
CLIMATE CHANGE

JULY 2007

MORE THAN HOT AIR?

Greenpeace threatens litigation against New Zealand corporates for greenhouse emissions.



Josh McBride
SENIOR ASSOCIATE



Kate Radka
SENIOR SOLICITOR

Greenpeace has served notice on a number of New Zealand companies claiming that they are potentially liable for the global warming consequences of their greenhouse gas emissions. This follows a similar move in Australia.

While it is easy to dismiss this move by Greenpeace as a publicity stunt, it nevertheless coincides with a growing recognition among corporates of climate change issues.

Greenpeace claims that climate change litigation is increasingly being used to deal with major greenhouse offenders. Greenpeace has likened this to tobacco and asbestos litigation in terms of potential company liability, noting that companies in both these industries have had to pay out large sums in compensation. They go on to comment that directors who are aware of this potential exposure, and do nothing about it, face potential claims for a breach of directors' duties.

The comparisons with tobacco and asbestos litigation are overstated. That litigation concerns personal injury in circumstances where there is an established legal duty of care (owing to the consumer or an employee) and clear evidence of causation. In the case of climate change, there is no recognised duty of care and causation will

be difficult, if not impossible, to establish against individual corporates.

Most of the other cases cited by Greenpeace in their press release are examples of regulators being compelled to consider the global warming effects of greenhouse gas emissions when assessing applications for resource consent related permits.

By way of example, one case relates to a coal mine in New South Wales. In its decision of November 2006, the Land and Environment Court concluded that there was a sufficiently proximate link between the mining of a substantial reserve of thermal coal in NSW and the emission of greenhouse gases, and that the environmental assessment for the project had to take this into account.

Another case cited by Greenpeace, on which a decision is yet to be released, is a case initiated by the Attorney-General of the State of California against a number of car manufacturing companies. The suit alleges vehicle emissions have contributed significantly to global warming, and argues that the car manufacturers should be held responsible for the past and future cost the state is incurring in combating this crisis. However, a similar case brought against the energy sector in the United States was

To receive your updates faster, please subscribe to our electronic newsletter service on:
info@bellgully.com

To view all our publications or update your details please visit our website: www.bellgully.com

For further information, please contact your usual Bell Gully advisor or any of the people listed below.

AUCKLAND

Garry Downs

64 9 916 8932
garry.downs@bellgully.com

Ian Gault

64 9 916 8967
ian.gault@bellgully.com

Willy Sussman

64 9 916 8952
willy.sussman@bellgully.com

Clive Taylor

64 9 916 8943
clive.taylor@bellgully.com

Marija Batistich

64 9 916 8809
marija.batistich@bellgully.com

Josh McBride

64 9 916 8831
josh.mcbride@bellgully.com

WELLINGTON

Mark O'Brien

64 4 915 6972
mark.o'brien@bellgully.com

David Craig

64 4 915 6839
david.craig@bellgully.com

Simon Watt

64 4 915 6854
simon.watt@bellgully.com

Damian Stone

64 4 915 6823
damian.stone@bellgully.com

Kate Radka

64 4 915 6868
kate.radka@bellgully.com

Disclaimer: This publication is necessarily brief and general in nature. You should seek professional advice before taking any further action in relation to the matters dealt with in this publication.

All rights reserved © Bell Gully 2007

dismissed.

In New Zealand, the Resource Management Act 1991 already obliges all those exercising powers and functions under the Act – such as local and regional councils, and the Environment Court – to have regard to the effects of climate change. While the courts have commented that the regulation of climate change is best carried out at a national level, the Act nevertheless requires this to be taken into account at all stages of an application for a resource consent. The cases cited by Greenpeace suggest that the existing regulatory requirements for resource applications in New Zealand are consistent with international best practice.

Greenpeace also claims that directors may find themselves personally accountable for a company's greenhouse gas emissions. This is a dubious proposition, even at a conceptual level, and in practice it would be very difficult to show a director had, for example, engaged in reckless trading or had otherwise failed to act in the best interests of the company, in circumstances where there is no established duty of care owing by the company and causation has multiple origins.

The possibility of directors being personally liable for the effects of greenhouse gas emissions seems very remote, and especially so given the wider context in which Greenpeace's claims should be viewed.

The Kyoto Protocol aims to reduce greenhouse gas emissions globally, but recognises that not all countries will be able to reduce emissions to the required levels. To that extent, Kyoto provides for alternative means of neutralising carbon liability. Similarly, not all businesses may be able to meet their proposed carbon liabilities by reducing emissions. They may need, in conjunction with reducing

emissions, to purchase credits to off-set emissions, or enter into Kyoto compliant or other projects to reduce their carbon liability.

If conduct is consistent with Kyoto or other relevant community standards, it is difficult to identify on what grounds such conduct could result in liability.

One thing is certain. We are experiencing a climate of change in community and corporate attitudes towards greenhouse gas emissions. The law will both lead and follow this change. It will not remain static.

For full details of the Greenpeace action, see the press release at www.greenpeace.org/new-zealand/press/releases/greenhouse-polluters-on-notice