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LAWYERS

Climate Change – Issuing the Writs



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Let's say you're a Mallee farmer whose crops have failed due to ten consecutive years of drought. Or you have commercial interests at Buller or Falls Creek and snow hasn't fallen in a decade. So what are you going to do about it?

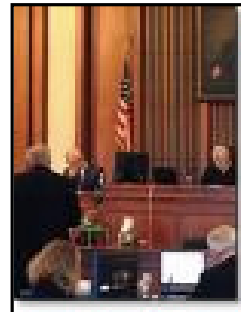
Probably nothing at the moment but in the foreseeable future you might decide to phone your lawyer.

'Litigation on climate-related damage is clearly on the horizon,' says Richard Lord, Senior London Lawyer in Commercial Law and he draws parallel with lawsuits on tobacco and asbestos thrown out of court regularly for decades, but later resulting in billions of dollars worth of damages. If climate change goes the same way as this, it will produce by far the most expensive environmental problem of all time. And don't think the large multinationals, particularly those in the energy business or who use large quantities of energy, aren't already thinking about the same issue.

Only 5 years ago the idea of anyone suing the government or some of the producers of fossil fuel energy would have raised a big laugh. But nowadays everybody agrees with the 'polluter pays' principle – it's only fair that when there is someone who pours sewerage into a river or toxic waste into the bay, that person should be liable for damages and possibly punitive damages as well.

Is there any difference between this and the activities of companies spewing CO₂ into the atmosphere and causing global climate change? Hardly. But, at the present, the evidence to sustain successful litigation is not absolutely certain. Environmental scientists have always said that it is possible that other factors contribute to global warming although our consumption of fossil fuels would seem to be by far the major cause.

Increasingly scientific research is, however, supporting the argument that the consumption of fossil fuels is the reason why the earth climate is changing so rapidly. It's the new evidence coming in that has provided the ammunition for a number of recent lawsuits in the United States and a number of anticipated lawsuits in Europe.



Twelve American states and several cities, for example are suing the Environmental Protection Agency (EPA) over its refusal to classify greenhouse gases as pollutants under the US Clean Air Act. Eight states and the City of New York have commenced actions against the five largest power companies arguing their CO₂ emissions are a public nuisance that the courts can curb. Action has also been commenced against US export credit groups for funding fossil fuel projects.

It is to be noted that these are all 'regulating' action calling for court declaration requiring the defendant to use its legislative powers in a way in which it has refused to do previously. Lawsuits claiming damages are likely to follow, however, just as soon as there is some success with regulating litigation.

James Connaughton, Chairman of the White House Council on Environmental Quality was asked in Paris recently whether he had given President George W Bush any assessments of the risks to the United States from climate litigation. "Absolutely!" said Connaughton, himself an attorney who helped sue the asbestos industry. "Endless litigation in America typically has not solved fundamental problem. It's probably the least effective and the most expensive tool (of public policy) we have, which is why you need to get on with better economic policies, with smarter investment in technology, and creating an environment where investments in those technologies can occur." he went on to say.

The first run of litigation in Australia or elsewhere is most unlikely to succeed. The successes, when they arrive, will initially be relatively small. As the scientific

evidence mounts up, however, the likelihood is that within the next twenty or thirty years commercially emitted CO₂ is very likely to be ranked well ahead of asbestos as the prime cause for litigation. Specifically it will be argued that defendants who had full knowledge their CO₂ emissions were going to cause harm to the environment and thus harm the plaintiff in whatever business he was involved in, be it growing grain or running a snow oriented facility, must pay.

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