Judiciary and climate change: government and corporate accountability

The Hon Justice Brian Preston, Chief Judge of the Land and Environment Court of NSW

Utrecht University and the Dutch Society for Environmental Law (21 March 2023)

The need for climate action

- Tackling the existential crisis of climate change requires ambitious action by governments and corporations to reduce greenhouse gas (GHG) emissions from human activity.
- The goal is to achieve net zero emissions – a balance between anthropogenic emissions by sources and removals by sinks.
- Emissions reductions need to be deep and rapid to limit global warming to the agreed temperature target of well below 2°C above pre-industrial levels (Article 2(1)(a) of the Paris Agreement) by the time target of the second half of this century (2050) (Article 4(1) of the Paris Agreement).

Government and corporate accountability

- Government and corporate actors need to be held to account for the adequacy of their climate action or inaction.
- Climate litigation enables the courts to hold governments and corporations to account.

Photo Credit: Corporate Knights

Government accountability

- The government of a polity needs to take the lead in setting and implementing the strategic, policy and legal frameworks needed for effective climate action.
- The legislature needs to enact laws to require climate action.
- The executive needs to execute these laws and implement policies for climate action.
- The judiciary needs to hold the legislature and executive accountable for discharging these responsibilities.

The legislature's accountability

- The legislature may:
  - Fail to make legislation as required by law; or
  - Make legislation contrary to law.
- The judiciary may hold the legislature accountable for these breaches of law.

Photo Credit: OpenGlobalRights

Failure to make legislation

- The legislature may fail to make delegated or subordinate legislation (such as regulations) in breach of a legal duty to do so.
- Example: *Trustees for the Time Being of Groundwork Trust and Another v Minister of Environmental Affairs and Others* [2022] ZAGPPHC 2
  - This case concerned the 'Highveld Priority Area' in South Africa, a region with high levels of air pollution from, among other sources, the mining and combustion of fossil fuels.
  - In 2012, an air quality management plan (the Highveld Plan) was prepared by the Minister of Environmental Affairs for the area with the "sole objective… to reduce ambient air pollution to a level that complies with the National Standards" ([19]).
  - The applicants, two non-governmental environmental organisations, challenged the unsafe levels of ambient air pollution in the Highveld Priority Area in two ways:
    - First, they argued that the poor air quality was in violation of s 24(a) of the Constitution of South Africa, which provides that "everyone has the right to an environment not harmful to their health or wellbeing" ([23.1]); and
    - Second, they argued that the Minister of Environmental Affairs "is obliged to create regulations to implement and enforce the Highveld Plan" ([23.2]).

Failure to make legislation

- The High Court found in favour of the applicants and held that the levels of air pollution were in breach of the environmental constitutional right: ([241.1]); and that the Minister had a legal duty to set regulations to reduce the pollution under the Highveld Plan ([241.2]).
- The Court directed the Minister to prescribe such regulations within 12 months of the decision and set out a number of issues for the Minister to consider when doing so ([241.4]-[241.5]).

Photo Credit: The Conversation

Failure to make legislation

- The legislature may fail to make delegated or subordinate legislation (regulations) because of a misunderstanding or misdirection as to power.
- Example: *Massachusetts v Environmental Protection Agency* 549 US 497 (2007)
  - Massachusetts petitioned the US EPA to make a rule (delegated legislation) under the *Clean Air Act 1963* to regulate GHG emissions, including carbon dioxide, from new motor vehicles. The US EPA denied the petition in the belief that it had no authority to regulate GHGs from new motor vehicles as they were not an "air pollutant" under 42 US Code § 7602(g) (s 302(g) of the *Clean Air Act*).
  - The US Supreme Court held that GHGs fit well within the *Clean Air Act's* "sweeping" and "capacious" definition of "air pollutant" (26, 29-30). The EPA was authorised by s 202(a)(1) of the *Clean Air Act* to regulate GHG emissions from new motor vehicles if the EPA forms a judgment that such emissions contribute to climate change (25, 30).
  - The Court remanded the proceedings for the EPA to determine the rulemaking petition consistent with the Court's decision.
  - The recent decision of the US Supreme Court in *West Virginia v Environmental Protection Agency* 142 US 2587 (2022) also dealt with the interpretation of the *Clean Air Act*, but did not overturn *Massachusetts v Environmental Protection Agency*.

Making legislation unlawfully

- The legislation passed by the legislature may be unconstitutional or otherwise legally invalid.
- Example: *Neubauer et al v Germany* (2021) 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20
  - Youth claimants challenged the constitutionality of Germany's *Climate Protection Act* that set inadequate GHG emissions reduction targets.
  - The German Constitutional Court found that the *Climate Protection Act's* provisions placed an unreasonable burden on future generations.
  - The German Constitution enshrined a right to future freedoms that protected the complainants against threats to freedoms caused by GHG reduction burdens being unilaterally offloaded onto the future.
  - The failure of the *Climate Protection Act* to set emissions targets beyond 2030 limits these intertemporal guarantees of freedom.
  - The Court ordered the federal government to remake the emissions reduction targets in the *Climate Protection Act* and determine targets for the years beyond 2031 by the end of 2022.
- See also: Petra Minnerop, 'The 'Advance Interference-Like Effect' of Climate Targets: Fundamental Rights, Intergenerational Equity and the German Federal Constitutional Court' (2022) 34(1) *Journal of Environmental Law* 135; Gerd Winter, 'The Intergenerational Effect of Fundamental Rights: A Contribution of the German Federal Constitutional Court to Climate Protection' (2022) 34(1) *Journal of Environmental Law* 209.

Photo Credit: National Public Radio

Making legislation unlawfully

- Example: *Steinmetz et al v Germany* (German Constitutional Court, filed 24 January 2022)
  - Building on the Court's orders in *Neubauer v* Germany, on 24 January 2022, a group of youth plaintiffs filed another constitutional challenge against Germany's updated *Climate Protection Act*.
  - The updated *Climate Protection Act*, which commenced on 31 August 2021, amended Germany's emissions reduction goals in the following ways:
    - Raised the reduction target for 2030 from 55% to 65% as compared to 1990 levels;
    - Updated the reduction path for 2031-2040;
    - Expanded legislative involvement in the determination of sectoral budgets from 2031 onwards; and
    - Brought forward the target year for achieving carbon neutrality from 2050 to 2045.
  - Relying on developments in international climate science and the strengthened targets in the Glasgow Climate Pact, the plaintiffs argue that the amended goals in the updated *Climate Protection Act* are now insufficient.
  - The plaintiffs seek to have parts of the updated *Climate Protection Act* declared unconstitutional and the legislature ordered to re-regulate the reduction goals in light of scientific and factual updates.

The executive's accountability

- The executive government may:
  - Fail to adopt a climate policy required by law;
  - Adopt a statutory rule or climate policy contrary to law;
  - Fail to implement a climate policy as required by law;
  - Inadequately implement a climate policy;
  - Fail to take adequate climate action;
  - Breach its duty of care in policy-making and decision-making;
  - Be under a duty to take climate action; or
  - Breach its duty to respect human rights in policy-making and decision-making.
- The judiciary may hold the executive accountable for these breaches of law.

Photo Credit: Governance Institute of Australia

Failure to adopt climate policy

- Legislation may require the executive government to adopt policies to mitigate or adapt to climate change.
- Example: *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* (2021) 250 LGERA 1
  - A climate action group sought an order in the nature of mandamus to compel the NSW Environment Protection Authority (EPA) to perform a statutory duty to develop environmental quality objectives, guidelines and policies to ensure the protection of the environment from climate change.
  - The Land and Environment Court of NSW held:
    - The statutory duty 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 NSW, 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 ([16], [69]).
    - The EPA had not fulfilled this duty to develop instruments of the kind described to ensure the protection of the environment from climate change, and was ordered by the Court to do so ([17], [18], [144], [148]).
  - The EPA released a Climate Change Policy and Climate Change Action Plan 2023-26 in January 2023.

Photo Credit: Environmental Defenders Office

Adopting unauthorised statutory rule

- The executive government may adopt a statutory rule that is not authorised by statute.
- Example: *West Virginia v Environmental Protection Agency* 142 US 2587 (2022)
  - The US EPA had promulgated the Clean Power Plan rule, which sought to reduce carbon dioxide emissions from existing coal-fired and natural gas-fired power plants by:
    1. Existing power plants undertaking to burn coal more cleanly.
    2. Effecting a shift in generation from existing coal-fired power plants, which would produce less power, to gas-fired power plants, which would produce more power.
    3. Effecting a shift in generation from both coal and gas-fired power plants to renewable energy sources.
  - The EPA cited s 111 of the *Clean Air Act* as providing authorisation to make the Clean Power Plan rule. Under that section the EPA can determine the "best system of emission reduction… that has been adequately demonstrated" for the kind of existing source. At issue was whether s 111(d) of the *Clean Air Act* authorised the "generation shifting" approach in the Clean Power Plan.
  - The majority (Roberts CJ, Thomas, Alito, Gorsuch, Kavanaugh and Barrett JJ), with a concurring opinion of Gorsuch J in which Alito J joined, held that it did not. The minority (Kagan J with whom Breyer and Sotomayor JJ agreed) dissented, holding that it did.

West Virginia v EPA: Opinion of the Court

- The majority announced and applied the “major questions doctrine”. This doctrine goes further than normal statutory interpretation to determine whether a policy or rule made by an agency is authorised by the statute.
- In the majority’s opinion, “there are ‘extraordinary cases’ that call for a different approach—cases in which the ‘history and the breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority” (17). In such cases, courts “‘typically greet’ assertions of ‘extravagant statutory power over the national economy’ with ‘skepticism’”. To convince the court otherwise, the agency must point to “clear congressional authorisation” for the power it claims (19).
- The majority held that the “generation shifting” approach in the Clean Power Plan represented such a transformative expansion of the EPA’s regulatory authority that there is every reason to hesitate before concluding that Congress meant to confer on the EPA the authority it claimed under s 111(d) of the *Clean Air Act* (20).
- Roberts CJ concluded “Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible ‘solution to the crisis of the day.’… But it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body” (39).

West Virginia v EPA: Dissenting Opinion

- The minority disputed the legitimacy and application of the major questions doctrine as a rule of statutory interpretation. The question of whether the Clean Power Plan is authorised by the *Clean Air Act* is to be determined by the "normal text-in-context statutory interpretation" (15).
- Applying this normal rule of statutory interpretation, the minority held that the Clean Power Plan is authorised by s 111 of the *Clean Air Act* (5-9, 19, 20-22, 32). The generation shifting enabled by the Clean Power Plan is the "best system of emission reduction", being the most effective and efficient way to reduce power plants' emissions (4-5).
- Kagan J observed that the history of regulation shows that "Congress makes broad delegations in part so that agencies can 'adapt their rules and policies to the demands of changing circumstances.'… To keep faith with that congressional choice, courts must give agencies 'ample latitude' to revisit, rethink, and revise their regulatory approaches" (26-27).
- This is what Congress had done. The enacting Congress told the EPA, in s 111 of the *Clean Air Act*, to pick the "best system of emissions reduction", recognising that this would change over time. Congress wanted and instructed the EPA "to keep up". The EPA followed those statutory directions when it issued the Clean Power Plan (27). The generation shifting approach was the best system of emissions reduction and accorded with the enacting Congress's choice (30-31).

Photo Credit: The New Yorker

Adopting unlawful climate policy

- The executive government may adopt a policy that is contrary to legislation.
- Example: *Friends of the Irish Environment CLG v Ireland et al* [2020] IESC 49
  - 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 (Article 2) and right to private and family life (Article 8).
  - The Irish Supreme Court held that the Plan fell short of the sort of specificity that the Act 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" ([6.32]).

Photo Credit: The Times

Adopting unlawful climate policy

- Example: *R (on the application of Friends of the Earth) et al v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin)
  - Friends of the Earth, ClientEarth, the Good Law Project and environmental campaigner Joanna Wheatley (the claimants) applied to, among other things, judicially review decisions of the UK Secretary of State for Business, Energy and Industrial Strategy (SoS) made under the *Climate Change Act 2008* (UK) (CCA) in relation to the Net Zero Strategy (NZS). The NZS was published in October 2021 and set out the UK government's proposals and policies to reduce the UK's GHG emissions to net zero by 2050.
  - The case was about whether the SoS complied with the requirements contained in ss 13 and 14 of the CCA in relation to the NZS.
    - Section 13 of the CCA imposes a duty on the SoS to "prepare such proposals and policies" as he considers will enable the carbon budgets under the CCA to be met.
    - Section 14 of the CCA requires the SoS to lay before Parliament a report setting out proposals and policies for meeting the current and future "budgetary period" up to and including the carbon budget that has just been set.
    - The NZS purported to state the proposals and policies required under s 13 and be the report required by s 14 of the CCA.
  - It was discovered during proceedings that the proposals and policies in the NZS were expected to achieve only 95% of the targets in the UK's most recent sixth carbon budget (CB6) ([139]).

Photo Credit: GOV.UK

Adopting unlawful climate policy

- Example: *R (on the application of Friends of the Earth) et al v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin)
  - While the UK High Court accepted that the SoS did not make any legal error by proceeding on the basis that the proposals and policies were expected to achieve only 95% of the CB6 targets ([161]-[193]), the High Court found in favour of the claimants on aspects of two grounds concerning ss 13 and 14, holding that:
    1. The SoS did not discharge his duty under s 13 of the CCA as, due to insufficiencies in the ministerial briefing materials, he was unable to take into account and decide for himself how much weight to give to his department's approach to overcoming the 5% shortfall in meeting the CB6 targets, or to the contributions which individual proposals and policies were expected to make in reducing GHG emissions ([194]-[222]).
    2. The SoS did not satisfy the requirements of s 14 because the NZS did not assess the contributions expected to be made by individual proposals and policies to GHG emissions reductions, and also because it did not reveal that the analysis put before the SoS left a shortfall against the CB6 targets or how that shortfall was expected to be met ([223]-[260]). The High Court noted that a report under s 14 was important as it allows Parliament and the public to understand and assess the adequacy of the UK government's policy proposals ([245], [247]).
  - The High Court ordered the SoS to lay a revised report before Parliament by no later than 31 March 2023.
  - The High Court also refused the SoS's application for permission to appeal on the basis that there was no real prospect of success and no other compelling reason for the appeal to be heard.

Failure to implement climate policy

- The executive government might adopt climate policies according to law, but fail to implement them.
- Example: *Leghari v Federation of Pakistan* [Lahore High Court], WP No 25501/2015, 4 September 2015
  - Pakistan had adopted policies for adaptation to climate change, but the government had not implemented them. Leghari submitted this inaction violated his fundamental rights, read with constitutional principles and international environmental principles.
  - The Lahore High Court held that the government's inaction in implementing the climate policies had breached Leghari's fundamental rights.
  - The Court ordered the establishment of an ad hoc Climate Change Commission to effectively implement the climate policies ([8]).

Inadequately implementing climate policy

- The executive government may have adopted a climate policy but taken insufficient action to advance its implementation.
- Example: *Gaurav Kumar Bansal v Union of India* [National Green Tribunal], Original Application No 498 of 2014, 23 July 2015
  - The Indian national government had adopted the National Action Plan on Climate Change (NAPCC) that promotes "development objectives while also yielding co-benefits for addressing climate change effectively." Its effectiveness, however, was being hampered by it not being implemented by each state government.
  - The National Green Tribunal of India directed the state governments to submit their climate action plans in consonance with the NAPCC and obtain approval from the Ministry of Environment, Forest and Climate Change.

Failure to take adequate climate action

- The executive government may fail to take adequate climate action, thereby breaching the law.
- Example: *Notre Affaire à Tous et al v France* [Administrative Court of Paris], No 1904967, 1904968, 1904972, 1904976/4-1, 14 October 2021
  - Four NGOs brought administrative proceedings claiming that the French government's failure to implement proper measures to effectively address climate change violated a statutory duty to act.
  - The plaintiffs argued that the government has legal duties to act on climate change stemming from the French Charter for the Environment, the ECHR and the general principle of law providing the right of every person to live in a preserved climate system.
  - On 3 February 2021, the Administrative Court of Paris held that France could be held responsible for failing to meet its own climate and carbon budget goals under EU and national law. The Court recognised that France's inaction caused ecological damage from climate change and awarded the plaintiffs one euro for moral prejudice caused by this inaction.
  - On 14 October 2021, the Court ordered the state to take immediate and concrete actions to comply with its commitments on cutting carbon emissions and repair the damage caused by its inaction by 31 December 2022.

Failure to take adequate climate action

- The executive government may be found not to have failed to take adequate climate action if it has had considerable regard to climate change factors when adopting policy or making decisions.
- Example: *R (on the application of Cox) v The Oil and Gas Authority* [2022] EWHC 75 (Admin)
  - On 18 January 2022, the UK High Court dismissed a challenge brought by campaigners to a revised strategy issued by the state-owned Oil and Gas Authority (OGA), which sets out plans to support ongoing efforts to exploit oil and gas reserves in the North Sea.
  - The claimants argued, among other things, that the strategy was irrational and inconsistent with the UK government's Net Zero target as it would lead to more oil and gas being extracted than would otherwise be the case.
  - The Court rejected the claimant's argument, finding that:
    - The revised strategy would not necessarily result in increased emissions ([126]-[135]); and
    - The OGA already had "considerable regard to UK domestic action on climate change" ([121]-[124], [136]).

Failure to take adequate climate action

- Example: *Daniel Billy et al v Australia*, Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No 3624/2019*, UN Doc CCPR/C/135/D/3624/2019 (22 September 2022)
  - While perhaps not strictly defined as ‘litigation’, eight Torres Strait Islander people and six of their children brought a complaint to the UN Human Rights Committee against the Australian government, alleging that Australia violated their rights under Articles 6 (the right to life), 17 (the right to be free from arbitrary interference with privacy, family and home) and 27 (the right to culture) of the International Covenant on Civil and Political Rights due to the government’s failure to address climate change.
  - The Torres Strait Islanders argued that these violations stemmed from the Australian government’s failure to implement adequate policies and targets to reduce greenhouse gas emissions, and provide sufficient funding for coastal defence and resilience measures on the Torres Strait Islands, such as seawalls.

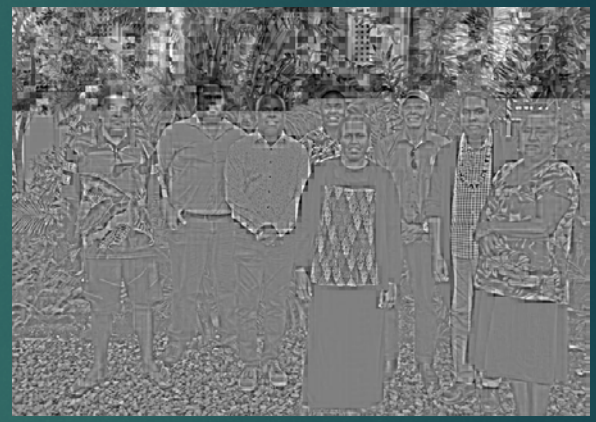


Image Source: Client Earth

Failure to take adequate climate action

- The Committee found in favour of the claimants, holding that Australia had violated their rights to culture and to be free from arbitrary interference with privacy, family and home, but not the right to life.
- In reaching this conclusion, the Committee considered the claimants' close, spiritual connection with their traditional lands, and the dependence of their culture on the health of the surrounding ecosystems ([8.12]-[8.14]).
- While the majority of the Committee held that there was currently no violation of the claimants' right to life, it recognised that "without robust national and international efforts, the effects of climate change may expose individuals" to such a violation ([8.7]). Individual opinions issued by the minority of the Committee, however, did find that the claimants' right to life had already been violated (Annexes I and III).
- As to remedies, the Committee asked Australia to adequately compensate the Torres Strait Islanders for the harm suffered, engage in meaningful consultations with their communities to assess their needs, and take measures to continue to secure the communities' safe existence on their respective islands ([11]).

Image Source: ABC News

Breach of duty of care in policy-making

- The executive government may be under a duty of care to pursue an adequate climate policy.
- Example: *Urgenda Foundation v The State of the Netherlands* (ECLI:NL:RBDHA:2015:7145) (The Hague District Court)
  - Urgenda Foundation and 900 Dutch citizens challenged the sufficiency of the Dutch government's climate policy and action, arguing that the government's failure to require deeper and more rapid reductions in GHG emissions breached its duty of care under the Dutch Civil Code and its obligations under the ECHR.

Photo Credit: Urgenda / Chantal Bekker

Breach of duty of care in policy-making

- The Hague District Court found in 2015 that the emissions reductions targets set by the Dutch government's climate policy were insufficient and ordered the government to limit GHG emissions by 25% below 1990 levels by 2020.

> "… due to the severity of the consequences of climate change and the great risk of hazardous climate change occurring – without mitigation 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" ([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" ([4.93]).

Breach of duty of care in decision-making

- Depending on the statute, the executive government may be under a duty to exercise statutory powers to protect people from climate change.
- Example: *Sharma v Minister for the Environment* (2021) 391 ALR 1; (2021) 248 LGERA 330; [2021] FCA 560
  - Eight Australian children brought proceedings against the Australian Minister for the Environment arguing that, in deciding under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) whether to approve an extension of a coal mine in NSW, the Minister had a duty to protect the young people from the devastating effects of climate change.
  - The Court held that "the Minister has a duty to take reasonable care to avoid causing personal injury to the Children when deciding, under s 130 and s 133 of the EPBC Act, to approve or not approve the Extension Project" ([491] and [513]). In establishing that duty, the Court found that the foreseeable harm of the project is "catastrophic" and the children should be regarded as persons who are so closely and directly affected that the Minister ought to consider their interests when making the approval decision ([257]). A reasonable Minister for the Environment ought to have the children in contemplation when facilitating the emission of GHGs into the Earth's atmosphere ([491]).

Breach of duty of care in decision-making

- The Court later declared: “The first respondent has a duty to take reasonable care, in the exercise of her powers under s 130 and s 133 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) in respect of referral EPBC No. 2016/7649, to avoid causing personal injury or death to persons who were under 18 years of age and ordinarily resident in Australia at the time of the commencement of this proceeding arising from emissions of carbon dioxide into the Earth’s atmosphere” ([2021] FCA 774 [58]).

Photo Credit: Environmental Law Australia

No duty of care in decision-making

- The primary judge's decision was overturned on appeal by the Full Federal Court (*Minister for the Environment v Sharma* (2022) 400 ALR 203; [2022] FCAFC 35).
- While the three judges of the Full Federal Court unanimously held that a duty of care should not be imposed, each wrote separate reasons explaining why this conclusion should be reached.
- In summary, a duty of care should not be imposed as it:
  - is unsuitable for judicial determination as it raises policy considerations about the proper response to climate change ([8]-[17], [233]-[266]), which makes it unfeasible to establish an standard of care for the Minister ([837]-[868]);
  - is inconsistent and incoherent with the text and objects of the EPBC Act (including the Minister's duties under the Act), and the government framework of responsibility for the protection of the environment ([267]-[272], [837]-[852]);
  - is not appropriate given the Minister's lack of control over the harm ([334]-[337]), the absence of the plaintiffs' "special vulnerability" ([339]-[340]), the indeterminacy of the class of individuals that would be affected by a hypothetical breach of the duty ([341]-[343], [701]-[747]), and the insufficient closeness between the Minister's exercise of statutory power and the risk of harm to the plaintiffs ([678]-[701]); and
  - does not cause a reasonably foreseeable risk of personal injury to the plaintiffs as the principles of causation in negligence would not be established ([869]-[886]).
- Notably, the Court did not contest the primary judge's findings of fact on climate change and the dangers it poses to the world and humanity.

Duty to take climate action?

- Example: *Pabai Pabai and Guy Paul Kabai v Commonwealth of Australia* (Federal Court of Australia, filed 22 October 2021)
  - On 22 October 2021, Pabai Pabai and Guy Paul Kabai, First Nations leaders from the Gudamalulgal nation of the Torres Strait Islands, commenced representative proceedings against the Australian government.
  - The applicants argue that the government 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 the impacts of climate change.
  - The applicants allege that the government breached this duty as its emissions reduction targets are not consistent with the best available science.
  - The duty of care is claimed to arise from, among other things, the government's obligations under the Torres Strait Treaty and commitments under the United Nations Framework Convention on Climate Change and the Paris Agreement.
  - The case is listed for a lay evidence hearing commencing on 6 June 2023 and for an expert evidence hearing likely to be held in October or November 2023.

Photo Credit: ABC News

Breach of duty to respect human rights in policy-making

- The executive government may be under a duty to respect human rights when setting and implementing climate policy.
- Example: *The State of the Netherlands v Urgenda Foundation* (ECLI:NL:GHDHA: 2018:2610) (The Hague Court of Appeal)
  - The Hague Court of Appeal in 2018 dismissed the Dutch government's appeal on the negligence grounds and upheld The Hague District Court's ruling on the human rights grounds. The Court concluded that by failing to set policy to reduce GHG emissions by at least 25% by end of 2020, the Dutch government acted in breach of its duty of care under Articles 2 and 8 of the ECHR.
  - Dangerous climate change threatens the lives, well-being 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 create an obligation for the state to take positive measures to contribute to reducing emissions relative to its own circumstances ([5.9.1]).

Breach of duty to respect human rights in policy-making

- Example: *The State of the Netherlands v Urgenda Foundation* (ECLI:NL:HR:2019:2007) (Supreme Court of the Netherlands)
  - The Supreme Court of the Netherlands in 2019 upheld the Court of Appeal's decision that the ECHR imposed a positive obligation on the Dutch government to take measures to prevent climate change.
  - These measures require the state to set policy to meet a GHG emissions reductions target of 25% compared to 1990 by the end of 2020.
  - Even though the Netherlands was only a minor contributor to climate change, it had an independent obligation to reduce emissions.

Photo Credit: Urgenda / Chantal Bekker

Breach of duty to respect human rights in policy-making

- Example: *Future Generations v Ministry of the Environment* (Supreme Court of Colombia, 11001-22-03-000-2018-00319-01, 5 April 2018)
  - Youth plaintiffs sued several bodies within the Colombian government, Colombian municipalities, and a number of corporations, alleging that rampant deforestation in the Colombian Amazon and climate change were threatening their rights to a healthy environment, life, food and water.

Photo Credit: Dejusticia

Breach of duty to respect human rights in policy-making

- The Colombian Supreme Court upheld the claim, holding that deforestation of the Colombian Amazon poses an “imminent and serious” threat to current and future generations due to its impact on climate change (34), and that this attacks fundamental rights to life, water, clean air and a healthy environment. The Court further found that the Amazon is an entity “subject of rights” and that the Colombian government has a duty of “protection, conservation, maintenance and restoration” of the Amazon (45).
- The Court made orders against three levels of government. The Court ordered 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 (46). The Court ordered the municipal governments to update their land management plans and to propose a plan for reaching zero deforestation (46-47). The Court also ordered regional environmental authorities to propose a plan for reducing deforestation (47).

Breach of duty to respect human rights in decision-making

- The executive government may be under a duty to respect human rights when making decisions with climate change implications.
- Example: *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21
  - Youth Verdict and the Bimblebox Alliance objected to Waratah Coal's mining lease and environmental authority for a proposed coal mine in the Galilee Basin on the basis that granting the lease and authority would unjustifiably limit human rights due to the adverse climate change impacts of the mine, among other grounds.
  - The Queensland Land Court decided that the importance of preserving human rights outweighed the potential $2.5 billion of economic benefits of the proposed mine, as well as its potential benefit to Southeast Asia as a reliable source of energy ([44], [45]). The Land Court recommended to the relevant executive decision-makers that both the lease and authority be refused ([1809], [1941]).

Image Source: Youth Verdict

Breach of duty to respect human rights in decision-making

- The Land Court found that approving the mine would contribute to climate change impacts, which would unjustifiably limit the following rights protected by the *Human Rights Act 2019* (Qld):
  - the right to life ([1505], [1512], [1513]);
  - the cultural rights of First Nations peoples ([1565], [1568]);
  - the rights of children ([1603]);
  - the right to property ([1611], [1622]);
  - the right to privacy and home ([1633]); and
  - the right to enjoy human rights equally ([1654]).
- The Land Court concluded that "approving the applications is not appropriate because, taking the nature and extent of the limit into account, the importance of preserving the human right is more important than the purpose of the Project… The evidence about the economic and other benefits of the Project is not cogent and persuasive in justifying the limit" ([1656]-[1657]).

Breach of duty to respect human rights in decision-making

- Example: *Nato and others v National Environment Management Authority and another* [2022] KENET 699 (KLR) (Civ)
  - This case concerned a challenge by local community members to a decision of the National Environment Management Authority of Kenya (Authority) to grant an environmental impact assessment (EIA) licence to a freight container company for the installation of a 15,000 MT bulk liquified petroleum gas storage depot.
  - The initial project proposed by the company was for a 30,000 MT depot. The initial project was opposed by both the Authority and the community members on safety grounds, among others, as the proposed project site adjoins densely populated residential areas and schools. The company downsized the project to 15,000 MT. The Authority granted an EIA licence to the company for the downsized project without a fresh EIA assessment.

Image Source: Focus Container Freight Stations

Breach of duty to respect human rights in decision-making

- The National Environment Tribunal of Kenya (Tribunal) held that “considering the poor quality of the public participation in the initial application for the EIA licence for the 30,000 MT project and the vehement objection to the same, the [Authority] ought not to have granted the EIA licence to the [company] without subjecting the downsized project to a fresh EIA study” ([59]).
- In reaching this conclusion, the Tribunal held that its powers extended to “making an inquiry into whether the EIA licence granted to the [company] does expose the residents to living conditions that are dangerous or negate the rights of the residents to live in a clean and healthy environment” ([53]).

Image Source: Strong Cities Network

Corporate accountability

- The corporate sector is primarily responsible for global GHG emissions.
- Corporations have legal responsibilities to reduce GHG emissions (see, Principles on Climate Obligations of Enterprises: https://climateprinciplesforenterprises.org/).
- Climate litigation aims to influence corporate action to reduce GHG emissions:
  - From the corporation's own activities;
  - In their supply chain; and
  - In their value chain.
- Climate-related greenwashing, or 'climate-washing', litigation is also gaining pace, with the aim of holding corporations to account for climate change misinformation.

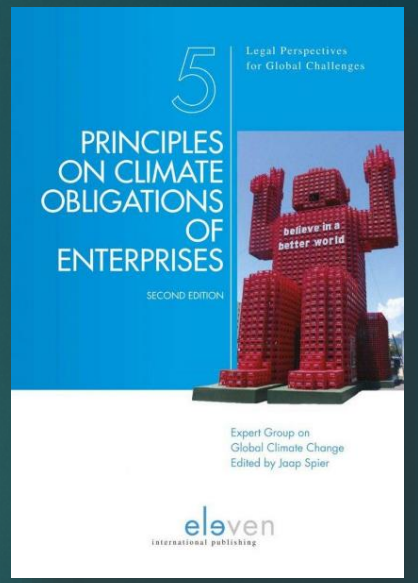
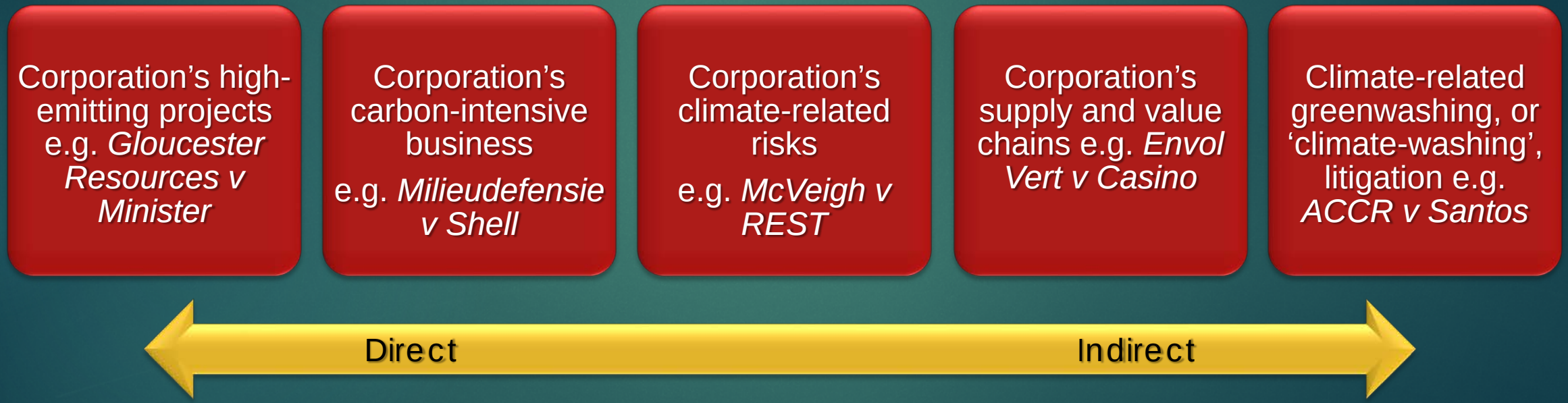


Photo Credit: Expert Group on Climate Change

Influencing corporate behaviour

- Climate litigation seeks to influence corporate behaviour directly or indirectly.



Accountability for high-emitting projects

- Climate litigation may challenge projects that will be a major source of GHG emissions, such as a new coal mine or coal-fired power station.
- Example: *Gloucester Resources Ltd v Minister for Planning* (2019) 234 LGERA 257
  - The Land and Environment Court of NSW refused development consent to a new open cut coal mine partly for its unacceptable GHG emissions that would result from the extraction and combustion of the coal mined (scope 1, 2 and 3 emissions).

> "In short, an open cut coal mine in this part of the Gloucester valley would be in the wrong place at the wrong time. Wrong place because an open cut coal mine in this scenic and cultural landscape, proximate to many people's homes and farms, will cause significant planning, amenity, visual and social impacts. 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 urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions. These dire consequences should be avoided. The Project should be refused" ([699]).

Accountability for high-emitting projects

- Example: *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21
  - In addition to recommending refusal of Waratah Coal's mining lease and environmental authority on human rights grounds, the Queensland Land Court found that the proposed project poses "unacceptable climate change impacts to Queensland people and property" ([36]).
  - The Land Court made the following findings of note in relation to high-emitting projects:
    - Scope 3 emissions: Granting permission to mine the coal could not be logically separated from the coal being used to generate electricity. The Land Court held that the mine's estimated scope 3 emissions could be taken into account in applying the principles of ecologically sustainable development and considering the public interest ([25], [695], [717], [1018]).
    - Market substitution: The Land Court rejected Waratah Coal's argument that "approving the mine will make no difference to total emissions, because it will displace other lower quality coal with higher GHG emissions" ([32], [1006], [1010], [1011], [1027], [1393]). This is the market substitution assumption or perfect substitution argument and was previously a major barrier to climate litigation in Queensland.
    - *Paris Agreement*: The parties agreed that the emissions from the combustion of coal at the mine would be 1.58Gt of CO_2 between 2029 and 2051. While this would not be the difference between acceptable and unacceptable climate change, the Land Court held that this was a "meaningful contribution" to the remaining carbon budget under the *Paris Agreement's* temperature goals ([31], [35], [1409]).

Accountability for carbon-intensive business

- Climate litigation may challenge the business model and activities of “carbon majors”.
- Example: *Milieudefensie et al v Royal Dutch Shell plc* (ECLI:NL:RBDHA:2021:5337)
  - Milieudefensie/Friends of the Earth Netherlands and six other plaintiffs alleged Royal Dutch Shell (Shell) had violated its duty of care under Dutch law by emitting GHG emissions that contributed to climate change.
  - The plaintiffs sought a ruling from the Court that Shell must reduce its GHG emissions by 45% by 2030 compared to 2010 levels, and to zero by 2050 in line with the Paris Agreement.

Photo Credit: Friends of the Earth International

Accountability for carbon-intensive business

Photo Credit: Jones Day

- Example: *ClientEarth v. Shell's Board of Directors* (High Court of England and Wales, filed 9 February 2023)
  - On 9 February 2023, ClientEarth filed a world-first lawsuit against Shell's Board of Directors, arguing that the directors' failure to manage the material and foreseeable risks posed to the company by climate change puts them in breach of their legal duties. The action is by way of a 'derivative' claim, which means that ClientEarth is bringing the action on behalf of Shell in its capacity as a shareholder of the company. The claim has received unprecedented support from numerous institutional investors collectively holding over 12 million shares in Shell.
  - ClientEarth's claim alleges that the directors' failure to adopt and implement a climate strategy that aligns with the Paris Agreement is in breach of their duties under the *Companies Act 2006* (UK), in particular, their duties to promote the success of the company, and exercise reasonable care, skill and diligence. Presently, Shell's net emissions are calculated to fall by just 5% by 2030, which does not comply with the Dutch Court's 2021 Order in *Milieudefensie et al v Royal Dutch Shell plc* to reduce its emissions by 45% by 2030.
  - ClientEarth alleges that the directors are mismanaging Shell's climate risks as the company's inadequate climate strategy threatens its long-term commercial viability, including by putting its assets at risk from extreme weather events (physical risks) and increasing the threat of its assets becoming stranded (transition risks).
  - ClientEarth is seeking the Court to order the Board of Directors to adopt a strategy to manage climate risk in line with its duties under the Companies Act, and in compliance with the Dutch Court's judgment.
  - Under UK law, leave of the Court is required to pursue this type of derivative action claim. The Court is yet to determine if such leave should be granted to ClientEarth.

Accountability for carbon-intensive business

- Example: Foreshadowed ClientEarth shareholder litigation against Shell's Board of Directors
  - In March 2022, ClientEarth announced that it intends to take legal action against Shell's Board of Directors, arguing that their failure to properly prepare the company for net zero puts them in breach of their legal duties.
  - The action is by way of a 'derivative' claim, which means that ClientEarth is bringing the action on behalf of Shell and in its capacity as a shareholder of the company.
  - ClientEarth alleges that the directors' failure to adopt and implement a climate strategy that aligns with the Paris Agreement is in breach of their duties under the *Companies Act 2006* (UK), in particular, their duties to promote the success of the company, and exercise reasonable care, skill and diligence.
  - According to ClientEarth, the directors are mismanaging Shell's climate risks as the company's inadequate climate strategy threatens its long-term commercial viability, including by putting its assets at risk from extreme weather events (physical risks) and increasing the threat of its assets becoming stranded (transition risks).
  - This claim is the first attempt to hold a company's directors personally liable for mismanaging a company's climate risks.
  - ClientEarth has notified Shell of its claim and is waiting for a response before seeking permission from the UK High Court to proceed with its claim.
- See: 'ClientEarth shareholder litigation against Shell's Board: FAQs', *ClientEarth* (Web Page, March 2022) <https://www.clientearth.org/media/puojyzvy/clientearth-shareholder-litigation-against-shell-s-board-faqs.pdf>.

Accountability for climate-related risks

- Climate litigation may challenge corporations' identification, management and disclosure of climate-related risks.

> *"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)

Accountability for climate-related risks

- Example: *McVeigh v REST* (Federal Court of Australia, filed 23 July 2018)
  - A superannuation fund member, Mark McVeigh, 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."

Photo Credit: ABC News

Accountability for supply and value chains

- Climate litigation may focus on corporate responsibility for GHG emissions in their supply and value chains.
- Example: *Envol Vert et al v Casino* (Saint-Étienne Judicial Court, filed 2 March 2021)
  - An international coalition of eleven NGOs sued the French supermarket chain Casino for its involvement in the cattle industry in Brazil and Colombia (its supply chain), which plaintiffs allege causes 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. The judgment is yet to be handed down.

Photo Credit: Mighty Earth

Accountability for supply and value chains

- Example: *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd* (2021) 252 LGERA 221
  - The NSW Land and Environment Court held that a coal mine or gas operator may have control to reduce scope 2 (upstream) emissions by its choice of electricity suppliers (in the supply chain) and scope 3 (downstream) GHG emissions by its control over end users (in the value chain) ([105]-[107]).

Photo Credit: ABC News

Accountability for ‘climate-washing’

- Example: *Australasian Centre for Corporate Responsibility v Santos* (Federal Court of Australia, filed 25 August 2021)
  - The Australasian Centre for Corporate Responsibility (ACCR) has filed a claim in the Federal Court of Australia against oil and gas company Santos over statements in its 2020 Annual Report, which the ACCR alleges are in violation of consumer protection and corporation laws.
  - In particular, the ACCR alleges that Santos’ claims that natural gas is a “clean fuel” that provides “clean energy” misrepresents the true effect of natural gas on the climate. The ACCR further alleges that Santos’ claims that it has a clear and credible plan to achieve net zero emissions by 2040 are misleading. This is because, according to the ACCR, Santos’ claims are inconsistent with its plans to expand its natural gas operations. These plans also depend on undisclosed assumptions about the effectiveness of carbon capture and storage processes. Santos is defending the action.

Photo Credit: Santos

Accountability for ‘climate-washing’

- Example: *Greenpeace France v TotalEnergies SE and TotalEnergies Electricité et Gaz France* (Judicial Tribunal of Paris, filed 2 March 2022)
  - Earlier this year, Greenpeace France, Amis de la Terre and Notre Affaire à Tous (ClientEarth supports the case and will be a third-party intervener) filed a request to obtain an injunction and compensation against TotalEnergies SE and TotalEnergies Electricité et Gaz France to stop their rebranding campaign.
  - The plaintiffs allege that the campaign is misleading as:
    - the companies’ claims to be aiming for net zero by 2050 and to become a major player in the energy transition are false; and
    - the companies’ claims promoting the environmental virtues and transition role of gas and biofuels are misleading.
  - According to the plaintiffs, the advertising campaign constitutes misleading commercial practices within the meaning of the French Consumer Code (which implements the EU Unfair Commercial Practices Directive) as the companies’ behaviour is in opposition to the transition to carbon neutrality by 2050.

Photo Credit: Power Technology

Achieving climate action

- By performing its essential role in holding governments and the corporate sector to account, the judiciary upholds the law and the rule of law.
- Where the law promotes taking action to reduce GHG emissions by sources and increase removal of GHGs by sinks, the judiciary's actions facilitate the achievement of effective climate action.