> its traditional duty of deciding *between the parties*, makes the decision which is in accordance with justice and fairness *between the parties*. The procedure that follows is largely adversarial. Yet this scarcely does justice to rights and obligations of an *erga omnes* character – least of all in cases involving environmental damage of a far-reaching and irreversible nature.[34]

The formulation of new legal doctrine is certainly a function of the legislature. Perhaps it is also emerging again as a function of the judiciary at least in the context of environmental law.

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ARRESTING CLIMATE CHANGE THROUGH INCREMENTAL STEPS: MASSACHUSETTS V ENVIRONMENTAL PROTECTION AGENCY

Introduction

A recent United States Supreme Court decision has confirmed that the risk of catastrophic harm from climate change and global warming, though remote, is nevertheless real.[1] Indeed, the risk of harm to humanity was not in contention before the court or before its members.[2] The decision turned on the right of a number of petitioners[3] to seek a ruling that the Environmental Protection Agency (EPA) had abdicated its responsibility under the federal *Clean Air Act* (US) to regulate the emissions of four greenhouse gases, including carbon dioxide.[4]

Yet the case is about so much more than the interpretation of a United States federal statute and the role a federal agency has to play in addressing climate change. The split decision[5] has been likened to the landmark case of *Roe v Wade* 410 US 113 (1973) in terms of its future impact on the standing of environmental litigants[6] and the authoritative interpretation given to "air pollutants" in the *Clean Air Act*. The decision has triggered a flurry of activity in the United States and not just by commentators speculating about its legal and political consequences. While the United States remains a strong opponent to the Kyoto Protocol, and the EPA declined to regulate carbon dioxide emissions, United States industry has been tentatively investing in clean energy projects. Investment rose markedly between 2005 and 2006.[7] Predictions have been made that the days of uncapped carbon dioxide emissions are numbered and the unavoidable impact on industry and the economy has been set in train.

While the case sets no precedent for Australian courts, it is of great interest. Climate change is a global issue and the recognition that "small incremental steps" taken by a regulatory agency should not be discounted as having an impact on global greenhouse gas emission levels make the case one worthy of note.[8]

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[34] *Judgment in Case Concerning the Gabcikovo-Nagymaros Project* (1998) 37 ILM 162 at 216.

[1] *Massachusetts v Environmental Protection Agency* 127 S Ct 1438 (2007) (No 05-1120) (2 April 2007), per Stevens J at 23. Decision available at http://www.supremecourtus.gov/opinions/06pdf/05-1120.pdf (viewed 19 June 2007).

[2] *Massachusetts v Environmental Protection Agency* 127 S Ct 1438 (2007) (No 05-1120) per Roberts CJ at 33.

[3] The petitioners included 12 States, four local authorities and 13 environmental groups.

[4] *Massachusetts v Environmental Protection Agency* 127 S Ct 1438 (2007) (No 05-1120) per Stevens J at 2.

[5] Stevens J joined by Kennedy, Souter, Ginsburg and Breyer JJ formed the majority. Roberts CJ, Scalia, Thomas and Alito JJ in dissent.

[6] This is standing under Art III of the United States *Constitution*. See Ward S, *Warming Up to Standing*, American Bar Association Journal eReport (6 April 2007), http://www.abanet.org/journal/ereport/a6epa.html (viewed 17 April 2007).

[7] Reportedly United States investors placed 262% more funds into green start-up projects in 2006 than in 2005. A total of US$2.4 billion was invested. See Eilperin J, "The Court's Green Light for Green Tech", *Washington Post* (8 April 2007).

[8] Stevens J held that even though "a first step might be tentative [this] does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law", *Massachusetts v Environmental Protection Agency* 127 S Ct 1438 (2007) (No 05-1120) per Stevens J at 21.

Background

A group of likeminded States in the United States, local authorities and environmental groups petitioned the United States Supreme Court for certiorari that the EPA, a federal agency, had "abdicated its responsibility under the *Clean Air Act* to regulate the emissions of four greenhouse gases, including carbon dioxide".[9]

Section 202(a)(1) of the *Clean Air Act* states:

> The [EPA] Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.[10]

The term "air pollutant" is defined in s 7602(g) to include "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive substance or matter which is emitted into or otherwise enters the ambient air".

The action had its genesis in a 1999 request by 19 environmental and private organisations (the petitioners) to the EPA to regulate greenhouse gas emissions of new vehicles under the *Clean Air Act*. The petitioners alleged that "climate change will have serious adverse effects on human health and the environment" and, further, that the EPA had itself acknowledged its competence to regulate carbon dioxide emissions.[11]

In September 2003 the EPA denied the request. The reason for the delay of four years in reaching a decision is not apparent from the judgments. A public consultation period of five months accounts for some time, and processing the more than 50,000 comments received by the EPA would have been time consuming. In any event the EPA decided it lacked statutory authority to regulate greenhouse gases. The reasons provided by the EPA appear to amount to an exercise in political tap dance. First, the agency stated that Congress was charged with the climate change issue and it was for Congress to provide specific amendments establishing binding emission levels which it had done so in other legislation. Second, the EPA stated that it was up to Congress to adopt "specially tailored solutions to global atmospheric issues" such as the prior regulation of pollutants diminishing the ozone layer. Third, the EPA reasoned that, based on a 2000 decision of the Supreme Court in *Food and Drug Administration v Brown & Williamson Tobacco Corp* 529 US 120 (2000),[12] climate change has its own "political history" and the EPA was justified in not regulating greenhouse gas emissions for this would have significant economic and political repercussions.[13]

Issues before the Supreme Court

There were a number of issues brought before the court. The EPA argued that none of the petitioners had standing because greenhouse gas emissions cause widespread harm on a global scale. Given the requirement for an identifiable injury, the EPA submitted that no petitioner had suffered a particular injury. Issues of standing under United States laws are of less interest to Australian lawyers and

[9] *Massachusetts v Environmental Protection Agency* 127 S Ct 1438 (2007) (No 05-1120) per Stevens J at 2.

[10] Note that the 1970 version of s 202(a)(1) used the phrase "which endangers the public health or welfare" rather than the more-protective "which may reasonably be anticipated to endanger public health or welfare". Congress amended s 202(a)(1) in 1977 to give its approval to the decision in *Ethyl Corp v Environmental Protection Agency* 541 F 2d 1 (1976) at 25 (en banc), which held that the *Clean Air Act* "and common sense … demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable". See Stevens J *Massachusetts v Environmental Protection Agency* 127 S Ct 1438 (2007) (No 05-1120) at 3, footnote 7.

[11] *Massachusetts v Environmental Protection Agency* 127 S Ct 1438 (2007) (No 05-1120) per Stevens J at 7.

[12] . In which the court held that the Food and Drug Administration (FDA) could not rely upon a general authority to regulate drugs as a basis for exercising authority over the tobacco industry, particularly given the significant economical impact of regulating tobacco. This case is referred to by Stevens J in *Massachusetts v Environmental Protection Agency* 127 S Ct 1438 (2007) (No 05-1120) at 9.

[13] For the summary of the Environmental Protection Agency's reasons see *Massachusetts v Environmental Protection Agency* 127 S Ct 1438 (2007) (No 05-1120) per Stevens J at 7-9.

scholars. However, in brief, the court found there was a procedural right to challenge unlawful agency action and that while the State of Massachusetts might no longer be a sovereign State, it had a stake in protecting its citizens.[14]

The Supreme Court then dealt with the injury to the petitioners. It was at this juncture that both the majority and minority judges acknowledged the serious problems posed by climate change (and thus the science supporting the issue) such that the decision is of some importance outside the United States jurisdiction.[15] While the court did note that risks of rising sea levels, irreversible changes to natural ecosystems, rising ocean temperatures, and a corresponding increase in hurricane ferocity, might not be "widely shared", this did not lessen the interest of the petitioners in the outcome of the litigation.[16] In contrast, the minority found that as global warming is a phenomenon harmful to humanity at large, the redress sought was no more focused on the petitioners than the public generally, hence there was no particularised injury.[17]

In relation to causation, the EPA acknowledged the link between man-made greenhouse gas emissions and global warming. However, the agency maintained the position that its decision not to regulate emissions from new cars could not significantly contribute to the petitioners' injuries.[18] The EPA argued that there was no realistic possibility that the relief sought by the petitioners would mitigate global climate change, particularly when emissions from developing states such as India and China were likely to offset any "marginal domestic decrease".[19]

This reference to the global nature of the problem seemed a constant thread in the EPA's argument. The reasoning appeared to be that as climate change and global warming was a global problem, the EPA has no authority to do anything. Further, the reference to developing nations and the fact that President Bush and his Administration had repeatedly declined to take action until the developing world was on board, seemed to influence the EPA's decision-making. To be fair, the *Clean Air Act* does seem (as it was drafted in 1970) to be aimed more at local air pollutants and to ensuring a clean local atmosphere for residents than the much bigger problem of global greenhouse gas emissions. However, this does not prevent the EPA from adopting evolving regulations as the problems themselves evolve.

Relevance for Australia in light of recent Australian cases

Stevens J found that while regulating motor vehicle emissions will not in itself reverse global warming, this did not leave the Supreme Court bereft of jurisdiction to decide whether the EPA had a duty to take steps to slow or reduce global warming.[20] The court also held it to be irrelevant that China and India were "poised to increase greenhouse gas emissions substantially over the next century" for a "reduction in domestic emissions would slow the pace of global emission increases no matter what happens elsewhere".[21] In reaching its decision the court placed significant weight on the existing agreement between the EPA and the President on the need to address global climate change.[22]

Of interest to statutory and regulatory authorities is the finding of the court that the EPA could not avoid its statutory obligation to regulate emissions from new motor vehicles under the *Clean Air Act*,

[14] *Massachusetts v Environmental Protection Agency* 127 S Ct 1438 (2007) (No 05-1120) per Stevens J at 14-17.

[15] Although the minority judgment of Roberts CJ did note some of the hazards or risks were long term and uncertain. See *Massachusetts v Environmental Protection Agency* 127 S Ct 1438 (2007) (No 05-1120) per Roberts CJ at 8-10.

[16] *Massachusetts v Environmental Protection Agency* 127 S Ct 1438 (2007) (No 05-1120) per Stevens J at 18-19.

[17] *Massachusetts v Environmental Protection Agency* 127 S Ct 1438 (2007) (No 05-1120) per Roberts CJ at 7.

[18] *Massachusetts v Environmental Protection Agency* 127 S Ct 1438 (2007) (No 05-1120) per Stevens J at 20.

[19] *Massachusetts v Environmental Protection Agency* 127 S Ct 1438 (2007) (No 05-1120) per Stevens J at 21.

[20] *Massachusetts v Environmental Protection Agency* 127 S Ct 1438 (2007) (No 05-1120) per Stevens J at 23.

[21] *Massachusetts v Environmental Protection Agency* 127 S Ct 1438 (2007) (No 05-1120) per Stevens J at 23.

[22] *Massachusetts v Environmental Protection Agency* 127 S Ct 1438 (2007) (No 05-1120) per Stevens J at 23.

simply by referring to uncertainty about climate change. Deciding not to act was not acceptable.[23] Australian regulatory authorities and decision-makers could perhaps take note of the decision from this perspective.

The case also highlights the difficulty of acting in an environment of uncertainty. The EPA's reason for not taking action was based, in part, on a lack of scientific certainty. There was no certainty as to the impact of regulating carbon dioxide emissions from new vehicles. The issue of uncertainty about the impact and extent of climate change has been examined in some recent Australian cases.

In *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* [2006] FCA 736[24] the impact of two proposals to open two separate coal mines in central Queensland was of concern to the applicant.[25] The basis of the applicant's argument was that over the lifetime of the mines tens of millions of tonnes of coal would be exported and, in all probability, burnt to generate power. Relating that to an impact of the proposal, the applicant stated:

> The production of greenhouse gases is almost certain to occur as a result of the action and can reasonably be imputed as within the contemplation of the proponent of the action.[26]

Dowsett J found that the Minister's delegate had considered the greenhouse gas and climate change issues which were indirect impacts and that there was no need for a "full scientific investigation and definitive determination of the matter".[27] Dowsett J also accepted the delegate's conclusion that the "possibility of increased concentration of greenhouse gases in the atmosphere … was speculative and merely theoretically possible". Consequently, if there "were any increased emissions the additional impact … would be very small and therefore not significant".[28]

In early 2007, the Queensland Land and Resources Tribunal considered an application for an extended mine surface area.[29] President Koppenol rejected the evidence of Professor Ian Lowe that the proposed mine would contribute to the cumulative impacts of global warming and climate change.[30] Koppenol P referred to the fact that in cross-examination Professor Lowe accepted that "the mine's annual contribution to annual global GHG emissions was 'very small'" and, further, that an expert witness for Xstrata "said that such a very small figure would make no difference to the rate of global warming", an assessment which Koppenol P accepted.[31]

President Koppenol concluded that a demonstrated causal link between the mine's greenhouse gas emissions and "any discernable harm – let alone any 'serious environmental degradation' – caused by global warming and climate change" had not been shown by the Queensland Conservation Council. Koppenol P adopted a position which seems to echo the arguments put by the United States EPA in *Massachusetts v Environmental Protection Agency* 127 S Ct 1438 (2007) (No 05-1120), where the EPA argued that the benefit in regulating greenhouse gas emissions from new cars would be so small that the action would not mitigate global warming. Koppenol P stated that the Queensland Conservation Council had failed to show that that would have the slightest effect on global warming or climate change in terms of a reduction of greenhouse gas emissions.

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[23] *Massachusetts v Environmental Protection Agency* 127 S Ct 1438 (2007) (No 05-1120) per Stevens J at 31.

[24] This case was heard in October 2005 and the judgment handed down 15 June 2006. It is currently under appeal to the Queensland Supreme Court.

[25] This was based upon the requirement under the *Environment Protection Biodiversity Protection Act 1999* (Cth) to consider all adverse impacts in determining whether a proposed action is a controlled action under the Act.

[26] *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* [2006] FCA 736 at [10].

[27] *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* [2006] FCA 736 at [24].

[28] *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* [2006] FCA 736 at [43].

[29] *Re Xstrata Coal Queensland Pty Ltd* [2007] QLRT 33.

[30] *Re Xstrata Coal Queensland Pty Ltd* [2007] QLRT 33 at [12].

[31] *Re Xstrata Coal Queensland Pty Ltd* [2007] QLRT 33 at [12].

Conclusion

The decision in *Massachusetts v Environmental Protection Agency* indicates the many difficulties involved in seeking to assess the impact of local action within the complex scientific framework of global greenhouse gas emission levels and the notion of climate change. Societies are based upon territorial boundaries and protecting assets within those boundaries. When authorities are asked to consider regulating economic activity within local boundaries (often at the expense of the local economy) for the good of human kind on a global scale, the problem does not fit neatly within the prevailing mindset based on territorial protectionism. Indeed, the problem seems so overwhelming that responses have tended to be either that there is no evidence that local actions are contributing to the global levels or, conversely, that there is no evidence that regulating local action will have a discernible beneficial impact on global emissions. If anything, the cases do demonstrate that domestic jurisdictions are grappling with the notion of restricting local activity for the wellbeing, not just of future generations in the United States or Australia, but of future generations globally. This involves adopting an altruistic approach which is not usually compatible with immediate concerns about economic growth. In this regard, the decision in *Massachusetts v Environmental Protection Agency* is a welcome one for it acknowledges that addressing global warming and climate change will not be solved overnight. It is a problem many decades in the making and small incremental steps are not to be discounted as contributing to the solution.

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UNITED KINGDOM CARBON EMISSIONS REDUCTION LEGISLATION

Introduction

In March 2007 the United Kingdom government released the *Draft Climate Change Bill 2007* (UK) (*Climate Change Bill*) for public comment.[1] If enacted as proposed, the legislation will make the United Kingdom the first nation to establish a legally binding target for reducing greenhouse gas (GHG) emissions. This short comment discusses the background to the proposed legislation, its rationale and its key provisions and innovations.

Many aspects of the *Climate Change Bill* are of direct relevance to the Australian context. There have been important legal developments in Australian climate change law through State-based schemes[2] and an emerging body of case law.[3] In addition the Australian government's response to the recent report of the Prime Ministerial Task Group on Emissions Trading[4] included a commitment to establishing a national emissions trading scheme, and the setting of an emissions reduction target sometime after the next federal election. However these are very modest and tentative steps. To achieve substantial reductions in Australia's greenhouse gas emissions a comprehensive legislative response in terms similar to the *Climate Change Bill* will be necessary.

Background

The United Kingdom's Climate Change Programme, originally published in 2000 and subsequently revised in 2006, sets out the British government's policies for addressing climate change at national and international levels.[5] The centrepiece of the policy is a commitment to reduce the United

[1] The *Draft Climate Change Bill 2007* (UK) is included in United Kingdom, Department of Environment, Food and Rural Affairs, *Draft Climate Change Consultation Document* (13 March 2007), http://www.defra.gov.uk/corporate/consult/climatechange-bill/index.htm (viewed 16 March 2007).

[2] See, eg the *Climate Change and Greenhouse Emissions Reduction Bill 2006* (SA).

[3] See Peel J, "The Role of Climate Change Litigation in Australia's Response to Global Warming" (2007) EPLJ 90.

[4] Prime Ministerial Task Group on Emissions Trading, *Report of the Task Group on Emissions Trading* (31 May 2007) http://www.pmc.gov.au/publications/emissions/docs/emissions_trading_report.pdf (viewed 23 June 2007).

[5] United Kingdom, Department of Environment, Food and Rural Affairs, *Climate Change: The UK Programme 2006*,

