The Challenges Facing Plaintiffs and Applicants for Review in Climate Change Litigation and Whether They Can Be Overcome in the Future

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1. Introduction

As quickly as the public's attention was drawn to the issue of 'climate change',[1] 'climate change litigation' has been acknowledged as an emergent body of law in its own right.[2] In the short time climate change litigation has been available to plaintiffs and applicants for review; it has already contributed to achieving sustainable development, the overarching objective of environmental legal systems.[3] It is evident from recent case law and legal scholarship however, that even with a strong plaintiff and a weak defendant, the prospect of a successful public interest claim is limited.[4]

In the context of climate change litigation, public interest claims will generally take one of two forms. The first are claims by private individuals to enforce laws which protect the environment. This requires the plaintiff or applicant to submit evidence which proves their case in order to obtain a remedy.[5] The second are claims against government decisions regarding matters which affect climate change by either merits or judicial review. Merits review requires that administrative decisions are correct and preferable.[6] Judicial review requires that administrative decisions are legal pursuant to the relevant statute and common law concepts.[7]

For the purposes of this paper, a plaintiff refers to a '... person who seeks relief against any other person by any form of proceedings in a court'.[8] An applicant refers to 'the person or persons making an application'.[9] This is equal to a plaintiff in a state jurisdiction, as opposed to the Federal Court.[10] To review in law, means to examine an '... administrative decision by a higher authority'.[11] Matters involving plaintiff's and applicant claims or administrative actions fall within the scope of public interest litigation, which is litigation by a private individual for the benefit the public.[12]

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[1] See for example David Guggenheim, *An Inconvenient Truth* (2006) Climate Crisis <http://www.climatecrisis.net> at 18 April, 2009.

[2] Rosemary Lyster, 'Chasing Down the Climate Change Footprint of the Private and Public Sectors: Forces Converge' (2007) 24 *Environmental and Planning Law Journal* 281, 281.

[3] Chris McGrath, 'Flying foxes, dams and whales: Using federal environmental laws in the public interest' (2008) 25 *Environmental and Planning Law Journal* 324, 324.

[4] See generally Shi-Ling Hsu, 'A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit' (2008) 78 *University of Colorado Law Review* 701.

[5] Chris McGrath, above n 3, 329.

[6] Administrative Review Council, *What Decisions Should be Subject to Merit Review?* (1999) Australian Government, Attorney General's Department <http://www.ag.gov.au/agd/www/archome.nsf> at 18 April, 2009.

[7] See generally Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (3rd ed, Sydney: Lawbook Co., 2004).

[8] Peter Butt (ed), *Concise Australian Legal Dictionary* (3rd ed, Sydney: Butterworths, 2004) 330.

[9] Butt, above n 8, 26.

[10] Butt, above n 8, 26.

[11] Butt, above n 8, 380.

[12] *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 at 477.

This paper will discuss the challenges facing plaintiffs and applicants for review in climate change litigation. In doing this, it will examine:

- the costs involved in litigation;
- the lack of adequately broad-standing provisions available to plaintiffs and applicants; and
- the difficulties in establishing causation.

In addition, this paper will discuss whether these challenges have been, can or will be overcome in the future.

2. Costs

The significant costs involved in litigation present a major challenge for plaintiffs and applicants in climate change litigation. In an address, Toohey J commented, 'there is little point in opening the doors to the courts if litigants cannot afford to come in'.[13] 'Costs' refers to the legal expenses incurred during litigation.[14] They can generally be divided into two categories; those associated with bringing the action, and those paid by the losing party to cover the winning party's legal costs at the conclusion of the litigation.

The costs associated with bringing an action include filing fees, solicitor and counsel fees, expert witness fees and other general fees such as research and photocopying.[15] The extent of these costs will depend on which court the action is brought in. The vast majority of public interest litigation however, is brought before the Federal Court. To give some indication of significance of the costs, the filing fee alone in this court is $1,762.[16]

In landmark cases, assistance has been offered to public interest litigants in bringing actions. Solicitors, counsel and expert witnesses have offered their expertise on a pro bono basis.[17] Outside of such cases however, little assistance is offered. It has been suggested that government funding for public interest environmental cases should be made available on a national level. There has been support for this previously[18] and in New South Wales litigants can apply for Legal Aid to bring an action regarding climate change.[19]

Parties who lose actions may be liable to pay the winning party's legal costs, or a portion thereof, at the conclusion of the litigation. The effect of this is that most conservation organisations are unwilling to take on the risk of having to pay such costs[20] and therefore defer their opportunity to bring an action in the first place.[21] This is especially true since the *Wildlife Whitsunday*[22] case

[13] Quoted in Paul Stein, 'The Role of the NSW Land and Environment Court in the Emergence of Public Interest Environmental Law' (1996) 13 *Environmental and Planning Law Journal* 179, 180.
[14] Bernard Cairns, *Australian Civil Procedure* (7th ed, Sydney: Lawbook Co., 2007) 491.
[15] Chris McGrath, above n 3, 335.
[16] *Federal Court of Australia Regulations 2004* (Cth) reg 4(1)(a).
[17] Chris McGrath, above n 3, 335.
[18] See generally John Bragg, 'Community Litigants in the Queensland Planning and Environmental Legal System' (2006) 12(54) *Queenslander Environmental Practice Reporter* 79.
[19] See generally David Mossop, 'The Justice Statement: A Mixed Bag for Environmental Law' (1995) 12 *Environmental and Planning Law Journal* 237.
[20] Kristy Ruddock, *Does Climate Change Litigation Work* (2007) Environmental Defender's Office <http://www.edo.org.au/edonsw/site/pdf/presentations/cc_litigation071019.pdf> at 19 April 2009.
[21] Ruddock, above n 20.

where costs were awarded against the conservation organisation. Evidently, they were unable to pay the costs which amounted to over $300,000 and as a result, they voluntarily wound up their organisation.[23]

The *Gunns Pulp Mill*[24] and the *Blue Wedges*[25] cases offer some hope to public interest litigants in regards to the issue of costs orders. In these cases, the court exercised their discretion not to order costs against the public interest litigants even though they lost. However, the courts are generally reluctant to not award costs against public interest litigants.[26] As such, it has been suggested that a public interest environmental litigation fund could be established.[27] Such a fund would be reliant on public donations. Similar concepts have been put into practice in Canada and the US and have proved useful.[28]

3. Standing

The lack of adequately broad-standing provisions available to public interest litigants is a major obstacle in climate change litigation. Standing is concerned with the relationship between the party bringing the action and its subject matter, rather than with the issues of fact and law raised by the claim.[29] The purpose of which, is that only those that have a legitimate interest in a matter are permitted access to the courts.[30] As explained by Gibbs CJ, '... a belief, however strongly felt, that the law generally or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi'.[31] Whether a person will be granted standing depends on what type of plaintiff or applicant they are and what type of action is being brought, either to enforce the law or to apply for merits or judicial review.

At common law, the right of standing requires a litigant to show some 'special interest in the subject matter' which is greater than the interests of other members of the public.[32] For example, they must show that they are likely to be advantaged if they are successful or be disadvantaged if they are unsuccessful. Unless gain or loss such as that mentioned can be established, standing will generally be denied.[33] Alternatively, they must demonstrate that harm to a person, or damage to a proprietary interest will result if they are unsuccessful.

Despite the common use of such a strict test,[34] Australian courts have applied a more liberal interpretation of the special interest requirement than their US counterparts.[35] For example, in

[22] *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage & Ors* (2006) 232 ALR 510.
[23] *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage & Ors* (2006) 232 ALR 510.
[24] *TWS v Turnbull* (2007) 98 ALD 651.
[25] *Blue Wedges Inc v Minister for the Environment, Heritage & the Arts* (2008) 245 ALR 584 at 73.
[26] See for example *Margarula v Minister for Environment* & *Heritage* [2005] FCA 1219 at [2].
[27] See Chris McGrath, above n 3, 335.
[28] Ben Boer, 'Legal Aid in Environmental Disputes' (1986) 3 *Environmental and Planning Law Journal* 22, 35.
[29] Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27 (1985) 11, 20.
[30] Gerry Bates, *Environmental Law in Australia* (6th ed, Sydney: Lexis Nexis Butterworths, 2006) 146.
[31] *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 531.
[32] *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 531.
[33] See generally Brian Preston, 'Public Enforcement of Environmental Laws in Australia' (1991) 6 *Journal of Environmental Law and Litigation* 39.
[34] See generally *Onus v Alcoa* (1981) 36 ALR 425.

the case of *North Coast Environment Council v Minister for Resources*, it was held that a conservation organisation was a 'person aggrieved' and therefore had a 'special interest' to apply for judicial review of a decision.[36]

Pursuant to legislation, the right of standing is granted to those who meet the criteria set out in the legislation which governs their claim. For example, in order to fall within the scope of sections 475 or 489 of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) litigants must be:

- an individual who is an Australian citizen; or
- an organisation that is incorporated which aims to protect, conserve or research into the environment; and
- has engaged in a series of activities for the protection, conservation or research into the environment at any time in the two years immediately prior to the alleged offence.[37]

These widened standing provisions are a progressive step in overcoming the lack of adequately broad-standing provisions. In the *Flying Fox* case the applicant was granted standing because her work in regards to the care of flying foxes and her employment and voluntary work for conservation organisations satisfied the requirements of the EPBC Act.[38] Litigants do however still face an uphill battle in establishing standing under other pieces of environmental legislation. This is evident from a number of decisions.[39] Take for example, the *National Greenhouse and Energy Reporting Act 2007* (Cth) which provides no avenue for a third party's to bring an action.

In regards to merits review, only those environmental decisions that are subject to merits review can be appealed by an applicant. For example, decisions concerning wildlife trade permits made pursuant to Part 13A of the EPBC Act. These decisions can be appealed to the Administrative Appeals Tribunal pursuant to section 303GJ of the EPBC Act. Despite specific provisions in legislation however, it has proved extremely difficult for a third party to have a decision reviewed on its merits.[40] The *Paradise Dam* case is evidence of this. In this case, it was advised that merits review was unavailable to the litigant and as a result no action was brought.[41]

The Administrative Review Council is of the belief that decisions that will, or is likely to, affect the interests of a person or property should be subject to merits review. This should include decisions that affect intellectual and spiritual interests, and not merely property, financial or physical interests.[42] Given the broad applicability of the EPBC Act and the fact that it is most commonly used to bring public interest claims regarding environmental law, the suggestion has been made that at the very least, applications regarding controlled actions, should fall within the scope of this recommendation.[43]

[35] *Duke Power Co v Carolina Environment Study Group Inc* 438 US 59 (1978) at 80.
[36] *North Coast Environment Council v Minister for Resources* (1994) 127 ALR 617.
[37] See for example, *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) s 475.
[38] *Booth v Bosworth* [2000] FCA 1878.
[39] See generally Christopher Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects* (1972).
[40] See John Hodgson, 'Third Party Appeals in South Australia, 1972-1993' (1996) 13(1) *Environmental and Planning Law Journal* 8.
[41] Chris McGrath, above n 3, 346.
[42] Administrative Review Council, above n 12.
[43] Administrative Review Council, above n 12.

In regards to judicial review, only those environmental decisions that are subject to judicial review will be allowed to be put forward by an applicant. For example, the *Administrative Decisions (Judicial Review) Act 1977* (Cth) provides a right of judicial review by the Federal Court of some administrative decisions of the Commonwealth government. The major problem with judicial review is that it has no jurisdiction to here applicants for review in regards to the merits of any decisions which. This was illustrated in the case of *Gun Pulp Mill* where it was stated, 'It is necessary to stress that the Federal Court has no jurisdiction to consider the merit or wisdom of any decision of the Minister. The sole concern of the Federal Court in this matter ... was the legality of the decisions made by the Minister'.[44]

The judicial review process disallows a public interest litigant from appealing a case via judicial review that attempts to argue the unfairness of the decision on the merits. There is little action to be taken here, given that the purpose of judicial review is to review is to ensure that administrative decisions are legal pursuant to the relevant statute and common law concepts.[45] It is not to review the merits of the case. The best way forward in regards to the difficulties faced by litigants is to broaden the appeals system in regards to merits review. Suggestions to this effect are made above.

An action may also be brought by the Attorney General or with his or her consent. In Australia however, Attorney Generals have been reluctant to give their consent to third parties to litigate in order to protect the public interest. This is however, a difficult path to take for a public interest litigant because the complaint will often arise out of activities carried out or authorised by the government, of which the Attorney General is a representative of.[46] This conflict was made apparent in *Trent v Cavanagh* where litigants challenged the decision of the Postmaster-General's Department to build a large communications tower on Black Mountain in Canberra.[47] The Attorney General granted consent to petitioner's, however he made it very clear that he did not want to be made reference to in their arguments.[48]

In the context of this conflict however, the role of the Attorney General can be effectively discounted in environmental litigation, particularly as the traditional approaches to standing are being given a more liberal interpretation by the courts.

4. Causation

The difficulties in establishing causation present a major hurdle for plaintiffs and applicants for review in climate change litigation. The problems associated with causation are twofold. First, it is extremely difficult to determine a causal link between greenhouse gas emissions, climate change and harm or damage to the environment. As Bilski explains, 'The fact that factors in addition to a defendant's actions contribute to global warming ... means that a defendant is not

[44] *TWS v Turnbull* (2007) 98 ALD 651.
[45] See generally Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (3rd ed, Sydney: Lawbook Co, 2004).
[46] Gerry Bates, above n 30, 164.
[47] *Kent v Cavanagh* (1973) 1 ACTR 43.
[48] *Kent v Cavanagh* (1973) 1 ACTR 43.

solely responsible for harm caused to the plaintiff'.[49] Second, the courts lack the sufficient scientific knowledge to deal with such claims given that prior to even determining causation, they must establish that climate change exists and that it is primarily caused by human activities. It has been noted that there is '... a significant resource imbalance in the area of environmental assessment and … people other than developers … rarely have adequate legal advice and representation'.[50]

There is no definitive test for determining causation in the context of climate change litigation.[51] The traditional approach in Australia is the common sense test which has been broadly applied.[52] This test requires the plaintiff or applicant to show that the defendant 'materially' contributed to the harm or damage suffered by them.[53] In *Gray v The Minister for Planning and Ors* however, the court rejected its application for use in climate change litigation. Since, the courts have approached the issue of causation on a case by case basis.

In recent times, the courts have considered the legislation applicable to the claim being brought in determining which test to apply. For example, in the *Anvil Hill* case the application of the *Environmental Planning and Assessment Act 1979* (Cth) required plaintiffs to demonstrate that the harm or damage that has or will be caused has a 'real and significant link' to the proposed project.[54] This is now a commonly used test for causation in the context of climate change litigation. It is at this point that issues as to the science behind climate change arise.

In the *Wildlife Whitsundays* case His Honour stated, 'I am far from satisfied that the burning of coal at some unidentified place in the world, the production of greenhouse gas emissions from such combustion, its contribution towards global warming and the impact of global warming upon a protected matter, can be so described'.[55] He criticised the *Stern Review on the Economics of Climate Change* and the *Intergovernmental Panel on Climate Change* which confirm that climate change is occurring and that it is largely attributable to human activities.[56]

Similarly, in the *Bowen Basin* case the court rejected the applicant's submissions on the basis that a causal link between greenhouse gas emissions, climate change and harm or damage to the environment could not be established.[57] This was no small mine either, around 85% of Queensland's coal comes from the Bowen Basin, where the two mines disputed in this case are

[49] Andrew Bilski, 'A Change in the Weather: The Incoming Tide of Climate Change Litigation' (2007) 16 *Polemic* 7.
[50] Quoted in David Robinson, 'The Environmental Defender's Office NSW, 1985-1995' (1996) 13 *Environmental and Planning Law Journal* 155.
[51] Matthew Skinner and Claire Forster, 'Tortious Climate Change Litigation' (Paper presented at the NELA Conference, Perth, 27-28 March 2008) 10.
[52] Skinner and Forster, above n 51, 10.
[53] Peter Cashman and Ross Abbs, 'Torts and Environmental Law' (Paper presented at the Beyond Environmental Law Conference, Sydney, 27 February 2007) 11.
[54] *Anvil Hill Project Watch Assn Inc v Minister for the Environment and Water Resources* (2007) 97 ALD 398.
[55] *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage & Ors* (2006) 232 ALR 510 at 72.
[56] See generally Anna Huggins, 'Is climate change litigation an effective strategy for promoting greater action to address climate change? What other legal mechanisms might be appropriate?' (2008) 13 *Local Government Law Journal* 184.
[57] *Re Xstrata Coal Queensland Pty Ltd & Ors v Queensland Conservation Council Inc & Ors* [2007] QLRT 33.

located.[58] In fact, the National Greenhouse Gas Inventory 2004 identified that coal mining released 21.3 million tonnes of C02 in 2004 which accounts for 4% of net national greenhouse gas emissions.[59]

In the *Greenpeace Australia Ltd v Redbank Power Co Ltd* case the court refused to stop the construction of a coal fired power station pursuant to section 98 of the *Environmental Planning and Assessment Act 1979* (NSW).[60] Pearlman CJ commented, 'Another important matter to note is the uncertainty in the evidence about the effect of CO2 emissions from the project ... the project will emit CO2. But what impact that will have on global warming ... is very uncertain'.[61]

These challenges may be overcome if the courts were willing to utilise some of the general principles of causation.[62] For example, the courts may deem causation as satisfied if they consider that greenhouse gas emissions from a defendant are not necessarily substantial but perhaps, material or significant.[63] Findings such as those made in the *Anvil Hill*[64] case and the US case of *Massachusetts v Environmental Protection Authority*[65] are evidence that progress has been made in relation to the establishment of a causal link between greenhouse gas emissions, climate change and harm or damage to the environment.

Such progress will continue to be made, as the body of science surrounding climate change grows.[66] Sir Nicolas Stern suggests that there is an 'overwhelming body of scientific evidence (which) indicates that the Earth's climate is rapidly changing, predominantly as a result of increases in greenhouse gases caused by human activities'.[67] If this evidence was taken on board by the legislature and as a result they included climate change as a controlled action under the EBPC, there would be little need for plaintiffs and applicants to establish causation in the first place.[68]

5. Conclusions

Significant progress has and will continue to be made in regards to climate change litigation. The analyses presented of the costs involved in litigation, the standing provisions available to plaintiffs and applicants and the difficulties in establishing causation suggest that the foundations have been laid for what will be a comprehensive avenue for plaintiff and applicants for review.

[58] Department of Natural Resources and Water, *Mining, Exploration and Petroleum: Mining Operations and Developments* (2007) State of Queensland <http://www.nrw.qld.gov.aulmines/coal/operations.html> at 19 April 2009.
[59] Australian Greenhouse Office, *National Greenhouse Gas Inventory 2004: Accounting for the 108% Target* (2006) Greenhouse <http://www.greenhouse.gov.aulinventory/2004/pubs/inventory2004.pdf> at April 19 2009.
[60] *Greenpeace Australia Ltd v Redbank Power Co Ltd* (1994) 86 LGERA 143 at 153.
[61] Quoted in David Robinson, above n 47.
[62] Chris McGrath, above n 3, 247.
[63] See *Environmental Agency v Empress Car Co (Arbertillery) Ltd* (1991) 2 AC 22.
[64] *Anvil Hill Project Watch Assn Inc v Minister for the Environment and Water Resources* (2007) 97 ALD 398.
[65] *Massachusetts Et Al v Environment Protection Agency Et Al* 127 S Ct 1438 (2007).
[66] See generally Tim Jewell and Jenny Steele, *Law in Environmental Decision-Making: National, European, and International Perspectives* (1998).
[67] David Hodgkinson and Renee Garner, *Climate Law in Australia: Australian Law and Policy* (2008) 4.
[68] Joseph Smith and David Shearman, *Climate Change Litigation: Analysing the law, scientific evidence & impacts on the environment, health and property* (Adelaide: Presidan Legal Publications, 2006) 143.

There are however, a number of challenges that still need to be overcome in order for this to be achieved.

In relation to costs, there is a real justification for:
- government funding to be introduced at a national level; and/or
- courts to more readily exercise their discretion not to award costs against public interest litigants; and/or
- statutory reform of the rules as to cost orders; and/or
- a public interest environmental litigation fund to be established.

In regards to the current standing provisions, it is imperative that:
- the courts continue to apply a liberal interpretation of the special interest test; and/or
- there be statutory reform in regard to the relevant legislation.

In relation to causation, it is essential that the courts:
- utilise some of the general principles of causation; and/or
- maintain a body of law which understands the science behind, and acknowledges the significance of, climate change.

It has been suggested that the challenges faced by plaintiffs and applicants for review will be overcome.[69] This is due partly because environmental legislation has progressed towards an extensive consideration of the role of ecosystems as a whole in regards to responding to environmental threats.[70] Indeed, 'with the emergence of climate change as a critical national and international issue, and with the implementation of mechanisms to deal with climate change ... it can be assumed that a clear line of jurisprudence will be developed'.[71]

[69] See *Pride of Derby v British Celanese* (1953) 1 All ER 179 at 204.
[70] Richard Brooks, Ross Jones and Ross Virginia, *Law and Ecology: The rise of the ecosystem regime* (2002) 146.
[71] David Hodgkinson and Renee Garner, above n 67, 188.