Turning a Ripple into a Torrent: Riding the Waves of Climate Change Litigation[1]

The Three 'Waves' of Climate Change Litigation

1. While most countries have enacted laws and implemented policies to respond to climate change, present measures are inadequate to meet the challenge posed by the current climate emergency.[2] Accordingly, individuals, communities, non-governmental organisations, and governments, continue to have recourse to litigation as a means of compelling the enforcement of existing climate change laws and to fill the void that exists in the present legislative and regulatory responses to climate change.[3] As has been observed, "litigation is central to efforts to compel governments and corporate actors to undertake more ambitious climate change mitigation and adaptation goals".[4]

2. What is climate change litigation? The recently published *United Nations 2020 Global Climate Litigation Report 2020 Status Review* ("UN Status Review") uses the term "climate change litigation" to denote cases that raise material issues of law or fact relating to climate change mitigation, adaptation, or the science of the phenomenon whether those actions are before administrative, judicial, or other adjudicatory bodies.[5] More "scholarly obsession" relating to climate change litigation describes its evolution in terms of 'waves'.[6]

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[1] Paper presented at Clayton Utz seminar, *Climate Change Litigation*, Sydney, 16 March 2021. I acknowledge the considerable assistance of my tipstaff, Lauren Musgrave, in the preparation and drafting of this paper. All mistakes are, of course, my own.

[2] United Nations Environment Programme and Sabin Center for Climate Change Law, *Global Climate Litigation Report: 2020 Status Review* (No DEL/2333/NA, 2020), 6.

[3] United Nations Environment Programme and Sabin Center for Climate Change Law, *Global Climate Litigation Report: 2020 Status Review* (No DEL/2333/NA, 2020), 6.

[4] United Nations Environment Programme and Sabin Center for Climate Change Law, *Global Climate Litigation Report: 2020 Status Review* (No DEL/2333/NA, 2020), 7.

[5] United Nations Environment Programme and Sabin Center for Climate Change Law, *Global Climate Litigation Report: 2020 Status Review* (No DEL/2333/NA, 2020), 6 noting the Sabin Center for Climate Change Law's US and non-US Climate Change Litigation charts and Climate Change Laws of the World Database and citing David Markell and J.B. Ruhl, 'An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?' (2012) 64(15) *Florida Law Review*, 27.

[6] Elizabeth Fisher, 'Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to Massachusetts v. EPA' (2013) 35(3) *Law & Policy* 236, 238.

3. This presentation will trace the development of the three discrete, yet often overlapping, waves of climate change litigation, both domestic and international.

4. The first wave of climate change litigation is commonly identified as litigation directed to compliance with environmental and planning legislation.[7] In the United States, the first wave was also characterised by actions in tort brought by governments,[8] advocacy groups,[9] and First Nations communities,[10] often by recourse to the public trust doctrine.[11] The second wave comprises actions alleging an infringement of constitutional or human rights.[12] The third wave employs corporate law to hold companies, company directors, auditors, advisors, and superannuation trustees, to account for failing to adequately mitigate, adapt to, or disclose the transactional risks of climate change.[13] In other words, it has pursued the money.

5. Before examining the three waves of climate change litigation, it is important to acknowledge the heterogeneity this litigation.[14] Most climate change litigation scholarship has focused on the so-called 'Global North' (for example, the United States, the United Kingdom, and Australia).[15] Regrettably this belies the fact that nations in the 'Global South' (south east Asia and the South Pacific) are among the most vulnerable to its impacts.[16]

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[7] The Hon Justice Brian J Preston SC, 'Legal imagination and climate litigation' (2020) 35(1) *Australian Environmental Review*, 2.
[8] See *Connecticut v American Electric Power*, 406 F Supp 2d 265 (SDNY, 2005), revd 582 F 3d 309 (2nd Cir, 2009); *People of the State of California v General Motors* (ND Cal, C06-05755 MJJ, 17 September 2007) slip op.
[9] See *Juliana v United States* (9th Cir, No. 18-36082, 17 January 2020) slip op.
[10] See *Kivalina v Exxon Mobil* 663 F Supp 2d 863 (ND Cal, 2009); *Kivalina v Exxon Mobil* 696 F 3d 849 (9th Cir, 2012); *Kivalina v Exxon Mobil* 133 US 2390 (2013).
[11] *Juliana v United States* (9th Cir, No. 18-36082, 17 January 2020) slip op.
[12] The Hon Justice Brian J Preston SC, 'Legal imagination and climate litigation' (2020) 35(1) *Australian Environmental Review*, 2.
[13] Andrew Korbel, 'A new era of climate litigation in Australia' (2020) 35(1) *Australian Environmental Review*, 10.
[14] Joana Setzer and Rebecca Byrnes, 'Global trends in climate change litigation: 2020 snapshot' (2020) *Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science*, 4.
[15] Jacqueline Peel and Jolene Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113(4) *The American Journal of International Law*, 679, 681. Those authors use that term to denote countries included in Annex I of the United Nations Framework Convention on Climate Change.
[16] Jacqueline Peel and Jolene Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113(4) *The American Journal of International Law*, 681-682.

The First Wave: a Ripple

6. Historically, climate change litigation in Australia has taken the form of judicial and merits review challenges to executive decision-making under environmental and planning legislation.[17] Typically this category of litigation has sought to challenge and set aside development approvals,[18] on that basis that there has been a failure to mitigate against potential contributions to greenhouse gas emissions,[19] or a failure to taken into account the likely future impacts of climate change.[20] This category of litigation generally arises in jurisdictions with expansive environmental and planning regulatory frameworks where standing is generally broadly conferred.

7. The success of the first wave of climate change litigation has been circumscribed because of the inherent limitations of judicial and merits review.[21] That is, a decision that is set aside pursuant to a successful judicial review application can be lawfully remade allowing the impugned development to proceed.[22] While merits review determinations permit a court or tribunal to refuse to grant an approval or to impose conditions that address climate change,[23] these decisions have minimal precedential and normative value.

[17] Federal Court of Australia, 19 August 2015, 'Statement re NSD33/2015 *Mackay Conservation Group v Minister for Environment*'; *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7.
[18] The Hon Justice Nicola Pain, 'Recent developments in climate change litigation in Australia and Beyond' (paper presented at the Law Society of NSW, Young Lawyers Environment Committee Annual Conference, 23 March 2019, Sydney), 3.
[19] See *Gray v Minister for Planning* (2006) 152 LGERA 258; *Coast and Country Association of Queensland Inc v Smith* [2016] QCA 242; *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7; *Australian Conservation Foundation v Minister for Environment and Energy* (2017) 251 FCR 359; *Australian Conservation Foundation v Latrobe City Council* (2004) 140 LGERA 100.
[20] See *Kennedy v NSW Minister for Planning* (2010) 176 LGERA 395; *Copley v Logan City Council* [2012] QPEC 39; *West Gippsland Catchment Management Authority v East Gippsland Shire Council* [2016] VCAT 1580.
[21] The Hon Justice Rachel Pepper, 'Climate change litigation issue: introduction' (2017) 32(3) *Australian Environment Review,* 54.
[22] The Hon Justice Rachel Pepper, 'Climate change litigation issue: introduction' (2017) 32(3) *Australian Environment Review,* 54. See also Federal Court of Australia, 19 August 2015, 'Statement re NSD33/2015 *Mackay Conservation Group v Minister for Environment*', quoted in University of Adelaide Public Law and Policy Research Unit, submission 35 to the Senate Inquiry into the *Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*.
[23] The Hon Justice Brian J Preston SC, 'Mapping Climate Change Litigation Australian' (2018) 92(10) *Australian Law Journal*, 787.

8. In the United States, the first wave of climate change litigation relied on actions in tort.[24] Each of Connecticut,[25] California,[26] and the City of New York[27] have brought actions against their biggest polluters on this basis. In *Kivalina v Exxon Mobil*, the Indigenous Inupiat village of Kivalina brought an ultimately unsuccessful nuisance suit against resource companies alleging that the respondent companies' contributions to climate change had caused the melting of arctic ice thereby threatening to render their lands uninhabitable.[28]

9. In Australia there has been a reticence to pursue tortious climate change actions due to the difficulty of establishing causation where the climate change impacts wrought by a single company or project are but a "drop in the ocean".[29] However, as Noel Hutley SC and Sebastian Hartford-Davis have observed in 2019, developments in climate attribution science (that is, the science of attributing extreme weather events[30]) mean that establishing a causative link between development activity and consequential climate change harm is becoming easier.[31]

10. In this context, the Chief Judge of the Land and Environment Court ("LEC") has suggested that there will be an increasing number of actions relating to the appropriateness of granting development approvals in flood prone, coastal or bushfire prone areas; the adequacy of building standards to withstand extreme weather events; legal responsibility for erosion, landslides, and flooding resulting from extreme weather events; the adequacy of emergency measures; the failure to undertake disease prevention programs as temperature increases

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[24] The Hon Justice Brian J Preston SC, 'Legal imagination and climate litigation' (2020) 35(1) *Australian Environmental Review*, 2.
[25] See *Connecticut v American Electric Power*, 406 F Supp 2d 265 (SDNY, 2005), revd 582 F 3d 309 (2nd Cir, 2009).
[26] *People of the State of California v General Motors* (ND Cal, C06-05755 MJJ, 17 September 2007) slip op.
[27] *City of New York v BP p.l.c.* (SDNY, 2018).
[28] *Kivalina v Exxon Mobil* 663 F Supp 2d 863 (ND Cal, 2009); *Kivalina v Exxon Mobil* 696 F 3d 849 (9th Cir, 2012); *Kivalina v Exxon Mobil* 133 US 2390 (2013).
[29] See Jacqueline Peel, 'Issues in Climate Change Litigation' (2011) 5(1) *Carbon and Climate Law Review*, 15, 23.
[30] Friederike Otto, Rachel James, and Myles Allen, 'The science of attributing extreme weather events and its potential contribution to assessing loss and damage associated with climate change impacts' Environmental Change Institute, School of Geography and the Environment, University of Oxford <https://unfccc.int/files/adaptation/workstreams/loss_and_damage/application/pdf/attributingextremeevents.pdf >.
[31] Noel Hutley SC and Sebastian Hartford-Davis, 'Climate Change and Directors' Duties: Supplementary Memorandum of Opinion' 26 March 2019, The Centre for Policy Development, [17].

result in disease proliferation; and the failure to preserve public natural assets in the face of climate change.[32]

11. But to date no court has ordered a defendant to pay damages for climate harms caused by a defendant's contribution to climate change.

12. In North America, the first wave of climate change litigation also relied on the public trust doctrine to argue that government has fiduciary obligations with respect to natural resources that it holds on trust for its citizens. At its core is the principle that exercises of government authority are restricted with respect to certain resources that must be held for the general public, must not be sold, and must be maintained for particular types of uses.[33]

13. In *Juliana v United States*, the District Court of Oregon left open the question of whether the atmosphere was a public trust asset.[34] In *La Rose v Canada* a coalition of young people brought an action against the Canadian government alleging that its inaction on climate change contravened the Canadian Charter of Rights and Freedoms, the Canadian Constitution, and the public trust doctrine.[35] However, in a decision handed down in December 2020, the Federal Court of Canada held that the public trust doctrine did not exist in Canadian law and the Court struck out the plaintiffs' pleadings in this regard.[36]

14. Commentators have observed that the public trust doctrine may be "submerged" or "sleeping" in Australia,[37] and have encouraged Australian practitioners to consider arguing a modernised conception of the public trust

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[32] The Hon Justice Brian J Preston SC, 'Mapping Climate Change Litigation' (2018) 92(10) *Australian Law Journal*, 776.
[33] Lauren Butterly, Rena Hasimi, Elaine Johnson and Rana Koroglu, 'Could the Public Trust Doctrine be used for climate litigation in Australia? The modernisation of the Public Trust Doctrine in the US and Canada in the context of the climate emergency' (2020) 35(1) *Australian Environment Review*, 15 citing Joseph Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' (1970) 68 *Michigan Law Review*, 477.
[34] *Juliana v United States* (D Or, 6:15-cv-01517-TC, 11 October 2016), 1255.
[35] *Luciuk (Guardian ad litem of) v. Canada,* [2020] F.C.J. No. 1037.
[36] *Luciuk (Guardian ad litem of) v. Canada*, [2020] F.C.J. No. 1037; *Luciuk (Guardian ad litem of) v. Canada*, [2020] F.C.J. No. 1037 at [59].
[37] Lauren Butterly, Rena Hasimi, Elaine Johnson and Rana Koroglu, 'Could the Public Trust Doctrine be used for climate litigation in Australia? The modernisation of the Public Trust Doctrine in the US and Canada in the context of the climate emergency' (2020) 35(1) *Australian Environment Review*, 15.

doctrine[38] on the basis that the Commonwealth, State and Territory governments owe a duty to the public to preserve the environment.[39] The the doctrine may be grounded in common law, statute, or equity.[40] In *Upper Mooki Landcare Inc v Shenua Watermark Coal Pty Ltd* the Chief Judge of the LEC left open the possibility of the public trust doctrine applying, while determining that it was not necessary to consider the doctrine in that decision.[41]

The Second Wave: Surf's Up

15. Internationally, there has been a marked increase in second wave cases more recently.[42] In jurisdictions such as Colombia, Ecuador, India, and New Zealand, rights-based arguments have been applied and expanded to include ascribing legal personhood to the natural world, including forests and rivers.[43]

16. The success of rights-based litigation is, however, dependent on the strength of the human rights framework within a particular jurisdiction. In the seminal case of *Urgenda v the Netherlands* the applicant successfully argued that pursuant to Arts 2 and 8 of the European Convention on Human Rights[44] (that is, the right to life and the right to a family and private life, respectively) the Dutch State was obligated to reduce greenhouse gas emissions by at least 25% by 2020 (when compared to 1990), in accordance with recommendations made

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[38] Lauren Butterly, Rena Hasimi, Elaine Johnson and Rana Koroglu, 'Could the Public Trust Doctrine be used for climate litigation in Australia? The modernisation of the Public Trust Doctrine in the US and Canada in the context of the climate emergency' (2020) 35(1) *Australian Environment Review*, 18.

[39] Lauren Butterly, Rena Hasimi, Elaine Johnson and Rana Koroglu, 'Could the Public Trust Doctrine be used for climate litigation in Australia? The modernisation of the Public Trust Doctrine in the US and Canada in the context of the climate emergency' (2020) 35(1) *Australian Environment Review*, 19.

[40] Lauren Butterly, Rena Hasimi, Elaine Johnson and Rana Koroglu, 'Could the Public Trust Doctrine be used for climate litigation in Australia? The modernisation of the Public Trust Doctrine in the US and Canada in the context of the climate emergency' (2020) 35(1) *Australian Environment Review*, 18.

[41] *Upper Mooki Landcare Inc v Shenua Watermark Coal Pty Ltd* [2016] NSWLEC 6 at [150]. See also *Willoughby City Council v Minister Administering the National Parks and Wildlife Act* (1992) 78 LGERA 19 at 34.

[42] United Nations Environment Programme and Sabin Center for Climate Change Law, *Global Climate Litigation Report: 2020 Status Review* (No DEL/2333/NA, 2020), 13.

[43] See Cristy Clark, Nia Emmanouil, John Page, Alessandro Pelizzon, 'Can You Hear the Rivers Sing? Legal Personhood, Ontology, and the Nitty-Gritty of Governance' (2018) 45(787) *Ecology Law Quarterly*; Dejusticia, 'Climate Change and Future Generations Lawsuit in Colombia: Key Excerpts from the Supreme Court's Decision' 13 April 2018 <https://www.dejusticia.org/en/climate-change-and-future-generations-lawsuit-in-colombia-key-excerpts-from-the-supreme-courts-decision/>.

[44] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 13 UNTS 221 (entered into force on 3 September 1953).

by the Intergovernmental Panel on Climate Change's Fourth Assessment Report.[45]

17. *Urgenda* evidences the ways in which a robust human rights framework may assist plaintiffs to effect concrete change. However, a human rights framework alone will be insufficient to achieve sound environmental outcomes. Countries that have strong constitutional environmental rights protection do not necessarily enjoy strong environmental protection.[46] For example, India was ranked 177 out of 180 countries on the *2018 Environmental Performance Index*, while Bangladesh and Nepal were ranked 179 and 176, respectively.[47] Good policy, political will, adequate resourcing, and the development of supporting institutional frameworks are also necessary.[48]

18. Jacqueline Peel and Jolene Lin have written that rights-based climate change litigation is disproportionately common in the Global South.[49] Peel and Lin also observe that climate change action in the Global South tends to be invoked at the periphery of litigation. They note that climate change actions in the Global South are more likely to be embedded within wider disputes regarding human and constitutional rights, conflicting land use, disaster management, and natural resource conservation.[50] The learned authors suggest that this may be due to inadequate resourcing; a diminished emphasis on climate change issues when compared to more pressing matters such as economic development,

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[45] *Urgenda Foundation v The State of the Netherlands* ECLI:NL:2019:2007 at [7.5.1]
[46] Rachel Pepper, Harry Hobbs, 'The Environment is All Rights: Human Rights, Constitutional Rights and Environmental Rights' (2021) 44(2) *Melbourne University Law Review* [not yet published. p 17 in draft].
[47] Rachel Pepper, Harry Hobbs, 'The Environment is All Rights: Human Rights, Constitutional Rights and Environmental Rights' (2021) 44(2) *Melbourne University Law Review* [not yet published. p 17 in draft] citing Zachary Wendling et al, *2018 Environmental Performance Index* (Yale Center for Environmental Law & Policy, 2018) vii.
[48] Rachel Pepper, Harry Hobbs, 'The Environment is All Rights: Human Rights, Constitutional Rights and Environmental Rights' (2021) 44(2) *Melbourne University Law Review* [not yet published. p 17 in draft] citing Chris Jeffords and Lanse Minkler, 'Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes' (2016) 69(2) *Kyklos* 294, 294, 298.
[49] Jacqueline Peel and Jolene Lin, 'Transnational Climate Litigation: the Contribution of the Global South' (2019) 113(4) *The American Journal of International Law*, fn. 20. Those authors use that term to denote United Nations Framework Convention on Climate Change non-Annex I countries.
[50] Jacqueline Peel and Jolene Lin, 'Transnational Climate Litigation: the Contribution of the Global South' (2019) 113(4) *The American Journal of International Law*, 683.

poverty alleviation, or public health concerns; and poor regulatory frameworks.[51]

19. Perhaps this is why the judiciary is playing an increasingly significant role in holding governments accountable in the Global South. For example, in the celebrated case of *Minors Oposa v Factoran* in 1993, the Supreme Court of the Philippines applied Art II of the *Constitution of the Republic of the Philippines 1987* to recognise the right of one generation (who were minors) to bring a class action on behalf of "generations yet unborn" (invoking the principle of intergenerational equity) to "ensure the protection of that right [to a sound environment] for generations to come".[52] In granting the petition for a writ of certiorari, the Court described the right to a "balanced and healthful ecology" afforded by Art II as a "fundamental legal right" and that, "as a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind."[53]

20. Likewise, in *Leghari v Federation of Pakistan*[54] a farmer alleged that the Pakistani government's delays in implementing its National Climate Change Policy violated its peoples' constitutional rights to life and dignity. The Green Bench[55] allowed Leghari's application, invoking the right to life and dignity enshrined in the Constitution of Pakistan and international jurisprudence in relation to the concepts of intergenerational equity and the precautionary principle.[56]

21. The second wave of climate change litigation in Australia has only just arrived. This is because of an absence of federally enacted human rights legislation and

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[51] Jacqueline Peel and Jolene Lin, 'Transnational Climate Litigation: the Contribution of the Global South' (2019) 113(4) *The American Journal of International Law*, 692-693.
[52] *Juan Antonio Oposa v The Hon Fulgencio S Factoran, Jr* (1993) (GR No 101083, 224 SCRA 792) per Davide JR. See also *Metropolitan Manila Development Authority v Concerned Residents of Manila Bay* (2008) (GR Nos 171947-171948).
[53] *Juan Antonio Oposa v The Hon Fulgencio S Factoran, Jr* (1993) (GR No 101083 ,224 SCRA 792) at 8. See also *Metropolitan Manila Development Authority v Concerned Residents of Manila Bay* (2008) (GR Nos 171947- 171948) per Davide JR.
[54] *Ashgar Leghari v Federation of Pakistan* WP No 25501/2015.
[55] On 5 April 2012, the Chief Justice of the Lahore High Court constituted a "Green Bench" and "Green Division Bench" to hear environmental cases before the Lahore High Court. The notifications regarding the establishment of both benches can be accessed here: <https://www.lhc.gov.pk/green_bench_notifications>.
[56] *Ashgar Leghari v Federation of Pakistan* WP No. 25501/2015 at [7].

any explicit recognition of human rights in the Commonwealth Constitution. The recent enactment of State and Territory human rights legislation is likely to alter this situation. Thus the newly promulgated *Human Rights Act 2019* (Qld) ("the Act") is already acting as a catalyst for rights-based climate change litigation in that State.[57]

22. A recent Queensland Land Court decision illustrates this point. In *Waratah Coal Pty Ltd v Youth Verdict Ltd*, Waratah Coal made an application to the Qld Land Court to strike out a number of objections to its Galilee Coal Project brought on human rights grounds by advocacy groups, Youth Verdict and the Bimblebox Alliance. The objectors had pleaded that Waratah Coal's development would infringe the right to life, and the cultural rights of Aboriginal and Torres Strait Islander peoples, both expressly provided for in that Act.[58] The Land Court rejected Waratah Coal's argument that it was beyond the Court's jurisdiction to consider objections based on the Act.[59] The Court held that it could not make a decision incompatible with human rights[60] and was therefore bound to consider human rights in making its decision.[61] The Court dismissed Waratah Coal's application and ordered it to pay costs.[62]

23. Somewhat analogous, last year in *Sharma v Minister for Environment* teenagers brought a class action in the Federal Court of Australia pleading that the Commonwealth Environment Minister owes them a duty to exercise power under ss 130 and 133 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) with reasonable care so as to not cause them climate change related harm.[63] The applicants are seeking injunctive and

[57] Briana Collins and Justine Bell-James, 'Rights-based opportunities for Australian climate litigation: the fresh potential of the Human Rights Act 2019 (Qld)' (2020) 35(1) *Australian Environment Review*; Jay Gillieatt, 'Youth Verdict and human-rights based climate litigation in Australia' (2021) 35(7)(8), 160.
[58] Jay Gillieatt, 'Youth Verdict and human-rights based climate litigation in Australia' (2021) 35(7)(8), 161-162.
[59] *Waratah Coal Pty Ltd v Youth Verdict Ltd* [2020] QLC 33, [77].
[60] *Waratah Coal Pty Ltd v Youth Verdict Ltd* [2020] QLC 33, [73]-[74].
[61] *Waratah Coal Pty Ltd v Youth Verdict Ltd* [2020] QLC 33, [76].
[62] *Waratah Coal Pty Ltd v Youth Verdict Ltd* [2020] QLC 33, 22.
[63] *Sharma v Minister for the Environment* (Amended Concise Statement, Federal Court of Australia VID607/2020, 14 December 2020).

declaratory relief to prevent the Minister from approving the extension of a mine in NSW.[64] The case is ongoing.

24. The second wave of climate change litigation also includes claims brought by climate refugees. These claims will become increasingly common as the adverse effects of climate change intensify. However, the obstacles that climate refugees will encounter in establishing their claims were made plain in the United Nations Human Rights Committee's ("the Committee") recent decision regarding the communication submitted by Ioane Teitiota[65] under Art 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights ("the Covenant").[66] Teitiota, a national of Kiribati, claimed that New Zealand had violated the Covenant by removing him from New Zealand to Kirabati in September 2015, in circumstances where climate change related sea level rise in Kirabati had resulted in a fundamental breach of his right to life. He submitted that the scarcity of fresh water on Kirabati because of saltwater contamination had resulted in overcrowding and subsequent violent altercations.[67]

25. A majority of the Committee rejected Teitiota's claim, finding that there was insufficient evidence before it to conclude that the supply of fresh water on Kirabati was inaccessible, insufficient, or unsafe so as to produce a reasonably foreseeable threat of a health risk that would impair the right to enjoy a life with dignity, or cause unnatural or premature death.[68] The Committee accepted Teitiota's claim that sea level rise was likely to render Kirabati uninhabitable, but noted that the likely timeframe of 10 to 15 years could allow for intervening acts by Kirabati, or the international community, to protect and, if necessary,

[64] *Sharma v Minister for the Environment* (Amended Originating Application, Federal Court of Australia VID607/2020, 14 December 2020).
[65] Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016*, UN Doc CCPR/C/127/D/2728/2016 (23 September 2020).
[66] *International Covenant on Civil and Political Rights*, General Assembly, signed 16 December 1966, 999 UNTS 171.
[67] Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016*, UN Doc CCPR/C/127/D/2728/2016 (23 September 2020) at [2.1].
[68] Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016*, UN Doc CCPR/C/127/D/2728/2016 (23 September 2020) at [9.8].

relocate its population.[69] The decision in *Teitiota* highlights the difficulties applicants are likely to face in establishing the imminence of harm due to climate change.

26. Nevertheless, a group of Torres Strait Islander Peoples have brought a Committee complaint against the Commonwealth government regarding its perceived climate change inaction.[70] They allege that Australia has violated Arts 6, 17, and 27 of the Covenant by failing to take action on climate change.[71] In December 2020, the United Nations Special Rapporteur on Human Rights and the Environment filed a joint amicus brief in support.[72]

The Third Wave: a Tsunami?

27. The third wave of climate change litigation emerged in the US in cases such as *Ramirez v Exxon Mobil Corporation*,[73] in which investors brought a class action against Exxon Mobil alleging that the company had made false and misleading statements about the impact of climate change on its business, and in *Lynn v Peabody Energy Corp*,[74] where plaintiffs argued that the respondent had breached its fiduciary duty by retaining shares in Peabody as an investment option for its pension plans when a reasonable fiduciary would have done otherwise having regard to the ongoing commercial divestment from the coal industry in the market.

28. Similar cases have been brought in Australia. First, in 2017 in *Abrahams v Commonwealth Bank of Australia*, shareholders of the Commonwealth Bank of Australia ("CBA") commenced proceedings in the Federal Court against CBA alleging that it had violated a number of the provisions of the *Corporations Act*

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[69] Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016*, UN Doc CCPR/C/127/D/2728/2016 (23 September 2020) at [9.12].
[70] 'Climate threatened Torres Strait Islanders bring human rights claim against Australia' *ClientEarth* (Web Page, 12 May 2019) <https://www.clientearth.org/press/climate-threatened-torres-strait-islanders-bring-human-rights-claim-against-australia/>.
[71] 'Torres Strait FAQ' *ClientEarth* (Web Page, 2019) <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190513_Not-Available_press-release.pdf>.
[72] Torres Strait Islander complaint against climate change inaction wins backing of UN legal experts' *ABC News* (Web Page, 11 December 2020) <https://www.abc.net.au/news/2020-12-11/torres-strait-islander-complaint-against-climate-change-inaction/12972926>.
[73] *Ramirez v Exxon Mobil Corporation* (ND Tex, 3:16-cv-3111-K, 14 August 2018).
[74] *Lynn v Peabody* (ED Mo, 4:15CV00916 AGF, 30 March 2017).

2001 (Cth) by failing to disclose climate related business risk in its 2016 annual report.[75] The proceedings were discontinued after CBA acknowledged those risks in its 2017 annual report.[76]

29. Second, in 2018 Mark McVeigh commenced proceedings in the Federal Court against the trustee of the Retail Employees Superannuation Trust ("REST"). McVeigh originally argued that REST had contravened s 1017C of the *Corporations Act 2001* (Cth) by failing to provide him with information regarding the financial risks posed to his superannuation account to enable him to make an informed judgment about the management of that account.[77] McVeigh subsequently amended his pleadings to further allege that REST breached its duties as a trustee by misrepresenting the strength of its climate change policy.[78] After two years of litigation, the parties settled the proceedings in November 2020.[79]

30. Third, in 2020 a similar action has commenced in the Federal Court by Kathleen O'Donnell, an investor in Commonwealth government bonds, against the Secretary to the Department of the Treasury and the Chief Executive Officer of the Australian Office of Financial Management. O'Donnell seeks declarations that the Comonwealth and its officers have breached their duty of disclosure under Pt 7.9 Div 5C of the *Corporations Act 2001* (Cth) by failing to disclose climate change risks to investors.[80]. Injunctive relief is also sought restraining the Commonwealth from promoting its bonds until it complies with its duty. In addition, O'Donnell pleads that the inadequacy of the respondents' disclosure constitutes misleading and deceptive conduct under s 12DA(1) of the *Australian Investments and Securities Commission Act 2001* (Cth).[81] O'Donnell further

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[75] *Guy Abrahams v Commonwealth Bank of Australia* (Concise Statement, Federal Court of Australia VID879/2017, 8 August 2017) at [16]-[19].
[76] 'Commonwealth Bank shareholders drop suit over nondisclosure of climate risks' The Guardian Australia (Web Page, 21 September 2017) <https://www.theguardian.com/australia-news/2017/sep/21/commonwealth-bank-shareholders-drop-suit-over-non-disclosure-of-climate-risks>.
[77] *McVeigh v Retail Employees Superannuation Pty Ltd* [2019] FCA 14 at [4].
[78] *McVeigh v Retail Employees Superannuation Pty Ltd* [2019] FCA 14 at [7].
[79] 'Rest reaches settlement with Mark McVeigh' Rest (Web Page, 2 November 2020) <https://rest.com.au/why-rest/about-rest/news/rest-reaches-settlement-with-mark-mcveigh>.
[80] 'Concise Statement', *Kathleen O'Donnell v Commonwealth of Australia & Ors* (Federal Court of Australia, VID482/2020, 22 July 2020) at [19]-[21].
[81] 'Concise Statement', *Kathleen O'Donnell v Commonwealth of Australia & Ors* (Federal Court of Australia, VID482/2020, 22 July 2020) at [22].

contends that in failing to provide adequate disclosure of climate change risks, the respondents have breached their duty of care and diligence under s 25(1) of the *Public Governance, Performance and Accountability Act 2013* (Cth).[82] The Commonwealth has yet to file a defence in the proceedings.

31. The third wave also includes 'greenwashing' complaints, which allege that advertising campaigns contain false or misleading information about climate change impacts. In December 2019 ClientEarth complained to the Organisation for Economic Co-operation and Development ("OECD") alleging that British Petroleum's ("BP") advertising campaign "Possibilities Everywhere" misled the public by overstating the scale of renewable and low-carbon energy in BP's portfolio in violation of the OECD's Guidelines for Multinational Enterprises.[83] Those Guidelines require organisations to provide accurate information to enable consumers to make informed decisions regarding the environmental impacts of products.[84] In response, BP withdrew the campaign and pledged to focus on its net zero ambitions.[85] The UN Status Review notes that plaintiffs are increasingly filing consumer and investor fraud claims alleging that companies have failed to disclose information about climate risk or have disclosed such information in a misleading way.[86]

32. As the impacts of climate change worsen and the transition away from carbon intensive industry accelerates, investor losses will increase and with it third wave climate change litigation.[87] There will be a shift away from public interest

[82] 'Concise Statement', *Kathleen O'Donnell v Commonwealth of Australia & Ors* (Federal Court of Australia, VID482/2020, 22 July 2020) at [24]-[25].
[83] ClientEarth, 'Complaint against BP in respect of violations of the OECD Guidelines' 19 December 2019, 6 < https://www.clientearth.org/media/4npme1i1/ncp-complaint-clientearth-v-bp-complaint-submission-and-annex-a-ce-en.pdf>.
[84] OECD, *OECD Guidelines for Multinational Enterprises* (2011) OECD Publishing <http://dx.doi.org/10.1787/9789264115415-en>, Ch VI, cl 6(c).
[85] ClientEarth, 'BP pulls advertising campaign just months after our legal complaint' (Web Page, 14 February 2020) < https://www.clientearth.org/latest/latest-updates/news/bp-pulls-advertising-campaign-just-months-after-our-legal-complaint/>.
[86] United Nations Environment Programme and Sabin Center for Climate Change Law, *Global Climate Litigation Report: 2020 Status Review* (No DEL/2333/NA, 2020), 4.
[87] Andrew Korbel, 'A new era of climate litigation in Australia' (2020) 35(1) *Australian Environmental Review*, 10.

litigation, which seeks to disrupt projects, towards claims for damages by investors who have suffered unexpected losses as a result of climate change.[88]

33. In an Australian context, changes in the regulatory framework surrounding disclosure will accelerate the momentum of the third wave. The Reserve Bank of Australia,[89] the Australian Securities and Investment Commission,[90] and the Australian Prudential Regulatory Authority,[91] have all publicly acknowledged the importance of climate change related disclosure. Additionally, there have been significant changes in financial reporting frameworks relevant to the disclosure of climate risk.[92] As Hutley SC and Hartford-Davis have observed, "these developments are indicative of a rapidly developing benchmark against which a director's conduct would be measured in any proceedings alleging negligence".[93] The observation is apt.

34. Many large resource companies are likely to be vulnerable to this kind of litigation. Again, Hutley SC and Hartford-Davis note that corporate disclosure of climate change risks have a tendency to be inconsistent both in terms of quantity and quality.[94] Anita Foerster and Jacqueline Peel have conducted a baseline assessment of the reporting practices of a small group of large Australian resource and energy companies representing a significant portion of

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[88] Andrew Korbel, 'A new era of climate litigation in Australia' (2020) 35(1) *Australian Environmental Review*, 13.
[89] Deputy Governor Guy Debelle, 'Climate Change and the Economy' (Speech, Centre for Policy Development, Sydney, 12 March 2019).
[90] ASIC Commissioner John Price, 'Climate change' (Speech, Centre for Policy Development, Sydney, 18 June 2018).
[91] APRA Executive Board Member Geoff Summerhayes, 'Australia's new horizon: Climate change challenges
and prudential risk' (Speech, Insurance Council of Australia, Sydney, 17 February 2017) < https://www.apra.gov.au/media-centre/speeches/australias-new-horizon-climate-change-challenges-andprudential-risk>; 'The weight of money: A business case for climate risk
resilience' (Speech, Centre for Policy Development, Sydney, 29 November 2017) <https://www.apra.gov.au/media-centre/speeches/weight-money-business-case-climate-risk-resilience>.
[92] Noel Hutley SC and Sebastian Hartford-Davis, 'Climate Change and Directors' Duties: Supplementary Memorandum of Opinion' 26 March 2019, The Centre for Policy Development, [7].
[93] Noel Hutley SC and Sebastian Hartford-Davis, 'Climate Change and Directors' Duties: Supplementary Memorandum of Opinion' 26 March 2019, The Centre for Policy Development, [6].
[94] Noel Hutley SC and Sebastian Hartford-Davis, 'Climate Change and Directors' Duties: Memorandum of Opinion' 7 October 2016, The Centre for Policy Development and the Future Business Council, [46]-[48].

market share. Their assessment reveals that climate change risk disclosure is highly variable in terms of nature, extent, and quality of reporting.[95]

Preparing for the Flood(gates)

35. As the physical and transactional impacts of the present climate emergency escalate, there be a concomitant increase in the volume of climate change litigation. Between 2017 and 2020 there has been a marked acceleration in international climate change litigation.[96] In 2017 the United Nations identified 884 cases brought in 24 countries. As of 1 July 2020, that number had nearly doubled with at least 1550 climate change cases filed in 38 countries.[97]

36. This trend has been encouraged by the strengthening of regulatory and legislative disclosure requirements, and scientific advances which assist plaintiffs in establishing the foreseeability of climate change harm.[98] More recently, there has also been an expanding number of pre and post disaster cases pleading a failure to plan for, or mitigate against, extreme weather events.[99] To this end, climate attribution science can be expected to play an ever central role in future litigation.[100]

37. In Australia, the first wave litigation will continue, and the second wave of rights-based climate change litigation reliant on State and Territory and international human rights instruments has begun. Australia is also likely to be subject to further climate change refugee litigation by its neighbours in the Pacific as sea-levels continue to rise.[101]

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[95] Anita Foerster and Jacqueline Peel, 'US fossil fuel companies facing legal action for misleading disclosure of climate risks: could it happen in Australia?' (2017) 32(3) *Australian Environment Review*, 59.
[96] United Nations Environment Programme and Sabin Center for Climate Change Law, *Global Climate Litigation Report: 2020 Status Review* (No DEL/2333/NA, 2020), 3.
[97] United Nations Environment Programme and Sabin Center for Climate Change Law, *Global Climate Litigation Report: 2020 Status Review* (No DEL/2333/NA, 2020), 3.
[98] United Nations Environment Programme and Sabin Center for Climate Change Law, *Global Climate Litigation Report: 2020 Status Review* (No DEL/2333/NA, 2020), 4.
[99] United Nations Environment Programme and Sabin Center for Climate Change Law, *Global Climate Litigation Report: 2020 Status Review* (No DEL/2333/NA, 2020), 4.
[100] United Nations Environment Programme and Sabin Center for Climate Change Law, *Global Climate Litigation Report: 2020 Status Review* (No DEL/2333/NA, 2020), 4, 44.
[101] United Nations Environment Programme and Sabin Center for Climate Change Law, *Global Climate Litigation Report: 2020 Status Review* (No DEL/2333/NA, 2020), 29.

38. However, it is the third wave of climate change litigation that is likely to become a tsunami in the future.[102] In the hands of a competent litigator, corporate law can accomplish what the first and second waves of climate change litigation in Australia have to date failed to do by creating an economic imperative to mitigate and adapt to climate change.[103] Start swimming now.

[102] Andrew Korbel, 'A new era of climate litigation in Australia' (2020) 35(1) *Australian Environment Review*, 13.
[103] The Hon Justice Rachel Pepper, 'Climate change litigation issue: introduction' (2017) 32(3) *Australian Environment Review*, 55.