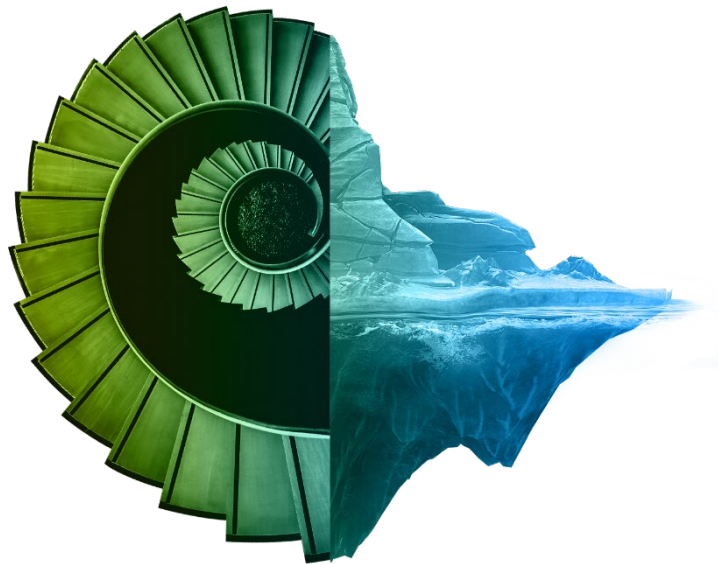


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Targeting net zero

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## Climate change litigation in Australia: key trends and predictions

## Climate change litigation in Australia: key trends and predictions

**Litigation is increasingly being used to seek to compel government and business to take action on climate change and climate-related risks. It is now more important than ever for in-house counsel and sustainability teams to be aware of the growing risk of climate change litigation in Australia.**

In Australia and abroad, climate litigation volumes are increasing, and claimants are testing numerous litigation pathways, including claims based in human rights, tort law, consumer laws and corporate disclosure laws.

The COVID-19 pandemic has done nothing to dampen this trend. In fact, this year alone, four new pieces of significant climate-related litigation have been commenced in Australia.

**We have identified the following key local and global trends affecting the legal landscape in Australia:**

- **Evolving judicial attitudes** – Several recent climate change decisions demonstrate that portions of the judiciary are willing to take an active role in shaping how laws operate in light of a changing climate.
- **Environmental impacts opening up new litigation pathways** – The 2019/20 summer bushfires have seen a significant increase in public concern about a changing climate. Physical environmental impacts are opening up new pathways to litigation and providing standing to domestic plaintiffs who have been affected by these events.
- **Consumer laws, corporate disclosure laws and directors' duties emerging as a potential new frontier** – A number of cases alleging inadequate disclosure of climate-related risks have been commenced in Australian courts. Now is a good time for organisations to review compliance on these fronts, with a particular focus on governance frameworks and accurate disclosures.
- **Claims based on human rights increasing** – Human rights instruments are also emerging as a basis for climate litigation. Commonly litigated rights, such as the right to life, children's rights and the right to property mean that there will be a high degree of transferability in jurisprudence on this topic around the country and the world.
- **Claims based in civil law may provide an additional source of liability** – A class action filed in the Federal Court of Australia against the Federal Minister for Environment asserting a novel duty of care suggests that plaintiffs are alive to this possibility. Civil claims in the United States, Germany and New Zealand in relation to climate change-related damage may further inspire plaintiffs to rely on similar causes of action here.
- **Non-judicial dispute resolution processes** – Beyond the court setting, the OECD National Contact Points complaints process has been gaining increased purchase as a forum for resolving climate change disputes. Australia has seen its first climate-related complaint taken to the Australian NCP for resolution.

We predict that the litigation landscape emerging in Australia will continue to be heavily shaped by these trends over the coming years. In navigating this landscape, together with the transition to a low carbon economy, organisations in both the public and private sectors are well-advised to undertake a holistic assessment of the drivers of climate litigation. Given that most material statutory duties are not overtly climate-related, it is important to review compliance with those duties afresh through the prism of climate-related physical and transition risk.

## Evolving judicial attitudes

An important initial trend to observe is the apparent willingness of judges to intervene on climate-related grounds, and decreasing propensity to defer to the legislature and executive.

In April 2019 a landmark ruling by the Chief Judge of the NSW Land and Environment Court in *Gloucester Resources Limited v Minister for Planning*<sup>1</sup> confirmed the willingness of the judicial arm to rule against fossil fuel development on climate change grounds.

In that case, Chief Judge Brian Preston upheld the refusal of an application to develop an open-cut coal mine in the Hunter Valley. According to Preston CJ, the Project would have 'significant and unacceptable planning, visual and social impacts, which cannot be satisfactorily mitigated', and 'the Project should be refused for these reasons alone'. However, Chief Judge Preston also found that '[t]he 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'. According to the Chief Judge:

[A]n open cut coal mine in this part of the Gloucester valley would be in the wrong place at the wrong time... because the GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at a time when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions.

The *Gloucester Resources* case built upon earlier judicial decisions which had recognised the relevance of downstream, scope 3 GHG emissions to environmental assessments of new mining projects<sup>2</sup> and amendments to planning schemes.<sup>3</sup>

A similar judicial attitude is evident in the interim decision of the Supreme Court of Victoria in *Wildlife of the Central Highlands Inc v VicForests*.<sup>4</sup> Following the destruction of large swathes of forest in the 2019/20 Australian summer bushfires, Wildlife of the Central Highlands (**WCH**) brought an application for an injunction restraining VicForests from continuing logging activities, on the grounds that VicForests would violate Victorian laws if it were to undertake those activities in coupes containing bushfire-affected threatened species. The court rejected VicForests' contention that the plaintiff's application was a 'transparent attempt to use the legal process to achieve a political outcome' and that the management of dynamic State forests was a matter of policy that was properly left to the executive. Justice Kate McMillan held, to the contrary, that the dispute over the application of sustainable timber harvesting laws raised an issue of the proper construction of the relevant legislation such that it was 'inherently suited to the judiciary'.<sup>5</sup>

Although not expressly a climate-related claim, the *WCH v VicForests* case points to the scope for physical phenomena understood to be linked to climate change to tip the balance in favour of courts stepping in to restrain (or indeed compel) government action.

A willingness on the part of the judiciary to step into the fray is not universal and will in some cases find its limits. So much is evident from the recent decision of the Ninth Circuit Federal Court of Appeals in *Juliana v United States*<sup>6</sup>. The proceeding, filed in 2015, concerned a challenge by 21 young people to US Government energy policies which alleges that those policies have destabilised the climate system and, in violation of the plaintiffs' constitutional rights, jeopardised human life, private property and 'civilisation itself'. On 17 January this year, the Court (2-1) dismissed the claim, the majority conceding that the US Government's climate policies might pose 'clear and present danger' capable of destroying the nation, but holding that it was for the Federal Government and Congress to act on climate change. According to the majority, the plaintiffs had constitutional rights to a stable climate system, but they did not have standing

<sup>1</sup> [2019] NSWLEC 7.

<sup>2</sup> *Gray v Minister for Planning* (2006) 152 LGERA 258.

<sup>3</sup> *Australian Conservation Foundation v Latrobe City Council* (2004) 140 LGERA 100.

<sup>4</sup> *Wildlife of the Central Highlands Inc v VicForests* [2020] VSC 10.

<sup>5</sup> *Wildlife of the Central Highlands Inc v VicForests* [2020] VSC 10, [22].

<sup>6</sup> *Juliana v United States* No. 18-36082 D.C. No. 6:15-cv-01517- AA.

because they had not established that the relief sought would be substantially likely to redress the plaintiffs' injuries. Further, an order requiring the Government to develop a plan to 'phase out fossil fuel emissions and draw down excess atmospheric carbon dioxide emissions' was in any event beyond the court's constitutional power.<sup>7</sup>

Less than one month earlier, on 20 December 2019, the Supreme Court of Netherlands in *Urgenda Foundation v State of the Netherlands*,<sup>8</sup> reached the opposite view to the *Juliana* majority. The court held that on the basis of the European Convention on Human Rights, the Netherlands has a positive obligation to take measures to prevent climate change and ordered the Dutch Government to increase its 2020 target to align with the levels of emissions reduction recommended by international climate science bodies. Although the Netherlands decision (which we explore further below) should be viewed in its unique jurisdictional context, we agree with the assessment of Melbourne University Professor Jacqueline Peel that decisions such as these demonstrate that 'around the world, courts are showing that they can be an active player in shaping how the law applies to climate change'.<sup>9</sup> Having regard to *Rocky Hill* and *VicForests*, we believe this comment to be true closer to home.

### Physical impacts in Australia are opening up litigation pathways

Historically, a significant portion of climate-related litigation in Australia has involved challenges to environmental approvals for projects that would, if approved, emit greenhouse gases.<sup>10</sup>

However the scope of climate-related litigation has been widening, due in part to increased incidences of apparently climate-related environmental disasters.

In NSW, the bushfires have prompted a legal claim against the Environment Protection Authority. On 20 April 2020, the Environmental Defenders Office, on behalf of the Bushfire Survivors For Climate Action, commenced legal action in the NSW Land and Environment Court.<sup>11</sup> The Bushfire Survivors are arguing that the EPA is expressly empowered, and required, by the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) to develop environmental quality objectives, guidelines and policies which:

- address greenhouse gas emissions, climate change and the environmental impacts of greenhouse gas emissions;
- regulate, and are adapted to reducing, sources of direct and indirect greenhouse gas emissions consistent with limiting global temperature rise to 1.5 degrees Celsius above pre-industrial levels;
- are calculated to keep greenhouse gas levels at a level which is appropriate, having regard to the best available science; and
- ensure, and are adapted to ensuring, environment protection.

According to the Bushfire Survivors, the EPA has failed to discharge this obligation in breach of the POEO Act. The Bushfire Survivors are seeking orders in the nature of mandamus, requiring the EPA to develop such objectives, guidelines and policies.

The case forms part of an expanding body of climate change actions brought against public authorities, regulators and decision makers in Australia and abroad. This includes the United States Supreme Court

<sup>7</sup> On 2 March 2020 the plaintiffs filed a petition for a rehearing of the Ninth Circuit's determination on standing:

<http://climatecasechart.com/case/juliana-v-united-states/>.

<sup>8</sup> [2015] HAZA C/09/00456689.

<sup>9</sup> <https://www.abc.net.au/news/2020-02-13/climate-change-legal-action-solve-global-warming/11943146>.

<sup>10</sup> See eg Kierra Parker, 'Litigating at the Source: Attributing Climate Change Impacts to Coal Mines' (2020) 37 EPLJ 67; Jacqueline Peel, Hari Osofsky and Anita Foerster, 'Shaping the "Next Generation" of Climate Change Litigation in Australia' (2017) 41(2) Melbourne University Law Review 793, 803.

<sup>11</sup> *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority (New South Wales Land and Environment Court)*.

case of *Massachusetts v EPA*,<sup>12</sup> where it was held that the United States EPA should reconsider its refusal to regulate greenhouse gas emissions from motor vehicles.

The *Bushfire Survivors* case also serves to demonstrate that, as physical effects of climate change are felt in Australia, there are now potential plaintiffs in Australia who may be able to establish standing to bring climate-related claims.

Similarly, in *Friends of Leadbeater's Possum Inc v VicForests (No 4)*,<sup>13</sup> the court accepted and relied on evidence that 'the frequency and intensity of wildfires are likely to increase under climate change scenarios, which predict increased rates of extreme climatic events'. According to the court, VicForests' past and future forestry operations in 66 coupes in the Central Highlands region of Victoria had, or were likely to have, a significant impact on the Greater Glider and/or the Leadbeater's Possum and therefore contravened section 18 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). The court accepted the applicant's submission that in assessing the threats in the impugned coupes, the role of wildfire, and the role of climate change in how it affects the occurrence, spread and severity of wildfire, needed to be taken into account.

These recent decisions demonstrate how the physical impacts of climate change close to home can open up litigation pathways which would otherwise be unavailable if the physical impacts of climate remained an issue over the horizon. We consider the theme emerging from these cases to be that the physical impacts of climate change domestically both deepen and broaden the scope for litigation, and justify a panoramic approach to assessing climate litigation risk.

### An ever-brightening spotlight on governance and disclosure

Environmental issues have been on the radar of Australia's corporate regulators for years. As early as 2008, the ACCC brought separate proceedings against each of De Longhi, GM Holden and Goodyear Tyres. The De Longhi case arose from unqualified claims that the company used 'environmentally friendly' refrigerants in its air conditioners. The GM Holden dispute was due to advertisements that the company's Saab vehicles provided 'carbon-neutral motoring'. Finally, Goodyear Tyres attracted the ACCC's attention when it falsely labelled a line of its tyres as 'environmentally friendly'.

Each case led to an enforceable undertaking to modify the company's advertising, plus additional remedial measures in relation to GM Holden and Goodyear Tyres.

The regulatory interest in climate change is now far broader. In September 2018, ASIC issued a set of recommendations in its report, *Climate Risk Disclosure by Australia's Listed Companies*,<sup>14</sup> highlighting that managing climate risk is an important governance and disclosure issue. These views are now feeding into the corporate regulator's latest guidance. In August 2019, ASIC published two updated Regulatory Guides,<sup>15</sup> including to add new types of climate change risk to the examples of common risks that may need to be disclosed in certain prospectuses, and to flag climate change as a systemic risk which could affect an entity's financial prospects in the future and which the entity might need to disclose.<sup>16</sup> ASIC also announced a plan to conduct surveillance of climate change-related disclosure practices by selected listed companies, and in mid-December 2019 it was reported that ASIC had started contacting large corporates as part of this surveillance work.<sup>17</sup> APRA has adopted a similar tack, noting most recently in an open letter on 24 February 2020 that 'the financial risks of climate change will

<sup>12</sup> 549 US 497 (2007).

<sup>13</sup> *Friends of Leadbeater's Possum Inc v VicForests (No 4)* [2020] FCA 704.

<sup>14</sup> ASIC, *Climate risk disclosure by Australia's listed companies* (Report 593, September 2018) <<https://download.asic.gov.au/media/4871341/rep593-published-20-september-2018.pdf>>.

<sup>15</sup> *Regulatory Guide 228 Prospectuses: Effective disclosure for retail investors* and *Regulatory Guide 247 Effective disclosure in an operating and financial review*, both available on ASIC's website.

<sup>16</sup> See ASIC, '19-208MR ASIC updates guidance on climate change related disclosure' (Media Release, 12 August 2019) <<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-208mr-asic-updates-guidance-on-climate-change-related-disclosure/>> ('ASIC 19-208MR').

<sup>17</sup> <https://www.abc.net.au/news/2019-12-10/asic-launches-climate-surveillance-of-big-companies/11786070>.

continue to be a focus of APRA's efforts to increase industry resilience, and more supervisory attention is being given to understanding these risks'.<sup>18</sup>

We have not yet seen regulatory actions commenced on climate grounds by ASIC or APRA, but such actions are not far-fetched. The US, in particular, has been the site of significant regulatory action in the financial regulatory space.

For example, on 8 November 2015, Peabody Energy Corporation reached settlement with the New York State Attorney General's Office (*NYAG*) whereby Peabody agreed to revise its financial disclosures to reflect the potential impact of climate change regulations on its future business. This followed an investigation by the *NYAG* into Peabody's disclosure of financial risks associated with climate change in its SEC filings. The findings of the *NYAG* included that Peabody had misrepresented findings and projections of the International Energy Agency regarding global coal demand, and that Peabody had committed financial fraud in violation of New York's Martin Act. As a condition of discontinuance of the investigation, Peabody agreed to add specific language on climate policy risks in its next quarterly report and to acknowledge potential effects of climate regulation on demand for Peabody's products and securities.<sup>19</sup> More recently, a decision was handed down late last year in the Attorney General of New York's claim against ExxonMobil for alleged misrepresentations to the public and investors about how it accounted for the costs of climate change regulation.<sup>20</sup> In that case, the court found in favour of ExxonMobil.

Developments in Australia, especially as viewed against the backdrop of regulatory activity occurring elsewhere (particularly the US), suggest that consumer laws, statutory disclosure regimes and directors' duties could be an emerging frontier for climate litigation in Australia.

A shareholder claim brought in 2017 against the Commonwealth Bank of Australia (**CBA**), argued that climate-related risks were material financial risks to the bank and that the bank had breached the *Corporations Act 2001* (Cth) because of inadequate disclosure of this risk. The case was withdrawn after CBA included references to climate risk in its next annual report.<sup>21</sup>

In the superannuation space, a claim was commenced in the Federal Court of Australia in 2017 against by one of the trust's members, arguing that the general duties of superannuation trustees require them to obtain information from investment managers, and provide information to their members, about climate change risks and how they are being managed. The claim alleged that REST has failed to comply with its duties. The trial was scheduled to occur in November 2020. The parties reached settlement out of court before the trial went ahead and the proceedings were dismissed with no order as to costs. REST released a statement in November 2020 which acknowledged that the Australian economy is exposed to the financial, physical and transition impacts associated with climate change. Accordingly, REST stated that as a superannuation trustee, it considers that it is important to actively identify and manage these issues, and continue to develop the systems, policies and processes to ensure that the financial risks of climate change are identified and quantified, considered in the context of investment strategy and asset allocation mix, and otherwise appropriately mitigated and managed, having regard to the Paris Agreement and other international efforts to mitigate climate change.<sup>22</sup>

Most recently, 23-year-old law student Kathleen O'Donnell filed a claim in the Federal Court of Australia against the Federal Government and two government officials, for allegedly failing to disclose the risks to

<sup>18</sup> <https://www.apra.gov.au/sites/default/files/2020-02/Understanding%20and%20managing%20the%20financial%20risks%20of%20climate%20change.pdf>.

<sup>19</sup> <http://climatecasechart.com/case/in-re-peabody-energy-corp/>.

<sup>20</sup> John Schwartz, 'New York Loses Climate Change Fraud Case Against Exxon Mobil', *The New York Times* (online, 10 December 2019) <<https://www.nytimes.com/2019/12/10/climate/exxon-climate-lawsuit-new-york.html>>.

<sup>21</sup> <https://www.comcourts.gov.au/file/Federal/P/VID879/2017/actions>.

<sup>22</sup> <https://rest.com.au/why-rest/about-rest/news/rest-reaches-settlement-with-mark-mcveigh>.

the value of government bonds posed by climate change. This is the first case in the world to deal with climate change as a material risk to sovereign bonds.

O'Donnell is alleging that the Government's failure to disclose information about Australia's climate change risks amounts to misleading or deceptive conduct under the *Australian Securities and Investments Commission Act 2001* (Cth). O'Donnell is also alleging that, in managing the website that publishes information statements about government bonds, the Secretary to the Department of Treasury and the CEO of the Australian Office of Financial Management failed to discharge their statutory duty to exercise reasonable care and diligence under the *Public Governance, Performance and Accountability Act 2013* (Cth).

O'Donnell is seeking a declaration of breach and an injunction to prohibit the Government from promoting exchange-traded government bonds until it updates its information statements to include information about Australia's climate change risks. She is not seeking damages.

The close analogies between the 'misleading and deceptive' and 'duties of reasonable care' causes of action, and more generally applicable consumer protection laws and directors' duties, suggests that similar kinds of claims could potentially be made against private sector boards in the Australian courts.

### Claims based on human rights are increasing

Evolving jurisprudence on climate change questions has also brought other sources of government liability into sharper focus. Human rights instruments and climate change-specific legislation, in particular, are emerging as tools accessible by citizens to compel government action.

A recent illustration is the decision of the Supreme Court of Netherlands in *Urgenda* (previously mentioned) in which it was held that individual nations have direct obligations under articles 2 and 8 of the European Convention on Human Rights, covering the right to life and the right to private and family life. The case, commenced in 2013 by the Dutch environmental foundation Urgenda on behalf of approximately 900 citizens, alleged that the Government had failed to take responsibility for the Netherlands' contribution to the global climate crisis.

According to the Supreme Court, the Dutch Government had the legal duty to prevent dangerous climate change on the basis of fundamental rights. Accordingly, it was appropriate for the court to rule that the State was required to achieve a reduction in its greenhouse gas emissions of at least 25% by 2020.

David Boyd, the UN Special Rapporteur on Human Rights and the Environment, has described the case 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',<sup>23</sup> and commentators have predicted that decisions such as these could 'pave the way for a flood of new climate-related legal claims against governments'.<sup>24</sup>

Rights-based legal action has also been brought in the Netherlands against corporates. In April last year, Friends of the Earth Netherlands, Greenpeace Netherlands, five other organisations and over 17,000 Dutch citizens filed a complaint against Royal Dutch Shell in the Hague, in order to 'legally compel the company to cease its destruction of the climate'.<sup>25</sup> According to the claimants, Shell had failed to align its business model with the goals of the Paris Climate Agreement, thereby putting itself in breach of a Dutch law prohibiting 'unlawful endangerment' of its human rights obligations by taking insufficient action against climate change. The plaintiffs are not seeking financial compensation, but are asking Shell to adjust its business model in order to keep global temperature rise below 1.5 degrees Celsius. The influence of

<sup>23</sup> <https://www.theguardian.com/world/2019/dec/20/dutch-supreme-court-upholds-landmark-ruling-demanding-climate-action>.

<sup>24</sup> <https://www.abc.net.au/news/2020-02-13/climate-change-legal-action-solve-global-warming/11943146>.

<sup>25</sup> <http://www.foeeurope.org/shell-court-case-refuses-stop-destroying-climate-131119>.

international climate agreements and human rights treaties – which, unlike the Dutch State, Shell is not a party to – remains to be seen.<sup>26</sup>

In addition to these state-based claims, an international complaint, brought by six young Portuguese plaintiffs against 33 countries,<sup>27</sup> was filed in the European Court of Human Rights on 2 September 2020.<sup>28</sup> Relying on the European Convention on Human Rights, the plaintiffs are claiming that their right to life is threatened by the effects of climate change (such as forest fires in Portugal), that their right to privacy includes their physical and mental wellbeing and is being threatened by heatwaves that force them to spend more time indoors.<sup>29</sup>

As well as rights-based claims in the courtroom, the turn to human rights in climate legal action is being seen in a complaint being handled by the United Nations Human Rights Committee lodged in May 2019 by a group of Torres Strait Islanders. The complaint alleges that the Australian Government has failed to take adequate action to reduce emissions or pursue proper adaptation measures and, as a consequence, has violated a number of articles of the Universal Declaration of Human Rights, including the right to culture (article 27), the right to be free from arbitrary interference with privacy, family and home (article 12), and the right to life (article 3). Similarly, a complaint lodged in 2016 by Greenpeace South-East Asia and other local environmental groups with the Philippines Human Rights Commissioner, is requesting that the Commissioner determine whether 47 companies were violating the rights of Filipino citizens.

In Queensland, the recently enacted *Human Rights Act 2019* (Qld) (**Queensland HR Act**) is being used to challenge the proposed Galilee Coal Project, one of nine proposed mines in the Galilee Basin, in central Queensland. Youth Verdict, a group of young people under 30 represented by the Environmental Defenders Office, has lodged an objection against the mine in the Queensland Land Court, arguing that it infringes on a number of their rights under the Qld HR Act, including the right to life, the protection of children and the right to culture. The objectors are petitioning the Land Court of Queensland to recommend that the Mining Lease and Environmental Approval for the Galilee Coal Project be refused.

If successful, the Youth Verdict case will have national, and potentially international, ramifications. There is of course the possibility of follow-on rights-based litigation, but perhaps even more importantly, it would sound a warning to Government more generally that their decision-making on carbon intensive projects will be open to scrutiny (and in some jurisdictions) legal challenge on human rights grounds, and this could further influence environmental and land use regulators' behaviours.

One of the powerful aspects of rights-based litigation is that there is a high degree of homogeneity between rights-based regimes around Australia and the world. Commonly litigated rights, such as the right to life, the right to property, children's rights and the right to culture, are essentially universal. Accordingly, notwithstanding jurisdictional differences, there will be a high degree of transferability in jurisprudence on this topic around the country and the world.

No doubt Victorian and ACT government decision makers, who are required to uphold the same rights as those being tested in the *Youth Verdict* case (under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT) respectively), will watch that case closely.

### Claimants are testing the waters with civil claims and novel duties

Claims based in civil law are an additional source of potential liability. Whilst the extent of this liability remains uncertain, civil claims are progressing in foreign courts, and an action just filed in the Federal

<sup>26</sup> See Pieter Gillaerts, 'Multinational Royal Dutch Shell summoned for insufficient efforts in combatting climate change' (11 July 2019) at <https://ohrh.law.ox.ac.uk/multinational-royal-dutch-shell-summoned-for-insufficient-efforts-in-combatting-climate-change/>.

<sup>27</sup> Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Germany, Greece, Denmark, Estonia, Finland, France, Croatia, Hungary, Ireland, Italy, Lithuania, Luxembourg, Latvia, Malta, the Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, Norway, Russia, Switzerland, Turkey, Ukraine and the United Kingdom.

<sup>28</sup> Youth for Climate Justice v Austria, et al.

<sup>29</sup> <http://climatecasechart.com/non-us-case/youth-for-climate-justice-v-austria-et-al/>.



Court of Australia against the Federal Minister for Environment suggests that Australian litigants are alive to this possibility.

On 8 September 2020 a group of school students, representing all Australian children born before September 2020, brought proceedings against the Federal Minister for the Environment.<sup>30</sup> The claimants are seeking an injunction preventing the Minister from approving the Vickery Extension Project in northern New South Wales, on the basis that the Minister has a duty to exercise her approval powers under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) with reasonable care to not cause the children harm. According to the claimants, approval of the Vickery Extension Project in northern New South Wales is likely to cause significant climate change-related harm due to the increase in carbon dioxide emissions that will result from extracting, exporting and burning the coal from the project.

The claimants seek to persuade the Court that the Minister owes them a duty of care. The claimants are relying on arguments that the Minister knew or should have known of the rates of increase in carbon dioxide concentration and surface temperatures, that the claimants are vulnerable to a known foreseeable risk of serious harm that the Minister can control but they cannot, and that the Minister has special responsibilities to the claimants by reason of her position in the Commonwealth Executive. Such a duty has not been recognised before and is likely to be challenging for the claimants to establish, especially having regard to the level of specificity with which the Federal Minister's duties and powers are prescribed under the EPBC Act. The issue of causation is also likely to present a considerable hurdle for the claimants, notwithstanding that recent decisions suggest that courts on the whole may be more willing than previously to draw the necessary causal link.

Civil suits have been brought overseas, including a number in the US. For example, in 2017 the County of San Mateo, the City of Imperial Beach and the County of Marin filed separate but nearly identical complaints in the California courts against 30 other fossil fuel companies, raising claims of strict liability and negligence for failing to warn, strict liability for a design defect, negligence, trespass, private and public nuisance. The case has been remanded from the federal court to the state court.<sup>31</sup> Similarly, in *City of Oakland v. BP p.l.c.*, the Ninth Circuit held on appeal that a state law claim for public nuisance does not arise under federal law.<sup>32</sup> The effect of the Ninth Circuit's decisions is also that *Pacific Coast Federation of Fishermen's Associations, Inc v Chevron Corp & Ors*, in which the Pacific Coast Federation of Fishermen's Associations is claiming damages arising out of nuisance, failure to warn and negligence, can also proceed in the US state courts.<sup>33</sup>

In New Zealand, Climate Change Iwi Group spokesperson Mike Smith is currently suing seven New Zealand companies, each of which is either involved in an industry which releases greenhouse gases into the atmosphere, or supplied products which release greenhouse gases when burned. Smith's claim is brought in tort, and argues that those companies should be held responsible for adverse effects of climate change.

The statement of claim initially raised three causes of action – public nuisance, negligence and breach of an inchoate duties. Injunctions were sought requiring each defendant to produce or cause net-zero emissions from its activities by 2030. In a decision published on 6 March 2020, the New Zealand High Court held that the public nuisance and negligence claims should be struck out.<sup>34</sup> However, Justice Wylie

<sup>30</sup> *Sharma v Minister for the Environment*.

<sup>31</sup> *County of San Mateo v Chevron Corp.*, No. 18-15499 (9<sup>th</sup> Cir. May 26, 2020).

<sup>32</sup> *City of Oakland v BP p.l.c.*, No. 18-16663 (9<sup>th</sup> Cir. May 26, 2020). See also *County of San Mateo v Chevron Corp.*, No. 18-15499 (9<sup>th</sup> Cir. May 26, 2020).

<sup>33</sup> [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2019/20190102\\_docket-318-cv-07477\\_stipulation.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2019/20190102_docket-318-cv-07477_stipulation.pdf). The PCFAA is alleging that it has suffered losses arising from the defendants' contributions to climate change and, in particular, the impact that rising ocean temperatures have had on commercial crab fisheries.

<sup>34</sup> *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419.

did not strike out the novel tortious duty which would make corporates responsible to the public for their emissions. According to Justice Wylie, it might be that the special damage rule in public nuisance could be modified, and/or that climate change science would lead to an increased ability to model the possible effects of emissions. These were issues which could only properly be explored at trial. The inchoate duty claim is yet to proceed to full hearing.

Another example of climate litigation based in civil law is the proceeding currently pending in the German courts against Germany's largest electricity producer, RWE AG. In November 2015, Peruvian farmer Saúl Luciano Lliuya brought a claim against RWE seeking damages, as well as declaratory and injunctive relief from the German Court. Lliuya alleged that RWE bore a level of responsibility for the melting of mountain glaciers near his home town of Huaraz, because RWE knowingly contributed to climate change by emitting substantial volumes of greenhouse gases. The claim was dismissed by the District Court of Essen, holding that it was not possible to identify 'a linear chain of causation from one particular source of emission' to the particular damage alleged. However, on 30 November 2017, the Higher Regional Court of Hamm recognised that the complaint was well-pled and admissible. According to GermanWatch - the NGO providing financial backing for Lliuya's legal case - the court has made a request to the State of Peru for permission to inspect the area the subject of the Lliuya's claim and is 'awaiting response from the competent authorities, which could (sic.) take some time to process'.<sup>35</sup>

The decision of the Higher Regional Court in *Lliuya* is a significant development in climate litigation, and has been hailed by climate campaigners as a 'historic breakthrough'. That said, the history of the Lliuya claim in the lower District Court proceeding, and the *Smith* claim in New Zealand, illustrate some of the difficulties litigants encounter in attempting to hear and determine climate change claims according to recognised causes of action.

In Australia, the Liability for Climate Change Damage (Make the Polluters Pay) Bill 2020, introduced by Adam Bandt on 24 February 2020, attempts to remove these types of barriers by replacing common law causes of action with a statutory cause of action for climate-related damage. The Bill provides for an Act that would provide a right for persons who have suffered climate change damage<sup>36</sup> to recover damages from major emitters of greenhouse gases, including fossil fuel producers and the owners or operators of coal-fired power stations. The Bill is of particular note for its proposed retrospective operation: major emitters of greenhouse gases would be liable for climate change damage if their emissions were greater than 1 million tonnes in any 12-month period on or after 1 September 1990 (which was when the first Intergovernmental Panel on Climate Change report was released).

The bill may be unlikely to be passed, but the bill, as well as the New Zealand and German cases, gives rise to an interesting question of policy: assuming a plaintiff can succeed in making out a civil claim (or its statutory analogue), to what extent should emitters face retrospective liability?

### Claimants relying on soft law frameworks to air climate-related complaints

Beyond the court setting, a notable development has been the increasing use of the OECD National Contact Point (**NCP**) complaints process.

NCPs are national institutions set up by individual countries pursuant to the OECD Guidelines for Multinational Enterprises, and which facilitate non-judicial dispute resolution processes.

Although NCPs are not new — the Australian National Contact Point (**ANCP**) received its first complaint in 2005 — the use of NCPs as an avenue to voice climate-related complaints is novel and significant.

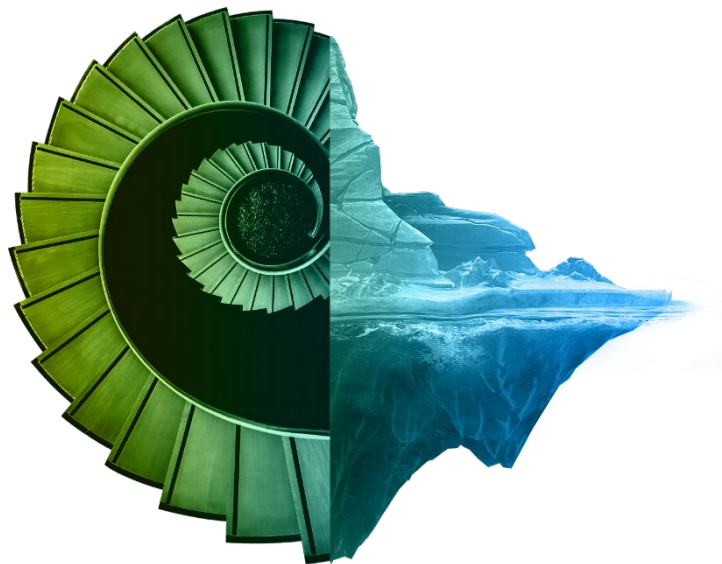
NCPs represent a low-cost avenue for agitating complaints, and their increasing use demonstrates the creativity of complainants in finding suitable forums for climate-related cases. A case in point is the

<sup>35</sup> <https://germanwatch.org/en/huaraz>.

<sup>36</sup> 'Climate change damage' is defined broadly to mean 'any damage arising in Australia from climate change'.

complaint that was lodged against a national bank in the ANCP. Environmental group Friends of the Earth Australia, along with a group of bushfire survivors, claims that the bank breached the OECD Guidelines by failing to prevent or mitigate the adverse environmental impacts of its investments in coal and fossil fuel projects. The complaint also alleged that the bank was failing to adhere to the Paris Agreement reduction targets across its lending portfolio.

This sits within a wider global context, including a complaint brought by Friends of the Earth Netherlands against ING bank before the Dutch NCP. That complaint led to ING committing to measuring and disclosing its indirect carbon emissions and to move its lending portfolio towards one that supports the Paris Agreement's 'well-below' two degrees goal. ING also committed to reduce its thermal coal exposure to close-to-zero by 2025, and to not finance any new coal-fired power plants. The outcomes in these cases illustrate the practical potential of the NCP process.



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