

Pre-trial Forensic Issues in Climate Change Litigation



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What do we mean when we talk about ‘climate change litigation’? For our part, we mean litigation in which the existence or impacts of anthropogenic climate change are material facts in the case.

Examples include:

- Public law actions to cause government or regulatory authorities to take action to address climate change risks;¹
- Private law actions alleging that the government² or industry³ owe a duty to take reasonable precautions to address climate change risk; and
- Regulatory⁴ or private law⁵ actions alleging that companies have misrepresented the impact that their products or business activities have on the climate.

Litigation on these topics is no longer novel. The number of climate change-related cases has more than doubled since 2015 with over 1,200 cases filed globally between 2014 and 2022.⁶

In any litigation, parties need to make forensic decisions about how they best prepare for and present their case at trial. However, specific issues may arise when litigating about the climate, arising from the particular nature of the facts in dispute. We address some of these issues below.

Pleadings

As is apparent from our definition above, the fact that human activity is the primary cause of global warming will be a material fact in all climate change litigation. If the matter proceeds by way of pleadings, the plaintiff will therefore want to plead this fact. This should be admitted by most reasonable defendants.

The plaintiff will also want to plead further material facts concerning the cause and effect of global warming, depending on the specific issues in their case. A plaintiff seeking to establish that a business operation (e.g., manufacturing cement) contributes to global warming may plead how particular greenhouse emissions are emitted and how long they remain in the atmosphere. There may also be a forensic benefit to pleading facts about the current state of the climate, including that the addition of further greenhouse gases to the atmosphere risks the earth reaching a ‘tipping point’ beyond which humans will be unable to control the trajectory of climate change.⁷ This may assist in demonstrating that even relatively minor additional emissions can have significant impacts.

Plaintiffs would be well advised to base any such allegations about the

physical science of climate change on the latest reports and data produced by the International Panel on Climate Change (IPCC). The IPCC reports generally represent the global scientific consensus on issues of climate and their conclusions are helpfully expressed with degrees of confidence. Reflecting these findings in your case theory increases the probability of obtaining supportive expert evidence that will be difficult for the other side to contest. It may, if you are lucky, even elicit an admission on the pleadings.

Agreed facts

There are likely to be facts concerning the causes and effects of climate change that are not truly in dispute, even if they have not been admitted on the pleadings. These could be the subject of agreement under s 191 of the *Evidence Act 1995* (Cth) (or State equivalents). This may include facts that the defendant wishes to rely upon in its defence – such as the current state of development of certain renewable or emission reduction technologies.

The effect of s 191 is to admit the agreed facts as evidence without the need to otherwise prove the existence of those facts.⁸ This may avoid the time and cost involved in obtaining scientific expert evidence on certain topics. However, once agreed, parties will be prevented from adducing evidence to contradict or qualify the agreed fact without leave.⁹ This means that parties must be mindful of the case they will seek to make out at trial, and not agree to non-contentious facts that they may later wish to qualify.

Evidence

Facts that remain in dispute will need to be proved through admissible evidence.

IPCC reports and studies from other non-governmental bodies are unlikely to fall within the ‘public documents’ exception to the hearsay rule,¹⁰ and are therefore unlikely to be admitted as proof of the facts stated within them. Expert scientific evidence will almost certainly be required, although that evidence may rely upon the scientific literature.¹¹ In many cases, evidence from multiple experts will be needed to address issues covering different fields of specialised knowledge. For example, a climate scientist may be able to address the causal connection between increased greenhouse gas concentration and the phenomenon of global warming – but is unlikely to be able to provide admissible opinion evidence addressing the sources of greenhouse gas emissions from an industrial gas operation.

As noted above, there are likely to be significant forensic benefits to confining the expert evidence to topics on which there is a high degree of scientific consensus. This will not only narrow the issues in dispute but may lead to a situation where the evidence is largely uncontested, resulting in findings in support of the relevant party’s case.¹²

Loss

Most climate change litigation in Australia has been regulatory or public interest litigation solely seeking public law remedies, injunctions or declarations. Questions of causation have therefore been confined to proving a link between the defendant’s conduct and climate change generally. There has been no need to prove present loss suffered by the plaintiff by reason of the defendant’s conduct.

This may change in the future. For example, if a company is revealed to have made misleading statements about its efforts to address climate change (e.g., misrepresenting its ‘net zero’ plan) and its share price subsequently tumbles, a claim could be brought on behalf of shareholders for loss caused by misleading conduct in respect of the company’s shares or breach of the continuous disclosure provisions. This would not necessarily require proof that the shareholders relied on the original misleading statements when purchasing their shares, although they may have done so. It may be sufficient to show that the company’s shares traded at an inflated price by reason of the conduct. The quantum of the loss could then be measured through an event study analysis, being an empirical

technique commonly used in shareholder class actions to measure whether a particular ‘event’ (here, the disclosure of the matters that indicated that prior representations were misleading) resulted in a statistically significant effect on the price of a company’s shares.¹³ There is no reason why this analysis cannot be applied in the context of climate related disclosures.

Another method that plaintiffs could use to show that a defendant’s conduct in contributing to climate change has caused personal loss is through the developing field of ‘attribution science’. Attribution science seeks to show the causal connection between global warming and particular natural events, such as heat waves, hurricanes or storms, by comparing the likelihood of the event occurring today to its likelihood in a world that was not subject to anthropogenic climate change.¹⁴

Conclusion

Climate change litigation is no longer foreign to the Australian legal system.

As the seriousness of the climate crisis deepens, it can be expected that there will be more litigation involving the causes and effects of climate change. Parties to such proceedings, and those advising them, will need to carefully navigate the particular issues that can arise when litigating about the climate. **BN**

ENDNOTES

- Bushfire Survivors for Climate Change v Environment Protection Authority* [2021] NSWLEC 92; 250 LGERA 1.
- Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560; 391 ALR 1; 248 LGERA 330, overturned on appeal in *Minister for the Environment v Shama* [2022] FCAFC 35; 291 FCR 311; 400 ALR 203.
- Smith v Fonterra Co-operative Group Limited* [2021] NZCA 552 (appeal to the New Zealand Supreme Court currently reserved).
- ASIC proceedings against Mercer Superannuation (Australia) Limited alleging that it engaged in misleading or deceptive conduct in contravention of 12DB and 12DF of the *Australian Securities and Investments Commission Act 2001* (Cth) for representing that its ‘Sustainable Plus’ investment option did not invest in carbon intensive fossil fuels (Federal Court Proceeding VID 117/2023).
- Australian Centre for Corporate Responsibility proceedings against Santos Ltd for representations that its natural gas products were ‘clean energy’ and that it had a clear and credible plan to achieve ‘net zero’ emissions by 2040 (Federal Court Proceeding NSD 858/2021).
- Joana Setzer and Catherine Higham, *Global trends in climate change litigation: 2022 Snapshot* (2022). London: Grantham Research Institute on Climate Change and the Environment and Climate Change Economics and Policy, London School of Economics and Political Science.
- Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560; 391 ALR 1; 248 LGERA 330 at [30].
- Minister for the Environment, Heritage and the Arts v PGP Developments Pty Limited* [2010] FCA 58 at [35].
- Evidence Act 1995* (Cth), s 191(2) (and State equivalents).
- Evidence Act 1995* (Cth), s 156 (and State equivalents). Where the *Evidence Act* does not apply, see *Perth Airport Pty Ltd v Qantas Airways Ltd [No 3]* [2022] WASC 51 at [129]-[133].
- See *Bushfire Survivors for Climate Change v Environment Protection Authority* [2021] NSWLEC 92; 250 LGERA 1 at [60]-[61].
- This is what occurred at first instance in *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560; 391 ALR 1; 248 LGERA 330.
- TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited* [2019] FCA 1747; 293 FCR 29 at [662], [1500]-[1671].
- Renee Cho, ‘Attribution Science: Linking Climate Change to Extreme Weather’ (4 October 2021), *State of Planet*, Columbia Climate School. Available: <https://news.climate.columbia.edu/2021/10/04/attribution-science-linking-climate-change-to-extreme-weather/> [accessed 25 May 2023].