

Identifying opportunities for climate litigation in or involving Australia

By Dr Chris McGrath¹

Two propositions for climate litigation:

1. When considering opportunities for future climate litigation, we should move from abstract theories to real & specific case studies (who, what, which court, how, etc).

“Legal analysis is then directed only to issues that are real and not imagined. Legal principle is then honed through practical application. Academic abstraction is then curbed by the parameters of a concrete dispute.”²

2. Liability for climate change is widespread but largely unrealised.³

Inter-jurisdictional climate liability arises from “result offences”

“Result offences” give inter-jurisdictional liability at common law and under statute for an act done outside the territory of a state that has a result inside the territory of a state, including for pollution of waters or the atmosphere.⁴

Framing litigation around the Carbon Budget

Case study of liability of operator of Loy Yang A Power Station:

Frame the cause of action around the company’s emissions from 2018-2048 as a percentage of the Carbon Budget for 2018-2050:

- 18.625 MtCO₂-e/yr x 30 years = 559 MtCO₂-e
- These emissions equal:
 - 0.2% (a 1/537th part) of the 1.5°C Carbon Budget
 - 0.05% (a 1/2,182nd part) of the 2°C Carbon Budget from 2018 for a 50% probability of exceeding 1.5°C (300 Gt) or 2°C (1220 Gt)⁵

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² Gageler J in *Clubb v Edwards* [2019] HCA 11 at [137] discussing why courts should not address hypotheticals.

³ See Saul Holt and Chris McGrath, “Climate change: is the common law up to the task?” (2018) 24 AULR 10.

⁴ See *Brownlie v State Pollution Control Commission* (1992) 76 LGRA 419 (NSWCCA; Gleeson CJ with whom Curruthers J and Lee AJ agreed). In that case a Queensland farmer who polluted a river flowing into NSW resulting in a fish kill was held liable for an offence against the *Clean Waters Act 1970* (NSW).

⁵ Based on: Intergovernmental Panel on Climate Change (IPCC), *Global Warming of 1.5°C: an IPCC special report* (IPCC, Geneva, 2018), Table 2.2, available at <<http://www.ipcc.ch/report/sr15/>>; and Malte Meinshausen, “Deriving a global 2013-2050 emission budget to stay below 1.5°C based on the IPCC Special Report on 1.5°C”, available at <https://www.climatechange.vic.gov.au/__data/assets/pdf_file/0018/421704/Deriving-a-1.5C-emissions-budget-for-Victoria.pdf>.

10 key issues for identifying future climate litigation opportunities:⁶

1. Who are the potential plaintiffs (i.e. who can sue)?
 - Who has legal standing?
 - Who is willing & suitable (i.e. rational & reasonable*)?
2. Who are the potential defendant/s & who is the best to choose?
3. What causes of action are available (e.g. judicial review, tort, etc)?
4. What evidence is available to establish the cause/s of action?
5. How should the evidence be presented / framed to best explain the facts & avoid defence strategies to avoid liability? [expect a dirty fight]
6. What remedies are available that a court will realistically grant?
7. What court should the litigation be commenced in?
8. What are the procedural obstacles & can they be overcome?
9. What resources are needed & available for the litigation (i.e. money, experts & lawyers)?
10. How do you avoid being overwhelmed by a big opponent?

⁶ These issues overlap & are built on Chris McGrath, "Flying foxes, dams & whales: Using federal environmental laws in the public interest" (2008) 25 EPLJ 324 at 328.