University of Western Australia and Law Society of Western Australia CPD Lecture on Climate Change Opening Remarks

The Hon Robert French AC

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I am delighted to be able to join with the Law School, the Law Society and the University Club in supporting this event to raise funds for bushfire relief through the Australian Red Cross. I look forward to hearing Associate Professor David Hodgkinson's lecture on Climate Change Law in Australia shortly. My brief remarks will focus on the increasing prevalence of climate change litigation and its potential to effect public policy change.

I have been advised, rather unusually, that I must not speak for less than my allotted time of 10 minutes and that Professor Hodgkinson must speak for no less than his allotted 40 minutes. Any shortfall will evidently have the draconian result that the single CPD point allocated to the lecture will not be awarded. I will therefore err, but only slightly, on the side of caution.

Debate about climate change has generated concern and division in Australian society and around the world. Despite decades of warnings by scientists in a variety of disciplines, many governments, reflecting in part a degree of societal inertia and pressures from various constituencies, have failed to take decisive action to reduce global emissions.

The zeitgeist is changing in Australia. In September 2019, an online Roy Morgan Survey[1] found that 78% of Australians were concerned about global warming, an increase of 12% since February 2014.[2] Interestingly, 50% of those surveyed considered that if we did not act soon it would be too late. 28% said it is already too late and 18% considered the concerns are exaggerated.

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1 Roy Morgan, '78% of Australians concerned about Global Warming' September 23, 2019, Finding No 8145, Press Release Special Poll, Australia. <http://www.roymorgan.com/findings/8145-global-warming-australia-september-2019> .

2 The survey covered 1,006 Australians aged between 18 and 64.

Since September, Australia has experienced an early, devastating and tragic bushfire season driven by a combination of prolonged drought, high temperatures and high winds. As at 21 January, 30 people had been killed, including four fire fighters and many millions of hectares burnt. Estimates of animal deaths are in the millions. The fires have been of a magnitude and intensity that generate their own extreme fire physics, including local weather systems complete with lightning which causes additional fires. We are in the realm of a frightening new bushfire paradigm driven by increasingly extreme weather patterns.

The fires have been a massive human and environmental tragedy. The immediate focus of communities, non-government organisations, such as the Red Cross, and governments is on support and recovery in the short and long term. Nevertheless, many Australians are experiencing and expressing concerns about the link between climate change, extreme weather events and their sequelae, and the perception that their governments, and particularly the national government, are not doing enough. Such concerns are not dispelled by assurances that we are complying with international legal obligations in relation to the reduction of greenhouse gas emissions. The collateral argument that the reduction of our emissions only withdraws a drop from the global ocean of CO_2 becomes less and less convincing — not least because it can be applied to almost any country other than the United States, India and China.

The extent of Australia's paper compliance with our Paris Agreement targets may have been affected by recent events. The bushfires have evidently released significant amounts of CO_2 into the atmosphere. According to the Copernicus Atmosphere Monitoring Service conducted by the European Union and based on satellite and in situ data, some 400 mega tonnes of CO_2 have been released into the atmosphere by the 2019–2020 bushfires. That represents, over a period of three months, Australia's average annual carbon dioxide emissions. That release has the obvious effect, as the United Nations Environmental Organisation observes, of increasing Australia's annual greenhouse gas emissions. The fires in this way contribute to global warming and can be said to thus increase the probability of recurring mega fires leading to the release of yet more CO_2. This is a climate feedback loop.

Policy change in this area will be driven by societal demands. It may be reflected in changes to the law or in the administration of existing laws about which Professor Hodgkinson will speak. It can also be affected by climate change litigation, the

incidence of which is increasing around the world and is directed at governments, regulators and the private sector.

Australia is a player in this field. The Grantham Research Institute on Climate Change and the Environment in a Report published in July last year recorded the incidence of climate change litigation around the world. In the United States there were 1,023 cases 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 cases respectively. New Zealand and Canada had 17 and 16 cases.[3]

The avenues for climate change litigation in any national jurisdiction depend upon its constitutional arrangements and the accepted role of the judiciary in that jurisdiction. I will mention briefly three very recent cases of climate change litigation in the Netherlands, the United States and France, each of which demonstrates, in its own way, the variety of forms which such litigation can take. They cannot readily be transplanted directly into the Australian context. As the Chief Justice of the Land and Environment Court of New South Wales, Brian Preston, said, speaking of environmental litigation generally in 2013:

> First and foremost the laws of the land must provide a foundation for environmental public interest litigation. The laws must create or enable legal suits or actions in relation to the aspect of the environment that is sought to be protected. If there is no right of action, there can be no litigation.[4]

Nevertheless, each can in its own way illuminate opportunities and obstacles and lines of argument which may be relevant in the Australian context.

The first of the three cases was commenced by a Dutch environmental group, The Urgenda Foundation and 900 Dutch citizens in 2015. They sought an order directing the Government of the Netherlands to reduce the State's emission of greenhouse gases. The District Court in The Hague allowed Urgenda's claim in 2015 ordering the State to reduce emissions by the end of 2020 by at least 25%, compared to 1990. In 2018, the Court of

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3 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.

4 Hon Brian J Preston SC, 'Environmental Public Interest Litigation: Conditions for Success', International Symposium Towards an Effective Guarantee of the Green Access: Japan's Achievements and Critical Points from a Global Perspective, 30-31 March 2013.

Appeal confirmed that judgment. On 20 December 2019, the Supreme Court of the Netherlands dismissed an appeal by the State from the Court of Appeal's decision.[5]

It its judgment the Supreme Court summarised the scientific consensus that greenhouse gases in the atmosphere retain heat radiated by the earth and that because an ever increasing volume of such gases has been emitted since the start of the Industrial Revolution, the earth is becoming warmer. Since the Industrial Revolution it has warmed by approximately 1.1^{o}C, 0.7^{o}C of which has occurred in the past 40 years. The consequences of the warming of the earth beyond 1.5^{o}C to 2^{o} were described by the Court as 'extremely dire' including extreme heat, extreme drought, extreme precipitation and a disruption of ecosystems that could jeopardise the food supply. The warming may also result in tipping points, as a result of which climate on the earth or in particular regions changes abruptly and comprehensively. I interpolate that the term 'feed-back loop' may play a role in defining such tipping points. The Court said '[a]ll of this will jeopardise the lives, welfare and living environment of many people all over the world, including in the Netherlands.[6]

The legal framework within which the Court made its decision was created by Articles 2 and 8, applicable in the Netherlands, of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*[7] (Convention) relating to the right to life and the right to respect for privacy and family life respectively. Dutch courts are constitutionally required to apply the Convention. Under the case law of the European Court of Human Rights, a contracting state is obliged to take suitable measures if a real and immediate risk to people's lives or welfare exists and the state is aware of that risk. By Article 13, national law must offer an effective legal remedy against a violation or imminent violation of the rights safeguarded by the Convention.[8]

In the course of its judgment, the Court made reference to the United Nations Framework Convention on Climate Change (UNFCCC), and the responsibility of States under that framework to take mitigating action. That responsibility informed the Court's rejection of the proposition that the global nature of emissions and their consequences meant that no protection could be derived from Articles 2 and 8 of the Convention.

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5 *State of the Netherlands (Ministry of Economic Affairs and Climate Change Policy) v Stichting Urgenda* ECLI:NL:HR:2019:2007, Hoge Road, 19/00135.

6 Ibid 4.

7 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

8 Ibid.

In its consideration of the UNFCCC the Court observed that no State party to that Convention can escape its own share of responsibility by arguing that compared to the rest of the world its own emissions are relatively limited in scope and that a reduction of its own emissions would have very little impact on a global scale. Each State is therefore obliged to reduce greenhouse gas emissions from its territory in proportion to its share of responsibility. Australia, it may be noted, is a party to the UNFCCC.

The Netherlands Government argued, in the Supreme Court, that it was not for the courts to embark upon the political considerations necessary for a decision on the reduction of greenhouse gas emissions. The Supreme Court held it was up to the courts to decide whether in taking their decisions government and the parliament remained within the limits of the law by which they are bound. The order which the District Court had issued to the State and which was confirmed by the Court of Appeal, was allowed to stand.

Illustrative of Chief Justice Preston's observation, quoted earlier, about the constraints that the law may place on the availability of legal remedies, is the even more recent decision of the United States Court of Appeals for the Ninth Circuit in *Juliana v United States,*[9] delivered on 17 January 2020. Twenty-one young people and an environmental organisation brought an action against the United States and various government agencies alleging climate-change injuries caused by the Federal Government continuing to 'permit, authorize and subsidize' fossil fuel. The injuries included were psychological harms, impairment to recreational interests, exacerbated medical conditions and damage to property. The plaintiffs sought, among other things, an injunction ordering the Government to implement a plan to 'phase out fossil fuel emissions and draw down excess atmospheric carbon dioxide'. By majority the Court held that there was little basis for denying that climate change was occurring at an increasingly rapid pace and that the unprecedented rise in carbon dioxide levels stemmed from fossil fuel combustion and would wreak havoc on the earth's climate if unchecked. The record also conclusively established that the Federal Government had long understood the risk of fossil fuel use and increasing carbon dioxide emissions and established that the Government's contribution to climate change was not simply a result of inaction. The Court nevertheless concluded that the relief sought by the plaintiffs was beyond its constitutional power. It was beyond the power of an Article III court to order, design, supervise or implement the requested remedial plan where any effective plan would

[9] *Juliana v United States* Case: 18-36082, 01/17/2020, ID: 11565804, DktEntry: 153-1.

necessarily require a host of complex policy decisions entrusted to the wisdom and discretion of the executive and legislative branches.

Despite finding adversely to the plaintiffs on the question of justicability, the majority opinion, written by Circuit Judge Hurwitz, was with the plaintiffs on the facts. Indeed, he revealed what may have been a baby boomer cultural preference in the opening paragraph of his opinion which read:

> In the mid-1960s, a popular song warned that we were 'on the eve of destruction'. The plaintiffs in this case have presented compelling evidence that climate change has brought that eve nearer. A substantial evidentiary record documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse.[10]

He concluded his reasoning observing:

> We reluctantly conclude … that the plaintiffs' case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box. That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes.[11]

The dissenting judge, District Judge Staton, who would have found for the plaintiffs, held that their suit sought to enforce the most basic structural principle embedded in their system of liberty, namely that the Constitution does not condone the nation's wilful destruction. She would have held that the plaintiffs had standing to challenge the government's conduct had articulated claims under the Constitution and sufficient evidence to press those claims to trial been presented. Judge Staton's opening paragraph was, if anything, more dramatic than that of the majority opinion:

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[10] Ibid 11 (footnote omitted).
[11] Ibid 32.

> In these proceedings, the government accepts as fact that the United States has reached a tipping point crying out for a concerted response—yet presses ahead toward calamity. It is as if an asteroid were barrelling toward Earth and the government decided to shut down our only defences. Seeking to quash this suit, the government bluntly insists that it has the absolute and unreviewable power to destroy the Nation.[12]

The third example from another national jurisdiction is pending litigation in France in which 14 local authorities and five non-government organisations have instituted proceedings in the Nanterre District Court against the oil company, Total, seeking orders that it take necessary measures to drastically reduce its greenhouse gas emissions. The action relies upon a new French law called 'The Law on the Duty of Vigilance' which came into force in March 2017 and requires some large French multi-national companies to take measures to identify and prevent risks to human rights and environmental violations caused by their activities and those of their subsidiaries. Those measures are required to be published in a Vigilance Plan and effectively implemented. Any party can take a company to court if it fails to comply with its obligation. The plaintiffs relied upon that statutory cause of action. Total is alleged to be responsible for about 1 per cent annually of global emissions and to be one of 20 companies contributing the most to global warming world-wide.

On Tuesday, 28 January 2020, Total was summoned to appear before the Nanterre District Court. Orders sought include the publication and implementation of a Vigilance Plan to align its activities with a greenhouse gas emission reduction pathway, including Scope 1, 2 and 3 emissions, compatible with limiting global warming to 1.5^{o}C above pre-industrial levels in order to achieve carbon neutrality by 2050. Plainly, that action is pending. The action appears to have been made possible by a public law creating statutory duties enforceable by private parties without any requirement to meet a standing test. Provisions of that kind can be seen in the Australian Competition and Consumer Law which authorises private enforcement actions by any person in respect of contraventions of the legislation.

The three examples I have cited are high profile climate change cases from around the world, which demonstrate the opportunities and limitations on litigation dependent upon particular constitutional and statutory frameworks. The Australian legal system offers opportunities for climate change litigation and, as noted earlier, there is a considerable number of cases on foot. Public law avenues obviously include objection processes where

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[12] Ibid 32–33.

development approvals are sought, and administrative and judicial review of regulatory and ministerial decisions. Private law remedies under the law of tort may be available in actual or apprehended pollution-generating activities leading to or associated with production of greenhouse gases. A leading case in the area of judicial review of regulatory action is the decision of the Land and Environment Court, delivered in February 2019 in *Gloucester Resources Ltd v Minister for Planning*[13] in which the Land and Environment Court of New South Wales dismissed an appeal against refusal of a ministerial consent to an application to re-open an old open coal mine. In so doing the Court considered greenhouse gas emissions which it found to be causally linked to climate change and its consequences. A causal link was based upon the proposition that each emission made a cumulative contribution.[14] Scope 3 emissions, that is downstream emissions resulting from the use of the producer's product were taken into account in that decision.

There has in the last two or three years been an increasing level of public discussion about the content, in an era of climate risk, of the statutory and fiduciary duties of company directors in Australia and elsewhere to exercise due care and diligence and to disclose matters which may materially affect the interests of the company. In a widely publicised joint opinion, commissioned by The Centre for Policy Development, published in 2016 and revised in 2019, Noel Hutley SC and Sebastian Hartford Davis, both of the Sydney Bar, said:

> 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.[15]

The approach to the law which they have enunciated has been given support by the Australian Securities and Investment Commission and most recently has been said to reflect

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13 (2019) 234 LGERA 257.

14 Expert evidence given by Professor Steffen who said that 'All emissions are important because cumulatively they constitute the global total of greenhouse gas emissions which are destabilizing 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'. The role of cumulative causal contributions is not novel and was applied by the High Court of Australia in asbestos litigation in *Amaca Pty Ltd v Booth* (2011) 246 CLR 36.

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

the position in both Australia and the United Kingdom by Lord Sales, a Justice of the Supreme Court of the United Kingdom.[16]

A pending case in the Federal Court of Australia, likely to be heard this year, has been brought by a member of the Retail Employees' Superannuation Trust alleging that it has breached its fiduciary duties owed to members by failing to adequately disclose or assess the impact of climate change on its investments. The applicant is represented by Environment Justice Australia. The implications of such litigation are clear enough.

Climate change litigation represents one class of items in the menu of measures that may effect societal and public policy change. In some cases, such as the *Urgenda Case*, the decision of the Court impacts directly on government action. Other forms of climate change litigation may have less direct effects, but nevertheless influence public policy, and importantly private sector responses. The question of their effects and the wider issues to be discussed by Professor Hodgkinson are no longer matters only of interest to lawyers. They have a real and personal importance for all Australians.

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[16] Lord Sales, 'Directors' duties and climate change: Keeping pace with environmental challenges' (Anglo-Australasian Law Society, Sydney, 27 August 2019).