



BRIEFING PAPER:
CLIMATE CHANGE LITIGATION
TRENDS, CASES, AND FUTURE DIRECTIONS

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1. INTRODUCTION

At a Law Society of NSW Thought Leadership seminar on 31 March 2021, Justice Brian Preston described climate law as “hot law”. By this, he explained, he meant that “the law relating to climate change and its consequences is rapidly evolving”.¹ Subsequent events have illustrated just how quickly the law relating to climate change is developing. In the space of three days in May 2021, courts in Australia handed down separate decisions establishing that the federal Minister for the Environment owes children a duty of care in relation to climate change,² and overturning water approval for a new coal mine.³ The same week, a court in the Hague ordered an oil and gas company to reduce its global carbon dioxide emissions by 45% by 2030,⁴ basing its decision on an unwritten duty of care in Dutch tort law.

To help make sense of this dynamic area of law, the Law Society established an expert climate change and the law working group in early 2021, which included members of its Litigation Law and Practice, Environmental Planning and Development, Diversity and Inclusion, and Human Rights Committees. This briefing paper – the product of the working group’s efforts – is designed to complement two Law Society Thought Leadership events on climate change and the law in 2021, and to shed light on the trends, cases, and future directions of climate change litigation in Australia and abroad.

Litigation is, of course, only one aspect of the response to climate change. In recent years, growing concern over the impact of climate change has provoked action across all levels of government, and a range of sectors.

In 2015, the Paris Climate Change Conference – known as the 21st Conference of the Parties (“COP21”) to the United Nations Framework Convention – produced the legally binding *Paris Agreement*, in which 195 nations, including Australia, and the European Union agreed to limit global warming to well below 2, preferably to 1.5 degrees Celsius, compared to pre-industrial levels.⁵ At the domestic level, the federal government and all states and territories in Australia have committed to reach net zero emissions by 2050, which is expected to contribute to limiting global warming.

Major business and investor groups have made their own statements and commitments on climate change. The Australian Climate Roundtable, which includes the Business Council of Australia and the Australian Industry Group, stated in 2020 that climate change is already having “a real and significant impact on the economy and community”, and emphasised its support for the core *Paris Agreement* target.⁶ Climate League 2030, a private sector initiative to reduce emissions in Australia, has attracted 20 participants responsible for over \$910 billion in assets under management since being launched in October 2020.⁷

These developments raise complex legal issues across different areas, including governance, environmental law, human rights, and regulatory compliance. Legal practitioners have an important role to play in the response to these challenges, by advising on the risks and opportunities they present. The authors of this briefing paper hope it will be a useful introduction for any Law Society member interested in learning more about climate legal risk considerations, and the implications of climate change litigation for lawyers and their clients.



2. CONTEXT AND TERMINOLOGY

The Climate Change Laws of the World Database – created and maintained by the Grantham Research Institute on Climate Change – tracks climate change litigation globally since 1993. Outside the United States, Australia has recorded the highest level of climate change litigation activity, with 121 cases as of October 2021. By contrast, the database records 77 cases in the United Kingdom, 56 in the European Union, 25 in Canada, and 21 in New Zealand.⁸

Experts have put forward several theories to explain Australia’s prominence on the global climate change litigation map. In an online article published in November 2020, Mallett et al. stated that Australia is a “particularly fertile testing ground for public interest litigation on climate change, given its sophisticated and independent legal institutions, a government policy supporting heavy industry, and the severe climate change impacts in the region”.⁹ Peel and Osofsky have suggested that the key drivers of recent climate litigation in Australia include “high-profile international cases, the conclusion of the *Paris Agreement*, advances in climate change science, and a changing business culture regarding climate change risk”.¹⁰

In assessing the scope and impact of climate change litigation, one difficulty many authors face is how to define the term. Bouwer has noted that “the worldwide combination of climate cases are a broad and unruly collection”¹¹ while Setzer and Vanhala observed in 2019 that there are “as many understandings of what counts as ‘climate change litigation’ as there are authors writing about the phenomenon”.¹² For the purposes of this briefing paper, the definition of “climate change litigation” is borrowed from the United Nations Environment Programme’s (“UNEP”) *Global Climate Litigation Report: 2020 Status Review* which considered the term to include “cases that raise material issues of law or fact relating to climate change mitigation, adaptation, or the science of climate change”.¹³

The first case in Australia to fall within this definition was *Greenpeace Australia Ltd v Redbank Power Ltd* in 1994. In that matter, Pearlman CJ of the NSW Land and Environment Court (“NSWLEC”) held that a proposed new power station in the Hunter Valley should be allowed to proceed, subject to several mitigation conditions.

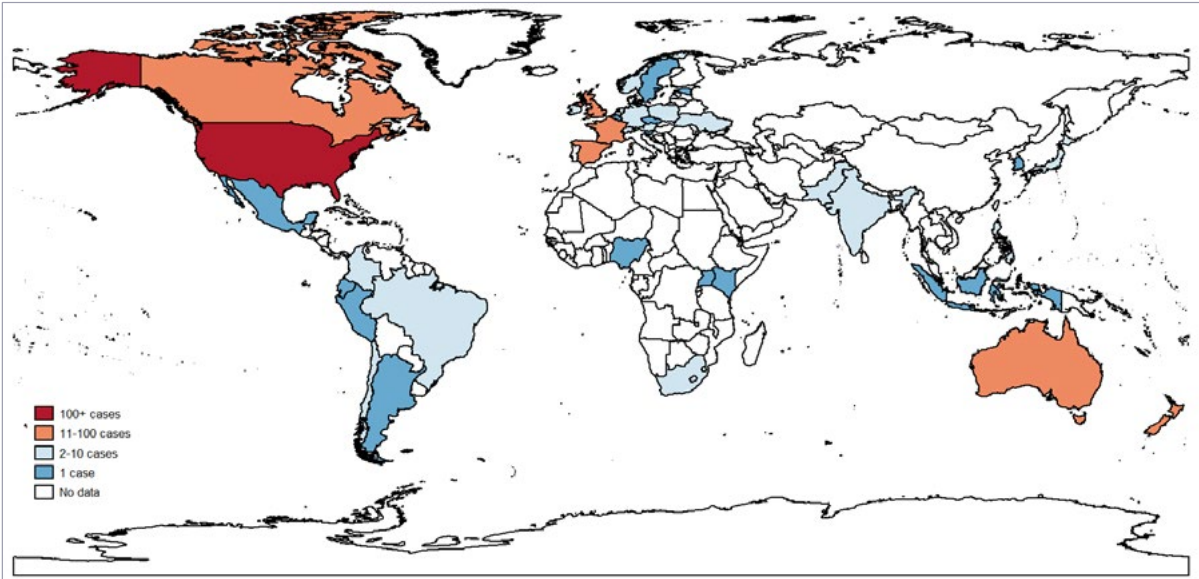


Figure A: Global cumulative climate change cases as at the end of May 2020. Source: Setzer and Byrnes, 2020

As the body of climate change cases in Australia has grown since 1994, authors have attempted to organise the cases into categories. Various writers have referred to different generations,¹⁵ eras,¹⁶ frontiers,¹⁷ and waves¹⁸ of climate change litigation, and even “a harmonic made up of multiple standing waves”.¹⁹ A recurring theme in this analysis is that while climate change litigation in Australia was initially dominated by administrative appeals to specific projects under environmental laws, cases now often have a broader focus on holding companies and governments to account for their actions, or inactions, related to climate change.

Rather than fitting climate change cases into categories, this briefing paper outlines a series of key trends identified by the Law Society’s climate change and the law working group. A selection of case summaries detailing influential or ground-breaking Australian matters is included to illustrate each trend. As climate change litigation is a global phenomenon, some significant cases from international jurisdictions are also outlined. Following the section on key trends and cases, the briefing paper provides a summary of predictions for future directions in climate change litigation in Australia, informed by working group members and existing literature.



‘CLIMATE CHANGE LITIGATION’ DEFINED

The United Nations Environment Programme (“UNEP”) considers ‘climate change litigation’ to include cases that raise material issues of law or fact relating to climate change mitigation, adaptation, or the science of climate change. UNEP further state that: “[s]uch cases are brought before a range of administrative, judicial, and other adjudicatory bodies. These cases are typically identified with keywords like climate change, global warming, global change, greenhouse gas, GHGs [greenhouse gases], and sea level rise”.



3. KEY TRENDS AND CASES

3.1. Corporate disclosure and directors' duties

The 2015 United Nations Climate Change Conference in Paris featured engagement from the private sector unprecedented in other international climate change negotiations. Prior to the conference, CEOs from 79 major global companies signed an open letter urging world leaders to reach an “ambitious climate deal” at COP21.²¹ During the conference, leaders from financial institutions and industries focused on cement, transportation, energy, and consumer products called on governments to implement predictable, long-term regulatory regimes and also announced their own commitments.²²

The business interest in COP21 reflected a growing recognition that “issues associated with climate change present significant economic and financial risks (and opportunities) over both long and shorter-term investment horizons”.²³ Shortly before the conference, Mark Carney, Governor of the Bank of England, delivered a speech outlining how climate change presents a financial, as well as an environmental, risk. Carney described three broad channels through which climate change can affect financial stability: physical risks, liability risks, and transition risks.²⁴

The G20’s Financial Stability Board, chaired by Carney at the time, subsequently established the Taskforce on Climate-related Financial Disclosures (“TCFD”) in December 2015 to develop consistent climate-related financial risk disclosures for use by companies, banks, and investors.

Recognition of the financial risks of climate change has grown more acute in the following years. The World Economic Forum’s *2016 Global Risks Report* rated “failure of climate change mitigation and adaptation” as having the largest impact of all risks to the global economy.²⁵ In February 2017, Geoff Summerhayes, then an Executive Member of APRA, said “some climate risks are distinctly ‘financial’ in nature. Many of these risks are foreseeable, material and actionable now”.²⁶ In June 2017, the TCFD released its final report, which contained disclosure recommendations structured around four thematic areas: governance, strategy, risk management, and metrics and targets.²⁷

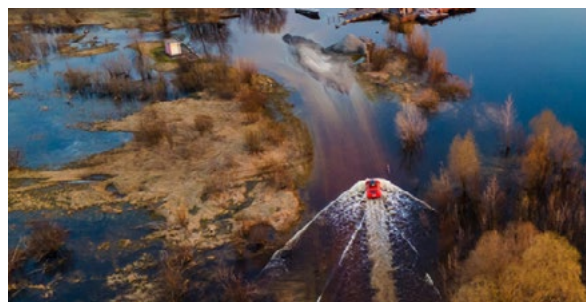
The TCFD framework has since become the global standard for climate-related disclosures, with over 900 organisations declaring their support.²⁸ In Australia, ASIC has recommended the TCFD framework to listed companies, and monitors the adoption of TCFD reporting.²⁹ In April 2021, APRA released a draft *Prudential Practice Guide CPG 229 Climate Change Financial Risks*, which is aligned with the TCFD recommendations. The draft guide states that “APRA anticipates the demand for reliable and timely climate risk disclosure will increase over time, and for institutions with international activities there is a need to be prepared to comply with mandatory climate risk disclosures in other jurisdictions.”³⁰

The ASX Corporate Governance Council has published guidance that similarly encourages entities to review and disclose exposure to climate change risks in line with the TCFD recommendations.³¹ The Reserve Bank of Australia has also supported the implementation of the TCFD recommendations,³² and warned in 2019 that “[c]limate change is exposing financial institutions and the financial system more broadly to risks that will rise over time, if not addressed”.³³ The same year, the Australian Accounting Standards Board published guidance on the ‘materiality’ of climate-related risk, for the purposes of preparing and auditing financial statements.³⁴

Climate risk disclosure was the focus of a 2016 opinion from barristers Noel Hutley SC and Sebastian Hartford Davis, in which the authors contended that company directors who fail to consider climate change risks now could later be found liable for breaching their duty of care and diligence in the future. The authors found that physical and transition risks arising from climate change could intersect with the interests of a company in a number of ways, “ranging from the emergence of a corporate opportunity to the perception of a foreseeable risk of harm”.³⁵ In a 2019 update to the opinion, the same authors noted that “we are now observers of a profound and accelerating shift in the way that Australian regulators, firms and the public perceive climate risk”. They concluded that:

It is increasingly obvious that climate change is and will inevitably affect the economy, and it is increasingly difficult in our view for directors of companies of scale to pretend that climate change will not intersect with the interests of their firms. In turn, that means that the exposure of individual directors to “climate change litigation” is increasing, probably exponentially, with time.³⁶

Hutley and Hartford Davis provided a further update to their opinion in April 2021. The authors assessed developments since 2019, concluding that “it is clear the benchmark for directors on climate change and attendant risks and opportunities continues to rise”.³⁷ In light of a proliferation of net zero commitments



THREE CATEGORIES OF CLIMATE CHANGE RISK

In a 2015 speech titled ‘Breaking the tragedy of the horizon – climate change and financial stability’, Mark Carney, Governor of the Bank of England, identified three key categories of financial risk arising from climate change. He defined these categories in the following terms.

Physical risks: the impacts today on insurance liabilities and the value of financial assets that arise from climate- and weather-related events, such as floods and storms that damage property or disrupt trade.

Liability risks: the impacts that could arise tomorrow if parties who have suffered loss or damage from the effects of climate change seek compensation from those they hold responsible. Such claims could come decades in the future, but have the potential to hit carbon extractors and emitters – and, if they have liability cover, their insurers – the hardest.

Transition risks: the financial risks which could result from the process of adjustment towards a lower-carbon economy. Changes in policy, technology and physical risks could prompt a reassessment of the value of a large range of assets, as costs and opportunities become apparent.

from corporations, the authors also analysed the ‘greenwashing’ litigation risks relating to such commitments. This issue is discussed further at 4.3 below.

In collaboration with James Mack, Hutley has prepared two legal opinions on superannuation trustee duties and climate change, in 2017³⁸ and 2021.³⁹ In their most recent opinion, the authors stated that “the nature of the financial risk posed by climate change to a superannuation trustee is ascertainable and also likely to be material”.⁴⁰ They concluded that trustees should receive expert advice on the financial risk of climate change, and assess the investment manager’s capability to manage and mitigate any climate risks.⁴¹

CLIMATE RISK DISCLOSURE: AUSTRALIAN REGULATORS' VIEWS⁴²

“ASIC considers that the law requires an OFR [operating and financial review disclosure] to include a discussion of climate risk when it is a material risk that could affect the company’s achievement of its financial performance... ASIC recommends listed companies with material exposure to climate risk consider reporting under the TCFD framework”.

– Australian Securities & Investment Commission, 2021

“In preparing financial statements, [public sector] agencies should consider climate related matters, if the effect of climate risk is material. Information is material if omitting, misstating or obscuring it could reasonably be expected to influence decisions that primary users of financial statements make on the basis of those financial statements.”

– NSW Government Treasury, 2021

“APRA... continues to encourage the adoption of voluntary frameworks to assist entities with assessing, managing and disclosing their financial risks associated with climate change, such as the TCFD recommendations. Looking ahead, the financial risks of climate change will continue to be a focus of APRA’s efforts to increase industry resilience, and more supervisory attention is being given to understanding these risks.”

– Australian Prudential Regulation Authority, 2020

“Climate change is exposing financial institutions and the financial system more broadly to risks that will rise over time, if not addressed... It is important that the focus of [climate-related financial] disclosure is on consistently and regularly providing quality information, so that financial institutions and investors can build an economy-wide understanding of the risks and how they are evolving”.

– Reserve Bank of Australia, 2019

“The [ASX Corporate Governance] Council would encourage entities to consider whether they have a material exposure to climate change risk by reference to the recommendations of the TCFD and, if they do, to consider making the disclosures recommended by the TCFD.”

– ASX Corporate Governance Council, 2019

Alongside regulatory developments, recent years have seen a number of high-profile actions brought against corporations in Australia, and in one case the Australian Government, for misleading or inadequate disclosure of climate-related risk.

In *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia*⁴³ the Full Court of the Federal Court dismissed an appeal by the Australasian Centre for Corporate Responsibility (“ACCR”). The case concerned attempts by ACCR, on behalf of over 100 Commonwealth Bank of Australia (“CBA”) shareholders, to propose three motions at a CBA annual general meeting relating to the greenhouse gas emissions attributable to the bank’s lending activity. CBA did not include two of the proposed resolutions in the notice of AGM, as they were “matters within the purview of the Board and management of the Bank”.⁴⁴ The third resolution was included in the notice of AGM along with a recommendation from the CBA board that shareholders vote against it. The Full Court agreed with the first instance decision that the actions of the CBA were lawful, affirming that shareholders in Australia have limited ability to control or comment on exercise of board management powers. This contrasts with the approach in the United States, where shareholders commonly propose non-binding resolutions pursuant to Rule 14a-8 of the *Securities Exchange Act of 1934* to express a view on company management.

The following year, in *Guy Abrahams v Commonwealth Bank of Australia*,⁴⁵ two longstanding Commonwealth Bank shareholders asserted that although climate change creates material financial risks to its business, the CBA had failed to disclose these risks to investors in its 2016 annual report. The shareholders argued that, in doing so, the bank had contravened requirements in the *Corporations Act 2001* (Cth) (“Corporations Act”) that a company’s annual report must include a financial report which gives a “true and fair” view of its financial position and performance,⁴⁶ and a directors’ report must include information that would allow shareholders to make an “informed assessment” of the company’s prospects for future financial years.⁴⁷

The application was discontinued in September 2017 after the CBA released its 2017 annual report, acknowledging the risk of climate change and committing to undertake climate change scenario analysis to estimate the risks to its business.

In August 2021, Guy Abrahams, together with Kim Abrahams, filed a new application in the Federal Court. The plaintiffs, who remain CBA shareholders, are seeking access to documents relating to the bank’s reported involvement in seven oil and gas projects, including any assessments of the projects’ environmental, social, and economic impacts.⁴⁸



Another matter focused on the Australian financial sector was *McVeigh v Retail Employees Superannuation Trust*.⁴⁹ Mark McVeigh, a member of the Retail Employees Superannuation Trust (“REST”), filed suit against REST in the Federal Court of

Australia alleging that REST, as a superannuation trustee, violated the Corporations Act by failing to provide information related to climate change business risks and any plans to address those risks.⁵⁰ The claim was later amended to allege the fund’s trustee had breached its obligations to the Applicant under s 52(2) (b) and (c) of the *Superannuation Industry (Supervision) Act 1993* (Cth) by, inter alia: not obtaining certain information from its investment managers in relation to climate change risks; and not complying with the TCFD recommendations.⁵¹

Following two years of legal proceedings, the matter was settled in early November 2020 on the same day the hearing was due to begin. In the settlement statement, REST acknowledged that “climate change is a material, direct and current financial risk to the superannuation fund across many risk categories” and “REST, as a superannuation trustee, considers that it is important to actively identify and manage these issues”. REST committed to nine actions, including achieving a net zero carbon footprint for the fund by 2050 and reporting on climate related progress in line with TCFD recommendations. REST also committed to “encourage its investee companies to disclose in line with the TCFD recommendations”.⁵²

Despite not setting a legal precedent, the outcome in this matter has been described as creating “a standard against [which] other superannuation funds will be measured”.⁵³ Professor Jacqueline Peel of Melbourne University expressed the view that “super funds will be looking very closely at that settlement in formulating what they will do on climate change”.⁵⁴

In the ongoing matter of *Kathleen O’Donnell v Commonwealth of Australia and Ors*,⁵⁵ a 23-year-old student who owns five exchange-traded Australian Government bonds has brought proceedings on behalf of herself and all persons who have owned a bond of the same nature since 5 July 2020. The amended statement of claim, filed on 23 December 2020, alleges that the Commonwealth has failed to disclose climate change risks to bond investors, and by doing so has breached its duty of disclosure, and misled and deceived investors.⁵⁶ The applicant contends that while the ASX has issued guidance to companies on the importance of disclosing climate related risk to shares, the Government has not adhered to this standard. She argues it is not possible to

assess the risk associated with Australian Government Bonds without disclosure from the Government. This is the first ever court case that has sought to hold the Australian Government to account over climate risks and, in the view of experts, the first such case worldwide.⁵⁷

Relief sought by the Applicant includes: a declaration from the Federal Court that the Commonwealth breached s 12DA(1) of the *Australian Securities And Investments Commission Act 2001* (Cth), which prohibits misleading or deceptive conduct in trade or commerce; and an injunction restraining the Commonwealth from promoting or issuing retail bonds until relevant climate risk disclosures are made.⁵⁸

In addition to traditional litigation forums, parties are exploring the potential of other avenues for action against companies in relation to climate change disclosure. In January 2020, Friends of the Earth Australia and three individuals submitted a complaint against ANZ Banking Group to the Australian National Contact Point (“AusNCP”) for the OECD Guidelines for Multinational Enterprises (“OECD Guidelines”). The complaint alleges that ANZ has breached the OECD Guidelines by failing to meaningfully adhere to the *Paris Agreement* reduction targets across its lending portfolio. The complaint also alleges the bank’s failure to disclose the full extent of its lending emissions is a breach of the OECD Guidelines.⁵⁹ In November 2020, the AusNCP determined to accept the complaint. If an agreement cannot be mediated, a ruling and recommendations will be issued within 12 months.⁶⁰

The Friends of the Earth Australia complaint draws inspiration from a complaint brought by four NGOs against ING Bank before the Dutch NCP.⁶¹ Following mediation in that matter, ING agreed to set targets and adopt a measurement and disclosure methodology in relation to its climate impact.⁶²

Korbel has observed that climate change litigation directed at corporations to date in Australia has primarily been driven by a desire to raise awareness and improve corporate responsiveness to climate change risks.⁶³ As such, the relief sought has mostly been declarative or injunctive. In other jurisdictions, litigants have gone further and sought damages for breach of company and director duties. In *People of the State of New York v Exxon Mobil Corporation*,⁶⁴ the New York Attorney General filed a fraud action in the New York Supreme Court alleging that Exxon Mobil had made misrepresentations in its climate disclosures. The relief sought included damages “caused, directly or indirectly, by the fraudulent and deceptive acts” and restitution of funds to investors.⁶⁵ In December 2019, the Court ruled in favour of ExxonMobil, finding the organisation did not mislead investors in its public disclosures about how it accounted for past, present and future climate change risks.⁶⁶

3.2 A 'rights turn' in climate change litigation

International treaty bodies and experts concur that a changing climate poses a threat to a suite of core human rights. The UN Committee on Economic, Social and Cultural Rights and the UN Committee on the Rights of the Child have both recognised that human rights can be affected by environmental harms.⁶⁷ In a 2019 report, the UN Special Rapporteur on extreme poverty and human rights Philip Alston stated that climate change threatens the right to life, water and sanitation, health, food, and housing, as well as a “wide range of civil and political rights”.⁶⁸ In a separate report released the same year, the UN Special Rapporteur on human rights and the environment, David Boyd, emphasised that “[c]limate change is already having major impacts on human health, livelihoods and rights”, including the rights to life, health, food, water and sanitation, a healthy environment, an adequate standard of living, housing, property, self-determination, development and culture.⁶⁹ The UN Human Rights Council (“UNHRC”) has repeatedly expressed similar concerns: NSW Young Lawyers has identified 11 resolutions passed by the UNHRC between 2008 and 2018 expressing concern about the human rights implications of climate change;⁷⁰ and in October 2021 the UNHRC recognised, for the first time, that having a clean, healthy and sustainable environment is a human right.⁷¹ The preamble to the *Paris Agreement* also drew a link between climate change and human rights, stating that “Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights”.⁷²

NSW Young Lawyers has identified 11 resolutions passed by the UNHRC between 2008 and 2018 expressing concern about the human rights implications of climate change;⁶⁹ and in October 2021 the UNHRC recognised, for the first time, that having a clean, healthy and sustainable environment is a human right.⁷⁰

Despite these developments, several constraints limit the capacity of human rights law to address the impacts of climate change. The International Bar Association (“IBA”) noted in a 2014 report that there is no free-standing right to a clean and healthy environment under core international human rights instruments,⁷³ although over 100 national constitutions do now include such a right.⁷⁴ Pepper and Hobbs have observed that “[t]he lack of a clear textual basis for the protection of the environment [in international human rights

law] can make it difficult for courts to intervene”.⁷⁵ In its 2014 report, the IBA also noted that multinational corporations are not directly bound under international or national human rights treaties, and that “[e]nvironmental human rights jurisprudence has also developed in the context of national harm, as opposed to transboundary pollution or global climate change”.⁷⁶

As the following case studies illustrate, climate change litigants in Australia, Europe, the Philippines, South Africa, Pakistan and the Netherlands have attempted to navigate these constraints by arguing that climate change is a threat to human rights such as the right to life, health and a healthy environment (in countries where such a right is legally recognised). Peel and Osofsky argue that these cases illustrate “a trend towards petitioners increasingly employing rights claims in climate change lawsuits, and a growing receptivity of courts to this framing”, describing the trend as a “rights turn” in climate change litigation.⁷⁷

*Waratah Coal Pty Ltd v Youth Verdict Ltd*⁷⁸ is the first climate change case in Australia that relies on domestic human rights legislation. Advocacy group Youth Verdict and an association of landholders and conservations known as The Bimblebox Alliance (“TBA”) have objected to an application to develop a thermal coal mine in the Galilee Basin. Youth Verdict and TBA’s grounds of objection include that to grant the application would be incompatible with various human rights – including the right to life, property rights, the right to privacy, the protection of children and cultural rights – and, therefore, would be unlawful under s 58(1) of the *Human Rights Act 2019* (Qld).

In an application to the Land Court of Queensland (“LCQ”), Waratah Coal sought to strike out objections that relied on the *Human Rights Act 2019* (Qld), or to obtain a declaration that the Court did not have jurisdiction to consider those objections. Waratah Coal contended that the LCQ’s function under environmental legislation to make recommendations to the Minister authorising mining lease grants did not confer upon the Court the jurisdiction to consider objections that relied on the *Human Rights Act 2019* (Qld).

Ultimately, the LCQ found that it did have jurisdiction as a “public entity” for the purposes of the *Human Rights Act 2019* (Qld), and that the making of a recommendation fell within the meaning of a “decision” and an “act” under s 58. As such, both the LCQ and the Minister are bound by Queensland’s human rights legislation in exercising their respective functions to give proper consideration to human rights. The LCQ therefore dismissed the application by Waratah Coal.⁷⁹ The objections put forward by Youth Verdict and TBA are scheduled to be considered at a hearing in February 2022.⁸⁰

The human rights implications of climate change also form the basis of a 2019 claim brought by a group of eight Torres Strait Islanders against Australia to the UN Human Rights Committee. The claimants allege that Australia's contribution to emissions and lack of adequate preventative and protective countermeasures violate their right to life,⁸¹ private and family life,⁸² and culture⁸³ under the International Covenant on Civil and Political Rights ("ICCPR"). The claimants have prima facie standing, as Australia is a party to the ICCPR and its Optional Protocol, which allows for Individual Communications to the UN Human Rights Committee, the relevant treaty body.

The claim states that Australia's inaction regarding climate change has caused heavy flooding and rising sea levels that is already impairing the exercise of the claimants' rights.⁸⁴ The UN Human Rights Committee's findings are pending as of October 2021.

As noted above, *Waratah Coal Pty Ltd v Youth Verdict Ltd* is the first climate change case in Australia to rely on domestic human rights legislation. However, the 'rights turn' in climate change litigation is also evident in other jurisdictions.

The well-known case of *Urgenda v State of the Netherlands* ("Urgenda") saw an environmental group, the Urgenda Foundation, and 900 Dutch citizens sue the Dutch government, seeking to require it to take greater action to prevent climate change. The matter was the subject of three rulings between 2015 and 2019. In 2015, the Hague District Court ordered the Netherlands to limit its emissions by a defined amount, basing its order, in part, on the doctrine of hazardous negligence arising from tort provisions in the Dutch Civil Code.

The human rights implications of climate change also form the basis of a 2019 claim brought by a group of eight Torres Strait Islanders against Australia to the UN Human Rights Committee. The claimants allege that Australia's contribution to emissions and lack of adequate preventative and protective countermeasures violate their right to life,⁸¹ private and family life,⁸² and culture.⁸³

The State appealed to the Dutch Court of Appeal and, ultimately, the Dutch Supreme Court. In December 2019 the Dutch Supreme Court confirmed the lower court's decision, and also held that the risks of climate change fell within the scope of the European Convention on Human Rights ("ECHR"), particularly within Article 2 (right to life) and Article 8 (private and family life). The Supreme Court ruled that these articles obliged the State to take measures against the risk of dangerous climate change.⁸⁵ In reaching its decision, the Supreme Court rejected all of the State's arguments, including that the Netherlands is a small country, and therefore the impact of reducing its emissions would be minimal. The Court determined that:

a country cannot escape its own share of the responsibility to take measures by arguing that compared to the rest of the world, its own emissions are relatively limited in scope and that a further reduction of its own emissions would have very little impact on a global scale. The state is therefore obliged to reduce greenhouse gas emissions from its territory in proportion to its share of the responsibility.⁸⁶

While the tortious duty of care established by the decision may not be replicable in other jurisdictions – due to its basis in the Dutch Civil Code⁸⁷ – the rights-based aspect of the decision has been closely monitored by international observers. The UN Special Rapporteur on Human Rights and the Environment described *Urgenda* as “the most important climate change court decision in the world so far, confirming that human rights are jeopardised by the climate emergency and that wealthy nations are legally obligated to achieve rapid and substantial emission reductions”.⁸⁸

The ongoing matter of *Do Hyun Kim et al v South Korea* concerns a complaint made by 19 youths to the South Korean Constitutional Court in March 2020. The complaint alleges that an amendment to South Korea's low carbon framework, which decreased the country's 2017 emissions reduction target by 24%, is inconsistent with a goal of keeping global warming well below 2 degrees Celsius, and violates the applicants' constitutional rights. These include, inter alia, their right to life,⁸⁹ to a clean and healthy environment,⁹⁰ to not be discriminated against as youths are disproportionately impacted by climate change,⁹¹ and to be protected by the State from environmental disasters.⁹² The applicants submit that they have standing as they are suffering direct, ongoing and relevant harm, and have exhausted other remedies.⁹³

In a separate national matter, *Future Generations v Ministry of the Environment and Others*, the Supreme Court of Colombia held that the “fundamental rights of life, health, the minimum subsistence, freedom and human dignity are substantially linked and determined by the environment and the ecosystem.”⁹⁴ The Court also held that the Colombian Amazon was a “subject of rights” under the Constitution, and that it was entitled to protection, conservation, maintenance and reforestation.⁹⁵

In *Youth for Climate Justice v Austria, et al.* six Portuguese youths filed a complaint to the European Court of Human Rights (“ECtHR”) against 33 countries. The complaint, filed in September 2020, alleged that the youths’ rights to life,⁹⁶ privacy⁹⁷ and to not experience discrimination⁹⁸ under the ECHR had been violated by the countries for taking insufficient action to realise the *Paris Agreement* targets. As a result, the youths contend they are being exposed to climate conditions that negatively impact their physical and mental wellbeing, and as young people, they will be disproportionately impacted by global warming over their lifetimes.

The applicant youths contend that they have standing as ‘victims’, as the countries’ climate policies affect everyone, or alternatively that they are specifically likely to be affected.⁹⁹ As under-resourced, full-time students, they requested to be exempt from the requirement to exhaust domestic remedies.¹⁰⁰ They further argue that the fact that each country’s contribution to emissions would not alone constitute a violation is irrelevant, as “[b]reach is found in the absence of proven causation where reasonable preventive measures were available and not taken”.¹⁰¹ The matter is pending before the ECtHR as of October 2021.

3.3. Climate science in the courtroom

In an article published in 2010, Justice Preston observed that “[i]t is only in recent years that climate change as a phenomenon has been more widely accepted by the courts, though there are still cases where the science of climate change is challenged”. Peel and Osofsky note that there are “many complexities and challenges that can arise in seeking to present scientific evidence in the courtroom in a way that judges will find persuasive”.¹⁰² To negotiate these challenges, lawyers involved in climate change cases often enlist credible, well-qualified experts to provide expert evidence on climate science and, in some cases, the likely contribution to climate change of a proposed development.

A recent example of climate science expertise informing judicial decision making can be found in the decision of Justice Bromberg in *Sharma v Minister for the Environment* (“*Sharma*”).¹⁰³ Bromberg J recognised that the Minister for the Environment has a duty to take

reasonable care to protect children from the effects of climate change when exercising powers under s 130 and s 133 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). The decision referred to climate change modelling of the Intergovernmental Panel on Climate Change (“IPCC”), and expert evidence presented to the Court by Professor Will Steffen, Professor Tony Capon, Dr Ramona Meyricke and Dr Karl Mallon.¹⁰⁴

*Gloucester Resources Limited v Minister for Planning*¹⁰⁵ concerned an appeal to the NSWLEC by a mining company against refusal in 2017 by the NSW Planning Assessment Commission (“PAC”) of an application for a coal mine at Rocky Hill in the Gloucester Valley of NSW.

Preston CJ dismissed the appeal and upheld the refusal by the PAC to approve the mine. The reasons provided for refusal included the mine’s “significant adverse impacts on the visual amenity and rural and scenic character of the valley, significant adverse social impacts on the community and particular demographic groups in the area, and significant impacts on the existing, approved and likely preferred uses of land in the vicinity of the mine”. Preston CJ added that the “GHG emissions of the Project and their likely contribution to adverse impacts on the climate system, environment and people adds a further reason for refusal”.

In reaching his decision, Preston CJ gave detailed consideration to findings of the IPCC, which he described as “the world’s most authoritative assessment body on the science of climate change”.¹⁰⁶

In a separate NSWLEC matter, *Bushfire Survivors for Climate Action Inc v Environment Protection Authority*,¹⁰⁷ a climate action group sought an order compelling the NSW Environment Protection Authority (“EPA”) to develop environmental quality objectives, guidelines and policies to ensure the protection of the environment from climate change. The Applicants argued that the preparation of such instruments fell within the duty imposed on the EPA by s 9(1)(a) of the *Protection of the Environment Administration Act 1991* (NSW).

The Applicants relied in part on expert scientific evidence from former Australian Chief Scientist, Professor Penny Sackett, on the links between bushfires and climate change. Professor Sackett opined that many individual extreme events can be directly linked to climate change, including the devastating Australian 2019-20 bushfires, which were at least 30% more likely because of climatic changes caused by humans.¹⁰⁸ She concluded her evidence by stating that “[i]t is reasonable to state that unabated climate change is the greatest threat to the environment and people of New South Wales”.¹⁰⁹ In his decision, Preston CJ held that the EPA did have a duty to develop the instruments of the kind described by the Applicants. The NSW Environment



CLIMATE CHANGE LITIGATION IN AUSTRALIA: FOUR KEY CASES

Gloucester Resources Limited v Minister for Planning [2019] NSWLEC 7

In this landmark decision of the NSW Land and Environment Commission, Preston CJ upheld the NSW Planning Assessment Commission's decision to refuse an application for a coal mine at Rocky Hill in the Gloucester Valley of NSW. In addition to the impacts of the proposed mine on the visual amenity and character of the valley, adverse social impacts on the community, and the impact of the use of land in the vicinity of the mine, Preston CJ stated that the "GHG [greenhouse gas] emissions of the Project and their likely contribution to adverse impacts on the climate system, environment and people adds a further reason for refusal".

Sharma v Minister for the Environment [2021] FCA 560

The applicants in this matter were eight Australian children who sought an injunction to restrain the Commonwealth Minister for the Environment from approving the expansion of a coal mine which they claimed would increase carbon emissions by 100 million tons per year. Bromberg J did not grant an injunction, but recognised that the Minister has a duty to take reasonable care to protect children from the effects of climate change when exercising relevant powers under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

Mark McVeigh v Retail Employees Superannuation Pty Ltd (Federal Court of Australia, NSD1333/2018, commenced 24 July 2018)

While this matter settled in November 2020 before the final hearing began – and thus did not establish a binding precedent – experts consider it will likely set a standard for the identification and management of climate change related risks by superannuation funds. In the settlement statement, REST acknowledged that "climate change is a material, direct and current financial risk to the superannuation fund across many risk categories" and committed to nine actions, including achieving a net zero carbon footprint for the fund by 2050 and reporting on climate related progress in line with TCFD recommendations.

Waratah Coal Pty Ltd v Youth Verdict Ltd [2020] QLC 33

This decision concerns the first climate change case in Australia to rely on domestic human rights legislation, brought by advocacy groups Youth Verdict and The Bimblebox Alliance. In an application to the Land Court of Queensland, Waratah Coal sought to strike out objections to a thermal coal mine that relied on the *Human Rights Act 2019* (Qld). The Court dismissed the application, finding that both it and the Minister are required to consider human rights in exercising their respective functions. The objections to the mining project are scheduled to be considered at a hearing in February 2022.

and Energy Minister subsequently announced that the NSW Government “will not be appealing that decision. In fact, we’ll be doing everything necessary to give it full effect”.¹¹⁰

In addition to Australian case studies, there is a growing body of international jurisprudence informed by expert evidence on climate change science. Two landmark decisions are *Asgbar Leghari v Federation of Pakistan*¹¹¹ (“*Leghari*”) and *Juliana v United States*¹¹² (“*Juliana*”). In *Leghari*, a 25-year-old farmer in Pakistan’s South Punjab region brought a case against the national and regional governments on the basis they had failed to implement relevant climate change policies. The Lahore High Court ruled in favour of the plaintiff, making sweeping orders to help ensure implementation of the government’s climate change obligations. In reaching its decision, the court referred to expert views on the causes of climate change, noting that “for Pakistan, climate change is no longer a distant threat – we are already feeling and experiencing its impacts across the country and the region”.¹¹³

In the ongoing matter of *Juliana*, discussed further at 3.4, the plaintiff’s case has been supported by over 1,000 pages of evidence from experts including Professor Ove Hoegh-Guldberg of the University of Queensland, Professor G. Philip Robertson of Michigan State University, and Professor Joseph Stiglitz of Columbia University. In a decision for the US District Court for the District of Oregon that was later overturned, Judge Aiken delved extensively into scientific evidence concerning whether the defendants were responsible for some of the harm caused by climate change. The judge denied the federal government and industry intervenors’ motions to dismiss the case, and articulated a new fundamental right “to a climate system capable of sustaining human life is fundamental to a free and ordered society”.¹¹⁴

3.4. A new generation of climate change litigants

In September 2019, a wave of 4,500 strikes and protests took place across 150 countries for the Global Week for the Future campaign. These protests to demand action on climate change were the culmination of the school strike for climate movement, which has been driven by children and young people who are aware of the risks of climate change, and who believe that action must be taken to mitigate its effects.

This youth-led political advocacy and campaigning activity has been accompanied by several climate change cases with children and young people as the lead litigants.

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The applicants in *Sharma*, referred to at 3.3, were eight Australian children who sought an injunction to restrain the Commonwealth Minister for the Environment from approving the expansion of a greenfield coal mine which they claim will increase carbon emissions by 100 million tons per year. The applicants argued that the Minister owes children a novel duty of care to protect them from the risks of climate change.

As noted above, Bromberg J ruled in May 2021 that the Minister does owe children a duty of care, of the nature outlined by the applicants. However, he stopped short of finding that this duty of care had been breached, as “the applicants have not satisfied the Court that it is probable that the Minister will breach the duty of care in making her decision... [and] have not satisfied the Court that they will have no further opportunity to apply for injunctive relief”.¹¹⁵

In his judgment, Bromberg J considered a range of potential harms that children in Australia may experience as a result of the direct, indirect, and flow-on impacts of climate change. These potential impacts include bushfires, heatwaves, droughts, tropical cyclones, floods, economic loss, air pollution, property damage, and the emergence of new human pathogens. He found that “[t]he risk of harm in question is reasonably foreseeable even without regard to the unparalleled severity of the consequences of that risk crystallising”.¹¹⁶

Several other Australian cases referred to in this briefing paper have been initiated by children and young people, including *McVeigh v Retail Employees Superannuation Trust*, *Kathleen O’Donnell v Commonwealth of Australia and Ors*, and *Waratah Coal Pty Ltd v Youth Verdict Ltd*.

The same trend is evident in international jurisdictions, for example in *Do Hyun Kim et al v South Korea* and *Youth for Climate Justice v Austria, et al.* The plaintiffs in *Juliana* are 20 children aged 8 to 19, who claim that the United States Government has violated their constitutional rights to life, liberty and property through its actions that cause climate change and climate-related injuries, and has failed to protect essential public trust resources.¹¹⁷ The plaintiffs claim that the Government is “substantially responsible” for damage to the climate through the Jordan Coal Energy Project, which is projected to cause 716.2 million metric tons of carbon dioxide, and the *Energy Policy Act* (1992),¹¹⁸ which mandates authorisation of natural gas importation and exportation. Similarly to the applicants in *Sharma*, the plaintiffs claim that climate change exposes them to potential injury through increased risk of bushfires, drought, storms, flood, ocean acidification, property damage, and extreme heat.

A separate matter, *Sacchi et al. v Argentina et al.*, concerned a petition filed by 16 children in 2019 before the UN Committee on the Rights of the Child against five countries. The petitioners – who were from 12 countries, and aged between eight and 18 – claimed that the respondents’ failure to mitigate climate change violated their rights to life,¹¹⁹ health,¹²⁰ prioritisation of children’s best interests,¹²¹ and the cultural rights of

Indigenous petitioners.¹²² The respondents’ failure to fulfill their international obligations under the *Paris Agreement* was said to have caused specific harms including wildfires in Tunisia, water shortages in South Africa, dangerous air quality in Nigeria, storms and flooding in the Marshall Islands, and sea level rise in Palau.¹²³

The petitioners sought a declaration that Argentina, Brazil, France, Germany, and Turkey violated their rights under the *Convention on the Rights of the Child* by insufficiently reducing greenhouse gas emissions. They also petitioned the Committee to find that climate change is a children’s rights crisis, and to recommend mitigation and adaptation strategies to the respondents. In October 2021, the Committee determined that a State party can be held responsible for the negative impact of its carbon emissions on the rights of children both within and outside its territory.¹²⁴ However, the Committee ultimately declared the petitioners’ complaints to be inadmissible, finding that domestic remedies had not been exhausted, as required by the *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*.¹²⁵



4. FUTURE DIRECTIONS IN CLIMATE CHANGE LITIGATION

4.1. Volume of cases

An April 2021 report published by the Geneva Association found that climate change litigation is “increasing in volume, scope and geographical spread” around the world.¹²⁶ The authors identified a noticeable increase in climate change cases since 2015, which they attributed in part to the signing of the *Paris Agreement* and the first instance ruling in *Urgenda*.¹²⁷

In relation to Australia, the Climate Change Laws of the World database records a spike in climate change related cases in 2008-2010 (see Figure B below). Some have suggested another surge of cases may occur in coming years. In their 2019 opinion, Hutley SC and Hartford Davis stated that advancements in climate attribution science may have an impact on the incidence of climate change litigation in Australia, and that the exposure of company directors to litigation “is increasing, probably exponentially, with time”.¹²⁸ Other experts have similarly predicted that claims against major emitters and financial institutions in Australia will increase as communities and shareholders seek accountability for their role in emissions mitigation.¹²⁹ Other factors that may increase the incidence of climate

change litigation in Australia include the recognition of new duties of care in relation to climate change, as occurred in *Sharma*, and the use by litigants of state and territory human rights instruments as a basis for cases that raise material issues of law or fact relating to climate change mitigation, adaptation, or the science of climate change.

4.2. The role of climate attribution science

The UNEP has noted that attributing a defendant’s emissions to climate change overall and linking climate change to specific impacts “plays a major role in many climate cases, including those seeking to compel national governments to take action on climate change and those seeking to hold corporations liable for their contribution to climate change”.¹³⁰ The first such attribution study was published in 2004.¹³¹ Since then, there have been rapid advancements in this scientific field, and many courts have accepted that it is possible to demonstrate to a legal standard of proof that anthropogenic greenhouse gas emissions have increased the frequency and/or severity of certain climate change-related impacts and extreme weather events.¹³² In Australia, scientists have given evidence

Climate change cases opened in Australia: 1990 to 2020

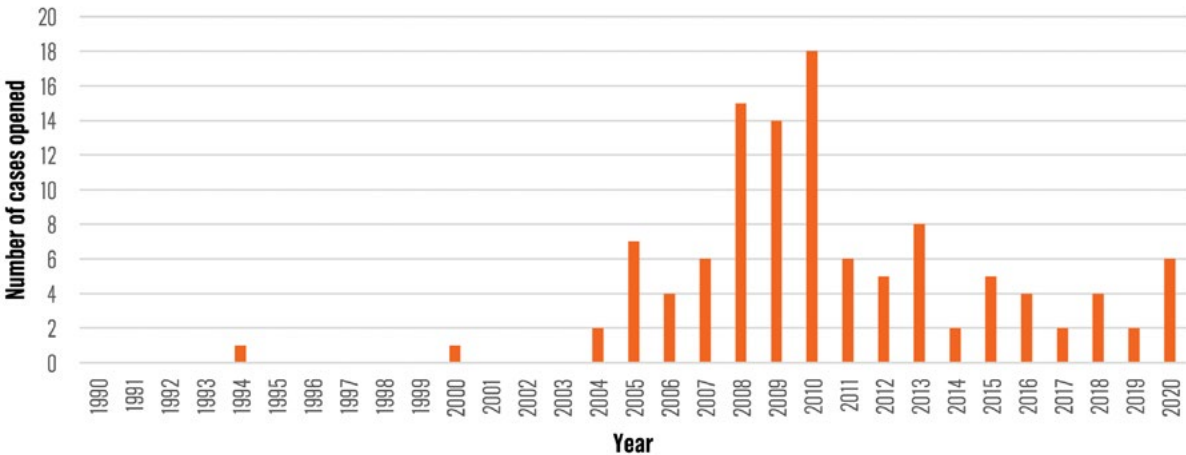


Figure B. Source: Climate Change Laws of the World database, Grantham Institute.

as expert witnesses in several Australian challenges to coal mining projects regarding the contribution to climate change made by a particular mine proposal.¹³³ As climate attribution science develops further, it is likely that it will play a pivotal role in climate change litigation, with potential implications for the award of damages against individuals, entities and governments.

4.3. Addressing 'greenwashing'

'Greenwashing' refers to the misrepresentation or exaggeration of the extent to which an investment, strategy or other type of product incorporates environmentally friendly, sustainable or ethical factors.¹³⁴

Starting in 2008, the ACCC has brought proceedings against a number of companies alleged to have made misleading environmental claims¹³⁵ including GM Holden, Prime Carbon, and Volkswagen. The GM Holden case concluded with a Federal Court finding that the company had made false and misleading claims in its "Grrrrreen" campaign, which promoted the environmentally friendly nature of Saab cars.¹³⁶ The Federal Court declared in a separate matter that Prime Carbon Pty Ltd made representations it could not substantiate concerning the sale of a soil carbon and sequestration program.¹³⁷ The Volkswagen matter, which arose from representations about compliance with diesel emissions standards, resulted in a record \$125 million in penalties.¹³⁸

There are signs that greenwashing claims will continue in coming years in Australia, and focus on individual directors as well as corporate entities. ASIC has identified greenwashing as a priority issue in its *Corporate Plan 2020-24*, and committed to "conduct[ing] surveillance to assess the extent to which product issuers are engaging in 'greenwashing' that results in consumer harms".¹³⁹

In their 2021 further supplementary memorandum of opinion, Hutley and Hartford Davis considered the litigation risks arising from net zero commitments.

The increasing number of "net zero" commitments brings into focus an acute litigation risk, namely that a company (e.g. through its financial statements and disclosures) may make *future representations* concerning climate risk and risk-mitigation, which it may not have a reasonable basis to make at the present time, and which may therefore be taken to have misled or deceived, or to be likely to mislead or deceive, the users of those financial statements.¹⁴⁰

The authors opined that companies making net zero commitments require "reasonable grounds" to support the express and implied representations contained within such commitments at the time those commitments are made.¹⁴¹ In the absence of such reasonable grounds, it is foreseeable that a net zero

commitment may lead to a finding that a company and its directors engaged in misleading or deceptive conduct or other breaches of the law.¹⁴² This risk is particularly salient given the increasing number of entities that have committed to achieving net zero emissions by 2050, which includes many of Australia's largest banks, superannuation funds and investor groups.

The litigation risk arising from a net zero commitment is set to be tested in a Federal Court case brought by the ACCR against Santos Ltd, which was filed on 25 August 2021.¹⁴³ The ACCR argue that Santos Ltd's claims that natural gas provides "clean energy" and that it has a "credible and clear plan" to achieve net zero emissions by 2040 constitute misleading or deceptive conduct under the Corporations Act and the Australian Consumer Law.¹⁴⁴

4.4. Increasing use of international adjudicatory bodies

Several of the complaints and cases referred to in section 3 have been brought before international bodies including UN treaty bodies and National Contact Points for the OECD Guidelines for Multinational Enterprises. The UNEP has identified several reasons why cases of this type are "likely to continue to proliferate".¹⁴⁵ This includes: the abundance of favourable soft law available to plaintiffs in international fora, including the *Paris Agreement*; statements from international treaty bodies and experts solidifying the consensus that climate rights are recognised in international soft law; the availability of strategic opportunities that may be unavailable in national courts; and the attractiveness, to strategic litigants, of a potentially influential ruling from an international body.¹⁴⁶

There is also a possibility that, in the future, the jurisdictional responsibility of the International Criminal Court ("ICC") will include a new crime of 'ecocide', or the destruction of ecosystems and the environment. In June 2021, a panel of international lawyers co-chaired by barrister and professor Philippe Sands QC and former UN prosecutor Dior Fall Sow released a proposed legal definition for 'ecocide'.¹⁴⁷ For the proposal to proceed further, it will be necessary for one of the ICC's 123 member countries to formally submit the definition for consideration at a meeting of States Parties to the Rome Statute. If a two-thirds majority of member states approve an amendment to the Rome Statute, 'ecocide' would become the court's fifth jurisdictional responsibility, alongside genocide, crimes against humanity, war crimes, and crimes of aggression. This would allow the ICC's Office of the Prosecutor to initiate an investigation against an individual suspected of 'ecocide', either on its own initiative or upon referral from the UN Security Council. Countries including France, Sweden, Vanuatu, and the Maldives have reportedly expressed some support for the proposal.¹⁴⁸

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