The Law in a Climate of Change

Inaugural Sir Francis Burt Oration

The Hon Robert French AC

6 November 2019, Perth

On 13 February 2013, the High Court of Australia heard an application to extend time to appeal from a decision of the Court of Criminal Appeal of the Supreme Court of Western Australia. The decision appealed against had been delivered on 29 July 1987.[1] Sir Francis Burt had presided as Chief Justice with two other Justices.

A 25 year old man, intellectually disabled because of diffuse brain damage, had been convicted of two offences of aggravated sexual assault on a child. He had been sentenced to seven years' imprisonment. He was also ordered to be detained indefinitely at the Governor's pleasure under s 662 of the *Criminal Code* (WA). The rationale of that order was not that he would pose a continuing danger to the community when released after serving his sentence. Rather, the sentencing judge reasoned that as an indefinite detainee he could be limited to a shorter but more achievable parole period than he would be allowed as a prisoner serving a finite term. The Court of Criminal Appeal by majority accepted the rationale of the indefinite detention order. Chief Justice Burt dissented. He said there was nothing in the appellant's record of prior convictions which would justify making the order.

Twenty six years later the offender was still in prison under the indefinite detention order. The High Court extended time, granted special leave to appeal and allowed the appeal against that order.[2] Four of the Justices, in a judgment in which I joined, said 'Burt CJ was plainly correct to conclude that the evidence did not support the making of the order.'[3] Justice Gageler, who wrote a separate judgment, said of Chief Justice Burt's dissenting judgment '[h]e adopted the correct test. He dissented. He was right.'[4]

It was a curious experience looking back at the appeal papers, at the print of old judgments in a font from the long gone technology of the electric typewriter. I had appeared

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1 *Yates v The Queen* (1987) 25 A Crim R 361.
2 *Yates v The Queen* (2013) 247 CLR 328.
3 Ibid 341 [36] (French CJ, Hayne, Crennan and Bell JJ).
4 Ibid 343 [44].

before all of the Judges involved in the case. It was also a revisiting of old memories to read the succinct dissent of Sir Francis Burt reaching across the years. Memories of his Honour as a Supreme Court Judge and as a Chief Justice tend to be vivid. To engage with him as counsel to Judge was challenging and stimulating. His questions were penetrating, his observations pithy, his courtesy constant, although at times he could disconcert. His judgments were practical and principled and no longer than they had to be. They are still cited in intermediate courts across Australia and in the High Court. In a decision about cause and effect in criminal cases in 1991, Sir Anthony Mason said:

> I agree with the statement by Burt CJ in *Campbell v The Queen*,[5] that it is 'enough if juries [are] told that the question of cause for them to decide is not a philosophical or scientific question, but a question to be determined by them applying their common sense to the facts as they find them, they appreciating that the purpose of the inquiry is to attribute legal responsibility in a criminal matter.[6]

The same passage was quoted in the joint judgment of Deane and Dawson JJ[7] and in that of Toohey and Gaudron JJ[8].

In *Hawkins v The Queen*[9] the High Court in a unanimous decision on the question of criminal responsibility and insanity arising under the *Criminal Code* (Tas), referred to the judgment of Burt CJ in *Schultz v The Queen*.[10] The Court noted that a different approach had been taken by the Court of Appeal of New Zealand but said '[t]he view of Burt CJ accords with the law in this country.'[11]

His Honour's reputation as a jurist was national. Tom Hughes QC, when he was Commonwealth Attorney-General between November 1969 and March 1971, sounded Sir Francis out about the possibility of him joining the High Court. Sir Francis disclaimed any interest. The only Justice who was appointed to the High Court during Hughes' time as Attorney-General was Sir Harry Gibbs, who was the Senior Judge when Sir Garfield Barwick retired in 1981 and was appointed as Chief Justice of the High Court to succeed him. Had

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5 (1981) WAR 286, 290.
6 *Royall v The Queen* (1991) 172 CLR 378, 387.
7 Ibid 411–12.
8 Ibid 423.
9 (1994) 179 CLR 500.
10 [1982] WAR 171.
11 (1994) 179 CLR 500, 514

Sir Francis been appointed in 1970 in lieu of Sir Harry Gibbs the same fate might have befallen him. However, a sliding door had closed — so be it. Western Australia was the beneficiary of that closure. It retained one of the finest legal minds in the country as a Judge of its highest court from 1969 to 1977 and as Chief Justice of the State from 1977 to 1988.

When, in 1962, he established the Independent Bar, which celebrates his life with this lecture in his honour, Sir Francis showed a clear, practical understanding of the professional environment and culture in which it had to fit — a culture informed by the established traditions of the fused profession in Western Australia. The Bar was not going to affect superiority over solicitors. Barristers were not to have regard to rules about not going to a solicitor's office to talk to them. As he said, in an interview in 1992:

> we never really observed those Bar rules … which have become ingrained in the Sydney practice of the Bar …We always tried to make it as easy as you could, and you had to. They were paying you and you had to do the work.[12]

He and his successors as leaders of the Bar in its formative years were not distracted by individual or institutional self-regard. They had no difficulty appearing with juniors from the amalgam who might also be acting as their instructing solicitors. For those who practiced as advocates in the amalgam and aspired eventually to go to the Bar, it gave them access to the best kind of guided experience in the work of advocacy.

Sir Francis was an institutional innovator but even his innovative instincts occasionally met their match. Launching the Law Society's website in 1998 he said:

> I am here this morning in response to your President's kind invitation to attend the launch of The Law Society's revised Web site. And as to that, I can only say that I have no idea what a Web site is, revised or otherwise.[13]

Despite his disclaimer of knowledge about the new world of the Internet, he had long enjoyed an expansive awareness of the effects of social change on our democracy and

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12 Interview with Francis Burt QC, 'The Foundations of the Independent Bar' (1992) 19(7) *Brief* 11, 12.

13 Sir Francis Burt, 'Launch of The Law Society's Web Site'(August, 1998) *Brief* 15.

community concepts of law and justice. In a paper delivered in 1987 and published in the *Australian Law Journal* under the engaging title 'The Moving Finger or the Irremovable Digit'[14] he wrote of the impact of social change on the legal profession. The rise of the welfare state, increasing taxation and regulation generally diminished the role of the common law in the courts. The statute, he said, 'has become King and for the man on the street and, particularly for the man in business, the law which affects him is now to be found in the statutes and in the mountains of regulation sustained by them.'[15] The justice of society as perceived by the average citizen, he observed, 'lies outside the law as we [have] understood it and practised it.'[16] Justice resided in how much tax had to be paid or what social benefits could be enjoyed, in things such as industrial awards, town planning schemes, housing, mortgages, and interest rates.

As I remarked earlier, Sir Francis could, at times, disconcert. In an appeal to the Court of Criminal Appeal I once referred to an unreported decision of that Court which seemed to support my argument. Sir Francis did not tend to favour reference to unreported judgments and said '[w]ell if we said that, we were wrong.' On another occasion, however, granting my client a costs certificate on the basis of a rather strained interpretation of the *Suitors Fund Act*, he said 'don't treat this as a precedent'.

Those two anecdotes may seem an unlikely platform for the general theme of this lecture. This lecture is concerned with the law in action through litigation, generally reacting to societal change, but sometimes acting upon it. The anecdotes however provide a useful entry point. Sir Francis' comments on each of those occasions stimulate reflection upon the common law method and the place in it of precedent and principle which allow it to engage with societal change whether that method be applied to constitutional law, statute law or the common law itself.

Precedent plays an important part in the life, the stability, the coherence and the development of the law. Precedent can guide the growth of principle but cannot be allowed to stunt it. It serves as an instrument of the legal system, but not so as to handcuff justice. There is nothing novel in that proposition. Lord Mansfield, who had more than one first to his name in the development of the common law, said in a judgment in 1774:

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14 Sir Francis Burt, 'The Moving Finger or the Irremovable Digit' (1987) 61 *Australian Law Journal* 465–70.

15 Ibid 467.

16 Ibid.

> the law of England would be a strange science indeed if it were decided upon precedents only. Precedents serve to illustrate principles … and these principles run through all the cases …[17]

A more recent perspective on precedent, principle and change was offered in 2008 by a leading scholar in the area, Professor Neil Duxbury who observed that the common law requires 'not an unassailable but a strong rebuttable presumption that earlier decisions be followed.'[18] Precedent must be used according to its nature and its proper purposes. Sometimes it is read as a kind of dry statutory text. Sometimes it is misread in a way which avoids thinking about underlying principle — for example, reading a case as identifying a necessary condition for some legal result, and alternatively as identifying a sufficient condition for some legal result. That sort of reading turns precedent into a convenient tick-box avoiding the need for careful reflection upon what the decision actually says and the assumptions, concessions or premises upon which it is based.

Precedent, as the late Julius Stone pointed out, offers leeways of choice — in the various ways of finding a ratio decidendi of a case, the materiality of the factual elements of the precedent decision and the level of generality at which those factual elements are material. Those leeways of choice are essential to enable the law to adjust, as it must, to new circumstances. Stone wrote in 1984 that the pace of societal change, even then, demanded:

> The law and its judges should … help rather than hinder an orderly and circumspect adjustment to change in social life. The leeways of choice available to appellate judges when the law is disputed have been for centuries an arena for further adjustment. In an age of unprecedented pressures for further adjustment, prudence demands that we understand the range and magnitude of these leeways as an ongoing social resource, and use them for the maintenance of justice in the contemporary legal order.[19]

The common law method is open-textured, whether applied to constitutions, broadly framed statutory provisions or the development and application of common law doctrines. It

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17 *Jones v Randall* (1774) 1 Cowp 37, 39; 98 ER 954, 955.

18 Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, 2008) 183.

19 Julius Stone, *Precedent and Law: dynamics of common law growth* (Butterworths, 1985) 271.

has to be in order to respond to the unimagined case which may be just around the corner and, beyond that, as Stone says to allow room for adjustment to social change.

The drafters of the *Australian Constitution*, by way of example, knew that they were drafting for unimagined futures. Sir John Downer, speaking of the judiciary of the future at the 1898 session of the Australasian Federation Conference in Melbourne said:

> With them rests the obligation of finding out principles which are in the minds of this Convention in framing this Bill and applying them to cases which have never occurred before, and which are very little thought of by any of us.[20]

In similar vein, Andrew Inglis Clark, one of the principal architects of our written *Constitution* said of it in 1901:

> it must be read and construed, not as containing a declaration of the will and intentions of men long since dead, and who cannot have anticipated the problems that would arise for solution for future generations, but as declaring the will and intentions of the present inheritors and possessors of sovereign power, who maintain the Constitution and have the power to alter it, and who are in the immediate presence of the problems to be solved.[21]

Those observations go to the intersection of the *Constitution* with societal change which can present new cases not in the minds of the drafters. They reflect the principles and traditions of the common law method of which Australians are the inheritors.

Today's world, 32 years after Sir Francis' 1987 paper on 'The Moving Finger or the Irremovable Digit', has seen far more change with greater impact on concepts of social justice and perceptions of the legal system than could have been imagined by even the most gifted futurologist at the time of the speech. Even as he delivered his speech a case was pending in the High Court which was to result in what Justice Gummow would later describe as a 'perceptible shift'[22] in the common law as the ultimate constitutional foundation in

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20 *Official Record of the Debates of the Australasian Federation Conference*, Melbourne, 28 January 1898, 275 (Sir John Downer).

21 A Inglis Clark, *Studies in Australian Constitutional Law* (Partridge and Co, 1901) 21.

22 *Wik Peoples v Queensland* (1996) 187 CLR 1, 182

Australia. That was, of course, *Mabo (No 2),*[23] decided in 1992, in which the High Court rejected a false view of Australian history which had been entrenched in legal precedent by the Privy Council in *Cooper v Stuart* in 1889.[24] In that decision the Privy Council had described Australia at the time of its colonisation as 'a tract of territory practically unoccupied without settled inhabitants or settled law.' That precedent was treated as binding by the Supreme Court of the Northern Territory in *Milirrpum v Nabalco*[25] even though the trial judge had found on the evidence before him '[a] subtle and elaborate system highly adapted to the country in which the people lead their lives' — a system which he characterised as a government of laws and not of men.[26]

It can fairly be said of the *Mabo* decision, which rejected that precedent, that it not only changed the law but effected an important shift in societal power structures affecting Australian Indigenous people. For perhaps the first time they moved beyond claiming grace and favour grants by statutory or executive action and asserted rights which the common law said they had.

At the time Sir Francis made his speech about social change and perceptions of justice in 1987, there was little talk about same sex marriage or the proposition that the *Constitution* properly interpreted would allow the Commonwealth Parliament to make laws to provide for such unions. In the event, a profound change in societal attitudes led to litigation the result of which enabled those societal attitudes to be respected and given effect by the Parliament of the Commonwealth.

With legal change and societal change, the question may often be asked: what comes first, the chicken or the egg? In a sense societal change always comes first. The cases which come before the courts and place demands on existing principles are a reflection of things happening in wider society. The courts do not have an agenda for promoting social change.

One of the biggest societal changes of our time is the rapidly dawning realisation of the truth and implications of anthropogenic climate change. There is an enhanced global and local public awareness of its significance for all reinforced by extreme weather events around the world. That awareness is reflected in international agreements, in regulatory advice, in investor, corporate and non-government organisational responses and in sometimes

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23 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
24 [1889] 14 App Case 286.
25 (1971) 17 FLR 141.
26 Ibid 267.

acrimonious public debate. Politically it seems to present, at times, intractable problems for governments hampered by the challenge of reconciling conflicting interests and, in some cases, having to overcome the stupefying effects of assurances from special interests and ideological warriors that all will be well if we just let nature take its course.

What, if any, parts do courts have to play in this area? In answering that question, it is necessary to restate that courts, at least in the common law world, are not programmatic policy-making institutions. They hear particular cases which come before them and they decide those cases. Their decisions may be precedents and those precedents may become vehicles for the development of principle. Such principles may be vulnerable to abolition or modification by legislation unless they are constitutional in character. Sometimes, however, a new principle or development of principle so accords with attitudinal change in society that it is difficult to set aside politically.

Climate change is a relatively new front in multi-dimensional debates about environmental issues which have taken place over many years involving action in the political and social spheres and sometimes litigation. Environmental groups were actively involved in litigation with governments and the private sector at the time that Sir Francis was Chief Justice. Sometimes it was litigation involving the prosecution of environmental activists.

Environmental groups sought to make governments and the private sector more responsive to their concerns. Often they were on the lookout for a plaintiff aggrieved by some adverse environmental action with standing to bring a case to court. The *Trade Practices Act 1974* (Cth) was invoked in relation to statements in trade or commerce by uranium producers and by the timber industry defending their practices. The Mining Warden's Court was a field of contest where exploration and other mining tenements were being sought and third party environmental groups sought to object and argued their right to do so.

I think it was in the early 1980s that I appeared for the Western Australian Conservation Council in the Mining Warden's Court objecting to the grant of a permit to a mining company to explore for coal under Mt Lesueur. David Ipp appeared for the miner. I pleaded the fragile biodiversity of Mt Lesueur. David Ipp said the people of Western Australia had a right to know what was underneath the ground. The peoples' right to know won the day in the Warden's Court. That battle was lost but in the long run the war was won.

In the face of opposition from farmers, residents, unions, artists and scientists, CRA discontinued plans to establish a coal mine and power station in the area. In 1992, the Mt Lesueur National Park was gazetted.[27] In that case litigation was an opening shot in a long running campaign — what was ultimately effective was community mobilisation across political lines.

In 1986, about ten years after the Conservation Council's unsuccessful attempt to prevent exploration for coal on Mt Lesueur, the first Australian Environmental Defender's Office was established in New South Wales. There is now a national network of such bodies. In late 1995 a group of lawyers, together with the Conservation Council of Western Australia, formed the Environmental Defender's Office of Western Australia which commenced operations in March 1996.

The Environmental Defenders Offices undertake a mix of functions. They provide representational and non-litigious advocacy on environmental questions, they make law reform submissions and they litigate on behalf of communities, individuals and non-government organisations in relation to environmental matters. They also undertake community education.

The range of activities undertaken by the Environmental Defenders Offices reflect the reality that litigation is just one item in a menu of responses to environmental issues. Those responses may be general seeking public policy development. They may be specific focussing on a particular case. Particular cases, as mentioned earlier, can enliven a new principle or extend an existing principle to new circumstances.

Over the decades since some of the quixotic engagements of the 1970s and early 1980s environmental law in Australia has become part of the public law landscape in which governments, government authorities and the private sector must operate. Litigation is one of the aspects of that landscape that has, I think, contributed to changes in societal attitudes to the protection of our natural environment. It has also enlivened pushback from government and some elements of the private sector.

Climate change today presents a global environmental challenge unlike any that humanity has faced before. There have been international and national responses to it and a

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[27] Janis Bailey, 'Mt Lesueur as a 'Space of Engagement': A Rural-Urban, Cross-Class Conservation Campaign' (Liverpool University Press Online).

variety of interests have weighed into the public policy debate. They include those who still see climate change concerns as a species of green theology or as a vehicle for social re-engineering by activists unconcerned with the impact of their agendas on people's jobs and the economy, particular in rural and regional areas. There are others who call for immediate and radical change in public policy and whose public protests, as we have recently seen in Perth, are deliberately disruptive in order to draw attention to their cause.

Regulators in this fraught area have to deal with the tensions between public and private interests which are not always mutually exclusive. A case illustrating those tensions was the issuance by the Environmental Protection Authority of Western Australia (EPA) in March 2019 of a document entitled 'Technical Guidance Mitigating Greenhouse Gas Emissions'.[28] Its purpose was to address the EPA's objectives for greenhouse gas emissions from new or expanding operations, including so-called Scope 3 Emissions by downstream project products. The document was said to:

- discuss circumstances under which the EPA would assess greenhouse gas emissions associated with development proposals;
- outline relevant considerations for mitigating greenhouse gas emissions consistent with the objects of the Act;
- ensure proposals that contribute to Western Australia's greenhouse gas emissions are assessed in a sound and consistent manner that demonstrates how the EPA's objectives for the 'greenhouse gas emissions' will be met.

The EPA stated in the document that the approaches it outlined were not new and had been applied to significant and relevant proposals subject to formal environmental impact assessment for almost two decades. Nevertheless it was widely seen as adopting a more stringent approach. The Guidance was described as complementary to existing national policy settings and consistent with goals for reducing greenhouse gas emissions under the United Nations Framework Convention on Climate Change (UNFCCC).[29]

The document referred, among other things, to Australia's 2030 Paris Agreement targets. It noted that Western Australia was said to have the second highest per capita

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[28] Environmental Protection Authority, 'Technical Guidance Mitigating Greenhouse Gas Emissions' (7 March 2019).

[29] *United Nations Framework Convention on Climate Change*, opened for signature 3 June 1992, 1771 UNTS 107 (entered into force 21 March 1994).

emissions of all Australian States and Territories with emissions per capita well above those of other developed economies including resource-based economies such as Canada. The emissions trajectory in Western Australia was said to be concerning in light of Australia's international commitments and increasingly stringent global agreements. On its face the Guidance document reflected a State regulator responding to Australia's international obligations in relation to protection of the global environment.

Despite the fact that the document issued by the EPA had no legal force and that the EPA is not the final decision-maker on proposals, they were perceived as creating a more stringent regulatory regime for the proponents of emitting developments. And, at a practical level, that may well have been the case.

There was an immediate reaction. The ABC News, on 8 March 2019, reported that concerns had been raised with the Premier by investors and industry representatives. In the event, the EPA withdrew the Guidance with a view to consulting further with stakeholders and the public.

The EPA then issued a Background Paper on Greenhouse Gas Emissions and invited submissions. The EPA's response to the mining and resources sector protests is not to be criticised. Regulators are not courts. They are arms of the executive government. While they must comply with their statutory objectives and, to that extent, statutory independence, they are not obliged to act like courts. Sometimes a regulator has to make a judgment call about policy development. Regulatory policy decisions are different from judicial decisions. A judicial decision cannot be withdrawn because of private sector and government pressures and may, in a particular case, set a general principle for future similar cases. Parliament cannot legislate to directly set aside a judicial decision. On the other hand, as noted earlier, the effect of a judicial decision can be overturned by changing the law which underpins it unless that law is the law of the *Constitution*.

A leading example of judicial decision-making in this area in Australia was the recent judgment of the Land and Environment Court of New South Wales, delivered on 8 February 2019 in *Gloucester Resources Ltd v Minister for Planning*.[30] In that case Preston CJ considered an application to mine coal from an old open coal mine one or two kilometres from the boundary of a country town. Ministerial consent had been refused. A number of

[30] [2019] NSWLEC 7; 234 LGER 257.

factors weighed against the mine and, as his Honour found, so did greenhouse gas emissions. The emissions were those associated with the construction and operation of the mine and those associated with the transport and combustion of the coal which would all contribute to climate change.

The Court found a causal link between the project's cumulative greenhouse gas emissions and climate change and its consequences. The cumulative emissions would contribute to the global total of greenhouse gas concentrations in the atmosphere and thereby affect the climate system and cause climate change impacts. In that way the project would be likely to have indirect impacts on the environment, including the climate system, the oceanic and terrestrial environment and people.[31] The fact that the aggregate emissions of a particular project represented only a small portion of the total of greenhouse gas emissions across the globe did not matter. All greenhouse gas emissions are cumulatively important and must be addressed through abatement from a range of small sources. His Honour also dismissed the argument that another coal mine would be approved in another country with less stringent environmental policies to meet global demand for coking coal and that the greenhouse gas emissions would nevertheless occur.

The judgment made extensive reference to scientific expert evidence, including evidence of the influence of climate change on worsening extreme weather in Australia.[32] The judgment quoted from the evidence of Professor Steffen who observed that:

> global greenhouse gas emissions are made up of millions, and probably hundreds of millions of individual emissions around the globe. All emissions are important because cumulatively they constitute the global total of greenhouse gas emissions, which are destabilising the global climate system at a rapid rate. Just as many emitters are contributing to the problem, so many emission reduction activities are required to solve the problem.[33]

The effects of such a decision, if not overturned on appeal, can only be overcome by legislative action which may involve a political cost. Of course it may be that although a precedent, it is not a binding precedent and although it may be said to enunciate a principle in

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31 Ibid [525].
32 Ibid [436].
33 Ibid [450].

relation to Scope 3 Emissions, other courts might not follow it or find it inapposite to their cases or say it was obiter.

Litigation has its advantages and limits and it may lead to responses from governments designed to overcome the effect of individual decisions. It is nonetheless an important mechanism for resolving, in a non-political forum, justiciable conflicts between opposing interests affected by responses or non-responses to climate change. And the fact is that climate change litigation is now a global phenomenon.

The Grantham Research Institute on Climate Change and the Environment[34] recorded 1,023 cases in the United States in the period from May 2018 to May 2019. The next most prolific jurisdiction was Australia with 94 cases. The European Union and Britain followed with 55 and 53 respectively. New Zealand and Canada had 17 and 16 cases.[35]

Most cases have been brought against governments by citizens, corporations and NGOs. They are brought by plaintiffs seeking mitigation measures and plaintiffs resisting them. Some can be classified as strategic, seeking public policy outcomes. Others may be more narrowly focussed challenging ministerial and regulatory decisions on particular projects or involving actions against private sector actors.

A leading example of strategic litigation is the ongoing case between *Urgenda Foundation and The State of Netherlands,* in which the District Court of The Hague in 2015 held that the Dutch Government has a legal duty to strengthen emissions reduction targets for 2020 and cut emissions by at least 25% below 1990 levels. The decision was reaffirmed by the Court of Appeal in October 2018 and is presently before the Supreme Court of the Netherlands.

Litigation in particular cases may draw attention to the way in which climate change risk informs statutory and common law duties particularly in the private sector.

There is an emerging focus on the statutory and fiduciary duties of company directors in Australia and elsewhere to exercise due care and diligence and to disclose risks which may materially affect the interests of the company. Noel Hutley SC and Sebastian Hartford Davis

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34 Joan Setzer and Rebecca Byrnes, 'Global trends in climate change litigation: 2019 snapshot' Grantham Research Institute on Climate Change and the Environment, Policy Report, July 2019.

35 Ibid 3.

issued a joint opinion in October 2016 on that issue which is in the public domain. A supplementary opinion issued on 26 March 2019 strengthened their advice:

> it is increasingly difficult in our view for directors of companies of scale to pretend that climate change will *not* intersect with the interests of their firms. In turn, that means that the exposure of the individual directors to 'climate change litigation' is increasing, probably exponentially, with time.[36]

Earlier, in June 2018 a Commissioner of the Australian Securities and Investments Commission advised directors to carefully consider the Hutley and Hartford Davis opinion.

Lord Sales, a Justice of the Supreme Court of the United Kingdom, referred to the Hutley-Hartford Davis opinion when addressing the same topic in a speech to the Anglo-Australian Law Society in Sydney in August. He said of Australia and the United Kingdom:

> environmental considerations *may* and, increasingly, *must* be taken into account by directors, particularly where there may be financial impacts on the company.[37]

The impact and utility of climate change litigation will depend upon those aspects of the legal system which can be called in aid by plaintiffs. A constitution with entrenched human rights, including social and economic rights, may provide opportunities for outcomes which cannot be overcome by legislative change.

In Australia there is no direct constitutional foundation for a judicial intervention of that kind in public policy. In some federations sub-national legal systems may provide a different range of opportunities for action. Human Rights Acts in Victoria, Queensland and the Australian Capital Territory impose duties on public authorities to take account of human rights in their decision-making. The application of those duties to decisions relating to greenhouse gas emissions is an open question but one worthy of exploration.

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36 Noel Hutley and Sebastian Hartford Davis, 'Climate Change and Directors' Duties', The Centre for Policy Development, 26 March 2019, 9 (emphasis in original).

37 Lord Sales, 'Directors' duties and climate change: Keeping pace with environmental challenges' (Anglo-Australasian Law Society, Sydney, 27 August 2019) (emphasis in original).

Short of constitutional provisions, and general human rights legislation, there are statutes national and sub-national which cast duties upon public authorities and private sector entities amenable to enforcement by regulators acting of their own motion or on complaint. Such statutory duties include compliance with pollution and emission standards relevant to climate change. At a more general level are the statutory duties imposed on directors in relation to diligence and disclosure. The Australian Competition and Consumer Law prohibits misleading or deceptive conduct in trade or commerce and allows any person to take private enforcement action. This may be relevant to misleading or deceptive commercial speech, for example, as to the carbon footprint associated with particular products or processes. Regulators may be the subject of judicial review in appropriate cases where they approve or refuse approval or imposes conditions on approvals which are adverse to the interests of affected communities or project proponents. Beyond statute in Australia and other common law jurisdictions is the common law and in particular the common law of tort, including private and public nuisance and the troublesome tort known as breach of statutory duty.

Sometimes public interest litigation can coincide with a public policy tipping point. An example in Australia, which I have already mentioned, was the litigation which led to the recognition of native title at common law. Climate change litigation is unlikely to lead to an individual decision which gives rise to an equivalent public policy outcome. It can, however, lead to enhanced sensitivity in the public and private sector of the need to address the climate change implications of their activities.

Beyond domestic forums, the utility of litigation in international forums is subject to the incentives and willingness of States to submit to the jurisdiction and comply with the outcomes. Of course, reputational factors may be in play. On the other side of the ledger, international arbitral forums have been used by private sector investors claiming that adverse action by government has impacted on their rights under investment treaties or free trade agreements. There is an increasing tendency however to carve out environmental regulation from that investor protection.

Overall, climate change litigation presents a rather complex global picture characterised by jurisdictional diversity between States and, in federal systems, within States. While there will always be particular cases worthy of pursuit because of the merits of those cases and the benefits of particular outcomes the question remains — can such litigation

change the public policy climate? I tend to think that, in conjunction with other factors it can raise public awareness and public and private sector sensitivity to and responsiveness to the challenges presented by climate change today. More importantly it is undertaken against the background of the increasingly obvious truth that climate change is happening rapidly.

Conclusion

As noted, Sir Francis Burt was sensitive to the ways in which social change can place new demands on existing legal principle and changing public perceptions of what is required of justice and the law. The common law method of which he was an accomplished master, demands flexibility to meet the climate of the times. In the particular field of climate change, the law must be able to show that it is up to the task when the responsibility of hearing and deciding cases responding to that change is thrust upon it.

It has been an honour to deliver this lecture, to celebrate the memory of a great Australian Judge and a great Western Australian public figure who many of us still remember with deep respect and affection.