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CURRENT ISSUES – Editor: Justice François Kunc

Climate Change and the Law 745

ARTICLES

CLIMATE CHANGE AND THE LAW – INTRODUCTION

Martijn Wilder AM 747

AN OVERVIEW OF INTERNATIONAL CLIMATE CHANGE LAW, INCLUDING THE PARIS AGREEMENT

Susan Biniaz

At the core of international climate change law is the 1992 UN Framework Convention on Climate Change (UNFCCC) and its several follow-on instruments, including, most recently, the 2015 Paris Agreement. These agreements and the decisions taken thereunder address a wide range of issues, including mitigation, adaptation, reporting, capacity-building, and financial assistance, among many others. The Convention and its progeny (UNFCCC regime) are undoubtedly the primary focus of global climate efforts. At the same time, the UNFCCC regime is only part of an international “regime complex” that includes other institutions, such as the Green Climate Fund, and other instruments, such as the International Civil Aviation Organization’s 2016 Resolution on a global market-based measure to address international aviation emissions and the Montreal Protocol’s 2016 Kigali Amendment on the production and consumption of hydrofluorocarbons. At this point, concern about climate change is so pervasive that it is the rare international arena that is not affected; even the Universal Postal Union has taken up the issue. This article focuses on the UNFCCC regime. There are many possible ways to examine it. One could start from the present, from the Paris Agreement in particular, and trace the derivation of various elements. One could look at it thematically, focusing on adaptation, mitigation, finance, and other aspects. This article looks at the regime historically, from the 1992 Framework Convention to the 2015 Paris Agreement, highlighting four issues and how they have been addressed over the years. In the case of two of these issues – legal character and the balance between nationally determined and internationally determined elements – it concludes that the Paris Agreement reflects a “Goldilocks” approach between past extremes. In the case of the other two – differentiation among Parties’ commitments and environmental ambition – Paris represents a distinct advance over previous instruments. 750

CLIMATE CHANGE LAW IN AUSTRALIA – A HISTORY AND THE CURRENT STATE OF PLAY

Ilona Millar and Sophie Whitehead

Climate change law is an emerging field that requires law-makers to address novel challenges and develop innovative regulations. The challenge of developing climate

change laws in Australia has been compounded by significant divergence between the major political parties, and the multi-disciplinary, cross-sectoral nature of the problem (and the solutions). This article charts the development of climate change law in Australia from the early frameworks and aspirations of the Hawke and Keating Governments to the Emissions Reduction Fund and Safeguard Mechanism of the Abbott and Turnbull Governments. This article finds that, despite the enactment of numerous innovative and well-designed legislative and policy frameworks, their effectiveness and ability to deliver long-term solutions has been hampered by: (1) inadequate levels of ambition; and (2) the uncertainty resulting from a lack of bi-partisan support. 756

CREATING, BUYING AND SAFEGUARDING EMISSIONS REDUCTIONS UNDER THE EMISSIONS REDUCTION FUND

Elisa de Wit and Amy Quinton

Carbon offsetting has become central to Australia’s current emissions reduction policy, and will continue to play an important role as emissions reduction targets become more ambitious and international carbon markets emerge. Established in 2011, Australia’s regulatory framework for carbon offsetting is continually evolving. Complexities associated with additionality, permanence, transparency, integrity, legal right and interactions with existing legal landscapes are ongoing. With the repeal of Australia’s carbon pricing mechanism in 2014, the primary buyer of Australian carbon credits has shifted from big emitters to the government via the Emissions Reduction Fund. This is coupled with a Safeguard Mechanism designed to protect carbon abatement realised by carbon offsetting efforts supported by the Fund. However, as the Fund is depleted and deeper emission reductions are required, we may need to see a shift back towards a “polluter pays” principle through an enhanced Safeguard Mechanism or some other approach. In the meantime, Australia’s growing carbon offsets market is well positioned to capitalise on any opportunities presented by emerging emissions trading rules under the Paris Agreement. 766

MAPPING CLIMATE CHANGE LITIGATION

The Hon Justice Brian J Preston SC

Litigation raising climate change issues has increased in the number and types of cases and the countries and jurisdictions in which the litigation has been brought. This article briefly maps this climate change litigation. In some places, the territory is well charted but in other places there is still terra incognita. In the latter places, the article indicates the types of litigation that have just been commenced or are anticipated to be commenced. 774

OBLIGATIONS ON AUSTRALIAN COMPANIES TO ADDRESS CLIMATE CHANGE

Stephanie Venuti and Martijn Wilder AM

Australia’s nationally determined contribution submitted under the Paris Agreement evidences a commitment to reducing greenhouse gas emissions by 26%–28% below 2005 levels by 2030; building on Australia’s commitment under the Kyoto Protocol to reduce greenhouse gas emissions by 5% below 2000 levels by 2020. This target cannot be reached without significant measures to mitigate emissions from Australia’s largest emissions sources: the private sector. Currently, Australia’s legal frameworks impose limited express obligations on Australian companies to reduce emissions, leading to significant debate on the legal obligations of companies to tackle climate change. However, increasing shareholder activism and investor demands on companies to act in alignment with Australia’s Paris Agreement targets (and the goals of the Paris Agreement at large) has led to a clear consensus on enhanced legal obligations, beyond specific climate laws, to

companies in addressing climate risk. Specifically, the way in which companies law is now being interpreted means that there is an increasing body of law requiring companies and their directors to demonstrate good governance with respect to addressing climate change, managing change risk, and related disclosures. With the Paris Agreement setting not only the direction of global climate change policy, but also stakeholder expectations in this regard, it is our view that legal obligations of the nature discussed in this article are only set to increase, placing more stringent mandatory climate responsibilities on companies, both within Australia and internationally. 789

THE FUTURE OF AUSTRALIA'S FEDERAL RENEWABLE ENERGY LAW

James Prest and Grace Soutter

This article presents a critical analysis of Australia's federal renewable energy law. Its operation as a system of tradeable renewable energy certificates is briefly explained, before an analysis of the future of the Renewable Energy Target beyond 2020 is undertaken. The implications of the Federal Government's recently abandoned National Energy Guarantee and the subsequent decision not to expand or extend the Renewable Energy Target are discussed. The article presents an international comparison which demonstrates that Australia's national support for renewable energy is unambitious in relative terms. It argues that in several respects, Australian federal renewable energy law must be extended to address important issues that are presently receiving little legislative or political attention. 799

THE VICTORIAN CLIMATE CHANGE ACT: A MODEL

Alainnah Calabro, Stephanie Niall and Anna Skarbek

In November 2017, Victoria's *Climate Change Act 2017* (Vic) came into effect. This Act introduces a framework modelled on the United Nations Paris Climate Agreement, in what may be the first translation of the international climate agreement into State legislation. The Act imposes on the State government similar obligations that national governments have accepted under the international agreement, namely: to commit to the science-based goal of stabilising greenhouse gas emissions at net zero by the middle of this century; to nominate rolling five-year carbon emissions targets along the trajectory to that net zero goal and to report transparently on the actions and progress toward achieving these. The Act recognises the whole of government nature of addressing climate change and extends its obligations to each Minister and portfolio within the State government. The result is a legislative framework that embeds climate change consideration into all material decisions of government, and rather than prescribing the solutions, prescribes the reporting and endgoal, allowing freedom for government to determine the most appropriate actions for the context over time. 814

CLIMATE FINANCE AND FINANCIAL MARKETS IN AUSTRALIA: THE CEFC AND ARENA

Monique Miller

Australia has two key Commonwealth government funding organisations that support the development of projects that reduce emissions. The Australian Renewable Energy Agency and the Clean Energy Finance Corporation have committed billions of dollars in funding since their establishment, and will continue to support the sector as Australia migrates to a lower carbon economy. Both organisations have developed sophisticated methods to approach financial decisions, keeping in mind a dual mandate of achieving value for taxpayers while also pursuing their significant policy goals. This article explains

the goals and operating realities of ARENA and the CEFC, while also analysing the particular challenges that each faces as a result of its legal structure. It then provides some case studies of projects that have been funded to date, and concludes that progress so far presents a “toolbox” of expertise to assist the Australian government in developing needed projects to mitigate climate change. 822

CARBON DIOXIDE REMOVAL GEOENGINEERING

Dr Kerryn Brent, Professor Jan McDonald, Dr Jeffrey McGee and Dr Brendan Gogarty

Carbon dioxide removal (CDR) geoengineering, the proposal to counteract anthropogenic climate change by large-scale removal of carbon dioxide from the atmosphere, is playing an increasingly prominent role in the modelling that informs international climate change policy. Most of the modelling for the 1.5–2°C temperature stabilisation targets of the *Paris Agreement* assumes that large-scale CDR will start by 2030 and be in full swing by 2050. The research, testing and development of CDR technologies needed to support these expectations pose significant challenges for international and domestic climate change law. Prominent examples of CDR proposals include bioenergy production with carbon capture and storage (BECCS) and carbon sequestration by ocean fertilisation. Australia has vast land and marine estates so has a natural advantage to contribute to the research, field-testing and development and implementation of CDR. Despite this, there has been little analysis to date of how Australian law might govern CDR research, testing and development. Using case studies of BECCS and ocean fertilisation CDR techniques, this article examines the capacity of current Australian law to govern CDR research. We find that general environmental legislation might provide a basic governance framework for research and field-testing of BECCS and ocean fertilisation, but recommend that specific laws be developed if CDR is to play a prominent role in meeting Australia’s international climate change commitments. 830

BIODIVERSITY CONSERVATION LAW AND CLIMATE CHANGE ADAPTATION

Dr Phillipa C McCormack

Australia is home to a rich diversity of life, including a great many species and ecological communities that occur nowhere else on Earth. However, this biodiversity is in a rapid decline, driven by threats such as habitat loss and the impacts of invasive species. Climate change will exacerbate these existing threats. In many cases, climate-driven changes to temperature, rainfall and extreme events will exceed the capacity of species and ecological communities to adapt. Australia’s environmental laws must be equipped to anticipate and respond to these climate-driven changes. This article highlights key climate change challenges for biodiversity and Australia’s conservation laws, and argues for a stronger focus on climate adaptation in law. In particular, such a focus would require a renewed commitment to implementing existing conservation laws; integrating climate change as a fundamental consideration in conservation decision-making; and legal reform to enable proactive, human interventions to facilitate adaptation. 839

Australian Law Journal Reports

HIGH COURT REPORTS – Staff of Thomson Reuters

DECISIONS RECEIVED IN SEPTEMBER 2018

Mighty River International Ltd v Hughes (<i>Corporations</i>) ([2018] HCA 38)	822
Mighty River International Ltd v Mineral Resources Ltd (<i>Corporations</i>) ([2018] HCA 38)	822
R v Bauer (a pseudonym) (<i>Criminal Law</i>) ([2018] HCA 40)	846
QLN146 v Republic of Nauru (<i>Citizenship and Migration</i>) ([2018] HCA 42)	877
QLN147 v Republic of Nauru (<i>Citizenship and Migration</i>) ([2018] HCA 41)	874