

UNITED STATES SUPREME COURT HANDS DOWN IMPORTANT CLIMATE CHANGE DECISION

Matthew Skinner, Partner

Julie-Anne Pearce, Lawyer

Allens Arthur Robinson,
Sydney

The decision in *Massachusetts, et al, Petitioners v Environmental Protection Agency et al* 549 US (2 April 2007) was an appeal to the United States Supreme Court from the DC Circuit Court of Appeals, which had held that the US Environmental Protection Agency (the EPA) had properly exercised its discretion under the US Clean Air Act by refusing to impose mandatory limits on greenhouse gas (GHG) emissions from new motor vehicles.

THE FACTS

In 1999, a number of environmental organisations petitioned the EPA to perform its mandatory duty under the Clean Air Act to regulate GHG emissions from new motor vehicles. The basis for the petition was that GHGs were 'air pollutants' that could reasonably be anticipated to harm public health and welfare as a result of global warming.

The EPA denied the petition. In subsequent proceedings, in which the environmental organisations were joined by 12 states and three major cities and the EPA by 10 states and six trade associations, the EPA argued that:

- the petitioners did not meet the standing requirements under the US Constitution in order to bring the proceedings;
- the Clean Air Act did not authorise the EPA to regulate GHG emissions from new motor vehicles; and
- even if the EPA had authority to set GHG emission standards, it would be unwise to do so at a time when the science is uncertain.

The Supreme Court rejected all three arguments.

THE DECISION

Standing

To demonstrate standing, a litigant must show that:

The decision has the potential to embolden climate change litigants. However, it does not provide direct authority that would support a tortious claim for damages.

It is possible that the finding that greenhouse gases are 'air pollutants' could be persuasive in jurisdictions outside the US, giving rise to the possibility of regulation and litigation in those jurisdictions.

- it has suffered a concrete and particularised injury that is either actual or imminent;
- the injury is fairly traceable to the defendant; and
- it is likely a favourable decision will redress the injury.

The EPA did not challenge the State of Massachusetts' contentions that it had suffered (and was likely to continue to suffer) injury in the form of loss of land, or that there is a causal connection between man-made GHG emissions and global warming. Rather, the EPA submitted that any steps it took to regulate GHGs from new motor vehicles would not redress any injuries suffered, given the increasing emissions from China, India and other developing nations.

The Supreme Court rejected this argument. While regulating motor vehicle emissions may not of itself reverse global warming, a reduction would slow the pace of global emissions and hence the risk of further catastrophic harm.

Authority to regulate

The majority of the Supreme Court rejected the EPA's assertion that GHGs were not 'air pollutants'. Accordingly, it found that the EPA had a statutory authority to regulate GHG emissions.

While the legislature may not have appreciated the possibility that GHG emissions could lead to global warming when drafting the Clean Air Act, the legislature did appreciate that, without regulatory flexibility, changing circumstances and scientific developments would soon render the legislation obsolete. In the circumstances, the broad language of the Clean Air Act reflected an intention to forestall such obsolescence.

Scientific uncertainty

The EPA could only avoid issuing regulations if it determined that GHG emissions did not contribute to climate change, or if it provided a reasonable explanation why it could not or would not exercise its discretion to determine whether they do.

The Supreme Court dismissed the 'laundry list' of reasons that had been offered by the EPA as to why it could not regulate on the basis that they did not amount to a reasoned justification for its position. The court found that the policy matters raised by the EPA, such as whether the executive branch of government was providing a response to global warming, were irrelevant. It was also insufficient to cite uncertainty surrounding various features of climate change as a reason not to regulate. Rather, if the scientific uncertainty is so profound that it precludes the EPA from making a reasoned judgment about whether GHGs contribute to global warming, it must say so.

IMPLICATIONS

The Supreme Court reversed the decision of the DC Court of Appeals and has remanded the petition for further proceedings consistent with its judgment. Accordingly, the decision does not amount to a direction to the EPA to introduce regulations addressing GHG emissions from new motor vehicles.

While the decision is likely to embolden climate change litigants, it does not provide direct authority that would support a tortious claim for damages. That said, while it will depend on the provisions of relevant legislation, the finding that GHGs are 'air pollutants' could be found persuasive in jurisdictions outside the US, giving rise to the possibility of regulation and litigation in those jurisdictions.

The finding that climate change being a global issue does not mean that local measures are irrelevant may be a relevant finding for future litigation relating to climate change.

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