minister for Planning* (2007) 157 LGERA 124 at [69]

⁵ Termed as *Vorsorgeprinzip*: see B J Preston, “The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific” (2005) 9 APJEL 109 at 133.

⁶ (2006) 67 NSWLR 256; (2006) 146 LGERA 10

Fifth, there is globalisation of environmental problems. Climate change, loss of biodiversity and desertification are obvious examples. These global environmental problems demand global legal solutions. International law has a clear role to play. Hence, the conventions on climate change, biological diversity and desertification. But as the environmental activists' slogan exhorts, there is a need to "Think globally, act locally". Action on these environmental problems needs to be taken locally in each nation state. This entails the enactment and enforcement of clear and effective environmental law in each nation state. This requires good governance. Litigation enforcing environmental law has a role to play in upholding good governance.

Sixth, globalisation of trade gives rise to translocation of environmental problems. An increase in environmental regulation in one nation state can result in flight of industry to another nation state with fewer, or less stringent, environmental laws. This has been a concern expressed by industry in relation to climate change regulation, such as emissions trading schemes. Stephen Hockman gives another example in his paper. He notes that one third of China's carbon emissions are a result of producing goods for export. The United Kingdom ("UK") claims that it has decreased its carbon emissions by 18% since 1990. Yet, a recent study found that once the carbon emissions of imports, exports and international transport are accounted for, in fact the UK's emissions have increased by 20%. The UK has, therefore, outsourced its carbon emissions to other countries, China in particular. This underscores the need for a global approach that recognises these interrelationships between countries and not to take a blinkered approach to each of the countries' obligations and actions.

Seventh, globalisation is occurring by reason of the increasing ease of access to information that technology, particularly the internet, enables. Laws and judicial decisions across the globe are readily able to be accessed. Networks of stakeholders share information. Climate change litigation is an example where cases and decisions are able to be accessed readily from anywhere in the world (language permitting). Matt Casey appends to his paper a chart of climate change litigation from an information resource prepared by lawyers in the United States ("US"). This is freely able to be accessed and keeps anyone interested up to date with the latest cases and decisions.

The ready availability of information means that similar litigation soon springs up in different countries. One can easily appreciate that occurring in a federal jurisdiction such as Australia. Simon Molesworth's paper about the responses of courts throughout Australia to climate change illustrates this. But we are also seeing it between nation states. In my decision in *Telstra Corp Ltd v Hornsby Shire Council* on the precautionary principle, I referred to for guidance decisions in New Zealand, UK, US, EC, India and Pakistan to name a few jurisdictions.

The decision of the US Supreme Court in *Massachusetts v Environment Protection Agency*⁷, a decision referred to by Matt Casey, holding that CO² was a pollutant, inspired litigation in NSW by a climate change activist group called Rising Tide. The group sought to enjoin a power station on the ground that the power station in burning coal was wilfully or negligently disposing of a waste (CO²) without lawful

⁷ 549 US 497 (2007)

authority in a manner that harms or is likely to harm the environment, in contravention of s 115 of the *Protection of the Environment Operations Act 1997* (NSW). The group argued that the power station's licence did not authorise the emission of CO₂, that pollutant not being expressly referred to in the licence.

The power station moved to have the action summarily dismissed. The Land and Environment Court of New South Wales (Pain J) held that on a proper construction the licence did impliedly permit the emission of CO₂ and hence the power station was not in breach of the statutory provision. The Court therefore summarily dismissed this claim⁸. However, a further claim was that, even if the licence authorised the emission of CO₂, it is subject to an implied limitation – a condition – that the power station is only authorised to emit CO₂ in a manner that has reasonable regard and care for the interests of other persons and for the environment. This further claim was not summarily dismissed and will go to trial⁹.

The tortious actions in nuisance and negligence, brought mainly in the US, to which Matt Casey refers, may also inspire like actions in other common law countries, such as Australia, NZ or the UK. As the New Zealand Court of Appeal said in *Sunset Terraces*¹⁰, “careful regard will be paid to developments in states with which we share many values.” The likelihood of success of any such tortious actions may not be any better than they have fared in the US, but undoubtedly there will be learning from the failure of others. It may be that tortious litigation will shift from focusing solely on liability for causing climate change to liability for maladaptation to climate change. Simon Molesworth referred to the Black Saturday fires in Victoria and the recent inquiry into those fires. Class actions have already commenced by affected persons, which will raise issues of failure to heed, and to take adaptive action in response to, the effects of climate change on the vegetation that burnt.

Eighth and finally, globalisation in the many ways I have mentioned adds weight to the call for an international environmental court, so eloquently put by Stephen Hockman. His arguments are sound. In addition, there is the need for good governance - international environmental law needs to be enforced to be effective. Current systems, as Stephen Hockman has noted, are ineffective; a new approach is required. A parallel can be drawn between international and municipal law: just as there needs to be litigation to enforce environmental laws at the municipal level, so too there needs to be litigation in a competent court at international level to ensure enforcement and implementation of international environmental law. Stephen Hockman has summarised the benefits of having such enforcement by an international environmental court, relating to ensuring access to justice, upholding and developing environmental law, and enabling effective preventative and remedial action.

⁸ *Gray v Macquarie Generation* [2010] NSWLEC 34 at [68].

⁹ *Ibid* at [67], [69].

¹⁰ [2010] NZCA 64 at [25].