Why not litigate climate change responses?

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Our professional impulse is that important disputes about rights and obligations, and the clash of interests, lend themselves to resolution by litigation. That is the peaceful mission of the rule of law available through the courts.

When the dispute stems from grievances about governmental or official conduct called for or regulated by statutes, it may even seem the more obvious, in a system like Australia's, that the courts will be the recourse for binding decisions. They are, after all, the boundary riders of the rule of law, where the social order allocates distinctive functions respectively to elected legislature, the responsible and accountable executive or administration and finally the impartial and therefore legalistic judiciary.

I have selected four well-known cases from the growing and very various global experience of litigation about aspects of different nations' responses to the threat posed by climate change. The sample is definitely not random: they seem to me to enable a point to be made. True, I can scarcely claim to discern lessons, let alone an overall pattern, from these or the many other cases that have been decided, or are in course of being fought. It is, I think, an area where conclusions are especially elusive, and nothing like scriptural truths is realistically to be sought.

As to all of these cases, they concern in one way or another the hottest of hot topics: how to avert what Allsop CJ described in one of them (the only Australian one) as 'the possible catastrophe that may engulf the world and humanity' – a threat his Honour noted was 'not in dispute' in litigation against the Commonwealth Minister for the Environment.

Two of the four cases are final decisions: one because the US Supreme Court is that country's ultimate appellate tribunal, and the other because special leave to appeal from the Full Court of the Federal Court of Australia has not been sought. One of the others, the most recent decision of the four, may well go further on appeal, maybe eventually to the UK Supreme Court.

And finally, in Germany, the longest running of these cases awaits trial after an unsuccessful attempt to have it dismissed summarily. In late May, the proceedings had progressed to the stage of a view with experts – remarkably, high in the Peruvian Andes, and with drones.

My point? Not, as some may have read my title of this speech, to encourage recourse to the courts of law, but to address the real grievances aroused by global governmental inadequacy of responses to climate change. That is, I think cases like these four rather clearly show the unsuitability of this topic for judicial settlement. That is not peculiar to climate change responses: most difficult and profoundly consequential differences in society, including the global community, are addressed and resolved through political action – or, alas, inaction – rather than by the wisdom of doctors of law. We don't entrust courts with the final say on the balance to be struck between taxes and welfare expenditure, the role of the state in the economy, matters of war and defence, foreign relations, or how children should be educated. Let alone matters involving special expertise such as a response to a pandemic.

Why should it be different for responses to climate change? Perhaps because the particular provisions of legislation invite judicial determination, or conversely the general and apparently open textured nature of common-law or codified tort claims seems to be the natural province of the courts.

These four cases illustrate, I hope, the illusory nature of that misguided impulse to litigate these matters.

None is technically, a constitutional case – that is, the enforcement of rights and obligations that the legislative cannot simply, I stress simply, negate by subsequent statute. That alone suggests an extra-legal ground for concern – that is, a victory in court may serve to provoke reactionary legislation – one pace forward but two paces backwards.

And even constitutions can be amended, if only in theory. Court decisions, however final institutionally, are not the last word, in democracies any more than in despotisms.

I suggest that climate change litigation, in light of these considerations, is best justified as one of the ways in which the body politic – the governed as well as the governors – may be shamed, nudged or even prodded into actually taking this emergency seriously enough to give us a decent prospect of decent survival.

The urgent deficiencies are numerous. One is the globally mad trope that very few individuals nations are very significant sources of global emissions. Even if that were true, its insanity in relation to a global issue is unmistakeable. Another is what we seek to tame linguistically by calling it 'Scope 3' emissions – the puzzling preference to ignore that coal is mined to be burnt, especially for this country that exports its coal to be burnt elsewhere. Supposedly, it is a contribution to sustainability anxiously to scrutinise the cement and diesel consumption of an open-cut mine, but not the emissions that are deliberately the result of selling the combustible product.

But gestural or banner litigation has many drawbacks. Not least is its tenuous prospect, considering recent history, of litigation actually driving the outcomes we need. Hauling wagons with rubber bands might be an apt description.

The split decision of the US Supreme Court on 30th June, in *West Virginia v EPA*, was not surprising to those who regard the so-called conservative/liberal

division on that bench as a predictable extension of partisan politics, or culture war. Maybe so, but I do not want to dip my toe in the unpleasant waters of that court's composition, or partisan predictability. Rather, there are themes in the reasoning, on both sides, that deserve somewhat more respect than the understandable simplicity of booing or cheering according to one's political or cultural tastes.

The case has a zombie character. The Obama administration formulated its Clean Power Plan, through the EPA, by way of delegated regulation of, among many other things, existing power plants – many of which generate electricity by coal-fired steam turbines.

The statutory means governing the agency's actions required its consideration, and opinion, as to a basic premise called 'the best system of emission reduction…that has been adequately demonstrated'. In particular, the contested regulatory power focussed on existing plants and was available only if their emissions were not regulated under two other EPA powers to do with health limits on airborne pollution and other pollutants toxic to humans. It appears to have been accepted that CO_2 and methane – GHG – either couldn't have been or actually had not been regulated under those two other EPA powers. That statutory scheme produced an unedifying combat of the majority and the minority as to the supposedly appropriate folksy paraphrase – was the power in question a stop gap, or a backstop? So much for textualism of any stripe.

Why zombie? Because the CPP was judicially stayed immediately, and never came into operation – pending judicial review. I wonder whether our High Court would even dream of that degree of judicial constraint on executive action… As you would guess, or know, President Trump's EPA thought it should wholly re-consider the Obama CPP, and duly formulated a new Affordable Clean Energy Rule – ACE as an example of the childish American use of propaganda acronyms – that it accepted 'would result in only small reductions in CO_2 emissions'.

The DC Circuit Court of Appeals reinstated the CPP and discarded the ACE Rule, holding the Obama agency and not the Trump agency had been correct as to its power. But the US Supreme Court effectively stayed that reinstatement of the CPP pending its appellate considerations of the cases, in which many states participated along with other parties. So, now in the Biden administration, the court was considering whether the Obama CPP was authorised – all without it having been in operation ever. The fact that the Biden EPA told the courts it was not intending to enforce the Obama rule and had decided to promulgate a new rule did not render the litigation moot, the majority ruled, in defensible if somewhat problematic reasoning that I will not critique.

So what was the original sin of this zombie rule so recently put to death by the Supremes? In a nutshell, the EPA had actually taken a novel approach to what it perceived as an unprecedented challenge. Of course, all justices accepted the genuineness of the problem – not a denialist among them. The majority was also at pains to emphasise that the expertise of the EPA had been deployed in ways never attempted before – supposedly, this factor weakened the plausibility of Congress having delegated such momentous matters for determination by the EPA. I can't help wondering whether long ago Congress itself should have stipulated in detail how NASA was to land men on the moon, also something experts had not attempted before being asked to do so. President Kennedy's famous view of unprecedented challenges apparently clouds over in the era of meeting the threat to the planet of climate change.

But this may be unfair to the Supreme Court majority. Because the litigation, in its bare essence, was really concerned only with the mundane question whether the general words of the relevant provisions of the Clean Air Act, under which the CPP

would have the effect of requiring states to regulate their power stations in accordance with the BSER determination by the EPA, did as a matter of law – statutory interpretation – empower the EPA to proceed as it did. It is, of course, a cardinal tenet of the rule of law that administrators, however expert, do not exceed their lawful authority in exerting official power. The case therefore presented a familiar, if fraught, issue of the court ensuring that a government agency had been given by the people's elected representatives – Congress – the very large powers in question. No-one, I hope, would doubt the importance of judges scrutinising such claims. Especially when the claimed rule-making power is so obviously legislative in character, an extra pressure requires the court jealously to ensure that legislative power, in a democracy, is not excessively delegated to unelected administrators.

I don't intend to inflict a critical case-note on you all. It suffices tonight to note that the majority could not see the very broad authority in the stop gap wording, and the minority saw the back-stop intention to deal with a new and large emergency. Interestingly, the so-called *Chevron* doctrine – a contested approach that pays judicial deference to administrative interpretations of grants of power to the executive by the legislature – was not much considered by the majority, and was not officially overruled. In this country, I suspect there is no room for *Chevron* anyhow – perhaps we take more seriously, or more consistently, John Marshall's famous dictum that it is emphatically for the judicial department to declare and enforce the law, including the limits of statutory authority.

At stake was the validity of a rule, the CPP, that would make business as usual for coal-burning power stations impossible. Politically, I stress politically, I must say that seems to be full of merit – but merits are not for courts to determine or decide in judicial review by way of interpreting statutory limits on governmental power. Thus, the majority had little doubt that the massive shift intended by the CPP to transition power generation from coal to gas and then to renewables, with huge economic and social ramifications – power bills up and coal-generation employment down – was simply not contemplated by the words enacted so generally and so long before a climate change response was on Congress's agenda.

And that may well be the better legalistic result. Although the acerbic dissent did point out the other side of the ledger, with increased investment in renewables and many jobs – and a more sustainable future – as a result that should have been considered to counter the effects of phasing out coal-fired power generation. Another jab delivered by the minority, reminding one of the zombie nature of the case, was that in any event the market, without the CPP ever having operated, was already moving against coal. Let's hope Vladimir Putin's gas squeeze does not halt that beneficial trend.

To conclude the American tale, it seems to me that much of the politically disappointing outcome in *West Virginia v EPA* stems from an approach that in this country would be an orthodox, and democratic, requirement that large powers to govern by administrative agencies require sufficiently clear language to be within statutory power. It is, in the upshot, a timely warning, as a new Australian government with a new kind of cross-bench beside it takes up the task of dealing with climate change, that the buck stops with what politics, not litigation, can achieve by way of changing the rules, because the facts have changed. The majority provocatively called in aid the repeated failure of Congress, before and after the Obama CPP, to legislate for such a transition to renewables. However irksome politically, it clinches for me that our legislation and not litigation, is the best, maybe only, way forward.

Let me be clear: litigation that enforces legislation that in turn controls governmental action is, naturally, an essential function of the judicial arm of government. We are, I hope, often going to be suing to require our Ministers and bureaucrats to observe, say, statutorily mandated sustainability requirements of due consideration. That is essential and most useful litigation – but its role in influencing responses to climate change depends utterly on Parliament having enacted appropriate regulation.

The most recent case, decided on 18th July, is the decision of the Administrative Court in the Queen's Bench Division that I will call *Friends of the Earth & ors v Secretary of State for Business, Energy and Industrial Strategy*. That's a portfolio title that bespeaks the high level and economically and socially comprehensive nature of the issues. The claim was not, as in *West Virginia*, to invalidate a governmental climate change response. Rather, the successful claim was that the government had not fully met the detailed requirements for reporting to Parliament – and thereby to the people – on the prognosis for policy settings to meet so-called zero net emissions by 2050, in order to reach treaty aims, among other things. By contrast with the American approach, the massive and profound nature of the changes to economic and other social behaviour, wide and deep, had been explicitly the basis of excellent legislation that required iterative recourse to real experts preparatory to the ultimate statement of policies and their prospects.

Again, as in *West Virginia*, the judicial review was premised on a correct reading of the relevant provisions of the controlling legislation, in this UK case their *Climate Change Act* of 2008. Everything in the careful exposition of that foundation of the ruling that the obligations had not been fully complied with is familiar to us. Including the necessary emphasis that the merits of the policies were ultimately not the business of the judges, and so not in issue in the litigation. They are, of course, political in every good sense of that word. And, on the established pattern, unequivocal and ample statements are made to the effect that the emergency is real. If for no other reason, that was compelled by the explicit premises and purpose of the laws requiring these progress reports.

This decision may or may not be appealed, and so is final only in the sense that any first instance decision is final, until reversed by a competent appeal. I lack the boldness to predict the outcome of any appeal. I will say that the reasoning of Mr Justice Holgate is nuanced, reflecting I suspect the arguments on both sides. At its heart, believe it or not, was the scope of the obligation for the minister to 'set out' various matters of specified prognostications as to the UK's progress to net zero by formally prescribed stages. Much turned on the interplay of quantitative and quantifiable assessments, triggered no doubt by the ominous statement of a 95% – not 100% – fulfilment of one of the critical measures. I won't delve into that particular debate, not only because in a world of predictions and estimates, and our new magic called modelling, the distinction is inherently uninteresting.

The case turned on sophisticated analysis of the written materials created to assist in preparing the report to be tabled in Parliament, as well as subsequent evidence from a senior bureaucrat to explain procedures and to supplement detail. Although these materials are, in themselves, of some interest given their subject-matter, my present focus is on the simplicity of the framework for the successful judicial review.

First, there is a statute, the terms of which, correctly interpreted, required

explanations rather than mere conclusions in order to 'set out' the crucial matters for public report. An analogy arises with our familiar prerequisites for description of proposals when public consultation is obligatory. Second, after judicial sifting and sorting, some deficiencies remained in the full compliance with the statutory reporting obligations. Third, both the statutory interpretation and assessment of compliance were informed by the evident purpose of these statutory reporting obligations: namely, transparency (i.e., open exposure) of the position of the Government after proper consideration, with respect to gravely important matters of public policy, extending well beyond electoral (let alone news) cycles. Significantly, Mr Justice Holgate adopted the approach to a somewhat similar dispute in the Republic of Ireland, quoting from Chief Justice Clarke of the Supreme Court of Ireland in *Friends of the Irish Environment v Govt of Ireland* decided in 2020, as follows:

> '…the very fact that there must be a plan and that it must be published involves an exercise in transparency. The public are entitled to know how it is that the government of the day intends to meet the [applicable emissions standards]. The public are entitled to judge whether they think a plan is realistic or whether they think the policy measures adopted in a plan represent a fair balance as to where the benefits and burdens associated with meeting [those standards] are likely to fall. If the public are unhappy with a plan then, assuming that it is considered a sufficiently important issue, the public are entitled to vote accordingly and elect a government which might produce a plan involving policies more in accord with what the public wish. But the key point is that the public are entitled, under the legislation, to know what the plan is with some reasonable degree of specificity.'

Again, the fundamental need for sound legislation in order for litigation to compel compliance with beneficial social outcomes such as transparency of policy making. Perhaps we are, tonight, on the verge of some such enactment in this country. Maybe not. In any event, please may Australia – Canberra more pointedly – progress beyond disdainful invocation of Cabinet-in-confidence. The people's confidence is abused by too broad and crude extents of secrecy in making policy, literally, for generations.

The Administrative Court in *Friends of the Earth* also decided, by dismissing, a discrete claim that the Government's reporting performance concerning the so-called carbon budgets should be measured against the statutory requirements construed stringently, so as to observe the supposed effect of sec 3 of the *Human Rights Act*, which seeks to modify statutory provision found to be incompatible with the European Convention on Human Rights. This argument was pitched very high, starting with the uncontested gravity of the threat, including to human life. The bridge too far was the slide from incompatibility as the gateway to a modified interpretation, to a notion of preferring an interpretation that would be more rather than less conducive to protection of the Convention rights. In a manner I think accords with an Australian approach in the absence of such a convention-incompatibility device (at national level), the court understandably resisted what it called 'crossing the demarcation between interpreting and amending legislation'.

For those interested in comparative law, stamp collectors of jurisprudence as we may be regarded, it is noteworthy that Mr Justice Holgate gained no assistance from the famous decision of the Supreme Court of the Netherlands, *Urgenda*, delivered in December 2019. One reason was the particular terms of the Dutch norm calling for adequate explanation of a governmental reduction of a carbon reduction target. Another was the basal difference, as to the governing treaty obligations, between the monist or direct effect approach in the Dutch system, and the dualist system operating in the UK and Australia. So we can't look to the treaties for the norms to litigate, except to the extent they are incorporated into our municipal law.

Litigation to enforce a transparency obligation is, by definition, as much in the public interest as is the obligation itself. But it all depends on the adequacy of the statutory obligation to consider, disclose and publish a report: and that depends on decisions made by Parliament, not the judges. Strong enacted words are needed to push over the instructive recoil of Canberra from admitting hoi polloi into the councils of state. And the panoply of frequently invoked exemptions from FOI disclosure justifies the sneer that we are actually enjoying, or suffering, freedom **from** information.

These two cases in companion common-law jurisdictions with functionally separated areas of government, like Australia's system, serve as a reminders that judicial review is not judicial policy correction. They illustrate the indispensable support for institutional legitimacy of judicial decisions that they are impartial legalistic declaration and enforcement of the law – in this context, enacted law – and thus must not become arenas for policy contests.

But responses to climate change **are** the creatures of policy contests.

Now we move from public law to private law – in a sense. The first two cases saw the judges policing legal limits, one for excess and one for deficiency. The next case, *Minister for the Environment v Sharma*, is a bit of a hybrid, reflecting the common law that was invoked. No application for special leave to appeal to the High Court has been made against the decision of 15th March, and so this judgment of the Full Court of our Federal Court is truly final. But not, given the nature of common law tort cases involving putative duties of care, at all the definitive last word.

The duty of care alleged against the Minister was said to arise from and to regulate the exercise of her powers under the *Environment Protection and Biodiversity Conservation Act* to approve or not the extension of a coal mine. For reasons I won't explore, it was said to be owed to minors – with an 'o' – being persons in Australia aged less than 18 years. The scope of the duty was argued to require reasonable care to avoid death or injury to those people, arising from CO_2 emissions into the Earth's, i.e., the globe's, atmosphere from burning the coal proposed to be mined from the extension.

At the outset, as I have already noted, the parties had common ground as to the nature and threat of climate change. It was also not in dispute, given well established common law principles, that the private-law tort of negligence is able to be pleaded against government authorities. In relation to their discharge of statutory functions, one way of thinking about such liability assimilates it to the odd but established category of 'breach of a statutory duty of care'. The duty of care is not statutory, in cases such as *Sharma*, but the potential to argue it exists does arise from the responsibility of the Minister and the correlative vulnerability of the children brought into conjunction by the consent function under the EPBC Act.

You all know the end of this story. A formidable set of self-sufficient reasons was discerned, severally, by each of the three judges, for the outcome: the claimed duty did not exist. I leave aside the very

substantial questions that in my opinion also presented an obstacle to the children's success, namely of the appropriateness of declaratory relief – i.e., a binding judicial statement of the existence of such a duty of care, without any other relief.

The absence of that private-law duty of care should not alarm anyone who cares to distinguish between individually actionable grievances and public political causes. If there is any overlap, as sometimes could well be the case, it surely was not possible in *Sharma*. That is, if anything, the huge import of coal combustion, as a generality, to responses to climate change rather dispelled than supported the imposition of a duty of care owed to individuals. For my part, I would add the anomalous nature of a duty apparently strengthened by its being owed to everyone – isn't the essence of the common law duty that it is owed to individuals severally, even if to everyone within an affected portion of mankind – here, I accept, all of us bar for the moribund?

I will not rehearse the exposition and details of the three judgments' dismissal of the claimed duty. It suffices to note the continued life in the admittedly problematic policy-operational dichotomy, and its related judicial self-denying ordinance that declines to adjudicate matters for political resolution. Whether our label of non-justiciability or the related American label of political question is used, one way or another it must be right in a constitutional democracy to leave such matters to non-judicial determination.

To these fundamental objections to the duty may be added other and independently operating factors. The diffuseness of the relations between the Minister and each of the children. The indeterminacy of that relation and liability said to spring from it. The incoherence of the generalised common-law duty and the Minister's role under the EPBC Act. The invidious if not impossible task of articulating the standards by which an impartial judge could adjudicate – without usurping democratic dominion over policy – whether conduct by act or omission fell short of a reasonable standard of care. These critical aspects of breach by negligence cannot be avoided, I think, in deciding the superficially anterior question of duty of care.

So *Sharma* manifests the unsuitability of tort litigation, at least under the rubric of negligence, to improve our responses to climate change. Whether the different but cognate liability in nuisance could produce any different outcome, I strongly doubt: its quite distinctive integer of proximity is probably apt to render such claims even more tenuous than negligence.

Sharma underlines the need for good statutes.

To conclude, some remarks about a case in progress, that appears to be another private law claim, i.e., calling in aid the same kind of legal norms – e.g., negligence or nuisance – that would govern day-to-day non-governmental dealings between people and legal entities. Cases like a householder suing to restrain a neighbouring factory's leaking of pollution across their boundary. The stuff of the common law, with all its retained flexibility and inventiveness.

However, this fourth case is not in a common-law jurisdiction. What the English judges made, not always wittingly it must be said, and still make – always wisely nowadays in Australia, I am tempted to say – was codified by Napoleon, and his assiduous, intellectual inheritors and emulators in Germany. So, a code, but in appropriately generalised terms, relevantly closely resembling key aspects of Australian common-law concepts of liability in negligence or in nuisance. I shouldn't suggest anything like complete analogy, but the fascinating now-you-see-it, now-you-don't resemblances between our systems are quite beyond any single speech's capacity to address.

Be that as it may, the claim by Saúl Luciano Lliuya, a Peruvian farmer, against RWE, a German globally active power and energy company with headquarters in Essen, is my selected example of a dubious – if perhaps sympathetic – resort to litigation about responses to climate change. The company – originally Reinisch-Westfälisches Elektrizitätswerk AG – has generated electricity in most of the historically employed ways, certainly thermally. Although it is now a very considerable global generator using renewables, it has long had and still has a coal-fired presence.

In that guise, because of that contribution to global warming – said to be among the heaviest industrial contributors in the period 1751-2010, at 0.47% – RWE has been sued by Mr Lliuya in the District Court of Hamm, for 0.47% of the estimated costs of protecting his home town of Huarez, in the Andes, from the dangers of a melting glacier causing flooding from the effects of avalanches on Lake Palcacocha, poised above the city. From press reporting and assorted commentaries, it does not appear at all that this risk is far-fetched or fanciful – if only.

But is this claim in a German court against one selected global GHG contributor, for about €20,000 damages, in principle or in practice, a good way to address reforms to climate change? Is this kind of litigation, based entirely on German codified norms for imposing liability on wrongdoers such as we would regard tortfeasors, likely to do more than publicise very real – and well justified – grievance? Should Pacific Island communities threatened by inundation as the ice-caps melt see such litigation – i.e., private-law claims – as a useful way forward?

You will have gathered, I hope, that I strongly urge better value publicity than we litigators, or judges, can provide. If, as I think it should be, the case is dismissed on the merits for any number of principled reasons, malevolent forces in public opinion around the world are most unlikely to take that outcome as a cue to speed up the end of coal-fired generation. (And RWE is, already, one of the most important renewables generators, without the spur of tortious liability, it would seem.)

But if the case were to succeed, it would matter only if RWE, its shareholders and its insurers, were thereby to be informed of the risks of mounting GHG in a way or with an intensity not apparent to them beforehand. This is, I think, totally implausible.

And were the wildest dreams of Mr Lliuya's supporters to be realised, and a win against RWE were seen to produce a financially loaded thunderclap against RWE and its coal-generating ilk, do we really think the various legislatures around the world will leave that as a position to be bargained or fought as individual or even class actions in tort? Legislation of some kind, recognising the long and lawful business of coal-fired power generation, seems very likely to nip such claims in the bud. We will see.

As so I finish by suggesting, notwithstanding my admiration and gratitude for the litigators whose work I have discussed, that we must first of all have the enacted laws – statutes – that enable courts impartially and without improper trespass on policy matters that must remain democratically rooted, to order governmental authorities to exercise within these limits and as required by such enacted laws, their duties, powers and functions so plainly in need of exercise, by way of our responses to climate change.

Why not litigate? Only if we first legislate. Well. What to do? Read what is happening, discuss, persuade, and vote. BN