



Climate litigation: cases and trends

THE HON JUSTICE BRIAN PRESTON

CHIEF JUDGE OF THE LAND AND ENVIRONMENT COURT OF NSW


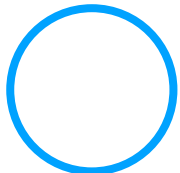
MACQUARIE UNIVERSITY COURTS AND CLIMATE CHANGE CONFERENCE

29 NOVEMBER 2021





PRESENTATION STRUCTURE

1. Climate litigation: what, where, who and why?
 2. Three current trends in climate litigation in Australia and overseas
 - Government accountability for climate action
 - Private sector and corporate practice
 - Human rights-based climate litigation
 3. Future outlook for climate litigation
- 
- 


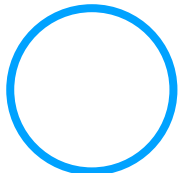


WHAT IS CLIMATE LITIGATION?



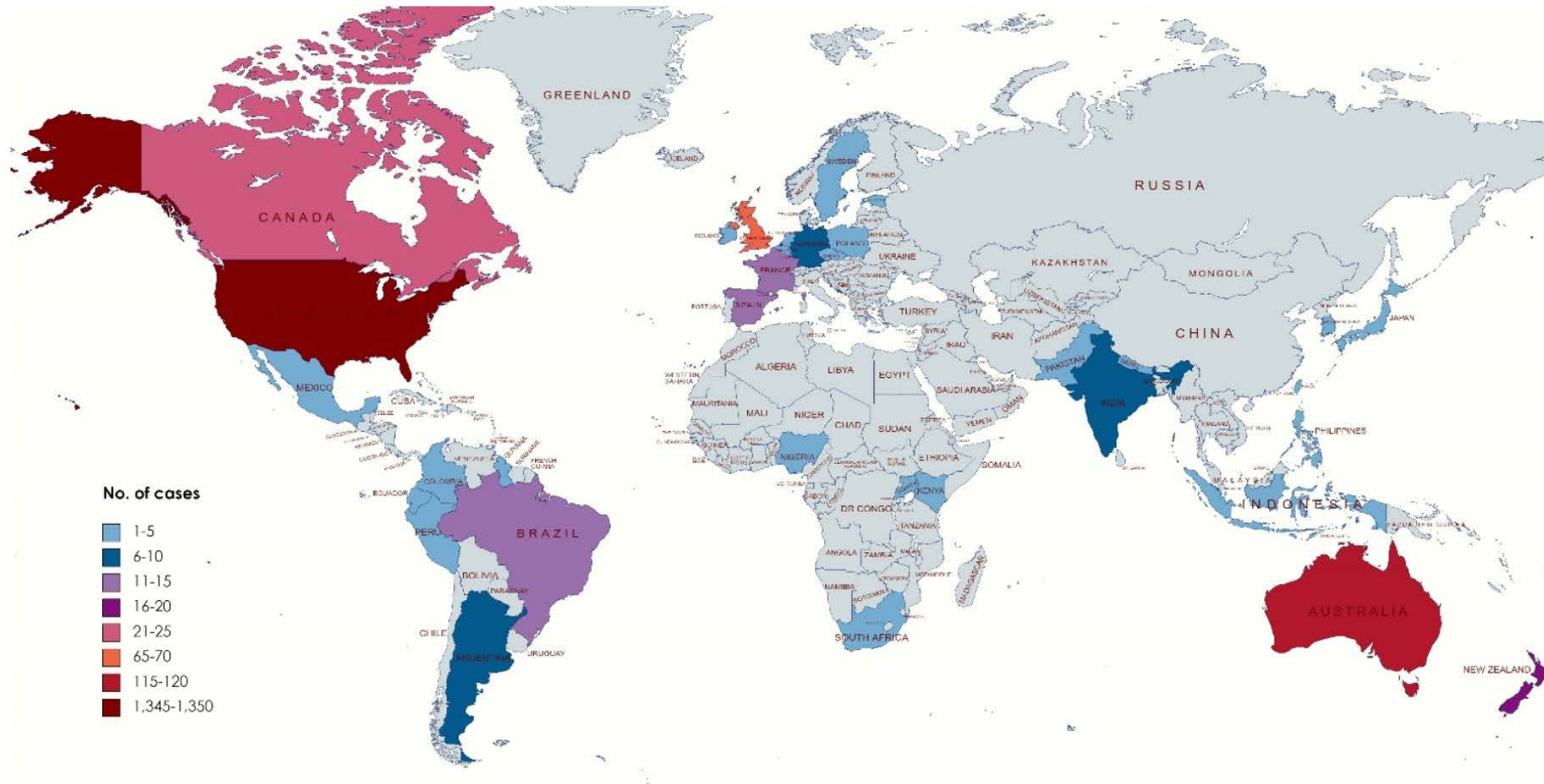
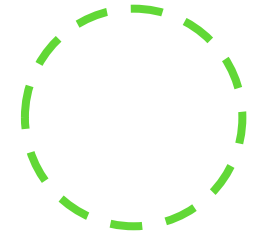
Climate litigation: includes lawsuits brought before administrative, judicial and other investigatory bodies, in domestic and international courts and organisations, that raise issues of law or fact regarding the science of climate change and climate change mitigation and adaptation efforts (Markell and Ruhl, 2012; Burger and Gundlach, 2017)

Climate litigation includes:

- Cases that are 'pro-regulatory' (aiming to increase climate mitigation or adaptation) and 'anti-regulatory' (aiming to reduce climate law and policy)
 - Climate change can be a peripheral or central issue in climate litigation
 - Climate litigation includes a diverse variety of legal processes, jurisdictions, and actors
- 
- 



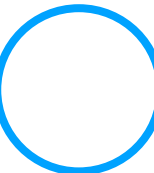
WHERE IS CLIMATE LITIGATION HAPPENING?



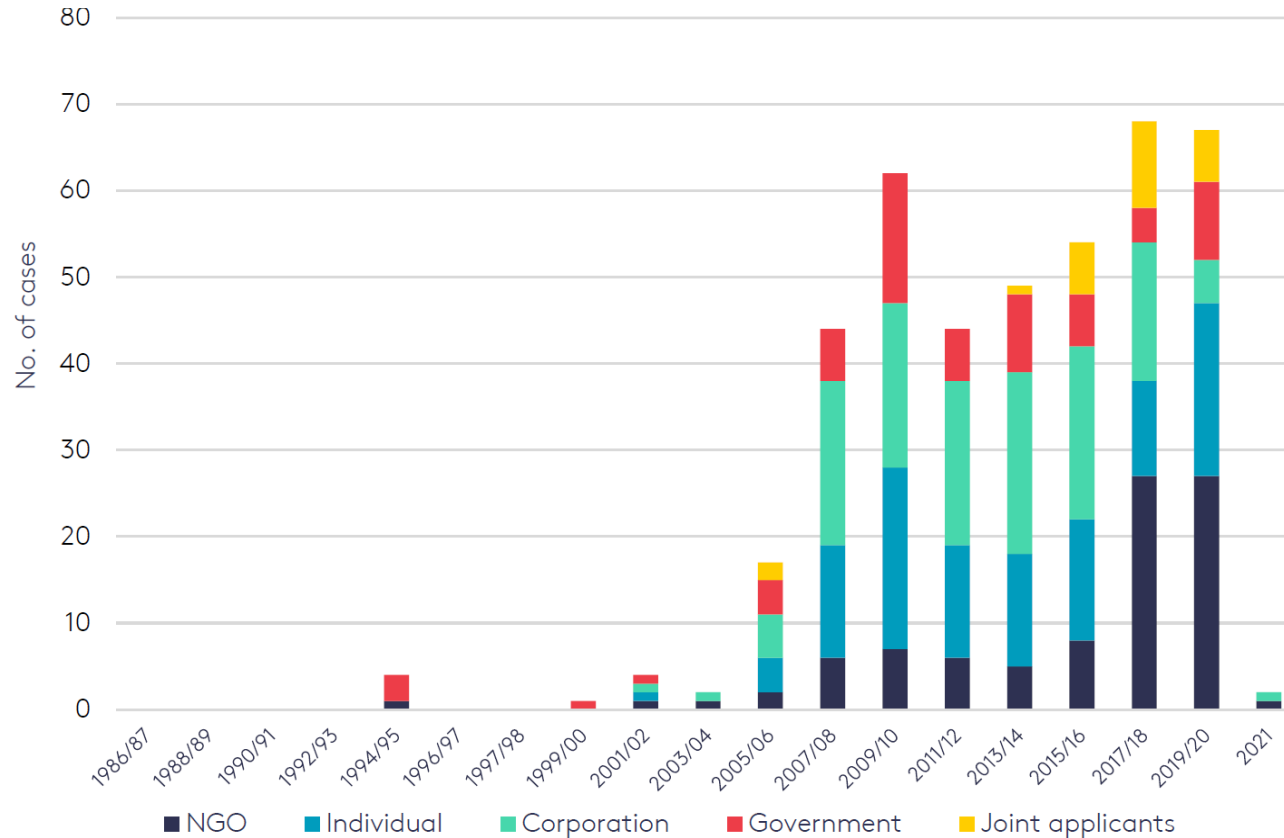
- As of 31 May 2021, 1,841 cases of climate change litigation from around the world had been identified
- 1,387 cases were filed in the US
- Outside the US, Australia is the jurisdiction with the highest identified number of climate litigation cases (115 cases)

Number of cases around the world to May 2021

Source: *Global Trends in Climate Change Litigation: 2021 Snapshot* (Report, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy)



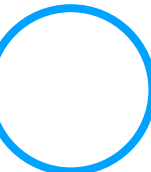
WHO ARE THE ACTORS IN CLIMATE LITIGATION?



- Increasing number of cases brought by NGOs and civil society groups
- Outside the US, just over half of all documented cases were brought by NGOs (21%), individuals (23%), or both acting together (4%). The remainder were brought primarily by companies (32%) and governments (15%).
- Over time, the majority of climate cases outside the US have been brought against governments (76%). A small but significant number of cases continue to be filed against corporations.

Non-US cases by applicant over time

Source: *Global Trends in Climate Change Litigation: 2021 Snapshot* (Report, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy)





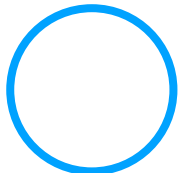
WHY CLIMATE LITIGATION?



Influence
legislative or
executive branches
of government

Influence private
actors and
corporate
behaviour

Influence public
discourse and
broader societal
change




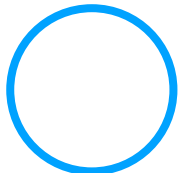


CURRENT TRENDS

Ongoing documentation of climate litigation:

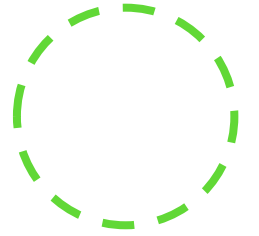
- Melbourne University (Australian cases): <https://law.app.unimelb.edu.au/climate-change>
- Grantham Institute (non-US cases): <https://www.climate-laws.org/>
- Sabin Centre (US Cases): <http://climatecasechart.com/climate-change-litigation/>

Current trends in climate litigation:

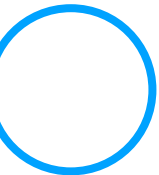
1. Government accountability for climate action
 2. Private sector and corporate practice
 3. Human rights-based climate litigation
- 
- 



A. GOVERNMENT ACCOUNTABILITY FOR CLIMATE ACTION



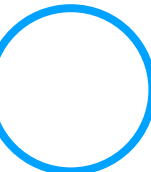
- Seeks to hold governments to account for a failure to take climate action (mitigation or adaptation)
- Cases often centre on climate commitments or targets, including global temperature limits set by the IPCC and Paris Agreement
- Two categories of cases:
 - claims regarding government action or omission; and
 - claims regarding authorisation of development or activity by private or third-party actors.



GOVERNMENT ACCOUNTABILITY FOR INADEQUATE CLIMATE ACTION

EXAMPLE: *URGENDA FOUNDATION V THE NETHERLANDS*


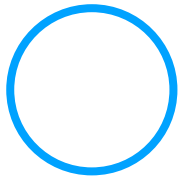
- A Dutch environmental group, the Urgenda Foundation, and 900 Dutch citizens sued the Dutch government to require it to do more to mitigate climate change
- *Urgenda* is considered a landmark case
- First litigation to successfully challenge the adequacy of a national government's approach to reducing emissions
- The proceedings addressed the Dutch government's climate policy as a breach of duty of care and as a breach of human rights law





INADEQUATE CLIMATE ACTION WAS NEGLIGENT

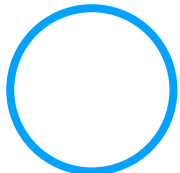
EXAMPLE: *URGENDA FOUNDATION V THE NETHERLANDS* (2015)

- The Hague District Court (2015):
 - On 24 June 2015, The Hague District Court found that the Dutch state's emissions reductions targets were insufficient and ordered the Dutch state to limit GHG emissions to 25% below 1990 levels by 2020.
 - The Court concluded that the state has a duty to take mitigation measures due to the severity of the consequences of climate change and the risk of climate change occurring.
 - “Due to the severity of the consequences of climate change and the great risk of hazardous climate change occurring – without mitigating measures – the court concludes that **the State has a duty of care to take mitigation measures**. The circumstances that the Dutch contribution to the present global greenhouse gas emissions is currently small does not affect this”: at [4.83]
 - The Court concluded that “the State ... has acted **negligently and therefore unlawfully** towards Urgenda by starting from a reduction target for 2020 of less than 25% compared to the year 1990”: at [4.93].
 - See: *Urgenda Foundation v State of the Netherlands* (ECLI:NL:RBDHA:2015:7145)
- 
- 



INADEQUATE CLIMATE ACTION BREACHED HUMAN RIGHTS

EXAMPLE: *THE NETHERLANDS V URGENDA FOUNDATION* (2018)

- The Hague Court of Appeal (2018):
 - On 9 October 2018, The Hague Court of Appeal upheld the District Court's ruling, concluding that by failing to reduce greenhouse gas emissions by at least 25% by end-2020, the Dutch government is acting unlawfully in contravention of its duty of care under Article 2 and Article 8 ECHR.
 - The Court of Appeal dismissed the Dutch Government's appeal on the negligence grounds
 - The Court held that the emissions targets contravened Article 2 of the European Convention on Human Rights (ECHR), which protects a right to life, and Article 8 of the ECHR, which protects the right to private life, family life, home, and correspondence.
 - The ECHR must not result in imposing an impossible or disproportionate burden on the state; the state is not required to guarantee the achievement of the rights but must take appropriate measures ([5.3.4]).
 - Dangerous climate change threatens the lives, wellbeing and environment of citizens in the Netherlands and worldwide. Climate change threatens the enjoyment of citizens' rights under articles 2 and 8 of the ECHR ([5.2.2]-[5.3.2], [5.6.2]).
 - Articles 2 and 8 thus create an obligation for the state to take **positive measures to contribute to reducing emissions relative to its own circumstances.** ([5.9.1])
 - See: *State of the Netherlands v Urgenda Foundation* (ECLI:NL:GHDHA:2018:2610)
- 



INADEQUATE CLIMATE ACTION BREACHED HUMAN RIGHTS

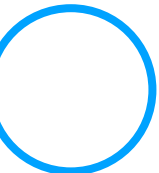
EXAMPLE: *THE NETHERLANDS V URGENDA FOUNDATION* (2019)

Supreme Court of the Netherlands (2019):

- On 20 December, 2019 the Supreme Court of the Netherlands upheld the decision of The Hague Court of Appeal:
 - The Supreme Court upheld the finding of the Court of Appeal that the ECHR imposed a positive obligation to take appropriate measures to prevent climate change;
 - These measures require the Netherlands to meet a greenhouse gas emissions reduction target 25% compared to 1990, by the end of 2020; and
 - Even though the Netherlands was only a minor contributor to climate change, it had an independent obligation to reduce emissions.



See: *State of the Netherlands v Urgenda* (ECLI:NL:HR:2019:2007)



GOVERNMENT ACCOUNTABILITY FOR INADEQUATE LAWS

EXAMPLE: *NEUBAUER ET AL V GERMANY* (2021)

- A group of youth plaintiffs challenged the constitutionality of emissions reduction targets in the German Climate Protection Law.
- The Court found that the current provisions of the law place an unreasonable burden on future generations.
- The German Constitution enshrined a right to future freedoms that protected the complainants against threats to freedom caused by the greenhouse gas reduction burdens being unilaterally offloaded onto the future.
- The failure to set emissions targets beyond 2030 limits intertemporal guarantees of freedom in the Constitution.
- The Court ordered the federal government to remake the emissions reduction targets in the law, and determine targets for the years beyond 2031 by the end of 2022.
- See: *Neubauer et al v Germany* (2021) 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20



Luisa Neubauer, one of the complainants.

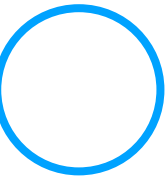
Source: <https://www.npr.org/2020/07/03/make-the-climate-a-priority-again-says-germany-s-student-plaintiff-neubauer>



GOVERNMENT ACCOUNTABILITY FOR INADEQUATE POLICIES

EXAMPLE: *FRIENDS OF THE ENVIRONMENT V IRELAND* (2020)

- Friends of the Irish Environment (FIE) challenged the Irish government's approval of the National Mitigation Plan which sought to transition to a low-carbon economy by 2050. FIE argued that the Plan violated Ireland's *Climate Action and Low Carbon Development Act 2015*, the Constitution of Ireland, and obligations under the European Convention on Human Rights (ECHR), particularly the right to life and the right to private and family life.
- On September 19, 2019, the High Court found in favour of the government. FEI appealed the ruling to the Court of Appeal. FEI also submitted an application to leapfrog the traditional appeal route and go directly to the Supreme Court.
- The Supreme Court unanimously determined that the Plan fell short of the sort of specificity that the *Climate Action and Low Carbon Development Act 2015* required because a reasonable reader of the Plan would not understand how Ireland will achieve its 2050 goals and "a compliant plan must be sufficiently specific as to policy over the whole period to 2050" : at [6.32]
- See: *Friends of the Environment CLG v. The Government of Ireland & The Attorney General* [2020] IESC 49





GOVERNMENT DUTY TO DEVELOP POLICY

EXAMPLE: *BUSHFIRE SURVIVORS FOR CLIMATE ACTION V EPA* (2021)

The Court held:

- The duty under s 9(1)(a) of the *Protection of the Environment Administration Act 1991* (NSW) to develop environmental quality objectives, guidelines and policies to ensure environment protection includes a duty to develop instruments to ensure the protection of the environment from climate change: [16], [68].
- At the current time and in the place of New South Wales, the threat to the environment of climate change is of sufficiently great magnitude and sufficiently great impact as to be one against which the environment needs to be protected: at [16], [69].
- The EPA has a discretion as to the specific content of the instruments it develops under s 9(1)(a) to ensure the protection of the environment from climate change: [16], [148].
- The EPA had not fulfilled this duty under s 9(1)(a) to develop instruments of the kind described to ensure the protection of the environment from climate change: [17], [18], [144], [145].

• See: *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* [2021] NSWLEC 92





GOVERNMENT DUTY TO ENFORCE THE LAW

EXAMPLE: *RICHARDS V ENVIRONMENT AGENCY* (2021)

- Proceedings brought on behalf of a 5 year old boy who lives in close proximity to a landfill site in Staffordshire and is badly affected by hydrogen sulphide emissions from the landfill site.
- The Court held that:
 - The Environment Agency was in breach of its statutory duty under the *Human Rights Act 1998* to protect right to life (article 2) and right to private and family life (article 8)
 - A positive operational duty was triggered under article 2 and article 8: [45], [55], [57]
 - The positive operational duty required the Environment Agency to take action to implement public health advice as expressed in a Risk Assessment, by designing and applying, and continuing to design and apply, measures to reduce hydrogen sulphide emissions from the landfill: [64]


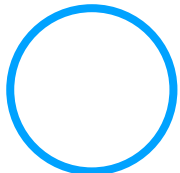


See: *R. (on the application of Richards) v Environment Agency* [2021] EWHC 2501




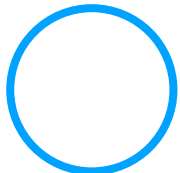


GOVERNMENT ACCOUNTABILITY: EMERGING CASES

- There is increasing focus on the impacts of subsidies for fossil fuel companies as a driving economic factor behind greenhouse gas emissions. The Grantham Institute predicts an increase in litigation targeting these subsidies.
 - ***Loach et al v OGA***: On 12 May 2021, campaigners in the UK launched judicial review proceedings against the state-owned Oil and Gas Authority's new strategy, which sets out plans to support ongoing efforts to exploit North Sea oil and gas reserves. The claimants argue that such plans are irrational and inconsistent with the UK Government's net-zero target because they will lead to more oil and gas being extracted than would otherwise be the case.
 - ***Pabai and Kabai v Commonwealth of Australia***: On 22 October 2021, Pabai Pabai and Guy Paul Kabai, First Nations' leaders from the Gudamalulgal nation of the Torres Strait Islands, filed a statement of claim against the Australian government. The applicants argue that the Commonwealth owes a duty of care to Torres Strait Islanders to take reasonable steps to protect them, their culture and traditional way of life, and their environment from harms caused by climate change, having regard to the best available science.
- 
- 

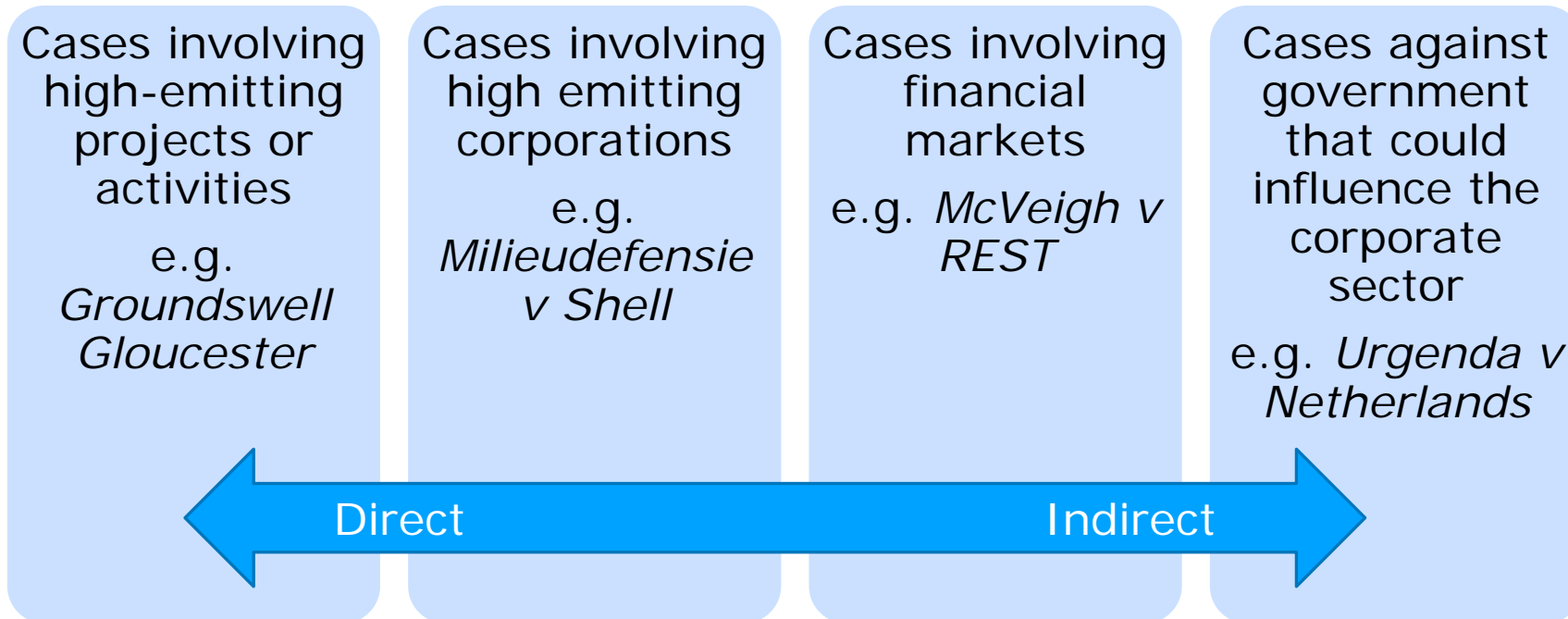


B. PRIVATE SECTOR AND CORPORATE PRACTICE

- Aims to influence corporate behaviour in relation to climate change and/or raise public awareness about the responsibility of major emitters.
 - Early climate litigation involving the corporate sector was dominated by claims against fossil fuel companies (involved in the extraction, refining and sale of fossil fuels).
 - There is increasing diversity in the approaches taken in cases seeking to influence corporate practice, including establishing corporate liability for past contributions to climate change.
 - An increasing number of claims focus instead on financial risks, fiduciary duties and corporate due diligence.
- 
- 

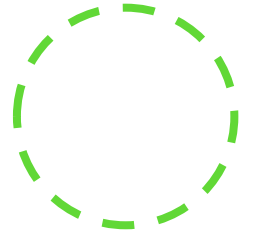
PRIVATE SECTOR AND CORPORATE PRACTICE

- Cases can seek to influence the private sector and corporate behaviour directly or indirectly



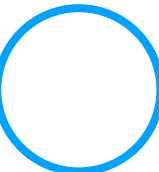
CORPORATE PRACTICE AND DUTY OF CARE

EXAMPLE: *MILIEUDEFENSIE V ROYAL DUTCH SHELL* (2021)



Source: www.foei.org/features/historic-victory-judge-forces-shell-to-drastically-reduce-co2-emissions#

Milieudefensie/Friends of the Earth Netherlands and six other plaintiffs alleged Royal Dutch Shell (**RDS**) had violated its duty of care under Dutch law by emitting greenhouse gas emissions that contributed to climate change. The plaintiffs sought a ruling from the Court that Shell must reduce its greenhouse gas emissions by 45% by 2030 compared to 2010 levels, and to zero by 2050 in line with the Paris Agreement.





CORPORATE PRACTICE AND DUTY OF CARE

EXAMPLE: *MILIEUDEFENSIE V ROYAL DUTCH SHELL* (2021)

The Hague District Court held:

- RDS has an obligation to reduce greenhouse gas emissions. This stems from an unwritten standard of care laid down in the Code which means that acting in conflict with what is generally accepted according to unwritten law is unlawful: [4.4.1];
 - The standard of care includes the need for companies to take responsibility for Scope 3 emissions, especially where these emissions form the majority of a company's emissions, as is the case for companies that produce and sell fossil fuels: [4.4.19];
 - RDS is obliged to reduce the CO2 emissions of the Shell group's activities by net 45% at end 2030, relative to 2019, through the Shell group's corporate policy. This reduction obligation relates to the Shell group's entire energy portfolio and to the aggregate volume of all emissions. It is up to RDS to design the reduction obligation, taking account of its current obligations. The reduction obligation is an obligation of result for the activities of the Shell group. This obligation includes the business relations of the Shell group, including the end-users, in which context RDS may be expected to take the necessary steps to remove or prevent the serious risks ensuing from the CO2 emissions generated by them, and to use its influence to limit any lasting consequences as much as possible: at [4.4.55].
- See: *Milieudefensie et al v Royal Dutch Shell plc* (ECLI:NL:RBDHA:2021:5337)
 - See also Otto Spijkers, 'Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell' *Chinese Journal of Environmental Law* (forthcoming, 2022)
- 

RESPONSIBILITIES OF SUPERANNUATION FUNDS

EXAMPLE: *MCVEIGH V REST* (2021)

- A superannuation fund member commenced proceedings against his superannuation fund, Retail Employees Superannuation Pty Ltd (**REST**), for failing to adequately disclose climate related business risks and strategies. The plaintiff, who will be unable to access his superannuation until the second half of the century, contended that REST failed to provide adequate information relating to:
 - “(a) knowledge of REST’s Climate Change Business Risks;
 - (b) opinion of Climate Change, the Physical Risks, the Transition Risks and REST’s Climate Change Business Risks;
 - (c) actions responding to REST’s Climate Change Business Risks;
 - (d) compliance with the [company and directors’ duties] with respect to REST’s Climate Change Business Risks.”
- In November 2020, the parties settled, with REST stating “that climate change is a material, direct and current financial risk to the superannuation fund,” and “that REST, as a superannuation trustee, considers that it is important to actively identify and manage these issues.”



Mark McVeigh

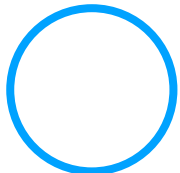
Source: www.abc.net.au/news/2020-01-18/mark-mcveigh-is-taking-on-rest-super-and-has-the-world-watching/11876360



PRIVATE SECTOR: EMERGING CASES

There is increasing attention on 'value chain climate litigation', where claimants seek to hold companies responsible for acts and omissions in their value chains and/or supply chains. The Grantham Institute predicts a future increase in value chain litigation.

- ***Envol Vert et al. v. Casino***: On March 2, 2021, an international coalition of eleven NGOs sued the French supermarket chain Casino for its involvement in the cattle industry in Brazil and Colombia, which plaintiffs allege cause environmental and human rights harms. The alleged environmental harms include destruction of carbon sinks essential for the regulation of climate change resulting from cattle industry-caused deforestation. The plaintiffs seek to compel the Casino group to comply with its obligations under the French duty of vigilance law of 27 March 2017.





PRIVATE SECTOR: EMERGING CASES

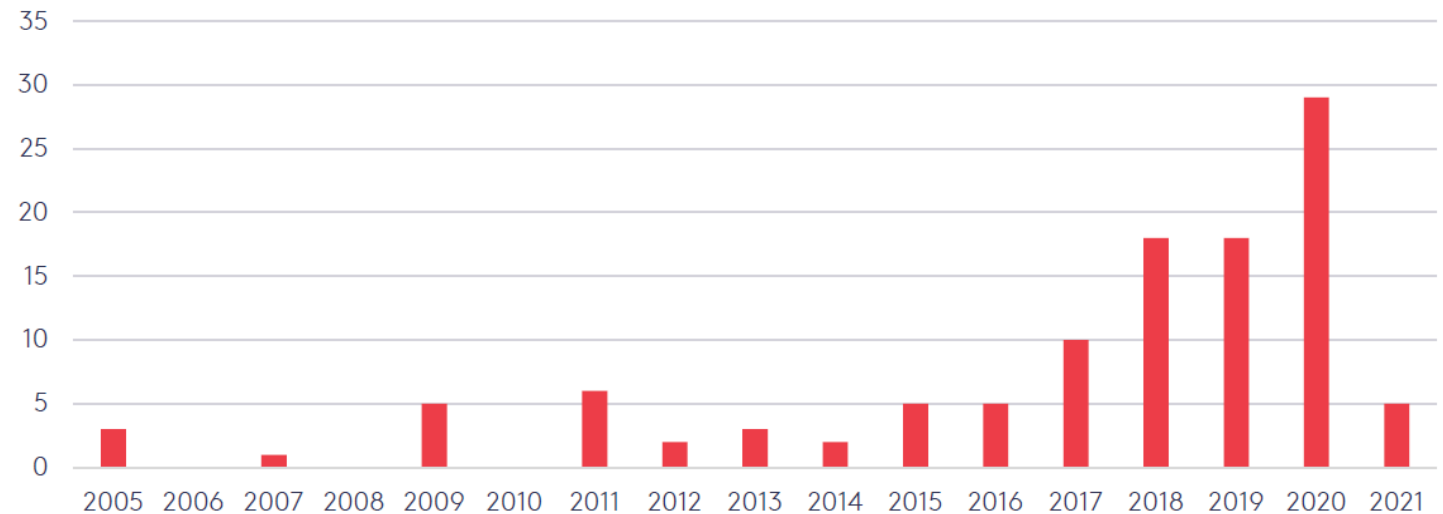
“The COVID-19 pandemic has elevated a focus on how firms and sectors prepare and act in respect of other foreseeable systemic risks like climate change. In our opinion, it is no longer safe to assume that directors adequately discharge their duties simply by considering and disclosing climate-related trends and risks; in relevant sectors, directors of listed companies must also take reasonable steps to see that positive action is being taken: to identify and manage risks, to design and implement strategies, to select and use appropriate standards, to make accurate assessments and disclosures, and to deliver on their company’s public commitments and targets.”

Mr Noel Hutley SC and Mr Sebastian Hartford Davis, *Climate Change and Directors’ Duties: Further Supplementary Memorandum of Opinion* (Centre for Policy Development, 23 April 2021)



C. HUMAN RIGHTS AND CLIMATE LITIGATION

Commentators have noted a 'rights-turn' in climate litigation, through which claimants seek to use human rights arguments to hold governments and corporations accountable for climate change (Osofsky and Peel, 2018)




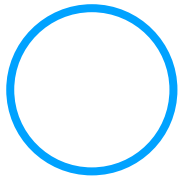
Chronological distribution of rights-based climate cases (% of cases, to May 2021)

Source: *Global Trends in Climate Change Litigation: 2021 Snapshot* (Report, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy)



HUMAN RIGHTS AND CLIMATE LITIGATION

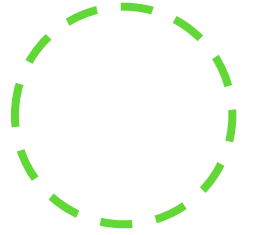
Climate litigation claiming breach of human rights includes:


1. Government inaction for adaptation to climate change
 2. Constitutional right of due process
 3. Right to life and healthy environment
 4. Right to life and culture
 5. Consideration of human rights in decision-making
- 
- 

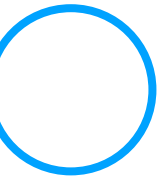


GOVERNMENT INACTION FOR CLIMATE ADAPTATION

EXAMPLE: *LEGHARI V PAKISTAN* (2018)




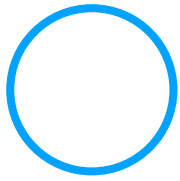
- Pakistan had two policies relating to adaptation to climate change, which the Government had not implemented. Leghari submitted that this inaction breached his fundamental rights, read with constitutional principles and international environmental principles.
 - The Court held that the government's inaction in implementing the climate policies breached Leghari's fundamental human rights.
 - By way of remedy, the Court ordered the establishment of a Climate Change Commission to effectively implement the climate policies.
 - In 2018, the Commission submitted a supplemental report on the implementation of priority actions. The Court agreed with the Commission's submissions that 66% of the priority items of the Framework had been completed due to the Commission's efforts and the responsibility for the remaining items should be left to government. Accordingly, the Court dissolved the Commission and instead constituted a Standing Committee on Climate Change to ensure the continued implementation of the Policy and the Framework.
 - See: *Ashgar Leghari v Federation of Pakistan* (2015) WP No. 25501/2015
- 





CONSTITUTIONAL RIGHT OF DUE PROCESS

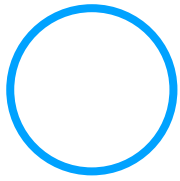
EXAMPLE: *JULIANA V UNITED STATES* (2015-ONGOING)

- On 12 August 2015, 21 youth and the organisation Earth Guardians filed a constitutional climate lawsuit against the US government.
 - The plaintiffs challenged affirmative government action under the **due process clause** in the US Constitution, which bars the Federal government from **depriving a person of “life, liberty or property” without “due process” of law.**
 - The plaintiffs sought declaratory relief that, by its affirmative actions in promoting and approving fossil fuel development and its inaction in regulating greenhouse gas emissions, the US Government has caused and contributed to catastrophic climate change and violated the plaintiffs’ constitutional **rights to life** and **equal protection** and the **implicit constitutional right to a stable climate.**
 - The US government and industry interveners sought to summarily dismiss the action.
- 
- 



CONSTITUTIONAL RIGHT OF DUE PROCESS

EXAMPLE: *JULIANA V UNITED STATES* (2015-ONGOING)

- On 10 November 2016, federal District Court Judge Aiken issued an Opinion and Order denying the federal government and industry intervenors' motions to dismiss the case.
 - The Court determined the political question doctrine does not apply to this case; the plaintiffs have standing; and the plaintiffs have properly asserted due process and public trust claims.
 - The Court articulated a new fundamental right, the right to a climate system capable of sustaining human life and held:
 - The right to a climate system capable of sustaining human life is fundamental to a free and ordered society: at 32-33.
 - Where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process violation: at 33
 - Plaintiffs had adequately alleged infringement of a fundamental right: at 34
 - Proceedings are ongoing, and the parties are currently undertaking settlement negotiations.
 - See: *Juliana v United States* 217 F. Supp. 3d 1224 (D. Or. 2016)
- 

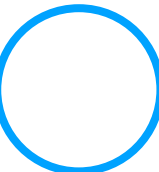
RIGHT TO LIFE AND HEALTHY ENVIRONMENT

EXAMPLE: *FUTURE GENERATIONS V MINISTRY OF THE ENVIRONMENT* (2018)



Source: www.dejusticia.org/en/asi-se-gano-en-colombia-un-litigio-por-el-planeta/


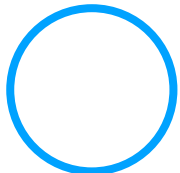
- On 29 January 2018, a group of 25 plaintiffs, between 7 and 26 years old, filed a *tutela*, a special action under the Colombian Constitution used to protect fundamental rights, before the Superior Tribunal of Bogota.
- The plaintiffs demanded that the relevant Colombian Ministries and Agencies protect their rights to a healthy environment, life, food and water.
- They claimed that deforestation in the Colombian Amazon and climate change are threatening these rights. They sought orders that the government halt deforestation in the Colombian Amazon.
- At first instance, the Court found against the plaintiffs.





RIGHT TO LIFE AND HEALTHY ENVIRONMENT

EXAMPLE: *FUTURE GENERATIONS V MINISTRY OF THE ENVIRONMENT* (2018)

- On April 5, 2018, the Supreme Court of Colombia reversed the lower court decision, recognizing 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": at [13].
 - The Court recognized the Colombian Amazon as a "subject of rights" in the same manner that the Constitutional Court recognized the Atrato River. The Supreme Court declared that the Colombian Amazon accordingly was entitled to protection, conservation, maintenance, and restoration: at [14]
 - The Court made orders across three levels of government, including ordering:
 - The Federal government to propose a plan to reduce deforestation in the Colombian Amazon and to establish an 'intergenerational pact for the life of the Colombian Amazon' with the plaintiffs, scientists and community members with the aim of reaching zero deforestation;
 - Municipal governments to update their Land Management Plans and to propose a plan for reaching zero deforestation; and
 - Regional environmental authorities to put forward a plan for reducing deforestation
 - See: *Demanda Generaciones Futuras v Minambiente* (STC4360-2018)
- 
- 

RIGHT TO LIFE AND CULTURE

EXAMPLE: TORRES STRAIT EIGHT (2019)

- A group of eight Torres Strait Islanders submitted a petition against the Australian government to the United Nations Human Rights Committee.
- The petition alleges that Australia is violating the plaintiffs' fundamental human rights under the International Covenant on Civil and Political Rights (**ICCPR**) due to the government's failure to address climate change. This petition represents the first climate change legal action in Australia that makes an argument based on a violation of human rights.
- First legal action filed with a UN body by inhabitants of low-lying islands against a national government for inaction on climate change.
- The complaint alleges that Australia's insufficient action on climate change has violated the following rights under the ICCPR: Article 27 (the right to culture), Article 17 (the right to be free from arbitrary interference with privacy, family and home), and Article 6 (the right to life). The complaint argues these violations stem from both insufficient targets and plans to mitigate greenhouse gas emissions and inadequate funding for coastal defence and resilience measures on the islands, such as seawalls.
- On August 13, 2020, Australia asked the Committee to dismiss the petition
- The complaint is still pending before the Committee.





HUMAN RIGHTS IN ENVIRONMENTAL DECISION-MAKING

EXAMPLE: *YOUTH VERDICT V WARATAH COAL* (2020)

Youth Verdict and the Bimblebox Alliance objected to Waratah Coal's mining lease and environmental authority of a proposed coal mine development in the Galilee Basin, on the basis that the decision to grant the mining lease and environmental authority would not be compatible with human rights and was therefore unlawful under section 58(1) of the *Human Rights Act 2019* (Qld).

Waratah Coal applied to strike out the human rights objections to the extent that they relied on the *Human Rights Act* or, in the alternative, obtain a declaration that the Queensland Land Court does not have jurisdiction and was not obliged to consider those objections.

The Land Court rejected the application and held that human rights considerations apply to the Land Court in making its recommendations on applications for a mining lease and environmental authority:

- The Land Court's recommendation on an application for a mining lease or environmental authority is both an "act and a "decision" as those terms are used by s 58(1). The recommendation would have a practical benefit to the ultimate decision-makers, who themselves would be bound by s 58(1): [54], [64]
- The Land Court has jurisdiction to consider objections based on the *Human Rights Act* in hearing objections to mining lease or environmental authority applications and also is compelled, as a public entity, to itself make a decision in a way that is compatible with human rights: [77]
- The objectors can rely on s 58 of the *Human Rights Act*, without seeking a remedy or separate relief under s 59. The objectors would be entitled to seek relief in the event the Land Court failed to make a recommendation in a way that was compatible with human rights: [87]

See: *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33





HUMAN RIGHTS: EMERGING CASES

While previous cases are contingent on a range of human rights, there are cases being brought internationally based on a nascent, stand-alone right to a stable climate.

Institute of Amazonian Studies v. Brazil: On October 8, 2020, the Institute of Amazonian Studies filed a Public Civil Action against the Federal Government of Brazil, seeking recognition of a fundamental right to a stable climate for present and future generations under the Brazilian Constitution, and seeking an order to compel the federal government to comply with national climate law. Plaintiffs allege that the federal government has failed to comply with its own action plans to prevent deforestation and mitigate and adapt to climate change, violating national law and fundamental rights.


For more on human-rights based climate litigation: Castan Centre Annual Lecture (9 December 2021)

<<https://www.monash.edu/law/research/centres/castancentre>>





CONCLUSION

- Climate litigation in Australia is situated within international trends, applied within Australian legal and political contexts
 - Increasing volume and diversity of climate litigation worldwide
 - Includes three current trends in climate litigation:
 1. Government accountability for climate action
 2. Private sector and corporate practice
 3. Human rights-based climate litigation
- 
- 