

Atmospheric Trust Litigation in Australia: an old doctrine, a new front

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Abstract:

Recent successful legal action in the United States brought by youth plaintiffs against state and federal governments has "opened up a major new front on climate litigation."¹ This litigation, known as "Atmospheric Trust Litigation," is predicated on the use of the public trust doctrine to force governments to protect the atmosphere for future generations by establishing scientifically-supported limits on greenhouse gas emissions. Could similar action be brought in Australia? This paper considers the feasibility of Atmospheric Trust Litigation in Australia. It begins with overview of the common law and constitutional bases for the public trust doctrine in Australia, and the rationale for incorporating the atmosphere within the public trust. This paper then explains how the public trust doctrine can be utilised both as a stand-alone cause of action and as a tool of administrative law. Issues including standing, justiciability, legislative displacement and the availability of a remedy are also considered. This paper concludes that, in spite of the unique challenges facing Atmospheric Trust Litigation in Australia, a legal argument framed around inherent rights, popular sovereignty and intergenerational equity presents perhaps the best opportunity to extend climate change litigation beyond its current limits.

Keywords: administrative law, Atmospheric Trust Litigation, Australia, climate change, common law, fiduciary duty, justiciability, intergenerational equity, litigation, parliamentary sovereignty, public trust doctrine, standing, United States.

BIOGRAPHY

Danny Noonan is a juris doctor candidate at Sydney Law School. In 2015 Danny volunteered as a law clerk for the U.S. environmental law non-profit Our Children's Trust, where he assisted with local, state, national and international climate change litigation. In February 2016 Danny presented at the Australian Centre for Climate Change and Environmental Law's 2016 Conference, "The Legal Implication of the Paris Agreement." Danny has previously interned with Environmental Justice Australia and The Aurora Project, continues to volunteer his time with Our Children's Trust, and currently works as a paralegal for Maurice Blackburn Lawyers.

¹ Michael Gerard, *Our Children's Trust Suit Against US Government Surmounts Litigation Hurdle* (18 May 2016) Sabin Centre For Climate Change Law Climate Law Blog <
<http://blogs.law.columbia.edu/climatechange/2016/04/09/our-childrens-trust-suit-against-us-government-surmounts-litigation-hurdle/>>.