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The Obligation of Law Schools to Respond to Climate Change

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Recommended citation(APA):
James, N., & Ireland-Piper, D. (2021). *The Obligation of Law Schools to Respond to Climate Change*. Abstract from Climate Change, Law and Legal Education Conference , Gold Coast, Queensland, Australia.

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2021 CLIMATE CHANGE, LAW AND LEGAL EDUCATION CONFERENCE

26-27 February 2021

ABSTRACTS (IN ORDER OF PROGRAM)

If the global temperature rises by 1.5°C, the Earth will face unprecedented climate-related risks and extreme weather events. This brings risks to health, livelihoods, food security, water supply, human security, and economic growth. In turn, the potential effects of climate change will influence most, if not all, aspects of law and regulation. In that context, this event invites participants to consider the place of climate change in legal education and as an interdisciplinary research challenge.

1. Keynote Address, Margaret Young – “Climate Change Law: International, Transnational, National, Subnational”.

Professor Margaret Young joined Melbourne Law School in 2009 from the University of Cambridge, where she held the inaugural position of Research Fellow in Public International Law at Pembroke College and the Lauterpacht Centre for International Law. She is the author of *Trading Fish, Saving Fish: The Interaction between Regimes in International Law* (Cambridge University Press, 2011), co-author of *The Impact of Climate Change Mitigation on Indigenous and Forest Communities* (Cambridge University Press, 2017), and editor of *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012).

Abstract: *Climate Change is a global problem that requires a global solution’ is a well-known phrase that has supported international legal developments including the Paris Agreement. Yet when a domestic judge recently threw out a lawsuit against United States-based fossil fuel producers, he reasoned that ‘climate change is a global problem that needs a global solution’. Understanding this judicial reasoning as either timorous deferral or audacious deflection requires a special agility on the part of law professors and students. Climate change mitigation and adaptation is developed through international law, transnational law and practice, national law and subnational law. The result is a dizzying mix that includes treaties, private directives from transnational task forces, legislation and declarations from local councils. Case-law from international courts and tribunals as well as domestic courts with specialized or general jurisdiction adds to the complexity. This article points to implications and challenges. Most clearly, lawyers need proficiency in multiple substantive areas for advocacy, litigation and law-making. But there is also a need for a deeper understanding about jurisdiction, functionalism and legal pluralism. There are no immediate answers to the question of which form of authority can provide a solution to the global problem of climate change. Nor are there clear boundaries around what is appropriate and just in addressing climate change at the local, national and international level. Legal scholarship and teaching helps address this critical, theoretical and practical need.*

2. Legal Education and Climate Change

THE OBLIGATION OF LAW SCHOOLS TO RESPOND TO CLIMATE CHANGE

Authors: Nick James and Danielle Ireland-Piper

Abstract: *Climate change will impact all aspects of society and human existence. Law, being a key mechanism of social governance, plays a key role in regulating and addressing the causes and consequences of climate change. How then, do we teach law in the midst of an unfolding climate crisis? In this paper, we consider the nature of law schools’ social obligation to respond appropriately to a warming planet. In so doing, we introduce the landscape of climate change law and then the implications of climate change on the law more generally. We then consider the social obligations of law schools and universities generally, including the source and nature of such*

obligations. We conclude the chapter by identifying mechanisms for law schools to fulfil their obligation to respond to climate change.

COLLABORATING FOR CLIMATE JUSTICE: STUDENT AND STAFF PARTNERSHIPS TO ADDRESS THE CLIMATE CRISIS

Authors: Monica Taylor and Justine Bell-James

Abstract: *A decade ago, the Brain & Mind Research Institute's Courting the Blues study found that Australian law students had higher rates of depression than the general population, and that the individualistic and competitive law school environment was a contributing factor.[1][8] Courting the Blues generated much-needed attention on law student well-being across the country, including through the publication of Good Practice Guidelines for Law Schools by the Council of Australian Law Deans. Since that landmark 2009 study, the climate crisis has emerged as a key contributing factor on youth anxiety and poor mental health globally. Already susceptible to anxiety and depression, law students are now likely experiencing worsening mental health as they find themselves triggered by the existential problem of climate change and their uncertain futures. This chapter defines and locates action on climate change in legal education in the context of student pro bono legal work. It describes a newly established Climate Justice Initiative (CJI) at the School of Law, University of Queensland, where students have the opportunity to work in collaboration with staff on climate justice issues, including through drafting environmental law reform submissions, and undertaking legal research to support pro bono litigation (primarily in the area of criminal law following charges arising from climate protests). Co-curricular in design, formalised student pro bono is grounded in service learning theory. Legal research, community legal education and law reform tasks undertaken on a pro bono basis (voluntarily, not for academic reward or credit) position law students in relationships of service to their communities. Serving the public good in this way helps students to develop their civic engagement and social responsibility which delivers intrinsic and extrinsic benefits (to students personally, and to society at large). Pro bono activities also help to bridge the divide between formal studies, experiential education and advocacy. This article concludes that, despite the negative psychological impact of the climate crisis on law students, initiatives such as the CJI can help respond to student well-being, as well as deliver core learning outcomes consistent with the Threshold Learning Outcomes in Law.*

3. Human Rights and Climate Change

IT MAKES NO DIFFERENCE WHAT WE DO': CLIMATE CHANGE AND THE ETHICS OF COLLECTIVE ACTION

Author: Jonathan Crowe

Abstract: *Opposition to collective action on climate change takes at least two forms. Some people deny that climate change is occurring or that it is due to human activity. Others maintain that, even if climate change is occurring, we have no duty to do anything about it, because our efforts would be futile. This article rebuts the latter line of argument. I argue that (1) everyone has a duty to do their share for the global common good, which includes doing one's part to combat climate change; (2) the idea that taking action against climate change is futile should be treated with caution, because sometimes actions may seem to make no difference to climate change, when really they do; (3) in any event, the duty to do one's share to combat climate change still applies, even if it is ultimately futile; (4) this is because not doing one's share for the common good harms oneself, regardless of whether it makes a difference to the wider outcome.*

HUMAN RIGHTS, LITIGATION, AND CLIMATE CHANGE.

Author: Andrew Jackson

CYCLONES, CITIZENSHIP FOR SALE AND GLOBAL CLIMATE JUSTICE

Author: Michael Krakat

Abstract: *Global climate change effectively connects with climate- and disaster induced migrations (such as natural disasters, pollution or pandemics). It is suggested that legislators -as well as*

educators- may consider reconciling these areas from multiple viewpoints. One of these viewpoints is the direct sale of citizenship absent any or most naturalization requirements. The paper argues that the requirements of citizenship are in need to be revisited in face of global climate change and associated considerations for justice. The paper will raise some of the following considerations: Could the trade of carbon certificates and the sale of passports connect, and if so, how? Will there be moral or even international law obligations on states to sell passports for reduced prices when facing climate induced migrations? What are the requirements on the sale of citizenship when facing global disasters, and do instruments such as quotas or funds assist in alleviating injustices?

THE SUBSTANTIVE CONTENT OF THE RIGHT TO A HEALTHY ENVIRONMENT

Author: Madelaine Clifford

4. Keynote Address, Tony McAvoy SC – “Indigenous Rights and Responses to Climate Change”

In 2015, Tony McAvoy SC became the first First Nations barrister in Australia to be appointed as Senior Counsel. Tony has developed a strong native title practice and has successfully appeared for claimants in several land claims. He has also acquired significant experience in the areas of environmental law, administrative law, human rights and discrimination law, coronial inquests and criminal law. Between 2011 and 2013, Tony was an Acting PartTime Commissioner of the NSW Land and Environment Court.

5. Private Law and Climate Change

TEACHING PRIVATE LAW IN A CLIMATE CRISIS: PROPERTY LAW AND CLIMATE CHANGE

Author: Nicole Graham

Abstract: *To facilitate institutional adaptation to climate change and address the existential threat of feedback processes, tipping points and lock-ins, it is necessary to confront the problem of private law. First Nations analyses, climate science, social science and legal research indicate that the interaction of Western private law and the Earth’s laws adversely impacts on the Earth’s systems. Private law is a contingent feature of planetary health because its key institutions, the corporation and private property, concentrate the legal rights to capital, the goods of life, in the private sphere. Private law establishes a suite of entitlements that act as shields against collective interests. Reforming law to address the climate crisis involves greater regulation of private interests to pursue the global goal of sustaining organised human societies. But closely regulating private interests undermines the structure and logic of law’s public/private taxonomy, and contradicts widely accepted truths about liberty. Teaching private law in a climate crisis requires preparing law students for bitter conflict over the planetary imperative that individual freedoms must be sacrificed to collective exigencies. Unilateral instruction is inadequate to teach the climate-striker generation whose interests, agency and skills are better served by co-producing alternative models of regulation. Collaboratively, we must connect law to geographically specific and dynamic ecological conditions and limits, research materially viable regulatory practices founded on the Earth’s laws, and learn how to prohibit the extraction, production and disposal of the goods of life for the primary benefit of the unsustainably and inequitably (over)developed world.*

DOES THE “REASONABLE PERSON” VOTE GREEN? NEGLIGENCE AND THE IDEOLOGY AND POLITICS OF A LEGAL FICTION

Author: Wendy Bonython

Abstract: *Despite the significant impact of climate change on the habitability of the Australasian continent, climate change in Australia is vigorously contested by media, governments, and society, reflecting a broad spectrum of social, economic and political ideologies. As climate change transitions from a futuristic spectre into lived reality, citizens and states are increasingly turning to private law causes of action and remedies both to address harms they have sustained, and as a means of protest against the political response to climate change. Objective reasonableness,*

typically assessed against the ‘reasonable person’ standard, is a critical barrier plaintiffs in negligence must overcome in order to succeed. Drawing on the extensive case law and academic literature which seeks to give flesh to the bones of the reasonable person, this paper explores the capacity of the reasonable person to accommodate differing political ideologies, including those of the type representing different stakeholder interests on the climate change spectrum. It further considers if and how the standard can be further adjusted to accommodate tensions within individuals created by virtue of conflict between their occupational or political affiliations and their personal values. The paper concludes, somewhat axiomatically, that as climate change advances ideological positions, including denialism, which may be defended as objectively reasonable now are likely to become less so, reflecting increasing levels of scientific knowledge and predictability of outcomes. The court’s traditional reluctance to interfere with policy decisions is likely to remain a barrier to claims challenging the formation of those policies; but challenges to the objective reasonableness of the manner of implementation and enforcement of those policies by non-government actors will increasingly gain legitimacy.

TEACHING SPORTS LAW: SPORTS GOVERNING BODIES AS REGULATORS OF CLIMATE CHANGE

Author: Annette Greenhow

Abstract: *Sport is generally regarded as a unique regulatory domain, reflecting a hybrid collection of public and private interests. Sports governing bodies (SGBs) are typically recognised as guardians of their sport, operating within voluntary and autonomous self-regulatory systems. As private non-state actors, SGBs are dominant regulators, possessing both legitimacy and authority to regulate their sport and modify the behaviour of a wide variety of stakeholders. The high social utility of sport and the intermediary role of SGBs as conduits in advancing state health and social policies establishes a quasipublic function and justifies the specificity of sport and the allocation of this exclusive social licence in producing and delivery sport as a public good. However, this social licence does not authorise sport to operate in a law-free zone. The growing body of sports law jurisprudence and scholarship is testament to the regulatory complexities associated within this domain. Consequently, a growing number of universities are developing and delivering specialised courses covering content relevant to sport and the law, regulation and governance (collectively referred to as ‘Sports Law Courses’). This article identifies Sports Law Courses offered across a sample of Universities with a view to addressing whether this quasi-public regulatory role is addressed in the subject content and learning outcomes. Adopting a qualitative research approach, this article examines the publicly available subject content information and looks specifically at whether the content covers the principles of corporate social responsibility vis a vis the role of SGBs as regulators of climate change.*

REGULATING THE ENERGY TRANSITION: TEACHING PLANNING LAW CONTESTATION IN THE CLIMATE CRISIS

Author: Madeline Taylor

Abstract: *Addressing climate change requires a concerted and sustained effort of regulatory systems to stimulate the transition of Australia’s highest emitting sector – electricity. Legal education and scholarship on energy plays a crucial role in achieving a sustainable energy mix. This presentation examines renewed planning law contestation for large-scale solar farms on agricultural cropping land. It is within this context that legal education must adapt to equip students with knowledge of planning law conflicts emerging as a result of systemic regulatory failures to safeguard sensitive land uses from traditional energy extraction activities.*

6. Contemporary Issues in Law and Climate Change

FOOD LAW, SUSTAINABILITY AND CLIMATE CHANGE

Author: Sharn Hobil

Abstract: *Australia is a signatory to the Sustainable Development Goals¹ (SDGs) and although attention is focused on achieving carbon reductions there is a lack of a focus on food systems. This is*

despite Australia's agro-farming industries and food systems being large contributors to factors which are causing climate change. Also, climate change is having major short and long-term impacts on Australia's food systems. How "food" is defined at law is a urgent contemporary issue if Australia wants to move towards ecologically sustainable and healthy food systems.

CLIMATE CHANGE AND ARCTIC PETROLEUM ACTIVITIES: CHALLENGING REGULATORY NORMS AND CHANGING LEGAL EDUCATION

Author: Tina Soliman Hunter

Abstract: *It is common knowledge that climate change is being felt the most in the Polar Regions. As a result of the melting of ice in these regions, new opportunities for petroleum development have arisen. The European Arctic, and in particular the Barents and Kara Seas, have provided the Norwegian and Russian states with new opportunities for petroleum exploration and production. As a result of these new activities, there are new economic imperatives and concomitantly new environmental challenges. These differing environmental conditions in the Arctic challenge contemporary petroleum regulatory legal norms particularly wells, health and safety, and responses to oil spills, which are currently predicated on existing petroleum regulatory norms. Such norms include drilling standards and oil spill response plans that are generally universal both in their natural and acceptance. However, as petroleum activities extend into the Arctic region, new challenges are arising. In particular the physical environment (ambient cold, presence of ice, currents and water temperature) are challenging both how we regulate petroleum activities as well as how the contemporary regulatory norms apply to this environment. Legal education pertaining to petroleum regulation continues to promulgate existing regulatory norms, particularly in the regulation of wells and oil spills. This article challenges these regulatory norms by analysing the physical environment of the Arctic region and its implications on petroleum regulation. In doing so, it challenges not only contemporary petroleum regulation but also advocates a need for interdisciplinary knowledge in legal education relating to Arctic petroleum to ensure effective, efficient and safe activities.*

CLIMATE CHANGE AND THE AUSTRALIAN PARADOX: CONSERVATIVE CORPORATE LAW IN A PROGRESSIVE CULTURE.

Author: Victoria Baumfield,

Abstract: *Australian corporate law is relatively conservative. It has tended to adopt innovations after its peers in areas as diverse as shareholder rights and social enterprise. Australian courts often display a lack of enthusiasm for the application of legislative innovations even when they are eventually adopted. So one would be forgiven for assuming that Australian corporate law is indifferent at best to the causes of climate change and sustainability more generally. Perhaps surprisingly, however, Australian corporate law and the stance of key players in the corporate law community increasingly support sustainability efforts. Those developments will be examined here.*

TACKLING CLIMATE CHANGE THROUGH THE FINANCIAL SECTOR: TEACHING REGULATORY CHALLENGES.

Author: Louise Parsons

7. International Law and Climate Change

CLIMATE CHANGE AND INTERNATIONAL MIGRATION

Author: Alexandra (Xander) Meise

Abstract: *Climate change is a national security threat and climate migration is a trigger of domestic and international conflict. As climate change increases population shifts, resource disruption, and geopolitical tensions worldwide, refugee and migrant protections will be tested alongside international and civil rights norms and laws. The modern international migration and refugee system, however, is a product of WWII geopolitical dynamics and was not designed to protect people from an existential threat like climate change. Indeed, the current definition of "refugee" under international law (and U.S. domestic law) does not expressly include climate refugees or climate*

migrants. Yet in a bold ruling issued in January 2020, the U.N. Human Rights Committee concluded that countries may not deport individuals who face climate change-induced violations of the right to life. Recognizing this, this article identifies gaps in current international (refugee) law regarding the climate crisis and draws upon “national security” jurisprudence to examine how executive authority and international agreements can be used to address climate migration. Doing so will make States more resilient to the pressing climate migration security threat and help repair faith in international rule of law’s capacity to resolve these issues. I would be happy to prepare a conference contribution drawing from this research.

‘LAW OF THE SEA AND CLIMATE CHANGE’.

Author: Laura-Leigh Cameron-Dow

INTERNATIONAL ENVIRONMENTAL LAW AND INTERNATIONAL CRIMINAL LAW

Author: Steven Freeland

Abstract: *The consequences of climate change are likely to exacerbate the conditions leading to armed conflict. Further, acts perpetrated during the course of warfare have, through the ages, led to significant environmental destruction. These have included situations where the natural environment has intentionally been targeted as a ‘victim’ or has somehow been manipulated to serve as a ‘weapon’ of warfare. Until recently, such acts were generally regarded as an unfortunate but unavoidable element of armed conflict, despite their potentially disastrous impacts. The existing international rules have largely been ineffective and inappropriate and have in practical terms done little to deter deliberate environmental destruction, particularly when measured against perceived military advantages. However, as the significance of the environment has come to be more widely understood and recognised, this is no longer acceptable, particularly given the ongoing development of weapons capable of widespread and significant damage. This presentation examines the current legal regime under international criminal law relevant to the intentional destruction of the environment during warfare, and argues that such acts should, in appropriate circumstances, be recognised as an international crime and should be subject to more effective rules giving rise to international criminal responsibility within the framework of the Rome Statute of the International Criminal Court.*