Climate change litigation: a conspectus*

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I. 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 nation 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 action,[3] 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

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

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

3 Joseph L Sax, *Defending the Environment: A Handbook for Citizen Action* (New York: Vintage Books, 1971), at xviii and 152.

4 Posner, *Climate Change and International Human Rights Litigation: A Critical Appraisal*, supra, note 2, at 1925-1926. See also Robert Meltz, *Report for Congress: Climate Change Litigation: A Growing Phenomenon* (Washington DC: Congressional Research Service, 2007), at 33; and Anna Huggins, "Is Climate Change Litigation an Effective Strategy for Promoting Greater Action to Address Climate Change? What Other Legal Mechanisms Might be Appropriate?" 13 *Local Government Law Journal* (2008), 184.

5 *Massachusetts v EPA* 549 US 497, 127 S.Ct. 1438, 167 L.Ed.2d. 248 (2007); *Walker v Minister for Planning* (2007) 157 LGERA 124.

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 American 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 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. Private litigants have also taken citizen action to enforce environmental laws to require mitigation of or adaption to climate change.

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6 *Connecticut v American Electric Power* 406 F Supp 2d 265 (SDNY, 2005); *Genesis Power Ltd 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, *Report for Congress*, supra, note 4, at 15.

8 *Greenpeace Australia v Redbank Power Company* (1994) 86 LGERA 143 in Tim Bonyhady, "The New Australian Climate Law" in Tim Bonyhady and Peter Christoff (eds), *Climate Law in Australia* (Sydney: Federation Press, 2007), at 11.

9 *Environmental Defence Society (Inc) v Auckland Regional Council and Contact Energy Ltd* [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.

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, the World Heritage Committee and the European Court of Justice.

II. 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.

1. 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 United States. The plaintiffs sought a permanent injunction requiring the defendants to cap their carbon dioxide emissions and to commit to yearly reductions over at least 10 years. The government plaintiffs sued on their own behalf to protect public lands (e.g. 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 wellbeing.

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

[12] David M Walker, *The Oxford Companion to Law* (Oxford: Oxford University Press, 1980), at 894.

[13] See Matthew Pawa and Benjamin Krass, "Global Warming as a Public Nuisance: Connecticut v American Electric Power", 16 *Fordham Environmental Law Review* (2004-2005) 407; Ken Alex, "A Period of Consequences: Global Warming as Public Nuisance", 43A *Stanford Journal of International Law* (2007) 77; and David Hunter and James Salzman, "Negligence in the Air: The Duty of Care in Climate Change Litigation", 155 *University of Pennsylvania Law Review* (2007) 1741, at 1788-1794.

[14] 406 F Supp 2d 265 (SDNY, 2005).

[15] 2007 WL 2726871 (NDCal, September 17 2007).

(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 in the *General Motors* suit appealed to the Court of Appeals for the Ninth Circuit, however the appeal was abandoned in June 2009.[17] On appeal in the *American Electric Power* suit, the Court of Appeals for the Second Circuit held that the actions did not present non-justiciable political questions.[18] The Court of Appeals vacated the decision of the District Court and remanded the matter for further proceedings.[19]

The Court of Appeals held that none of the six factors set out in *Baker v Carr*[20] to describe non-justicable political questions applied.[21] In particular, the Court of Appeals held that the plaintiffs' case did not ask the Court to fashion a comprehensive and far-reaching solution to global climate change, a task that arguably falls within the purview of the political branches, rather it sought to limit the emissions from six coal-fired power stations that were allegedly causing them injury.[22]

The Court of Appeals also found that the parties had standing and that the municipal and private plaintiffs were not precluded from bringing the federal common law nuisance claims.[23] It had been unnecessary for the District Court to address these questions due to the dismissal of the proceedings on the grounds of non-justiciability.

In *Kivalina v ExxonMobil*,[24] the native Inupiat village of Kivalina in Alaska brought a public nuisance suit against nine oil companies, 14 power companies and a coal company. The plaintiffs alleged that as a result of global warming, Arctic ice which used to protect the Kivalina coast from severe weather and, hence, erosion had diminished. The resulting erosion of coastal areas meant the village had to relocate or be abandoned. The plaintiffs sought monetary damages from the defendants for their contribution to climate change.

The defendants filed a motion in the District Court to dismiss the proceedings for the District Court's lack of subject matter jurisdiction over the plaintiffs' federal claim for

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16 *Connecticut v American Electric Power Co*, 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; Alex, *A Period of Consequences*, supra, n 13 at 91; Meltz, *Report for Congress*, supra, n 4, at 24.

17 Nevertheless, the Court of Appeals, Fifth Circuit, in another appeal, *Comer v Murphy Oil* 585 F.3d 855 (5th Cir 2009) stated that the district courts' decisions in both the *General Motors* suit and the *American Electric Power* suit were "legally flawed" (at 876) and based on a "false premise" (at 879).

18 *Connecticut v American Electric Power Co* 582 F 3d 309 (2nd Cir 2009), at 315, 332.

19 Ibid at 393.

20 369 US 186; 82 S.Ct. 691; 7 L.Ed.2d 663 (1962).

21 *Connecticut v American Electric Power Co* 582 F 3d 309 (2nd Cir 2009), at 323 – 332.

22 Ibid at 325.

23 Ibid at 315, 349, 371.

24 663 F.Supp.2d 863 (NDCal 20 September 2009).

common law nuisance. The defendants contended that the plaintiffs' claims were non-justiciable under the political question doctrine and that the plaintiffs lacked standing to pursue their global warming claims in nuisance on the ground that their injury was not "fairly traceable" to the defendants' conduct. The District Court granted the defendants' motions to dismiss for lack of jurisdiction, concluding that the plaintiffs' federal claim for nuisance was barred by the political question doctrine (was non-justiciable) and for lack of standing. The Court accordingly dismissed the proceedings.[25]

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.[26]

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, they may exacerbate the problem they were intended to remedy or shift the problem to other locations.[27] An action in private nuisance by affected landowners may lie against the public authority, subject to any statutory immunities or defences.

In *Open Space Institute Inc v American Electric Power Co,*[28] 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 United States. The suit was joined with the *Connecticut v American Electric Power* suit discussed earlier and was also dismissed on grounds of non-justiciability.

2. 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.[29]

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.

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[25] *Kivalina v ExxonMobil* 663 F.Supp.2d 863 (NDCal 30 September 2009), at 882 – 883.

[26] Anthony Dugdale and Michael A Jones (eds), *Clerk & Lindsell on Torts* (London: Sweet & Maxwell Ltd, 19th ed, 2006) at 1162; and *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903.

[27] Jan McDonald, "A Risky Climate for Decision-making: The Liability of Development Authorities for Climate Change Impacts", 24 *Environment and Planning Law Journal* (2007), 405, at 414.

[28] 04-CV-05670 (SDNY, filed 21 July 2004).

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

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.[30] 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)".[31]

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.[32] Hence, ascertaining the scope or content of the duty of care depends on ascertaining the particular relationship between the defendant and the plaintiff. Further, 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.[33]

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.[34] 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.[35] The court must engage in "a multifactorial or 'salient features' analysis"[36] 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.[37] However, reasonable foreseeability may not be sufficient in itself to always give rise to a duty of care.[38]

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

[31] *Roads & Traffic Authority of NSW v Dederer* (2007) 238 ALR 761 at [44].

[32] Ibid at [43]-[44].

[33] Ibid at [18], [43], [51].

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

[35] *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at [76], [93].

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

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

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

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 determinant,[39] although it remains as a salient feature to be considered. Other factors have been suggested,[40] 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".[41] 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 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 reasonably 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,[42] 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 as greater tidal inundation that, in turn, harms a resident or their property in a coastal community? And when did such foreseeability arise?[43] The criterion of proximity, whether expressed as spatial or temporal proximity, is also unlikely to be satisfied.

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

[40] See *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at [10]- [15], [133], [201], [259], [335], [406].

[41] Hunter and Salzman, *Negligence in the Air*, supra, note 13, at 1748.

[42] *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47.

[43] See Hunter and Salzman, *Negligence in the Air*, supra, note 13 at 1745, 1769.

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 the plaintiff.[44]

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 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).[45] 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 the defendant 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.

The third hurdle is establishing that the defendant's particular breach of duty was, in a common sense way,[46] 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 timeframes, 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*.[47]

These hurdles in a negligence action for failure to mitigate were encountered in *Comer v Murphy Oil*.[48] Comer and 13 other individuals harmed by Hurricane Katrina in the United States sued nine oil companies, 31 coal companies and four chemical companies, including in negligence. The plaintiffs' negligence claim asserted that the defendants had a duty to conduct their businesses so as to avoid unreasonably

[44] See further Hunter and Salzman, *Negligence in the Air*, supra, note 13 at 1745-1749.

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

[46] *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 515, 522, 524.

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

[48] *Comer v Murphy Oil* No 1:05-CV-436 (SD Miss, 18 April 2006); Hunter and Salzman, *Negligence in the Air*, supra, note 13 at 1754.

endangering the environment, public health, public and private property, as well as the citizens of Mississippi; that the defendants 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; and that these emissions caused the plaintiffs' lands and property to be destroyed or damaged.[49] The District 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.[50]

On appeal, the Court of Appeals for the Fifth Circuit reversed the decision holding that the plaintiffs had standing to bring the nuisance, trespass and negligence claims,[51] but did not have standing to bring the unjust enrichment, fraudulent misrepresentation and civil conspiracy claims.[52] The Court of Appeals found that the plaintiffs satisfied each of the three constitutional minimum standing requirements.[53] The plaintiffs alleged they had sustained actual concrete injury in fact to their particular lands and property and these injuries could be redressed by the compensatory and punitive damages they sought for these injuries.[54]

The Court of Appeals also found the plaintiffs had shown that the injuries alleged were fairly traceable to the defendants' actions. For the purpose of establishing standing, it was not necessary for the plaintiffs to establish the proximate causation needed to succeed on the merits of a tort claim. Rather, an indirect causal relationship will suffice, provided there is a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant.[55] The Court of Appeals rejected the defendants' contentions that the causal link between emissions, sea level rise and Hurricane Katrina was too attenuated in that the defendants' actions are only one of many contributions to greenhouse gas emissions, thereby foreclosing traceability. The Court of Appeals relied on the US Supreme Court's decision in *Massachusetts v EPA*[56] rejecting similar contentions and accepting a causal chain virtually identical in part to that alleged by the plaintiffs in the *Comer* case.[57]

The Court of Appeals also held that the nuisance, trespass and negligence claims did not present non-justiciable political questions.[58] The case has been remanded to the District Court for further proceedings consistent with the Court of Appeals' decision.[59]

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

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[49] Summarised in *Comer v Murphy Oil* 585 F.3d 855 (5th Cir 2009) at 861

[50] *Comer v Murphy Oil* No 1:05-CV-436 (SD Miss, 18 April 2006) dismissed on 30 August 2007.

[51] *Comer v Murphy Oil* 585 F.3d 855 (5th Cir 2009) at 863 - 867.

[52] Ibid at 867 – 869.

[53] Set out in *Lujan v Defenders of Wildlife* 504 US 555, 560 – 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

[54] *Comer v Murphy Oil* 585 F.3d 855 (5th Cir 2009) at 863.

[55] Ibid at 864.

[56] 549 US 497, 127 S.Ct. 1438, 167 L.Ed.2d. 248 (2007).

[57] *Comer v Murphy Oil* 585 F.3d 855 (5th Cir 2009) at 865 – 866.

[58] Ibid at 869, 875 – 876, 879 - 880.

[59] Ibid at 880.

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 programs, as the area and frequency of diseases spread; and
(f) the failure to preserve public natural assets in the face of climate change.[60]

To date, there have not yet been any successful actions in negligence for damage or loss caused by climate change, but the potential exists.[61] Liability of public authorities for negligence can be limited by statute.[62]

3. 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.[63] 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.[64] 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.[65]

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.[66] The first climate change case to rely on civil conspiracy was *Comer v Murphy Oil.*[67] The plaintiffs' civil conspiracy claim asserted that the defendants were aware for many years of the dangers of greenhouse gas emissions, but they unlawfully disseminated misinformation about these dangers in furtherance of a civil conspiracy to decrease

[60] Philippa England, "Heating Up: Climate Change Law and the Evolving Responsibilities of Local Government", 13 *Local Government Law Journal* (2008), 209, at 217.

[61] Hunter and Salzman, *Negligence in the Air*, supra, note 13; Zada Lipman and Robert Stokes, "Shifting Sands: The Implications of Climate Change and a Changing Coastline for Private and Public Authorities in Relation to Waterfront Land", 20 *Environmental and Planning Law Journal* (2003), 406; Jan McDonald, "The Adaptation Imperative: Managing the Legal Risks of Climate Change Impacts" in Bonyhady and Christoff, *Climate Law in Australia*, supra, note 8, at 124; McDonald, *A Risky Climate for Decision-making*, supra, note 27; and England, *Heating Up*, supra, note 65.

[62] 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 Pt 5 of the *Civil Liability Act 2002* (NSW).

[63] *Mulcahy v The Queen* (1868) LR 3 HL 306 at 317.

[64] Dugdale and Jones, *Clerk & Lindsell on Torts*, supra, note 26, at 1611.

[65] Walker, *The Oxford Companion to Law*, supra, note 12, at 276.

[66] Stephan Faris, "Climate Conspiracy?", Australian Financial Review, 27 June 2008, at 9.

[67] No 1: 05-CV-436 (SD Miss, 18 April 2006), on appeal 585 F.3d.855 (5th Cir 2009).

public awareness of the dangers of global warming.[68] The District Court dismissed all of the plaintiffs' claims, including the civil conspiracy claim, on the grounds that plaintiffs lacked standing and the claims presented non-justiciable political questions. On appeal, the Court of Appeals for the Fifth Circuit also determined that the plaintiffs lacked standing to bring the civil conspiracy claim (as well as the unjust enrichment and fraudulent misrepresentation claims).[69] The plaintiffs had not identified a particularised injury that affected them in a personal and individual way; rather, the injury was a generalised grievance common to the entire American citizenry.[70]

In *Kivalina v ExxonMobil*[71],the plaintiffs 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 alleged 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 alleged that the defendants were engaging in concert with each other over the creation of global warming, giving substantial assistance or encouragement to each other to so conduct themselves.

The District Court dismissed the proceedings on the motion of the defendants concluding that the plaintiffs' federal claim for common law nuisance was non-justiciable and the plaintiffs lacked standing. The plaintiffs' remaining claims, including civil conspiracy, were based upon state law. The District Court declined to exercise supplemental jurisdiction over the state law claims as it had dismissed the federal claim over which it had original jurisdiction. The state law claims were dismissed without prejudice to their presentation in a state court action.[72]

4. 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 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,

[68] Summarised in *Comer v Murphy Oil* 585 F.3d 855 (5th Cir 2009) at 861.

[69] Ibid at 867 - 869.

[70] Ibid at 869.

[71] 663 F.Supp.2d 863 (NDCal 30 September 2009).

[72] *Kivalina v ExxonMobil* 663 F.Supp.2d 863 (NDCal 30 September 2009), at 882 – 883.

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.[73]

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.[74]

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.[75]

The plaintiffs in *Comer v Murphy Oil* raised a fraudulent misrepresentation claim alleging that: the defendants knowingly made materially false statements in public relations campaigns to divert attention from the dangers of global warming, so as to dissuade government regulation, public discontent and consumer repulsion; both government actors and the general public were unaware that these statements were false; government officials and the general public acted upon the defendants' statements; and the plaintiffs suffered injuries as a result of that reliance.[76] The Court of Appeals for the Fifth Circuit determined that the plaintiffs lacked standing to bring the fraudulent misrepresentation claim.[77]

III. 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:

- Misleading or deceptive conduct under s 52(1):

  "A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive".

- False or misleading representations under s 53:

  "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:

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[73] Walker, *The Oxford Companion to Law*, supra, note 12, at 341; and see also Dugdale and Jones, *Clerk & Lindsell on Torts*, supra, note 26, Ch 18.

[74] *Halsbury's Laws of Australia* (Butterworths) [300-10], at 547,077-547,083.

[75] Walker, *The Oxford Companion to Law*, supra, note 12, at 844.

[76] *Comer v Murphy Oil* 585 F.3d 855 (5th Cir 2009) at 861.

[77] Ibid at 867 – 869.

(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".

- False or misleading representations about land under s 53A(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 businesses. It has released two reports *Green Marketing and the Trade Practices Act*[78] and *Carbon Claims and the Trade Practices Act*.[79]

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*. Six examples are the ACCC actions concerning the environmental claims by De Longhi, Goodyear, Saab, Prime

[78] Australian Competition and Consumer Commission (ACCC), "Green Marketing and the Trade Practices Act", 2008, <http://www.accc.gov.au/content/item.phtml?itemId=815763&nodeId=69646a6d15e7958a41b40ab5848c6968&fn=Green%20marketing%20and%20the%20Trade%20Practices%20Act.pdf> (last accessed on 28 July 2010).

[79] Australian Competition and Consumer Commission (ACCC), "Carbon Claims and the Trade Practices Act", 27 June 2008, <http://www.accc.gov.au/content/index.phtml/itemId/833279/ > (last accessed on 28 July 2010).

Carbon, V8 Supercars and Global Green Plan that their products or services 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".[80]

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 was "environmentally-friendly", had "minimal environmental impact", its production process resulted 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.[81]

The ACCC challenged the "green" claims by GM Holden Ltd in the advertising of Saab cars. Saab advertised that "Grrrrrreeen, 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 considered such claims to be misleading because:

"• 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;
- 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
- 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.[82]

The ACCC commenced proceedings in the Federal Court and obtained declarations that GM Holden had breached ss 52 and 53(c) of the *Trade Practices Act*.[83] In addition, GM Holden accepted a court-enforceable undertaking to refrain from republishing the original advertisements and to train its marketing staff in relation to

[80] Australian Competition and Consumer Commission (ACCC), "De Longhi Alters 'Environmental Friendly' Claims", 30 April 2008, <http://www.accc.gov.au/content/index.phtml/itemId/825883/fromItemId/810627> (last accessed on 28 July 2010).

[81] Australian Competition and Consumer Commission (ACCC), "Goodyear Tyres Apologise, Offer Compensation for Unsubstantiated Environmental Claims", 26 June 2008, <http://www.accc.gov.au/content/index.phtml/itemId/833219/fromItemId/810627> (last accessed 28 July 2010.

[82] Australian Competition and Consumer Commission (ACCC), "ACCC Takes Action Against GM Holden Ltd over Saab 'Green' Claims'", 18 January 2008, < http://www.accc.gov.au/content/index.phtml/itemId/808355/fromItemId/810627 > (last accessed on 28 July 2010).

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

misleading and deceptive green marketing claims.[84] GM Holden advised the ACCC that it will plant 12,500 native trees which it believed to be sufficient to offset the carbon emissions for the life of all Saab motor vehicles sold during the advertising campaign.[85]

The ACCC also pursued V8 Supercars Australia Pty Ltd after the company introduced its *Racing Green Program* claiming that it would plant 10,000 native trees to fully offset the carbon emissions from the V8 Championship Series.[86] The ACCC considered that the claims were unclear, suggesting that the trees would quickly absorb the carbon emission when it was likely that it would take a number of decades for one year's racing emissions to be absorbed by the specially planted trees.[87] The ACCC accepted a court enforceable undertaking from V8 Supercars Australia Pty Ltd that:

"• any future claims that it publishes about 'green marketing' will be first considered by a solicitor with experience in trade practices law to ensure that it complies with the *Trade Practices Act*,
- any future claims that it makes about trees being planted to offset carbon emissions will include an explanation about the time before those emissions will be offset, and
- an acknowledgement of the ACCC's concerns and the undertaking will be placed on its Racing Green pages of the V8 Supercars website".[88]

The ACCC commenced proceedings against Prime Carbon Pty Ltd alleging that the company had made false or misleading representations about the supply and sale of carbon credits. Prime Carbon sells a "soil carbon and sequestration program" to farmers which aims to sequester carbon from the atmosphere and store it in agricultural land.[89] The ACCC alleged that Prime Carbon made false claims that it was a registered broker and aggregator with the National Stock Exchange of Australia Ltd. Prime Carbon also made misleading representations about National Environment Registry Pty Ltd, a company through which Prime Carbon supplied some of its services, stating that it was regulated by the Australian Government, it was the registry for all approved carbon credits in Australia and that it had an arrangement with the Chicago Environment Registry that would allow Australian carbon credits to be traded in the international market.[90]

The Federal Court made a declaration that Prime Carbon had represented that its services had benefits they did not have and had represented an affiliation that it did

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[84] *Australian Competition and Consumer Commission v GM Holden Ltd (ACN 006 893 232)* [2008] FCA 1428 (18 September 2008) at [16], [10] setting out the undertaking given to ACCC by GM Holden for the purposes of s 87B of the *Trade Practices Act 1974* (Cth) at [22]-[23].

[85] *Australian Competition and Consumer Commission v GM Holden Ltd (ACN 006 893 232)* [2008] FCA 1428 (18 September 2008) at [16], [10] setting out the undertaking given to ACCC by GM Holden for the purposes of s 87B of the *Trade Practices Act 1974* (Cth) at [17]. See also Australian Competition and Consumer Commission (ACCC), "Saab 'Grrrrrrreen' Claims Declared Misleading by the Federal Court", 18 September 2008, <http://www.accc.gov.au/content/index.phtml/itemId/843395 > (last accessed on 28 July 2010).

[86] Australian Competition and Consumer Commission (ACCC), "V8 Supercars corrects carbon emissions claims", 18 September 2008, <http://www.accc.gov.au/content/index.phtml/itemId/843360/fromItemId/621575> (last accessed on 28 July 2010).

[87] Ibid.

[88] Ibid.

[89] Australian Competition and Consumer Commission (ACCC), "ACCC institutes proceedings against Prime Carbon Pty Ltd", 5 January 2010, < http://www.accc.gov.au/content/index.phtml/itemId/908275/fromItemId/621575 > (last accessed 1 October 2010).

[90] John Taberner et al, "Be wary of 'greenwash'", 25(3) *Australian Environment Review* (2010), 7, at 7.

not have in contravention of s 53 of the *Trade Practices Act.*[91] Orders were made restraining Prime Carbon and it sole director, Mr Bellamy, from engaging in such conduct. The Court also required Prime Carbon to publicise the Court's orders through letters to the company's customers and a notice on its website, and Mr Bellamy was also ordered to undertake compliance training.

The ACCC also commenced proceedings against a greenpower retailer that breached a court enforceable undertaking. Between 2006 and 2008, Global Green Plan Ltd operated GreenSwitch, a retailer of GreenPower under the Australian government's GreenPower accreditation program. Whilst operating GreenSwitch, Global Green Plan accepted payments from customers on the proviso that the company would purchase renewable energy certificates (REC). However, not all of the money received by Global Green Plan to purchase RECs was used for that purpose. In December 2009, the company acknowledged that its conduct was likely to be in breach of the *Trade Practices Act* and gave an undertaking to make up the 4,137 shortfall in RECs by March 2010.[92] When the company failed to do so, proceedings were commenced in the Federal Court. On 29 September 2010, the Federal Court made a declaration that Global Green Plan had breached its undertaking by failing to purchase the required number of RECs.[93]

IV. ADMINISTRATIVE LAW

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

1. JUDICIAL REVIEW

A. 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.[94]

A breakthrough came with the US Supreme Court's decision in *Massachusetts v EPA.*[95] The State of Massachusetts, together with 11 other States, three cities, two Unites States 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 s 202 (a)(1) of the *Clean Air*

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[91] Australian Competition and Consumer Commission (ACCC), "Company admits misleading consumers about marketing carbon credits", 11 March 2010, < http://www.accc.gov.au/content/index.phtml/itemId/918242/fromItemId/927069 > (last accessed 1 October 2010).

[92] Australian Competition and Consumer Commission (ACCC), "GreenPower retailer breached undertaking", 1 October 2010, < http://www.accc.gov.au/content/index.phtml/itemId/949786 > (last accessed 7 October 2010).

[93] *Australian Competition and Consumer Commission v Global Green Plan Ltd* [2010] FCA 1057, at [6] , [12].

[94] 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 Envtl L Rep 20, 179; and *Natural Resources Defense Council v EPA*, 464 F 3d 1 (CADC, 2006).

[95] 549 US 497, 127 S.Ct. 1438, 167 L.Ed.2d. 248 (2007).

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,*[96] 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.[97] The fact that other States suffered similar injuries did not disqualify Massachusetts.[98]

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 injuries that it cannot be challenged in court.[99] 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."[100]

The Supreme Court found that reducing domestic automobile emissions, a major contributor to GHG concentrations, is "hardly a tentative step".[101]

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.[102]

The Supreme Court's decision in *Massachusetts v EPA* was followed in upholding standing for plaintiffs bringing common law actions, including in nuisance, for climate change induced harms causally connected to the defendants' conduct.[103]

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[96] 504 US 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

[97] *Massachusetts v EPA* 549 US 497, 127 S.Ct. 1438, 167 L.Ed.2d. 248 (2007) at 19-20.

[98] Ibid at 19.

[99] Ibid at 20.

[100] Ibid at 21.

[101] Ibid at 21-22.

[102] Ibid at 22.

[103] See *Connecticut v American Electric Power Co* 582 F 3d 309 (2nd Cir 2009) and *Comer v Murphy Oil* 585 F.3d 855 (5th Cir 2009).

The issue of standing does not present the same procedural barrier in jurisdictions 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.[104] Judicial review of administrative action relating to climate change is thereby facilitated.

B. 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.

C. 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.

In *Massachusetts v EPA*, the US Supreme Court found that the EPA's reading of the applicable statutory provision, s 202(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.[105] The Supreme Court held that the EPA Administrator must determine whether or not emissions of greenhouse gases from new motor vehicles cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare, or whether the science is too uncertain to make a reasoned decision.[106]

In response to the Supreme Court's ruling, in December 2009, the EPA Administrator signed and published two findings regarding GHGs under the *Clean Air Act,* first an endangerment finding and, second, a cause or contribute finding The endangerment finding, is that the current and projected atmospheric concentrations of six, key, well-mixed GHGs—carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride

[104] For example, see *Environmental Planning and Assessment Act 1979* (NSW), s 123.

[105] *Massachusetts v EPA* 549 US 497, 127 S.Ct. 1438, 167 L.Ed.2d. 248 (2007) at 25-26, 29-30.

[106] Ibid at 30 - 31.

(SF_6)— threaten the public health and welfare of current and future generations.[107] The cause or contribute finding, is that the combined emissions of these well-mixed GHGs from new motor vehicles and new motor vehicle engines contribute to the greenhouse gas pollution which threatens public health and welfare.[108] On 1 April 2010, the EPA finalised the light-duty vehicle rule controlling GHG emissions.[109] On 13 May 2010, the EPA issued the final GHG Tailoring Rule, which specifies that beginning in 2011, projects that will increase GHG emissions substantially will require an air permit. Covered facilities include power plants, industrial boilers and oil refineries and are responsible for 70 percent of the GHGs from stationary sources.[110] On 12 August 2010, the EPA proposed two rules to ensure that businesses planning to build new large facilities or make major expansions to existing ones will be able to obtain New Source Review Prevention of Significant Deterioration permits to address GHGs. The EPA has called for public comment on these proposed rules.[111]

D. 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. 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.[112]

E. 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.[113]

Examples of express relevant matters are provisions in local environmental plans requiring consideration of the effect of coastal processes and coastal hazards and

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[107] US Environment Protection Agency, "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act", 74(239) *Federal Register* (15 December 2009), 66496, available at < http://epa.gov/climatechange/endangerment.html > (last accessed 13 October 2010).

[108] Ibid.

[109] US Environment Protection Agency, "Light Duty Vehicle Greenhouse Gas Emissions Standards and Corporate Average Fuel Standards; Final Rule", 75(88) *Federal Register* (7 May 2010), 25324, available at < http://epa.gov/otaq/climate/regulations.htm > (last accessed 13 October 2010).

[110] US Environment Protection Agency, "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule", 75(106) *Federal Register* (3 June 2010), 31514, available at < http://www.epa.gov/NSR/actions.html#may10 > (last accessed 13 October 2010).

[111] US Environment Protection Agency, "EPA Proposes Rules on Clean Air Act Permitting for Greenhouse Gas Emissions", Press Release 12 August 2010, available at < http://epa.gov/climatechange/index.html > (last accessed 13 October 2010).

[112] For example, see Byron Local Environmental Plan 1988, cl 9(3).

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

potential impacts, including sea level rise, on a proposed development or arising from a proposed development.[114]

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,* 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 be considered in the proposed amendment to the planning scheme to facilitate mining coalfields to supply coal for the power station.[115]

In *Gray v Minister for Planning,* the Land and Environment Court of NSW held that GHG emissions from downstream use (burning) of coal mined from the proposed coal mine were relevant matters to be considered in the environmental assessment of the mine[116] and in the Director-General's decision to accept the environmental assessment as adequately addressing the environmental assessment requirements of the Director-General.[117]

In *Walker v Minister for Planning,* 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 for Planning in determining to approve a concept plan for the project under Part 3A of the *Environmental Planning and Assessment Act* 1979 (NSW) (EPA Act).[118] The Court found that the public interest was an impliedly relevant matter to be considered and that ecologically sustainable development (ESD) was an element of the public interest. Consideration of the principles of ESD in the circumstances of the case required consideration of the climate change flood risk to the coastal plain.[119]

On appeal, the New South Wales 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 EPA Act.[120] 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".[121] 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

[114] See Standard Instrument (Local Environmental Plans) Order 2006, cl 5.5 (2).

[115] *Australian Conservation Foundation v Latrobe City Council* (2004) 140 LGERA 100 at [43]-[47].

[116] *Gray v Minister for Planning* (2006) 152 LGERA 258 at [100], [125].

[117] Ibid at [115], [126], [135].

[118] *Walker v Minister for Planning* (2007) 157 LGERA 124 at [166].

[119] Ibid.

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

[121] Ibid at [42].

exercise of powers granted to the Minister, and thus become capable of avoiding decisions".[122] The Court of Appeal held, however, that in 2006, when the Minister made his decision, this was not the situation and hence the Minister's decision could not be avoided on that basis.[123]

In *Aldous v Greater Taree City Council*,[124] the Land and Environment Court dismissed a challenge to the validity of a development consent granted by the local council for the construction of a new dwelling on a beachfront property at Old Bar, near Taree. One of the arguments put forward by the applicant was that the council failed to take into account the principles of ecologically sustainable development, in particular the council failed to take into account or assess climate change induced coastal erosion.

The Court first considered whether the council had an obligation to take into account the principles of ecologically sustainable development when it considered and determined the development application. The application was made under Part 4 of the EPA Act. Section 79C of the EPA Act mandates that a council take into account the public interest when determining whether to grant development consent.[125] Given the decisions in *Walker v Minister for Planning*,[126] and the appeal decision *Minister for Planning v Walker*,[127] as well as international and national case law dealing with this point, Biscoe J concluded that public interest includes the principles of ecologically sustainable development.[128] Biscoe J considered that the issue raised by the Court of Appeal in its decision in *Walker* was one of timing: at the time of the Minister's approval of the concept plan in 2006, not taking ecologically sustainable development into account did not affect the validity of the decision. However, this would not be the case today: due to the growing public perception of ecologically sustainable development, it is plainly an element of the public interest.[129]

After concluding that the principles of ecologically sustainable development were a relevant consideration in the council reaching its decision, Biscoe J considered whether the council did in fact take ecologically sustainable development into account when granting consent for this development. Biscoe J concluded that the council did take coastal erosion and its inducement by climate change into account when reaching its decision. This conclusion was based on, among other things: the fact that the council had a Coastal Management Plan adopted in 1996; that it had sought advice from the Department of Land and Water Conservation on whether the 1996 advice from the Department, that the 100 year coastal line included a best estimate provision for climate change, should be reassessed and had been advised that the advice was still applicable; and that the council had taken steps to prepare a

[122] Ibid at [56].

[123] Ibid.

[124] (2009) 167 LGERA 13.

[125] Ibid at [24].

[126] (2007) 157 LGERA 124.

[127] (2009) 161 LGERA 423.

[128] *Aldous v Greater Taree City Council* (2009) 167 LGERA 13, at [24].

[129] Ibid at [28].

coastal zone management plan for the Old Bar where the property was located.[130] Therefore, this ground of challenge was rejected.[131]

In *Haughton v Minister for Department of Planning and Ors,*[132] the applicant challenged the validity of a concept plan approval granted by the Minister for Planning for two coal-fired power stations. Two grounds of challenge were that the Minister failed to consider mandatory relevant considerations, namely ESD and anthropogenic climate change as an element of the public interest, in approving the project. The matter was heard by the Land and Environment Court in September 2010 and judgment is reserved.

In *Natural Resources Defense Council v Kempthorne,* 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 United States Fish and Wildlife Service.[133]

In *Barbone v Secretary of State for Transport,*[134] the applicants applied to quash a decision of the UK Secretary of State for Transport, accepting the recommendation of a planning inspector, to grant planning permission to increase the permitted annual throughput of passengers and the number of air traffic movements at Stansted airport. The applicants, who opposed the airport expansion project, claimed that the inspector and Secretary of State failed to take into account all the environmental impacts and economic effects of the project, particularly the economic impact of the project on the UK balance of trade, the noise impacts of the project and the greenhouse gas emissions which will result from the implementation of the project.[135] The Administrative Court refused the application, holding that there was no failure to take into account material considerations.[136]

In *R. (on the application of Hillingdon LBC) v Secretary of State for Transport and Transport for London,*[137] the claimants, a group of local authorities and organisations, challenged the legality of the UK Secretary of State for Transport's decision in 2009 to confirm policy support for the construction of a third runway and additional terminal at Heathrow airport. The Government had announced in 2003, in its White Paper, *The Future of Air Transport*, its support for a third runway at Heathrow airport. Subsequently the Government undertook a consultation process, beginning in 2007 and culminating with the 2009 decision.

The claimants challenged the 2009 decision on a number of grounds. One was that there had been a breach of natural justice/legitimate expectation in failing to undertake a fair consultation process in that there were three elements in the final

[130] Ibid at [76]–[77].

[131] Ibid at [78].

[132] Proceedings No 40423 of 2010 and 40424 of 2010 (commenced 3 June 2010) and argued before Justice Craig on 15, 16 and 17 September 2010.

[133] *Natural Resources Defense Council v Kempthorne* 506 F Supp 2d 322 (EDCal, 2007) at 368-370.

[134] [2009] EWHC 463 (Admin); [2009] Env LRD 12.

[135] Ibid at [26], [27].

[136] Ibid at [91].

[137] [2010] EWHC 626 (Admin); [2010] JPL 976.

decision which were not present in the consultation process. Specifically, the final decision proposed a new target for aviation emissions to be capped in 2050 below 2005 levels, an increase in air traffic movements and the introduction of a "green slots" policy to reduce carbon emissions. The claimants claimed these were new factors which produced a fundamentally different decision to that consulted upon.[138] Another ground was that there was a failure to take into account material considerations, including the developments in climate change policy since 2003.[139]

The Administrative Court noted that whilst the claimants' submissions demonstrated the potential significance of developments in climate change policy since 2003, judicial review proceedings were not a suitable forum to resolve this technical debate.[140] Carnwath LJ said that a flaw in the consultation process or failure to take into account a material consideration is unlikely to justify the intervention of the court if it can be remedied at a later stage.[141] The new matters and change in policy would be subject to further statutory consultation and consideration in the process of preparing the new Airports National Policy Statement required under the *Climate Change Act* 2008 (UK).[142] However, the situation would be different if there was a policy or factual consideration which made the proposal so obviously unacceptable that the only rational course would be to abort it altogether.[143] Carnwath LJ held that none of the climate change issues raised by the claimant were of such significance that the only rational response would be to abandon the whole project at this stage.[144]

F. 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.[145]

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.

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[138] Ibid at [28] – [29].

[139] Ibid at [30].

[140] Ibid at [77].

[141] Ibid at [69].

[142] Ibid at [77].

[143] Idid at [69].

[144] Ibid at [78].

[145] 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), s 37A; *National Parks and Wildlife Act 1974* (NSW), s 2A(1); *Water Management Act 2000* (NSW), s 9(1); *Fisheries Management Act 1994* (NSW), s 3(2); and *Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005*, cl 2(1).

G. NON-COMPLIANCE WITH PROCEDURAL REQUIREMENTS

Many planning and environment statutes require, as a precondition 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 & Heritage v Queensland Conservation Council*,[146] 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.[147] 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.[148] In *Gray v Minister for Planning*,[149] both direct and indirect effects of mining and subsequent use of the coal from the proposed coalmine were required to be considered in the environmental assessment.[150]

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*, the EIA for proposed electricity transmission lines was held inadequate for failure to discuss the carbon dioxide emissions from new power plants in Mexico, which would be connected by the proposed electricity transmission lines with the power grid in southern California.[151]

Mid States Coalition for Progress v Surface Transportation Board concerned an EIA for a proposed rail line.[152] 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 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 EIA to be

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[146] (2004) 134 LGERA 272, The Full Federal Court decision upholding Kiefel J's decision is *Queensland Conservation Council Inc v Minister for the Environment & Heritage* [2003] FCA 1463 (19 December 2003).

[147] *Minister for the Environment & Heritage v Queensland Conservation Council* (2004) 134 LGERA 272 at [53]-[55].

[148] Ibid at [60]. See Douglas E Fisher, "The Meaning of Impacts – The Nathan Dam Case on Appeal", 21 *Environmental and Planning Law Journal* (2004), 325; Chris McGrath, "Key Concepts of the Environment Protection and Biodiversity Conservation Act 1995 (Cth)", 22 *Environmental and Planning Law Journal* (2005), 20, at 36; Sommer N, "Queensland Conservation Council Inc v Minister for the Environment and Heritage [2003] FCA 1463 ('Nathan Dam Case')", 9 *Australasian Journal of Natural Resources Law and Policy* (2004), 145.

[149] (2006) 152 LGERA 258.

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

[151] *Border Power Plant Working Group v Department of Energy* 260 F Supp 2d 997 (SD Cal, 2003) at [42].

[152] 345 F 3d 520 (8th Cir, 2003).

inadequate for failure to consider the possible effects of an increase in coal consumption.[153]

In *Center for Biological Diversity v NHTSA*, the EIA 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.[154]

In *Pembina Institute for Appropriate Development v Attorney General of Canada*,[155] the Federal Court of Canada upheld a judicial review challenge to a Joint Review Panel's report on the EIA 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.[156]

2. CIVIL ENFORCEMENT

Private citizens and non-governmental organisations may also take citizen actions to enforce compliance with environmental laws to require mitigation of or adaptation to climate change.

In *Gray v Macquarie Generation,*[157] the applicants, who were two members of a climate change activist group, Rising Tide, brought proceedings pursuant to an open standing provision to enforce pollution laws so as to require mitigation of GHG emissions from the coal-fired, Bayswater power station. They sought a declaration that the operator of the power station, Macquarie Generation, was disposing of waste, namely by emitting carbon dioxide into the atmosphere, without a valid environment protection licence and in a manner likely to harm the environment in contravention of s 115(1) of the *Protection of the Environment Operations Act* 1997 (NSW). Furthermore, the applicants contended that even if the Court found that the respondent held a valid licence and lawful authority to emit carbon dioxide, that authority did not extend to the emission of carbon dioxide in a manner that did not have reasonable regard and care for the interests of other persons and the environment.[158] In support of this argument the applicants relied on *Van Son v Forestry Commission of NSW,*[159] a case where it was held there was no implied statutory immunity for nuisance resulting from activities permitted by statutory schemes for forestry management and water pollution.

The respondent filed a motion for summary dismissal of the proceedings on the basis that no reasonable cause of action was disclosed. The Land and Environment Court

[153] Ibid at [29].

[154] *Center for Biological Diversity v NHTSA* 508 F 3d 508 (9th Cir, 2007) at [20]-[22].

[155] 2008 FC 302 (5 March 2008),

[156] Ibid at [73]-[75], [78], [79].

[157] [2010] NSWLEC 34

[158] Ibid at [41].

[159] (1995) 86 LGERA 108, at 129 - 130.

of NSW dismissed the applicants' claim that carbon dioxide was waste requiring regulation under the statutory scheme and that the respondent lacked the lawful authority to emit carbon dioxide without a valid licence.[160] However, on the additional nuisance ground of the applicants' claim, the Court held it was not satisfied that the respondent had demonstrated that no reasonable cause of action existed and hence summary dismissal was not warranted.[161]

In the *Vaughan v Byron Shire Council* cases,[162] the owners of a beachfront lot on Belongil Spit at Byron Bay attempted to rebuild an interim sandbag wall originally constructed by the local council, which had been destroyed by strong storms and elevated ocean water levels. The interim wall protected the owners of property from coastal erosion. The owners' intention was to rebuild the wall using rocks. The council sought an interlocutory injunction restraining the owners from rebuilding the wall.[163] The council argued that since 1988 it had had a policy of planned retreat.[164] The policy consisted of restricting development in some coastal areas within certain distances of the erosion escarpment and requiring that development be relocatable so that it could be removed as erosion moves landward, rather than preventing development altogether.[165] The council also relied on expert evidence that the structure would cause damage to other properties it had not protected by exacerbating existing downdrift erosion impact, and that the structure would also impede access to the beach.[166]

The owners, in turn, sought orders against the council to enforce the development consent that the council had issued to itself in 2001 to build the interim sandbag wall. The owners sought an order that the council rebuild the sandbag wall that had been destroyed.

The Land and Environment Court upheld the council's action and granted an interlocutory injunction that the owners cease rebuilding the interim wall.[167] The parties later agreed to vary the interlocutory injunction, so as to allow the owners to rebuild the wall using geobags and sand.[168] The case was ultimately settled and did not proceed to final hearing.

3. 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.

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160 *Gray v Macquarie Generation* [2010] NSWLEC 34, at [58], [60].

161 Ibid at [62] - [67].

162 *Byron Shire Council v Vaughan; Vaughan v Byron Shire Council* [2009] NSWLEC 88 and *Byron Shire Council v Vaughan; Vaughan v Byron Shire Council (No 2)* [2009] NSWLEC 110.

163 *Byron Shire Council v Vaughan; Vaughan v Byron Shire Council* [2009] NSWLEC 88 at [1].

164 Ibid at [4].

165 Ibid at [4].

166 Ibid at [6].

167 *Byron Shire Council v Vaughan; Vaughan v Byron Shire Council* [2009] NSWLEC 88 at [18].

168 Noted in *Byron Shire Council v Vaughan; Vaughan v Byron Shire Council* [2009] NSWLEC 110 at [6], [16].

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*,[169] 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,*[170] 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*,[171] 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. The Tribunal recognised that the relevant planning provisions did not contain specific consideration of sea level rises, coastal inundation and the effects of climate change unlike in other States of Australia.[172] In this policy vacuum, the Tribunal applied the precautionary principle and refused to grant the permits for the development.[173]

Subsequently, a General Practice Note titled "Managing Coastal Hazards and Coastal Impacts of Climate Change" has been introduced and incorporated into all of the State's planning schemes.[174] The amendments incorporated Clause 15 into the State Planning Policy Framework, which requires decision makers to apply the precautionary principle to planning and management decisions when considering the risks associated with climate change. This provision has influenced the outcome of subsequent merits decisions in the Tribunal.[175]

In *Myers v South Gippsland Shire Council (No 1),*[176] a case where the applicant sought approval for the subdivision of coastal land in a residential area into two lots, the Tribunal found that there was insufficient information before the Tribunal to adequately assess the impact of climate change on the proposed development and

[169] [2006] QPEC 95 (25 August 2006).

[170] [2007] SAERDC 50 (19 September 2007).

[171] [2008] VCAT 1545 (29 July 2008).

[172] Ibid at [35].

[173] Ibid at [48].

[174] Victoria Government Gazette, 'Notice of Approval of Amendment VC52 to Victoria Planning Provisions under *Planning and Environment Act* 1987 (Vic)', 18 December 2008, at 3043.

[175] See discussion in Hon. Kevin Bell, "The precautionary principle: what is it and how do courts use it to protect the environment?", presentation held at Environment Defenders Office Victoria Seminar Series 2010 "Precautionary Principle", Melbourne, 13 July 2010, at 15 - 16; and Simon R. Molesworth, "The extent to which Environmental Courts are responding to climate change by adopting a precautionary approach", presentation held at 5th World Bar Conference, Sydney, 4 April 2010, at 15 – 22.

[176] [2009] VCAT 1022 (22 June 2009).

the permit applicant was required to prepare a coastal hazard vulnerability assessment.[177]

In *Myers v South Gippsland Shire Council (No 2),*[178] the Tribunal considered the same development following the submission of the coastal hazard vulnerability assessment by the applicant. The assessment revealed that by the year 2100 without mitigation work, which neither the applicant nor the council was prepared to undertake, there would be no dune, no road and therefore no access and the site would be inundated by storm surges.[179] The Tribunal concluded that without a specific local policy or planning scheme in place to address such issues the project could not be approved as to grant a permit in these circumstances would consent to a poor planning outcome that would unnecessarily burden future generations.[180]

In *Ronchi v Wellington Shire Council,*[181] a matter involving an application for the construction of two, double-storey dwellings situated between a creek reserve and coastal sand dunes, the Tribunal considered the effect of the amendments to the State Planning Policy Framework. The Tribunal held that the amendments elevated climate change considerations in the planning scheme in a way that placed a greater onus on developers to respond to climate change in the design of new proposals.[182] Following the decision in *Myers (No 1),*[183] the Tribunal held that it was not acceptable to approve the proposed development without first requiring the applicant for the development to prepare a coastal hazard vulnerability assessment.[184]

A similar approach was adopted in *Owen v Casey City Council*[185] where the Tribunal was asked to consider the preliminary question of whether a coastal hazard vulnerability assessment was required. The Tribunal concluded it was.[186] In *Cooke v Greater Geelong City Council,*[187] the Tribunal indicated it was not prepared to approve otherwise meritorious developments without resolution of the potential implications of climate change. Accordingly, the Tribunal provided the opportunity for the applicant to prepare and submit a coastal hazard vulnerability statement for the sites.[188]

In *Taip v East Gippsland Shire Council*,[189] a case involving the review of a permit for residential development in the coastal zone, the Tribunal held that it was an insufficient design response to the totality of climate change impacts to rely simply on raising the level of the proposed dwellings above the projected flood and sea levels

[177] Ibid at [32].

[178] [2009] VCAT 2414 (19 November 2009).

[179] Ibid at [30].

[180] Ibid, at [31].

[181] [2009] VCAT 1206 (16 July 2009).

[182] Ibid at [18].

[183] *Myers v South Gippsland Shire Council* [2009] VCAT 1022 (22 June 2009).

[184] *Ronchi v Wellington Shire Council* [2009] VCAT 1206 (16 July 2009), at [20] – [21].

[185] [2009] VCAT 1946 (25 September 2009).

[186] Ibid at [19].

[187] [2010] VCAT 60 (20 January 2010).

[188] Ibid at [81].

[189] [2010] VCAT 1222 (28 July 2010).

expected under climate change.[190] This did not address access to the dwellings for future users of the site and emergency personnel, which access would be vulnerable to gradually increasing water levels,[191] or the effect of storm surges.[192] The Tribunal concluded that the permit had been granted without a full and proper consideration of the risks and hazards from sea level rise and other climate change impacts, and held that the permit should not issue.[193]

The Victoria Civil and Administrative Tribunal has also considered the effects of climate change on water supplies in exercising its jurisdiction to review groundwater licence applications. In *Alanvale Pty Ltd v Southern Rural Water Authority*,[194] the Tribunal held that there was a risk in over allocating groundwater resources and potential for serious or irreversible environmental damage as a result. The Tribunal considered the biggest factor influencing the risk of over allocating groundwater resources is the effect of climate change on rainfall.[195]

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

In *Genesis Power Ltd v Franklin District Council*,[196] the New Zealand Environment Court granted land use consent for 18 wind turbines on a scenic peninsula south of Auckland. Although the Court found there would be adverse effects on the natural character and landscape of the coastal environment, as well as other impacts, there were numerous countervailing positive effects, which were underlaid by the national interest, associated with renewable energy.[197] The Court noted recent legislative amendments to the *Resource Management Act* 1991 (NZ) to include explicitly the effects of climate change and the benefits to be derived from the use and development of renewable energy. This was a clear recognition by Parliament of both the importance of the use and development of renewable energy and the need to address climate change, both of which were key elements in the proposed wind farm.[198]

The Court rejected an argument that the contribution of the proposed wind farm to reduce greenhouse gas emissions would be "de minimus".[199] The Court cited with approval the report of the national board of inquiry into the Stratford power station in 1995 which addressed and rejected this specific argument, that because the world's CO_2 emission are composed of a greater number of small emissions, the effect of any one of them should be discounted. That is the reason for the UN Framework Convention on Climate Change, that all parties, and at least as many countries as

[190] Ibid at [60] – [61].

[191] Ibid at [62].

[192] Ibid at [68].

[193] Ibid at [114] – [119].

[194] [2010] VCAT 480 (21 April 2010).

[195] Ibid at [157].

[196] [2005] NZRMA 541.

[197] Ibid at [212].

[198] Ibid at [220].

[199] Ibid at [222] – [226].

possible, should address the problem together. Without united efforts towards addressing climate change, the situation becomes another example of what the economist Garrett Hardin called the "tragedy of the Commons" in his famous article bearing that title. Each emitter of CO_2 should be responsible for the global effects in proportion to its contribution to global emissions.[200]

The Court concluded that the benefits of the proposal, when seen in the national context, outweigh the site-specific effects, and the effects of the local surrounding area.[201]

In *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd*,[202] the Land and Environment Court of New South Wales approved a large wind farm in the Southern Highlands region of New South Wales. 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.[203] The Court noted that increasing the supply of renewable energy involved promoting sustainable development, including intergenerational equity.[204] On balance, the Court concluded that "the overall public benefits outweigh any private disbenefits either to the Taralga community or specific landowners".[205]

In a similar case, *Perry v Hepburn Shire Council*, the Victorian Civil and Administrative Tribunal also approved a wind farm at Leonards Hill, in the Daylesford mineral spa district in inland Victoria.[206] 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".[207] The Tribunal considered the benefits of renewable energy outweighed the adverse visual, noise and other impacts of the wind farm, with the result that a permit should be issued for the proposal.[208]

In *Derbyshire Dales District Council v Secretary of State for Communities and Local Government,*[209] a planning inspector had allowed an appeal by a wind energy company against the council's refusal of, and instead granted planning permission for, four wind turbine generators, a substation, access tracks and ancillary

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[200] Ibid at [223].

[201] Ibid at [228].

[202] (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).

[203] *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* (2007) 161 LGERA 1 at [3].

[204] Ibid at [73], [74].

[205] Ibid at [352].

[206] (2007) 154 LGERA 182.

[207] *Perry v Hepburn Shire Council* (2007) 154 LGERA 182 at [27].

[208] Ibid at [160] – [162].

[209] [2009] EWHC 1729 (Admin); [2010] 1 P & C R 19.

equipment. The inspector considered, amongst other matters, the potential contribution the proposal would make in achieving regional and national strategic targets for renewable energy generation and weighed such contribution against any adverse impacts in terms of other issues.[210] The inspector rejected the council's argument that renewable energy targets were immaterial to the determination of an individual planning application.[211] The inspector concluded that the adverse impacts the proposal would have on landscape and conservation were limited in nature and extent and were outweighed by the benefits of the renewable energy that would be supplied. Although the contribution to achieving regional and national targets for renewable energy generation would be modest, it would be by no means trivial. The inspector noted that "it is only by a succession of such individual proposals, of varying scales, that targets can be achieved".[212]

The council applied under s 288 of the *Town and Country Planning Act* 1990 (UK) to quash the decision of the Secretary of State by his planning inspector. The Administrative Court dismissed the council's application, finding no error of law in the inspector's reasoning.[213] Carnwath LJ noted that it had been common ground in the appeal before the inspector that the national renewable energy policy was a matter to be balanced against any harm the proposal might cause, that there was a shortfall of renewable energy sources judged by reference to regional targets and that the renewable energy output from the proposal should be given significant weight in determining the planning application.[214] The council argued, however, that the renewable energy targets were not relevant to individual planning applications. This submission was based on a sentence in a paragraph in a recent policy statement on planning and climate change. The inspector dealt with the council's submission, but adopted what he regarded as a rational reconciliation of the apparent conflict in the policy statement.[215] Carnwath LJ found no legal objection to the inspector's approach.[216]

V. 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 (Article 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.[217] In Pakistan, the constitutional right to life (Article 9) has been held to include a right to have a clean

[210] Ibid at [3].

[211] Ibid at [8].

[212] Ibid at [9].

[213] Ibid at [43].

[214] Ibid at [38], [42].

[215] Ibid at [40], [42].

[216] Ibid at [42].

[217] *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.

atmosphere and unpolluted environment.[218] In Kenya, the constitutional right not to be deprived of life save by court sentence (s 71(1)) has been held to include a denial of a wholesome environment in which to live.[219] In the Philippines, the right to a balanced and healthful ecology in accord with the rhythm and harmony of nature (Article II, s 16) has been held to be a deduction from, if not a reiteration of, the constitutional right to life provision (Article III, s 1).[220]

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.[221]

While there have been a number of actions, based on constitutional rights to life, addressing the effects of air pollution,[222] there has not yet been litigation focused on GHG emissions or climate change, although there is the potential.[223]

VI. 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),[224] and the *American Convention on Human Rights*, before the Inter-American Commission for Human Rights (IACHR).

1. ECtHR DECISIONS

There have been four 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.

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

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

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

221 See Philip Alston (ed), *Human Rights Law* (Dartmouth: Aldershot, 1996), at xii-xiii, and for an international human rights perspective see Henry Steiner, Philip Alston and Ryan Goodman (eds), *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (Oxford: Oxford University Press, 2008), at 58-59.

222 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).

223 Laura Horn, "Climate Change Litigation Actions for Future Generations", 25 *Environmental and Planning Law Journal* (2008), 115 at 131.

224 Similar cases, based on the European Convention for Human Rights (EHCR), 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 Handelgesellschaft mbH v Einfuhrund Vorratselle 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.

In *Lopez Ostra v Spain*,[225] the applicant lived metres away from and suffered for three 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 Article 8 (right to respect for private and family life) in that the authorities did not strike a fair balance between the town's need for a sewerage plant and the applicant's right under Article 8.[226] 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.[227]

In *Fadeyeva v Russia,*[228] 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 wellbeing due to the State's failure to protect her private life and home from severe environmental nuisance from the plant, in violation of Article 8 of the Convention. The ECtHR held that while the Convention does not contain a right to nature preservation as such, Article 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.[229] The ECtHR held Russia to be in breach of Article 8 and awarded damages and costs.[230]

In *Okyay v Turkey*,[231] 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 Article 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 Article 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 Article 6 and awarded the applicants compensation.[232]

[225] (ECHR judgment of 9 December 1994, Series A No 303).

[226] Ibid at [58].

[227] Ibid at [56].

[228] (Application No 55723/00, ECHR 2005-IV).

[229] Ibid at [80], [84], [86].

[230] Ibid at [134], [138], [149]- [150].

[231] (Application No 36220/97, ECHR 2005-VII).

[232] Ibid at [74] – [75], [79].

In *Giacomelli v Italy*,[233] a case involving a complaint about noise and emissions from a waste treatment plant that processed hazardous waste, the applicant, who lived 30 metres from the plant, sought damages and to have the facility closed down. The applicant complained that the persistent noise and harmful emissions from the plant constituted a severe disturbance of her environment and a permanent risk to her health and home in breach of Article 8 of the Convention.[234] The company operating the plant had been granted an operating licence in 1982 to treat non-hazardous waste and then a further authorisation in 1989 to treat harmful and toxic waste. Neither of these decisions were preceded by appropriate environmental investigation and the company was not required to carry out an environmental impact assessment until 1996. On two occasions the Ministry of the Environment found that the plant's operations were incompatible with environmental regulations. In addition, a Regional Administrative Court had held that the plant's operation had no legal basis and should be suspended immediately. However, the administrative authorities did not at any time order the closure of the facility.[235]

The ECtHR held that Article 8 may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure to regulate private-sector activities properly. The Court must ensure that a fair balance is struck between the interests of the community and the individual's right to respect of the home and private life.[236] The ECtHR held that this individual right is not confined to concrete or physical breaches, such as unauthorised entry into a person's home, but also those that are not concrete or physical, such as noise, emissions, smells or other forms of interference.[237] After considering the actions of the administrative authorities, the ECtHR concluded that the State did not succeed in striking a fair balance between the interest of the community in having a plant for the treatment of toxic industrial waste and the applicant's effective enjoyment of her right to respect for her home and private and family life.[238] The ECtHR therefore found a violation of Article 8.

2. 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.[239]

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[233] (Application No 59909/00, ECHR 2006-XII).

[234] Ibid at [68].

[235] Ibid at [89] – [92].

[236] Ibid at [82].

[237] Ibid at [76].

[238] Ibid at [97].

[239] Earthjustice, "Nobel Prize Nominee Testifies about Global Warming", 1 March 2007, <http://www.earthjustice.org/news/press/007/nobel-prize-nominee-testifies-about-global-warming.html> (accessed on 28 July 2010).

VII. INTERNATIONAL LAW

1. 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 arbitration[240] 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 dispersed over a number of European States harming human health and damaging ecosystems;[241] and
(c) haze from Indonesian forest fires noticeable in a number of neighbouring countries and going as far as Australia in 1999.[242]

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 and the European Court of Justice.

2. INTERNATIONAL COURT OF JUSTICE

The International Court of Justice (ICJ), the judicial body of the United Nations, has an important role in shaping the law of this area. It first held, in the 1949 *Corfu Channel case*,[243] that a State has a duty "not to allow knowingly its territory to be used for acts contrary to the rights of other states".[244] 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.[245] 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.

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[240] *Trail Smelter case* (United States v 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 tonnes of sulphur were emitted from the smokestacks of the smelter.

[241] Devereaux McClatchey, "Chernobyl and Sandoz One Decade Later: The Evolution of State Responsibility for International Disasters, 1986-1996", 25 *Georgia Journal of International and Comparative Law* (1996), 659.

[242] Alan Khee-Jin Tan, "Forest Fires of Indonesia: State Responsibility and International Liability", 48 *International and Comparative Law Quarterly* (1999), 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) at 218-226, 233-239.

[243] *Corfu Channel case* (UK v Albania) 1949 ICJ 4 (1949).

[244] McClatchey, *Chernobyl and Sandoz One Decade Later*, supra, note 241, at 664.

[245] Ibid, at 665.

The ICJ has not had many opportunities to decide on environmental matters. The main cases so far[246] have stopped short of giving a detailed exposition on environmental law.[247]

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*,[248] the Pacific Island-State of Tuvalu threatened to take action in the ICJ against countries who have not ratified the treaty.[249] 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.[250] 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.[251] 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.[252]

Alternatively, the parties have to agree to bring the dispute before the court,[253] which is not always a likely outcome on issues as sensitive as GHG emissions constituting a violation of international environmental law.[254] Finally, parties can agree to bring disputes before the ICJ under a treaty which is in effect between them.[255] In Tuvalu's case, its only treaty with the United States, the *Treaty of Friendship*,[256] does not contain such a clause.

3. 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:

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246 Judgment in the *Case Concerning the Gabcíkovo-Nagymaros Project* (Hungary v Slovakia) 1997 ICJ 3 (September 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 (September 22).

247 Philippe Sands, "International Environmental Litigation and Its Future", 32 *University of Richmond Law Review* (1999), 1619, at 1633.

248 Australia subsequently ratified the Kyoto Protocol on 3 December 2007.

249 For more articles on Tuvalu and global warming, see < http://www.tuvaluislands.com/warming.htm> (accessed on 28 July 2010).

250 *Statute of the International Court of Justice*, Arts 34(1) and 35(1).

251 *Statute of the International Court of Justice*, Art 36.

252 Andrew Strauss, "The Legal Option: Suing the United States in International Forums for Global Warming Emissions", 33 *Environmental Law Reporter* (2003), 10185, at 10185-10186.

253 *Statute of the International Court of Justice*, Art 36(1).

254 Strauss, *The Legal Option*, supra, note 252, at 10186.

255 Ibid.

256 *Treaty of Friendship between the United States of America and Tuvalu* 2011 UNTS 79 (signed 9 February 1979, entered into force 23 September 1983), <http://untreaty.un.org/unts/120001_144071/27/3/00022289.pdf > (accessed on 28 July 2010).

> "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:
> …
> (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.[257] In the shrimp/turtle dispute,[258] 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.[259] 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 Article 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.[260]

4. 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*.[261] This body has also seen some environmental-related litigation.[262] 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*

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[257] 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* (European Communities – 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)); *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)); and *Australia - Apples case* (Australia – Measures affecting the importation of apples from New Zealand) WT/DS367 (Panel Report on 9 August 2010, appeal by Australia on 31 August 2010, appeal by New Zealand 13 September 2010).

[258] Unites States – Import prohibition of certain shrimp and shrimp products, WT/DS58/AB/R. Appellate body report adopted on 6 November 1998.

[259] Sands, *International Environmental Litigation and Its Future*, supra, note 247, at 1635-1636.

[260] William Burns, "The Exigencies that Drive Potential Causes of Action for Climate Change at the International Level", 98 *American Society for International Law Proceedings* (2004), 223, at 227.

[261] Strauss, *The Legal Option*, supra, note 252, at 10188 and, drawing on that article, see also Burns, *The Exigencies that Drive Potential Causes of Action for Climate Change*, supra, note 260.

[262] *Southern Bluefin Tuna Cases* (Australia v Japan; NZ v Japan) (1999).

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 oceans,[263] which means that they, and consequently, the commercial fisheries sector, may be profoundly affected by climate change.[264] 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.[265] 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.[266] 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.

5. 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 have 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"[267] 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.[268] The sites covered in the petitions are the Waterton-Glacier International Park (USA/Canada), Sagarmatha National Park (Nepal), Belize Barrier Reef Reserve System (Belize), Huascaran National Park (Peru), and the Great Barrier Reef (Australia).[269]

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

[263] William Burns, "A Voice for the Fish? Litigation and Potential Causes of Action for Impacts under the United Nations Fish Stocks Agreement", 48 *Santa Clara Law Review* (2008), 605, at 617.

[264] Ibid, at 607.

[265] Ibid, at 608.

[266] Ibid, at 635-636.

[267] *Convention Concerning the Protection of the World Cultural and Natural Heritage* 15 UNTS 511, Art 4 (Opened for signature 16 November 1972, entered into force 17 December 1975).

[268] Erica Thorson et al. "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", 16 February 2006, <http://legacy.lclark.edu/org/ielp/objects/Waterton-GlacierPetition2.15.06.pdf > (accessed on 28 July 2010) at vii-viii.

[269] Meltz, *Report for Congress*, supra, note 4, at 30.

their findings in regards to the effects of climate change on world heritage sites.[270] At the following session, in 2006, the Committee limited itself to endorsing the "Strategy to assist State Parties to implement appropriate management responses"[271] and requested that State parties implement the strategy.[272] The strategy refers generally to mitigating 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 taken,[273] to the disappointment of the petitioners.[274]

6. EUROPEAN COURT OF JUSTICE

The European Parliament and Council of the European Union has issued directives establishing and extending a GHG emissions trading scheme (ETS) in the European Community. Disaffected polluters have brought various proceedings challenging the whole or aspects of the directives and decisions of EU countries implementing the directives. The primary directive is Directive 2003/87/EC establishing the scheme for greenhouse gas emission allowance trading within the European Community. Arcelor, a large producer of pig iron and steel in France, Spain, Germany and Belgium, has brought a series of litigation challenging Directive 2003/87/EC and its implementation by Member States.

Arcelor first sought judicial review of a decision by the French government not to repeal the decree implementing Directive 2003/87/EC in France in so far as it applied to installations in the steel sector. Arcelor argued that certain provisions infringe its fundamental rights to property and the freedom to pursue an economic activity by requiring it to operate its plants under unsustainable economic conditions. Arcelor also argued that there was a breach of the principle of equal treatment in that other sectors in direct competition with Arcelor and with comparable or higher greenhouse gas emissions, such as producers of non-ferrous metals and chemicals, were not subject to the Directive.

The French Conseil d'Etat dismissed Arcelor's application except for the allegation in breach of the principle of equal treatment, which it considered was a challenge to the Directive itself rather than the legality of its implementation. The Conseil d'Etat referred the issued of equal treatment to the European Court of Justice (ECJ).[275]

The ECJ (Grand Chamber) held that the European Community legislature did not infringe the principle of equal treatment by treating comparable situations differently

[270] 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.

[271] 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.

[272] 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.

[273] World Heritage Committee, "Strategy to Assist State Parties to Implement Appropriate Management Responses", WHC-06/30.COM/7.1 (adopted on 17 July 2006) pp 1-2 at §B.9 and §C.10.

[274] See Climate Justice, "World Heritage Committee Fails to Act", 20 July 2006, <http://www.climatelaw.org/cases/country/intl/unescobelize/2006Jul20/ > (accessed 28 July 2010).

[275] *Societe Arcelor Atlantique et Lorraine and Others v Premier ministre and Others* (Conseil d'Etat, 8 February 2007, Case no. 287110).

when it excluded the chemical and non-ferrous metal sectors from the scope of Directive 2003/187/EC.[276]

Arcelor also brought proceedings in the Court of First Instance of the ECJ seeking partial annulment of Directive 2003/87/EC to the extent it applied to installations for the production of pig iron and steel as well as compensation for the damaged suffered by Arcelor following the adoption of the Directive. The Court of First Instance held that Arcelor was not individually or directly concerned by the contested provisions of the Directive within the meaning of the fourth paragraph of Article 230 EC (the European Community Treaty) and Arcelor's application for annulment of the contested provisions of the Directive was inadmissible.[277]

The Court of First Instance did, however, rule that Arcelor's application for damages was admissible.[278] Nevertheless, in order for the damages application to succeed, Arcelor had to show a sufficiently serious breach of a rule of law which is intended to confer rights on individuals.[279] The Court of First Instance found that the contested provisions of the Directive cannot infringe Arcelor's right to property or its freedom to pursue an economic activity, or even that that alleged infringement was capable of causing it damage.[280] The Court also rejected Arcelor's plea of illegality based on a sufficiently serious breach of the principle of equal treatment, relying on the reasoning of the ECJ in the earlier case.[281] Finally, the Court rejected Arcelor's plea of illegality that the contested provisions of the Directive disproportionately restricted its freedom of establishment under the first paragraph of Article 43 EC.[282] The Court held the restrictions arose not from the Directive but from national rules made pursuant to the Directive.[283]

The European Parliament and Council of the European Union has also issued a directive, Directive 2008/101/EC, bringing aviation activities of aircraft operators operating flights arriving at and departing from European Community aerodromes within the European Union ETS. Member States were to bring into force laws, regulations and administrative provisions necessary to comply with the 2008 Directive by 2 February 2010. The United Kingdom made the Aviation Greenhouse Gas Emissions Trading Scheme Regulation 2009 to give effect to the 2008 Directive. Flights from and to the United States which arrive and depart from Community aerodromes would be covered by the 2008 Directive and Regulations.

A United States air transport association has brought judicial review proceedings in the UK challenging the lawfulness of the Regulation and the 2008 Directive underlying the Regulations. Amongst the grounds of challenge is the allegation that the 2008 Directive and Regulations contravene the Convention on International Civil

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[276] *Societe Arcelor Atlantique et Lorraine and Others v Premier ministre and Others* [2008] ECR I-9895, (Case C-127/07, 16 December 2008) at [73], [74].

[277] *Arcelor SA v European Parliament and others*, (Case T-16/04, 2 March 2010) at [122].

[278] Ibid at [138].

[279] Ibid at [141].

[280] Ibid at [158], [160].

[281] Ibid at [168] – [171].

[282] Ibid at [192].

[283] Ibid at [190].

Aviation (Chicago Convention). The matter was proposed to be referred to the ECJ. However, before it was referred, a number of organisations, including a coalition of five environmental organisations,[284] applied for and the Administrative Court granted leave to intervene in the proceedings.[285]

VIII. 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.[286] Another important effect of litigation is that such actions raise the defendants' and the public's awareness of the implications of climate change[287] and, sometimes, solutions are reached at a much faster pace by commencing proceedings.[288]

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.

[284] Three US-based organisations, Environmental Defense Fund, Earthjustice and the Center for Biological Diversity, as well as WWF UK, Transport & Environment, and the Aviation Environment Federation in Europe.

[285] *R (on the application of Air Transport Association of America Inc) v Secretary of State for Energy and Climate Change* [2010] EWHC 1554 (Admin).

[286] Sax, *Defending the Environment*, supra, note 3, at xviii, 152. See also Preston BJ, "The Role of Public Interest Environmental Litigation" 23 *Environmental and Planning Law Journal* (2006), 337, at 339.

[287] Benjamin Harper, "Climate Change Litigation: The Federal Common Law of Interstate Nuisance and Federalism Concerns", 40 *Georgia Law Review* (2006), 661, at 697.

[288] See, for example, Harper, *Climate Change Litigation,* ibid, at 697.