

SHAPING THE ‘NEXT GENERATION’ OF CLIMATE CHANGE LITIGATION IN AUSTRALIA

JACQUELINE PEEL,^{*} HARI OSOFSKY[†] AND ANITA FOERSTER[‡]

Recent international developments — including the conclusion and entry into force of the Paris Agreement and the high-profile Urgenda case, in which the Dutch government was sued over its inadequate targets for reducing emissions of greenhouse gases — have sparked interest in the possibilities for exploring new avenues of strategic climate change litigation in Australia. Australia already has a substantial body of decided climate change cases. To date, most have involved administrative challenges to projects under environmental laws in order to have climate change impacts taken into account. While this ‘first generation’ of cases has achieved significant results, there is increasing interest in the environmental advocacy and legal communities in taking forward a ‘next generation’ of cases that have a broader focus on holding governments and corporations directly accountable for the climate change implications of their actions. This article is the first to explore the contours of such next-generation climate change litigation in Australia, including the drivers for these lawsuits, the potential legal avenues by which they might be brought, and likely enablers and barriers. Rather than abandoning first-generation challenges — which have targeted Australia’s principal sources of greenhouse gas emissions such as coal-fired power stations and coal mines — we argue that the most fruitful strategy for future climate change litigation in Australia is likely to be one that continues to advance lower risk cases building from the base of existing litigation, while simultaneously attempting novel approaches. If sufficient resources existed, such an approach would have the benefit of allowing for more likely wins, paired with high-profile innovation that might capture the public imagination and maximise the potential for significant policy and regulatory impact.

^{*} BSc, LLB (Hons) (UQ), LLM (NYU), PhD (Melb); Professor of Law, Melbourne Law School, The University of Melbourne.

[†] BA, JD (Yale), PhD (University of Oregon); Dean, Penn State Law and School of International Affairs; Distinguished Professor of Law, Professor of International Affairs, Professor of Geography, The Pennsylvania State University.

[‡] LLB (Hons), PhD (Melb); Senior Research Fellow, Melbourne Law School, The University of Melbourne.

CONTENTS

I	Introduction.....	794
II	Why a ‘Next Generation’ of Climate Change Litigation?.....	800
	A Defining ‘Next-Generation’ Climate Change Litigation	801
	B Drivers for Next-Generation Lawsuits	805
	1 International Legal Developments.....	805
	2 Improvements in Climate Change Science	811
	3 Changing Business Culture around Climate Change Risk	813
III	Taking Forward Next-Generation Climate Change Litigation.....	815
	A Avenues for Next-Generation Climate Change Litigation	816
	1 An Australian <i>Urgenda</i> ?	818
	2 Suing Companies and Their Directors?	825
	B Relationship between First- and Next-Generation Litigation	828
IV	Enablers and Challenges for Next-Generation Climate Change Litigation.....	831
	A Procedural Barriers.....	831
	B Evidentiary Aspects	834
	C Partnering and Facilitation	836
	1 Partnering in the Area of Energy Policy and Competition Law.....	837
	2 Partnering with Shareholders and Investors.....	840
V	Conclusion: Shaping the Next Generation of Australian Climate Litigation..	843

I INTRODUCTION

This is an opportunity to be bold spirits rather than timorous souls and provide a lead for the common law world.¹

Strategic climate change litigation generally involves the use of the law and court action to advance beneficial outcomes for addressing climate change.²

¹ Justice Paul L Stein, ‘Are Decision-Makers Too Cautious with the Precautionary Principle?’ (2000) 17 *Environmental and Planning Law Journal* 3, 3. Justice Stein in this article was discussing judicial innovation to develop understanding and application of the precautionary principle as a central principle of environmental law. Other members of the judiciary have argued that a similarly progressive approach is necessary in cases dealing with climate change. For instance, in the recent US decision of *Juliana v United States of America*, 217 F Supp 3d 1224, 1263 (D Or, 2016), discussed below, Aiken J of the US District Court of Oregon urged that ‘[e]ven when a case implicates hotly contested political issues, the judiciary must not shrink from its role as a coequal branch of government’.

Climate change litigation in Australia has a long and proud history. The first climate change case of *Greenpeace Australia Ltd v Redbank Power Pty Ltd* ('Redbank Power') was decided in 1994 by Pearlman CJ of the Land and Environment Court of New South Wales ('NSWLEC').³ That case involved a challenge by Greenpeace, supported by the Environmental Defenders Office NSW ('EDO NSW'),⁴ to a government decision approving a new coal-fired power station on grounds including the potential for the power station to emit greenhouse gases ('GHG') and contribute to climate change. *Redbank Power* has served as a model for much of the ensuing climate change litigation in Australia over the subsequent 20 years. Like the *Redbank Power* case, this 'first generation' of Australian climate change litigation has largely concerned administrative challenges to government decision-making under planning and environmental legislation, seeking to incorporate climate change within the scope of decision-making on a project, generally as an aspect of ensuring the application of concepts or principles of ecologically sustainable development ('ESD').⁵ One stream of this litigation has targeted GHG emissions reduction (mitigation) by challenging coal-fired power and coal mines.⁶ A second 'adaptation' stream has focused on climate change impacts for

² For a discussion of strategic litigation, see Catherine Corey Barber, 'Tackling the Evaluation Challenge in Human Rights: Assessing the Impact of Strategic Litigation Organisations' (2012) 16 *International Journal of Human Rights* 411.

³ (1994) 86 LGERA 143.

⁴ Environmental Defenders Offices ('EDOs') are an Australia-wide network of environmental legal organisations providing advice and advocacy on public interest environmental issues and litigation: EDOs of Australia, *EDOs of Australia: Protecting the Environment through Law* (Brochure) <[https://d3n8a8pro7vmtx.cloudfront.net/edonsw/pages/1399/attachments/original/1446680490/151104_EDO_Network_CV_Brochure_-_final_\(2\).pdf?1446680490](https://d3n8a8pro7vmtx.cloudfront.net/edonsw/pages/1399/attachments/original/1446680490/151104_EDO_Network_CV_Brochure_-_final_(2).pdf?1446680490)>, archived at <<https://perma.cc/5LZM-VQAX>>.

⁵ ESD is a central concept of Australian environmental law calling for 'development which aims to meet the needs of Australians today, while conserving our ecosystems for the benefit of future generations': Ecologically Sustainable Development Steering Committee, 'National Strategy for Ecologically Sustainable Development: Part 1 — Introduction', *Department of Environment and Energy* (Web Page, December 1992) <www.environment.gov.au/about-us/esd/publications/national-esd-strategy-part1#WIESD>, archived at <<https://perma.cc/YD5B-LGKV>>. In legislation it is often expressed as a series of ESD 'principles' including those of biodiversity conservation, polluter pays, intergenerational equity and the precautionary principle: see, eg, *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) s 3A.

⁶ See, eg, *Redbank Power* (n 3); *Australian Conservation Foundation Inc v Minister for the Environment* [2016] FCA 1042.

development, such as the risks posed by sea level rise and increased coastal flooding.⁷

The achievements of the first generation of climate change litigation in Australia have been significant in a number of ways.⁸ Over time — in an incremental and iterative fashion — these cases have consolidated the practice of including climate change considerations in environmental impact assessment undertaken for projects with substantial GHG emissions or the potential to be impacted by climate change consequences such as sea level rise.⁹ More broadly, the cases have raised awareness of climate change as a key environmental issue in the public, business, professional and government sectors.¹⁰

Nonetheless, climate change litigation in Australia has not achieved the transformative impact seen in other countries. Australia, for example, has not had a *Massachusetts v EPA* moment equivalent to that of the US. The US Supreme Court's decision in that case required the Environmental Protection Agency ('EPA') either to regulate motor vehicle GHG emissions or better justify its refusal to do so.¹¹ On the basis of this decision, the Obama administration found GHG emissions cause pollution that threatens public health and welfare, and introduced regulations to limit such emissions from motor

⁷ See, eg, *Wade v Warrnambool City Council* [2009] VCAT 2177; *Tauschke v East Gippsland SC* [2009] VCAT 2231.

⁸ While first-generation climate change cases have been decided by both state and federal courts and tribunals across Australia, many of the cases with the most far-reaching impacts are decisions of the NSWLEC: see, eg, the 'Anvil Hill' case of *Gray v Minister for Planning* (2006) 152 LGERA 258. Courts in other jurisdictions, such as the South Australian Environment, Resources and Development Court, the Planning and Environment Court in Queensland and the Victorian Civil and Administrative Tribunal have also decided a number of significant climate cases, albeit fewer than the NSWLEC. For details, see University of Melbourne, *Australian Climate Change Litigation* (Database) <<https://apps.law.unimelb.edu.au/lawapps/climatechange/index.php>>, archived at <<https://perma.cc/XMD9-C45G>>. This case law database is searchable by jurisdiction. It is fair to say that climate change cases before federal courts in Australia have not achieved success as a legal matter but have nevertheless had important indirect impacts on public opinion and government behaviour as documented in Jacqueline Peel and Hari M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015). For another useful database for Australian climate change cases, see Chris McGrath, 'Case Studies', *Environmental Law Australia* (Database) <<http://envlaw.com.au/category/case-studies>>, archived at <<https://perma.cc/8977-LZYB>>.

⁹ Jacqueline Peel, 'Environmental Impact Assessments and Climate Change' in Michael Faure (ed), *Elgar Encyclopedia of Environmental Law* (Elgar, 2016) vol 1, 348; see especially at 353–5.

¹⁰ These various 'regulatory impacts', direct and indirect, of the first generation of Australian climate change litigation are discussed extensively in Peel and Osofsky (n 8).

¹¹ *Massachusetts v Environmental Protection Agency*, 549 US 497 (2007).

vehicles¹² and stationary sources, such as power plants.¹³ A number of these regulations have been slated for repeal by the Trump administration,¹⁴ which in turn may open up new litigation pathways.

Australia also has not seen the kind of common law actions that have been brought in the US, alleging government or corporate responsibility for likely climate change damage on the basis of actions in nuisance, negligence or under the public trust doctrine.¹⁵ Although the US Supreme Court significantly limited federal public nuisance claims on the grounds that such actions are displaced by Congress's grant of authority to the EPA under the *Clean Air Act*,¹⁶ that avenue could reopen if the Republican Congress — without the veto constraints under President Trump that President Obama provided — eliminates that authority. Efforts to use the public trust doctrine in the United States achieved an important milestone in November 2016, when an Oregon district court held in *Juliana* that constitutional due process and public trust claims against the federal government for its failure to address climate change

¹² *Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act*, 74 Fed Reg 66496 (15 December 2009). See generally Peel and Osofsky, (n 8) 65–8.

¹³ *Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units; Final Rule*, 80 Fed Reg 64510 (23 October 2015) introduced a carbon pollution standard for new power plants under *Clean Air Act*, 42 USC ch 85 (1970) § 7411(b). The Obama administration's Clean Power Plan proposed 'emission guidelines for states to follow in developing plans to address greenhouse gas emissions from existing fossil fuel-fired electric generating units': *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Proposed Rule*, 79 Fed Reg 34830, 34830 (18 June 2014). In addition to the directives in President Trump's Executive Order and the EPA's proposed rule repealing the Clean Power Plan described below, this Clean Power Plan has been subject to challenge in industry lawsuits. In February 2016, the US Supreme Court issued a decision staying the EPA's implementation of the Clean Power Plan pending the resolution of these challenges before the District of Columbia Circuit Court: *Order in Pending Case, West Virginia v EPA* (9 February 2016) <www.scotusblog.com/wp-content/uploads/2016/02/15A773-Clean-Power-Plan-stay-order.pdf>, archived at <<https://perma.cc/HKT9-SPSB>>.

¹⁴ *Executive Order No 13783*, 82 Fed Reg 16093 (31 March 2017). Section 2 of the Trump administration's Executive Order requires an 'immediate review of all agency actions that potentially burden the safe, efficient development of domestic energy resources'. Section 3(ii) rescinds the Obama-era Executive Order on carbon pollution standards for new power plants and s 4 orders the EPA to review the Clean Power Plan. On 16 October 2017, the EPA proposed a repeal of the Clean Power Plan, with comments due on 15 December 2017: *Proposed Rule*, 82 Fed Reg 48035 (16 October 2017).

¹⁵ See Sabin Centre for Climate Change Law, Columbia Law School and Arnold & Porter Kaye Scholer LLP, 'US Climate Change Litigation', *Climate Change Litigation Databases* (Database, 2017) <www.climatecasechart.com>, archived at <<https://perma.cc/3SCT-H6JQ>>.

¹⁶ *Clean Air Act* (n 13); *American Electric Power Co Inc v Connecticut*, 564 US 410, 423 (2011).

sufficiently had been adequately alleged to survive a motion to dismiss.¹⁷ While the ultimate resolution of this case on the merits remains unclear, it provides an important model for how a public trust claim can be framed in the climate change context.

Courts in other jurisdictions issued ground-breaking decisions around governmental duties to address climate change in the lead-up to the 2015 international climate negotiations in Paris. In June 2015, the Hague District Court in the Netherlands handed down a decision finding that the Dutch government's 2020 GHG emissions-reduction target was inadequate in light of international climate science and international climate policy, and ordering the government to increase its target in fulfilment of a duty of care to its citizens to safeguard them from the effects of climate change.¹⁸ Four months later in September 2015, the Lahore High Court in Pakistan held that the national government violated its citizens' fundamental rights through delays in implementing the country's climate change adaptation policy framework.¹⁹ Greenpeace Southeast Asia, together with local groups and individuals, also filed a petition that same month, which the Philippines Commission on Human Rights is currently considering.²⁰ The petition claims that major contributors to climate change, including the 50 largest fossil fuel companies, are violating Filipinos' fundamental human rights.²¹ That December, the international community concluded a decades-long negotiation process to adopt the 2015 *Paris Agreement* with the central goal of holding global average

¹⁷ *Juliana* (n 1).

¹⁸ *Urgenda Foundation v Netherlands (Ministry of Infrastructure and the Environment)*, Rechtbank Den Haag [Hague District Court], C/09/456689/HA ZA 13-1396 (24 June 2015) ('*Urgenda*') [English translation] <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196>>, archived at <<https://perma.cc/L6KG-Z76S>>.

¹⁹ *Leghari v Federation of Pakistan*, Lahore High Court Green Bench (Pakistan), WP No 25501/2015, Orders of 4 September 2015 and 14 September 2015 <https://elaw.org/PK_AsgharLeghari_v_Pakistan_2015>, archived at <<https://perma.cc/U3QJ-D68E>>.

²⁰ Greenpeace South East Asia et al, Petition to the Commission on Human Rights (Republic of the Philippines), Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change (22 September 2015, amended 9 May 2016) <www.greenpeace.org/seasia/ph/press/releases/Worlds-largest-carbon-producers-ordered-to-respond-to-allegations-of-human-rights--abuses-from-climate-change/The-Climate-Change-and-Human-Rights-Petition>, archived at <<https://perma.cc/U3QJ-D68E>>.

²¹ *Ibid.* The Commission accepted the petition in December 2015 and is currently conducting its investigation: Greenpeace, 'Philippines Launches World's First National Human Rights Investigation into 50 Big Polluters' (Press Release, 4 December 2015) <www.greenpeace.org/international/en/press/releases/2015/Philippines-launches-worlds-first-national-human-rights-investigation-into-50-big-polluters>, archived at <<https://perma.cc/8YCC-2HY2>>.

temperature rises to ‘well below 2°C’ and pursuing efforts to limit temperature rises to no more than 1.5°C.²²

In light of these international developments, there has been increasing discussion in the Australian environmental advocacy and legal communities of the potential to emulate recent overseas climate change lawsuits with a ‘next generation’ of climate change litigation.²³ While there is a high level of interest in pursuing such cases, many questions remain about what exactly next-generation climate change litigation in Australia might involve. What causes of action may be pursued and which might offer the best prospects of success in an Australian legal context? What are the potential enablers of, and barriers to, bringing next-generation climate change cases? More fundamentally, is there a need for a next generation of novel climate change lawsuits or are efforts to launch such cases better viewed as an extension of first-generation litigation, building on the strategies and lessons developed through that experience? This article provides the first comprehensive analysis of these questions in an Australian context, with the aim of beginning, and informing, further conversations around the future of climate-change litigation in Australia.

Following an examination of ways of defining ‘next-generation’ climate change litigation, Part II of the article considers the impetus for discussions about initiating such cases in Australia. It identifies key drivers, including recent high-profile international cases, the conclusion of the *Paris Agreement*, advances in climate change science, and a changing business culture regarding climate change risk. Part III then turns to the question of how next-generation climate change litigation might be taken forward in an Australian context. It canvasses potential pathways for next-generation cases, as well as their relationship to past and ongoing first-generation litigation. A critical question that arises in this regard is whether next-generation climate change cases should displace or supplement first-generation litigation. Part IV considers

²² United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on its Twenty-First Session, Held in Paris from 30 November to 13 December 2015*, UNFCCC Dec 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1 (29 January 2016) annex (‘*Paris Agreement*’) art 2.1(a).

²³ See generally Australian Earth Laws Alliance, ‘AELA 2016 Conference: The Future of Australian Environmental Law — Politics, Reform and Community Activism’ (Web Page, 2016) <<https://perma.cc/T7YP-28VP>>. These discussions clearly recognise that international models will need to be adapted to local circumstances and take account of local legal constraints. These cases in other jurisdictions are thus considered an inspiration for new types of climate change cases in Australia rather than examples that can be directly transposed into the Australian legal environment.

potential enabling factors and hurdles for next-generation climate litigation that are shared with other types of public interest environmental litigation, but which may manifest in different ways in next-generation cases. These include: procedural questions relating to getting a case before the courts, such as standing, case funding and costs risks, securing legal representation and selecting an appropriate forum for the case; evidentiary aspects once the case is in court such as issues of showing attribution and causation, and the presentation of climate science in the courtroom; and new opportunities for advocacy organisations to partner with companies, investors and others who have aligned interests in clean energy transition or adaptation planning. Part V concludes with a discussion of the competing strategic considerations that are likely to be in play as groups work to shape the next generation of climate change litigation.

II WHY A 'NEXT GENERATION' OF CLIMATE CHANGE LITIGATION?

Unlike many other countries, Australia already has a significant history of climate change litigation.²⁴ The only country that has had more cases is the United States.²⁵ Therefore, in discussing next-generation Australian climate change litigation, environmental advocates and lawyers are not talking about how to *start* a climate change justice movement in this country,²⁶ but rather whether and how that movement needs to be revitalised, potentially through bringing different sorts of lawsuits to those that have characterised the first

²⁴ Meredith Wilensky, 'Climate Change in the Courts: An Assessment of Non-US Climate Litigation' (Research Paper, Sabin Center for Climate Change Law, February 2015) <https://web.law.columbia.edu/sites/default/files/microsites/climate-change/white_paper_-_climate_change_in_the_courts_-_assessment_of_non_u.s._climate_litigation.pdf>, archived at <<https://perma.cc/UE3D-YRE6>>.

²⁵ *Ibid* ii.

²⁶ Climate change justice is a rather elastic term used in many different ways by different groups in different contexts. The Climate Change Justice and Human Rights Task Force of the International Bar Association provides a leading discussion of the concept: International Bar Association, Climate Change Justice and Human Rights Task Force, *Achieving Justice and Human Rights in an Era of Climate Disruption* (Report, 2014) 2 <www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx>, archived at <<https://perma.cc/HPH3-CP64>>. The Task Force defined climate justice in the following terms: 'To ensure communities, individuals and governments have substantive legal and procedural rights relating to the enjoyment of a safe, clean, healthy and sustainable environment and the means to take or cause measures to be taken within their national legislative and judicial systems and, where necessary, at regional and international levels, to mitigate sources of climate change and provide for adaptation to its effects in a manner that respects human rights.'

generation of cases. This part considers how next-generation climate change litigation might be defined. It then discusses some of the key drivers that have generated momentum for investigating next-generation lawsuits, or at least, taking a fresh look at climate change litigation in Australia and how its strategic impact might be maximised.

A Defining 'Next-Generation' Climate Change Litigation

A central concern in assessing the potential for a next generation of climate change litigation in Australia is an understanding of what such litigation might involve. This is not a straightforward question to answer. For a start, climate change litigation itself can be difficult to define.²⁷ As Peel and Osofsky have discussed in previous work on this topic, a useful way of conceptualising climate change litigation is as a series of concentric circles (see Figure 1).²⁸ At the core are cases that directly engage questions of climate change law and climate science, for example, corporate responsibility for the environmental impacts of GHG emissions. As we move towards the periphery of the circles, climate change tends to feature less in the arguments put before a court, even if addressing the problem of climate change remains one of the key motivators for those bringing the cases. For the most part, 'strategic' climate change litigation — that brought with the aim of producing policy or social change with respect to the issue — involves litigating 'core' climate change cases.

²⁷ There is no one agreed definition of climate change litigation but in general commentators point to the need for a specific framing of arguments, motives or the judgment in climate change terms: see, eg, David L Markell and JB Ruhl, 'An Empirical Survey of Climate Change Litigation in the United States' (2010) 40 *Environmental Law Reporter* 10644, 10647; Chris Hilson, 'Climate Change Litigation in the UK: An Explanatory Approach (or Bringing Grievance Back In)' in Fabrizio Fracchia and Massimo Occhiena (eds), *Climate Change: La Risposta del Diritto* (Editoriale Scientifica, 2010) 421, 422.

²⁸ Peel and Osofsky (n 8) 8.

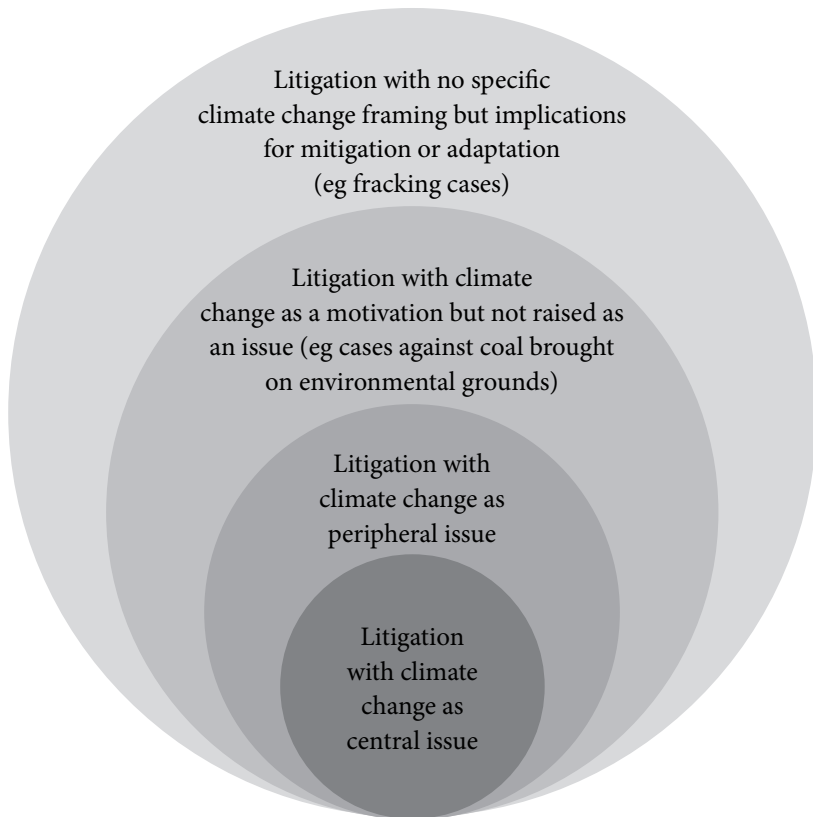


Figure 1: Conceptualising Climate Change Litigation²⁹

The second question that then arises is what is *next-generation* climate change litigation? This necessarily involves some notion of what is encompassed within first-generation climate change jurisprudence and how next-generation cases differ from what has gone before. In Australia, most climate change litigation to date has pursued a standard statutory pathway, albeit with variations depending upon the legislation under which a case is brought.³⁰ These cases have generally involved challenges to administrative decision-making (either judicial review or merits review) under planning or environmental legislation raising questions of both climate change mitigation and

²⁹ Ibid 8.

³⁰ Ibid 40.

adaptation.³¹ There have also been a number of cases brought by the Australian Competition and Consumer Commission ('ACCC') relating to misleading 'green' product claims.³² In addition, in the broader penumbra of climate change litigation — cases in the outer circles depicted in Figure 1³³ — there has been an increasing number of cases focusing on issues such as the use of hydraulic fracturing ('fracking') for coal seam gas exploitation,³⁴ access to information,³⁵ and class actions for damage from extreme weather events such as major floods and bushfires.³⁶ However, in the main, the core of first-generation cases are lawsuits that have focused on individual, emissions-intensive *projects*, which have been brought under environmental *statutes*, and have sought to *improve governmental decision-making* regarding those projects.

By contrast, what we have termed next-generation litigation in this article represents a shift away from the project-level focus and environmental statutory basis of earlier cases. Next-generation cases are founded on an accountability model whereby legal interventions are designed to hold governments and corporations *directly* to account for the climate change implications of their activities.³⁷ Lawsuits in this vein often embrace a broader range of parties pursuing climate change-related litigation with a different range of motivations than those of first-generation litigants. In particular, parties may not be pursuing actions to advance beneficial outcomes for addressing climate change as a primary goal. Even if they are driven by

³¹ See generally University of Melbourne, *Australian Climate Change Litigation* (n 8).

³² Brian J Preston, 'Climate Change Litigation (Part 1)' (2011) 5 *Carbon and Climate Law Review* 3, 12–14.

³³ Peel and Osofsky (n 8) 8.

³⁴ See, eg, 'Mining and Coal Seam Gas,' NSW EDO (Web Page, 2016) <www.edonsw.org.au/mining_coal_seam_gas_cases>, archived at <<https://perma.cc/GJ7Q-PK3Y>>, for mining and coal seam gas hydraulic fracturing cases undertaken by EDO NSW.

³⁵ See, eg, *Environment Victoria Inc v Department of Primary Industries (General)* [2013] VCAT 39.

³⁶ See The New Lawyer, 'Qld Flood Class Action Could Be the Biggest Ever,' *Lawyers Weekly* (Sydney, 23 March 2012) <www.lawyersweekly.com.au/deals/12695-qld-flood-class-action-could-be-biggest-ever>, archived at <<https://perma.cc/9WG3-7ZMN>>; Tim Tobin and Andrew Fraatz, 'Bushfire Class Actions' (2012) 109 *Precedent* 4.

³⁷ It is recognised that merits and judicial review are also means to hold governments accountable for their decision-making. In first-generation cases, however, such actions are designed to ensure that governments meet statutory requirements and act within the law. In next-generation cases, the focus is on how government policy, action or inaction contributes directly to climate change and ways of holding governments to account for those contributions.

commercial motives, though, the end result is potentially beneficial to addressing climate change where cases foster better consideration of climate change risks in business decision-making and the eventual uptake of clean energy practices. This trend is particularly apparent in the growing interest in lawsuits brought by shareholders and investors against companies and directors over inadequate disclosure of climate change risk. But it is equally the case in emerging US public trust lawsuits (involving youth plaintiffs arguing on behalf of future generations' interests)³⁸ or human rights cases (highlighting the linkage between violation of rights protections and environmental harms, including climate change).³⁹

Another difference that is evident between past cases and proposed next-generation cases is the move away from using only administrative law avenues under environmental legislation to also exploring causes of action found in the common law or in other areas of law outside of the environmental field. This broadening of the scope of legal avenues considered for climate change litigation reflects both concerns with the adequacy of administrative review (particularly judicial review) as a tool for effecting transformative legal change in the climate change arena,⁴⁰ as well as a desire to provide stronger foundations for duties of care on the part of governments and corporations to address climate change. It is important to emphasise, however, that the legal avenues being considered as a basis for next-generation climate change litigation are not themselves novel causes of action. Indeed, one of the ironies of next-generation litigation is that legal advocates are often looking to the past to shape the litigation of the future. By turning to old legal precedents, well-established mechanisms in other areas of law, and 'ancient' common law doctrines such as the public trust,⁴¹ the architects of next-generation climate change litigation seek to repurpose these existing legal tools for new climate-related ends.

³⁸ See, eg, *Juliana* (n 1).

³⁹ See John H Knox, 'Climate Change and Human Rights Law' (2009) 50 *Virginia Journal of International Law* 163.

⁴⁰ See, eg, Kirsty Ruddock, 'Has Judicial Review Killed ESD?' (2013) 28 *Australian Environment Review* 625.

⁴¹ *Juliana* (n 1) 1262.

B Drivers for Next-Generation Lawsuits

1 International Legal Developments

Our starting point for this consideration of next-generation cases is the perception — which has been at the forefront of recent discussions of climate change litigation within the Australian environmental advocacy community — that recent international legal developments have created impetus or opportunities for thinking about strategic climate change litigation in new ways.⁴² The *Urgenda* case — which generated significant media attention in Australia as in other countries⁴³ — is often cited as an important development in this regard.⁴⁴ The legal prospects of an *Urgenda*-style case in Australia may be significantly lower given differences between the relevant provisions of the *Dutch Civil Code* relied on by the *Urgenda* plaintiffs and tortious causes of action in Australia's common law system.⁴⁵ Nonetheless, the Hague District Court's decision on 24 June 2015 undoubtedly inspired and energised the Australian environmental advocacy community regarding the potential for climate change litigation to achieve policy change.⁴⁶ Environmental advocacy organisations, such as the Environmental Defenders Offices ('EDOs'), have been deluged since the *Urgenda* decision with enquiries about the potential for similar cases in Australia, with interest from both prospective claimants and funders.⁴⁷ More broadly, it is evident that the *Urgenda* case put climate

⁴² See n 23.

⁴³ See, eg, Katherine Lake, 'What Does the Dutch Court Ruling on Climate Targets Mean for Australia?', *The Conversation* (Online, 26 June 2015) <<https://theconversation.com/what-does-the-dutch-court-ruling-on-climate-targets-mean-for-australia-43841>>, archived at <<https://perma.cc/E73J-JNFZ>>; Don Anton, 'A Dutch Blueprint for Climate Litigation', *The Sydney Morning Herald* (Sydney, 2 July 2015) <www.smh.com.au/comment/a-dutch-blueprint-for-climate-litigation-20150702-gi3d5d.html>, archived at <<https://perma.cc/BR4A-AQ99>>.

⁴⁴ See, eg, Tim Baxter, 'Urgenda-Style Climate Litigation Has Promise in Australia' (2017) 32 *Australian Environment Review* 70.

⁴⁵ See Part III(A)(1).

⁴⁶ In July 2015, EDOs around the country hosted a visit and series of presentations on the case from Marjan Minnesma, Director of Urgenda: 'Climate Change: Climate Litigation Specialist Marjan Minnesma to Detail Landmark Legal Challenge at State Library of Queensland', *The Courier Mail* (Brisbane, 21 July 2015) <www.couriermail.com.au/news/queensland/climate-change-climate-litigation-specialist-marjan-minnesma-to-detail-landmark-legal-challenge-at-state-library-of-queensland/news-story/211dc09724cea5c870f49038e6635b15>.

⁴⁷ This was noted by participants in the 2016 Shaping the Next Generation of Climate Change Litigation workshop: see generally Anita Foerster, Hari Osofsky and Jacqueline Peel, 'Shaping the Next Generation of Australian Climate Change Litigation' (Report on a Melbourne Law School Workshop, 17 November 2016) <http://law.unimelb.edu.au/__data/assets/pdf_file/

change litigation on the map for a wider range of actors than those usually engaged in first-generation cases, including different constituencies of litigation funders and barristers. This has encouraged a fresh perspective on possible avenues for bringing climate change cases, especially within the legal community.⁴⁸

Another pivotal development that has helped to re-enliven interest in climate change litigation in Australia is the *Paris Agreement* concluded by 195 nations at the end of 2015.⁴⁹ This treaty entered into force on 4 November 2016 and will come into effect from 2020.⁵⁰ On 10 November 2016, Australia announced its formal ratification, joining over 100 other countries that are now party to the treaty.⁵¹ Australia's 2030 emissions reduction pledge — of a 26–8% cut in emissions from 2005 levels — is widely considered inadequate,⁵²

0003/2292285/Workshop-Report-Shaping-the-next-generation-of-climate-litigation.pdf>, archived at <<https://perma.cc/3ZT7-ATUH>>.

⁴⁸ Felicity Nelson, 'Dutch Climate Champion Brings "Case for Hope" to Australia', *Lawyers Weekly* (Sydney, 24 July 2015) <www.lawyersweekly.com.au/news/16874-dutch-climate-champion-brings-a-case-for-hope-to-australia>, archived at <<https://perma.cc/W92P-DCHC>>. Cf Felicity Nelson, 'Dutch Climate Change Case No Roadmap for Aus', *Lawyers Weekly* (Sydney, 16 July 2015) <www.lawyersweekly.com.au/news/16831-can-we-replicate-the-dutch-climate-change-victory>, archived at <<https://perma.cc/8GTS-G45K>>.

⁴⁹ 'Historic Paris Agreement on Climate Change: 195 Nations Set Path to Keep Temperature Rise Well below 2 Degrees Celsius', *United Nations Framework Convention on Climate Change* (Web Page, 12 December 2015) <<http://newsroom.unfccc.int/unfccc-newsroom/finale-cop21>>, archived at <<https://perma.cc/J7E9-UH3J>>.

⁵⁰ See *Paris Agreement* (n 22); 'Paris Agreement: Status of Ratification', *United Nations Framework Convention on Climate Change* (Web Page) <http://unfccc.int/paris_agreement/items/9444.php>, archived at <<https://perma.cc/7G6B-STT2>>.

⁵¹ Malcolm Turnbull, Julie Bishop and Josh Frydenberg, 'Ratification of the Paris Agreement on Climate Change and the Doha Amendment to the Kyoto Protocol' (Joint Media Release, 10 November 2016) <http://foreignminister.gov.au/releases/Pages/2016/jb_mr_161110a.aspx?w=tb1CaGpkPX%2FIS0K%2Bg9ZKEg%3D%3D>, archived at <<https://perma.cc/XD9F-NXLK>>. Under the Doha Amendment to the *Kyoto Protocol*, Australia has committed to emissions reduction obligations for a 'second commitment period' up to 2020. Australia's 2020 reduction target is a 5% cut on 2000 levels of GHG emissions: 'Fact Check: Do Australia, US "Compare Favourably" on Emissions Targets?', *ABC News* (Online, 18 December 2014) <www.abc.net.au/news/2014-12-18/greg-hunt-cherrypicking-emissions-reduction-targets/5896148>, archived at <<https://perma.cc/CG9L-8PSE>>. For the latest information on the parties to the *Paris Agreement*, see 'Paris Agreement: Status of Ratification' (n 50).

⁵² 'Fact Check' (n 51); Australian Government Department of the Prime Minister and Cabinet, *Australia's 2030 Emission Reduction Target* (Summary Report, 11 August 2015) <www.pmc.gov.au/resource-centre/domestic-policy/summary-report-australia-s-2030-emission-reduction-targets>, archived at <<https://perma.cc/7DYZ-BXKH>>; David Thorpe, 'Australia's Climate Pledge Leaves Other Countries to Pick up the Slack', *The Fifth Estate* (Web Page, 18 August 2015) <www.thefifthestate.com.au/habitat/climate-change-news/australias-climate-

and there are also serious questions about the capacity of existing federal climate change measures, such as the Emissions Reduction Fund ('ERF'), to meet even that weak target.⁵³ Australia's participation in the *Paris Agreement* is thus likely to increase domestic and international scrutiny of its actions on climate change.

That said, President Trump's June 2017 decision to have the US withdraw from the treaty and abandon domestic federal implementation efforts such as the Clean Power Plan poses a significant challenge.⁵⁴ The US measures were expected to contribute around 20% of pledged global GHG emissions reductions.⁵⁵ The US government's submission of a formal notice of its intention to withdraw from the Paris Agreement followed in August 2017.⁵⁶ However, in accordance with art 28 of the treaty, this process will not be complete until November 2020.⁵⁷ As this process unfolds, it remains unclear

pledge-leaves-other-countries-to-pick-up-the-slack/76661>, archived at <<https://perma.cc/93NM-G7B4>>. See generally Climate Change Authority, *Comparing Countries' Emissions Targets: A Practical Guide* (Guide, March 2015).

⁵³ See, eg, Peter Hannam and Jonathan Swan, 'Ross Garnaut Slams Abbott Government's Direct Action Policy as like a "Martian Beauty Contest"', *The Sydney Morning Herald* (Sydney, 7 March 2014) <www.smh.com.au/federal-politics/political-news/ross-garnaut-slams-abbott-governments-direct-action-policy-as-like-a-martian-beauty-contest-20140306-34atj.html>, archived at <<https://perma.cc/C76D-6DH7>>; Paul Burke and Frank Jotzo, 'Wrong Way, Go Back', *Centre for Climate Economics and Policy, Crawford School of Public Policy, ANU College of Asia and the Pacific* (Web Page, 17 March 2014) <<https://ccep.crawford.anu.edu.au/news-events/news/3718/wrong-way-go-back>>, archived at <<https://perma.cc/56WX-K8F6>>; Peter Christoff, 'On These Numbers, Australia's Emissions Auction Won't Get the Job Done', *The Conversation* (Online, 27 April 2015) <<https://theconversation.com/on-these-numbers-australias-emissions-auction-wont-get-the-job-done-40761>>, archived at <<https://perma.cc/D5KQ-U5ET>>; Frank Jotzo, 'Australia's 2030 Climate Target Puts Us in the Race, but at the Back', *The Conversation* (Online, 12 August 2015) <<https://theconversation.com/australias-2030-climate-target-puts-us-in-the-race-but-at-the-back-45931>>, archived at <<https://perma.cc/DZE9-WT7F>>.

⁵⁴ See 'Statement by President Trump on the Paris Climate Accord', *The White House* (Web Page, 1 June 2017) <www.whitehouse.gov/the-press-office/2017/06/01/statement-president-trump-paris-climate-accord>, archived at <<https://perma.cc/2DLE-HYJP>>.

⁵⁵ Chris Mooney, 'What It Would Really Mean if Trump Pulls the US out of the Paris Climate Agreement', *The Washington Post* (Washington, 9 November 2016) <www.washingtonpost.com/news/energy-environment/wp/2016/11/09/what-it-would-really-mean-if-trump-pulls-the-u-s-out-of-the-paris-climate-agreement>, archived at <<https://perma.cc/373U-D39R>>.

⁵⁶ Office of the Spokesperson, 'Communication Regarding Intent to Withdraw from Paris Agreement', *US Department of State* (Media Note, 4 August 2017) <www.state.gov/r/prs/ps/2017/08/273050.htm>, archived at <<https://perma.cc/2SSH-3FX9>>.

⁵⁷ Lavanya Rajamani and Jutta Brunnée, 'The Legality of Downgrading Nationally Determined Contributions under the Paris Agreement: Lessons from the US Disengagement' (2017) 29 *Journal of Environmental Law* 537, 539; 'UN Officially Notified of US Intention to Withdraw from Paris Climate Pact', *UN News Centre* (Web Page, 4 August 2017) <www.un.org/apps/

whether the US will ultimately stay in the *Paris Agreement* but seek to ‘downgrade’ its emissions reduction pledge, as well as how such action or complete withdrawal by the US might affect the ambition of other countries’ climate actions.⁵⁸

If the *Paris Agreement* continues, with or without the US, it offers limited direct prospects for climate change litigation to enforce its requirements,⁵⁹ which are mostly directed to states parties’ preparation, implementation and review of their ‘nationally determined contributions’ (‘NDCs’) to the global climate change response.⁶⁰ In particular, the *Paris Agreement* does not provide specific legal causes of action that could be pursued by individuals or groups to enforce Australia’s obligations under the *Paris Agreement*. Moreover, the Australian government’s initial NDC for the period 2020–30 indicates that no new legislation will be enacted to give effect to Australia’s obligations under the *Paris Agreement*, which will instead be achieved relying on existing policy measures such as the ERF.⁶¹ Despite these limitations, the *Paris Agreement* provides a goal for international climate change action and an approach to achieving that goal that is considerably clearer and more transparent than previous agreements, which could help bolster claims in litigation brought using other legal avenues.

Two provisions of the *Paris Agreement* are potentially pertinent in this regard. The first is art 2, which sets out its overarching objective of strengthening the global response to the threat of climate change by, inter alia,

news/story.asp?NewsID=57314#.Wk3dl2iWZaQ>, archived at <<https://perma.cc/LR2M-XLWZ>>. *Paris Agreement* (n 22) annex art 28 provides:

- 1 At any time after three years from the date on which this Agreement has entered into force for a Party, that Party may withdraw from this Agreement by giving written notification to the Depositary.
- 2 Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal.
- 3 Any party that withdraws from the Convention shall be considered as also having withdrawn from this Agreement.

⁵⁸ See Rajamani and Brunnée (n 57).

⁵⁹ The *Paris Agreement* provides for limited dispute settlement and a weak compliance mechanism: see *Paris Agreement* (n 22) annex arts 15, 24.

⁶⁰ *Ibid* arts 3–4.

⁶¹ Australian Government, Department of Foreign Affairs and Trade, ‘Australia’s Intended Nationally Determined Contribution to a New Climate Change Agreement’ (August 2015) <<http://dfat.gov.au/international-relations/themes/climate-change/submissions/Pages/australias-intended-nationally-determined-contribution-to-a-new-climate-change-agreement-august-2015.aspx>>, archived at <<https://perma.cc/3UBP-865G>>.

[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.⁶²

This ‘long-term temperature goal’, as it is referred to in the *Paris Agreement*,⁶³ provides guidance on the maximum permissible global temperature rise considered acceptable by the international community.⁶⁴ Working backwards from the 2°C (or 1.5°C) target, scientists can calculate the remaining global carbon budget to stay within that temperature threshold.⁶⁵ Although the *Paris Agreement* does not specify parties’ individual shares of that budget, it does provide for a five-yearly ‘global stocktake’ to assess the collective progress made by NDCs in achieving the treaty’s goals, which is to be undertaken ‘in the light of equity and the best available science’.⁶⁶ These provisions articulate some broad parameters by which courts might judge the adequacy of a government’s proposed emissions reduction actions or the environmental significance of a particular emissions-intensive project. While the art 2 objective is not directly enforceable in Australian law, judges may take judicial notice of the new global temperature goal as part of their assessment of factual evidence in a case.⁶⁷ For instance, an understanding of the *Paris Agreement*’s

⁶² *Paris Agreement* (n 22) art 2.1(a).

⁶³ *Ibid* art 4.1.

⁶⁴ The 1992 *UNFCCC* — the parent treaty to the *Paris Agreement* — provided no firm guidance in this regard, merely aiming to ‘prevent dangerous anthropogenic interference with the climate system’: *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994) art 2.

⁶⁵ See Malte Meinshausen et al, ‘Greenhouse-Gas Emission Targets for Limiting Global Warming to 2°C’ (2009) 458 *Nature* 1158; Sivan Kartha, ‘Implications for Australia of a 1.5°C Future’ (Working Paper No 2016-09, Stockholm Environment Institute, 2016). In its fifth Assessment Report, the Intergovernmental Panel on Climate Change (‘IPCC’) established that atmospheric concentrations of GHG must be stabilised at 450 parts per million in order to achieve the 2°C target and provided their first explicit statements about the available carbon budget for various temperature targets: IPCC, *Climate Change 2014: Synthesis Report* (Report, 2015) 20. For example, in Table 2.2 of the report, the IPCC provided global carbon budgets that corresponded to three temperature thresholds (1.5°C, 2°C, 3°C) and three probabilities of keeping global temperature increases below these thresholds (66%, 50%, 33%): at 64.

⁶⁶ *Paris Agreement* (n 22) art 14.1.

⁶⁷ Rules of evidence concerning judicial notice of matters of common knowledge are a relevant consideration here. Given the high visibility and wide reliance on both the 1.5°C and 2°C temperature goals as indications of ‘safe’ levels of climate change, it is increasingly likely that a judge would take judicial notice of these matters. Section 144 of the uniform Evidence Acts provides that proof is not required about matters not reasonably open to question which are

long-term temperature goal and how it relates to global carbon budgets could inform judicial evaluation of evidence regarding factual questions such as how much a particular project or a particular entity's activities contribute to GHG emissions and climate change.⁶⁸

A second key provision of the *Paris Agreement* is art 4.1, which provides that,

[i]n order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.

common knowledge or capable of verification by reference to an authoritative document. Also potentially important is the law regarding the relationship of treaties and domestic law, particularly in situations where the treaty has been ratified by the Australian government, but there is not domestic legislation giving express effect to its substantive goals and objectives, as is the case in relation to the *Paris Agreement* (including the 2°C temperature goal). For a broad consideration of the extent to which unincorporated treaties and international law more generally can affect the domestic law of Australia, through the interpretation of statutes, development of the common law and potentially broadening the scope of judicial review, see Glen Cranwell, 'Treaties and Australian Law: Administrative Discretions, Statutes and the Common Law' (2001) 1 *Queensland University of Technology Law and Justice Journal* 49; Glen Cranwell, 'Treaties and the Interpretation of Statutes: Two Recent Examples in the Migration Context' (2003) 39 *AIAL Forum* 49.

⁶⁸ *Urgenda* provides a good example of a court relying, in part, on international climate change science and treaty law to find that the Dutch government owed a duty of care to *Urgenda* to set and implement emissions reduction targets in line with these standards: *Urgenda* (n 18). Arguably, this line of reasoning would be strengthened following the successful conclusion and coming into force of the *Paris Agreement* with its clear temperature goal. In *Urgenda*, the Court relied on IPCC climate science, international climate change agreements under the *UNFCCC* and decisions and statements by European institutions and the Dutch government to find that the 2°C temperature goal was the widely accepted starting point for the development of climate policies and that substantial cuts in GHG emissions globally were required to meet this goal and thereby avert dangerous climate change: see especially *Urgenda* (n 18) [4.11]–[4.34]. The Court also considered the emissions reductions required to achieve this goal at a national scale, finding that the Netherlands would need to achieve a 25–40% reduction in emissions (based on 1990 levels) by 2020 in order to contribute proportionally to meeting this goal. The Court relied on this evidence to determine the substantive content of the duty of care that was found to be owed by the Dutch Government to *Urgenda*, with an ultimate finding that the state had a legal obligation to *Urgenda* to deliver at least a 25% reduction in GHG emissions (based on 1990 levels) by 2020: at [5.1]. See also Roger Cox, *A Climate Change Litigation Precedent: Urgenda Foundation v The State of the Netherlands* (Paper No 79, Centre for International Governance Innovation, November 2015).

This provision equates to a call for global action to achieve ‘net zero emissions’ in the second half of the century — a goal that will only be attainable with a phase-out of fossil fuel energy sources.⁶⁹ Although art 4.1 does not provide a precise timeline for this phase-out, it clearly signals a finite lifespan for the fossil fuel economy globally. As such, it provides added impetus for domestic decision-making to move away from the approval of emissions-intensive projects. Again, art 4.1 does not provide domestic litigants with any direct legal pathway to hold governments or corporate actors accountable for climate change implications of their activities. However, as with art 2, it may aid plaintiffs in establishing factual points such as the sustainability of continued fossil fuel development.⁷⁰

2 Improvements in Climate Change Science

Another potential impetus for a renewed interest in climate change litigation is the increasing sophistication of climate change science. The most recent assessment by the Intergovernmental Panel on Climate Change (‘IPCC’) articulates the strong scientific consensus on the existence and human causes of climate change, as well as the likely nature of its impacts.⁷¹ In *Urgenda*, the Hague District Court extensively referred to IPCC reports to ground its understanding of the GHG emissions reductions required from developed countries in order to prevent dangerous anthropogenic global warming.⁷² Australian cases — even in jurisdictions that have in the past displayed open scepticism towards climate change science — have increasingly embraced the international scientific consensus on the causes and effects of climate change.⁷³

⁶⁹ Michael B Gerrard, ‘Legal Implications of the Paris Agreement for Fossil Fuels’, *Climate Law Blog* (Blog Post, 19 December 2015) <<http://blogs.law.columbia.edu/climatechange/2015/12/19/legal-implications-of-the-paris-agreement-for-fossil-fuels>>, archived at <<https://perma.cc/36U6-CEJT>>.

⁷⁰ See generally n 67. *Urgenda* provides a relevant example of a court drawing on international climate science and treaty law to make a finding on the issue of transition timeframes and pathways. Using this evidence, the court found it was not adequate for the Dutch government to postpone substantial emissions reduction measures beyond 2020: Cox (n 68) 6–9. Article 4.1 of the *Paris Agreement*, which provides for transition to net zero emissions in the second half of the century would arguably strengthen such a line of reasoning and encourage a court to consider evidence of the emissions reduction pathways required to achieve this objective.

⁷¹ IPCC, *Climate Change 2014: Impacts, Adaptation, and Vulnerability* (Cambridge, 2014).

⁷² *Urgenda* (n 18) [2.8]–[2.21].

⁷³ Justine Bell-James and Sean Ryan, ‘Climate Change Litigation in Queensland: A Case Study in Incrementalism’ (2016) 33 *Environmental and Planning Law Journal* 515.

What remains more challenging is linking specific projects with specific impacts, or from an adaptation or loss and damage perspective, linking specific weather events with specific harms. However, scientific knowledge on ‘event attribution’ is rapidly improving.⁷⁴ While it is still not possible to say definitively that a particular severe weather event was ‘caused’ by climate change, scientists are increasingly able to ‘estimate how much more or less likely the event has become due to human influences on the climate.’⁷⁵ For some climate change impacts, such as those related to increased temperatures (eg heat waves, coral bleaching, sea-level rise), the scientific understanding of causation is far more advanced than for others.⁷⁶

Advances have also been made in research examining the specific contribution of fossil fuel companies to global GHG emissions and climate change. Richard Heede’s pioneering work examining the share of global GHG emissions attributable since industrialisation to so-called ‘carbon major’ companies is one example.⁷⁷ This work formed the basis of the above-mentioned petition accepted by the Philippines Commission on Human Rights in December 2015 alleging the responsibility of carbon majors for climate change impacts on Filipinos’ human rights.⁷⁸ Another example is the use of climate scientists’ research on carbon budgets and climate change impacts. Scientists, such as Professor David Karoly and Dr Malte Meinshausen of the University of Melbourne, have given evidence as expert witnesses in several Australian challenges to coal mining projects regarding the contribu-

⁷⁴ Committee on Extreme Weather Events and Climate Change Attribution, National Academies of Sciences, *Attribution of Extreme Weather Events in the Context of Climate Change* (National Academies Press, 2016) 1.

⁷⁵ Andrew King and David Karoly, ‘How We Can Link Some Extreme Weather to Climate Change’, *Pursuit* (Online, 18 March 2016) <<https://pursuit.unimelb.edu.au/articles/how-we-can-link-some-extreme-weather-to-climate-change>>, archived at <<https://perma.cc/QW22-Q9BA>>.

⁷⁶ Mitchell T Black, David J Karoly and Andrew D King, ‘The Contribution of Anthropogenic Forcing to the Adelaide and Melbourne, Australia, Heat Waves of January 2014’ (2015) 96(12) (Special Supplement) *Bulletin of the American Meteorological Society* S145; Matthias Mengel et al, ‘Future Sea Level Rise Constrained by Observations and Long-Term Commitment’ (2016) 113 *Proceedings of the National Academy of Sciences of the United States of America* 2597; Scott F Heron et al, ‘Warming Trends and Bleaching Stress of the World’s Coral Reefs 1985–2012’ (2016) 6 *Scientific Reports* (online); Ruben van Hooidonk et al, ‘Local-Scale Projections of Coral Reef Futures and Implications of the Paris Agreement’ (2016) 6 *Scientific Reports* (online).

⁷⁷ See Richard Heede, ‘Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010’ (2014) 122 *Climatic Change* 229.

⁷⁸ Greenpeace South East Asia et al (n 20).

tion to climate change made by a particular mine proposal — evidence which assists in determining the significance of a project's environmental impacts.⁷⁹

3 *Changing Business Culture around Climate Change Risk*

The Paris Conference was notable for the constructive engagement of business interests and the private sector in a way not previously seen in other international climate change negotiations.⁸⁰ This engagement is evidence of an ongoing change in business culture around climate change risk as more and more companies and investors take the issue seriously and begin to take initiatives to transition to clean energy sources.⁸¹ Not all companies have embraced the need to disclose and act on climate change risk (indeed, some companies in the fossil fuel sector remain very resistant to this view and may be emboldened by the US Trump administration and its expansion of coal, gas and oil production).⁸² Nonetheless, there has been a gradual shift to view climate change as a material business risk.⁸³ Various efforts have underpinned and strengthened this shift, including the development of international standards by the Financial Stability Board's Task Force on Climate-Related Financial Disclosures,⁸⁴ and investigations launched by state Attorneys General and the Securities and Exchange Commission ("SEC") into alleged

⁷⁹ See, eg, *Xstrata Coal Queensland Pty Ltd v Friends of the Earth — Brisbane Co-Op Ltd* [2012] QLC 13, [552]; *Hancock Coal Pty Ltd v Kelly [No 4]* [2014] QLC 12, [214]–[216].

⁸⁰ Ilario D'Amato, 'Marc Bolland, CEO, M&S: COP21 a "Turning Point" Thanks to Business Engagement and Demand', *The Climate Group* (Blog Post, 6 December 2015) <www.theclimategroup.org/what-we-do/news-and-blogs/cop21-a-turning-point-thanks-to-business-engagement-and-demand-marc-bolland-ceo-mands>, archived at <<https://perma.cc/GJ57-J78Q>>.

⁸¹ This shift is evident in voluntary climate disclosures of companies tracked by organisations such as the CDP, the scale of which has increased significantly in recent years: CDP, *Out of the Starting Blocks: Tracking Progress on Corporate Climate Action* (Report, October 2016) <www.cdp.net/en/research/global-reports/tracking-climate-progress-2016>, archived at <<https://perma.cc/3WNR-EJXX>>.

⁸² Mark Barteau, 'What President Trump Means for the Future of Energy and Climate', *The Conversation* (Online, 10 November 2016) <<https://theconversation.com/what-president-trump-means-for-the-future-of-energy-and-climate-68045>>, archived at <<https://perma.cc/Y2BK-XX4Q>>.

⁸³ Sarah Barker et al, 'Climate Change and the Fiduciary Duties of Pension Fund Trustees: Lessons from the Australian Law' (2016) 6 *Journal of Sustainable Finance and Investment* 211.

⁸⁴ The Task Force launched its recommendations report on 14 December 2016: Task Force on Climate-Related Financial Disclosures, *Recommendations of the Task Force on Climate-Related Financial Disclosures* (Draft Report, 14 December 2016) <www.fsb-tcfd.org/publications/recommendations-report>, archived at <<https://perma.cc/V6WJ-KFNS>>.

misleading and deceptive disclosure practices of major coal and oil companies in the United States.⁸⁵ In Australia, key developments have included: the issue of an opinion from a leading Sydney barrister, Noel Hutley SC, on the obligations of company directors to consider and act on climate change risk;⁸⁶ and the announcement by Australia's financial regulator, the Australian Prudential Regulation Authority, that it intends to monitor the consideration and disclosure of climate risks by banks, insurers, superannuation funds and wealth managers given the financially material and foreseeable risks posed to Australian businesses, with potentially system-wide implications for the financial system.⁸⁷

⁸⁵ Justin Gillis and Clifford Krauss, 'Exxon Mobil Investigated for Possible Climate Change Lies by New York Attorney General', *The New York Times* (New York, 5 November 2015) <www.nytimes.com/2015/11/06/science/exxon-mobil-under-investigation-in-new-york-over-climate-statements.html>; New York State Office of the Attorney General, 'AG Schneiderman Secures Unprecedented Agreement with Peabody Energy to End Misleading Statements and Disclosure Risks Arising from Climate Change' (Press Release, 9 November 2015) <www.ag.ny.gov/press-release/ag-schneiderman-secures-unprecedented-agreement-peabody-energy-end-misleading>, archived at <<https://perma.cc/BJ44-6NFR>>. A further investigation is underway in California: Ivan Penn, 'California to Investigate Whether Exxon Mobil Lied about Climate-Change Risks', *Los Angeles Times* (Los Angeles, 20 January 2016) <www.latimes.com/business/la-fi-exxon-global-warming-20160120-story.html>, archived at <<https://perma.cc/H647-9B6R>>. See also Jackie Wattles, 'SEC Is Latest Regulator to Investigate Exxon Mobil's Accounting Practices', *CNN Money* (Web Page, 20 September 2016) <<http://money.cnn.com/2016/09/20/news/companies/exxon-mobil-sec-investigation/index.html>>, archived at <<https://perma.cc/F9LL-QHCM>>; nn 134–52 and accompanying text.

⁸⁶ Noel Hutley and Sebastian Hartford-Davis, 'Climate Change and Directors' Duties' (Memorandum of Opinion, Centre for Policy Development and Future Business Council, 7 October 2016) <<http://cpd.org.au/2016/10/directorsduties>>, archived at <<https://perma.cc/24WK-2CJ7?type=image>>; Jessica Irvine, 'Company Directors to Face Penalties for Ignoring Climate Change', *The Age* (Melbourne, 31 October 2016) <www.theage.com.au/business/company-directors-to-face-penalties-for-ignoring-climate-change-20161030-gsdwha.html>, archived at <<https://perma.cc/E6MW-5EY3>>. The Memorandum of Opinion outlines the applicable provisions within the *Corporations Act 2001* (Cth) and relevant case law in relation to disclosure of business risks and director's duties to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person in their circumstances would exercise. It confirms that, where they are reasonably judged to be foreseeable and material, the business risks posed by climate change (both physical and non-physical) should be disclosed under existing general risk disclosure requirements. Further, directors (and other officers) should carefully consider climate risks in the exercise of their legal duties. The opinion concludes that '[i]t is likely to be only a matter of time before we see litigation against a director who has failed to perceive, disclose or take steps in relation to a foreseeable climate-related risk that can be demonstrated to have caused harm to a company': at 2 [51].

⁸⁷ Geoff Summerhayes, 'Australia's New Horizon: Climate Change Challenges and Prudential Risk' (Speech, Insurance Council of Australia Annual Forum, Sydney, 17 February 2017).

This changing business environment raises possibilities for pursuing a range of new climate change litigation pathways using corporations law mechanisms.⁸⁸ For environmental advocacy groups, these shifts also open up new possibilities both for partnering with investor and shareholder groups or leading companies that wish to forward policy development and corporate action, and for identifying laggards who may be the target of litigation efforts.

III TAKING FORWARD NEXT-GENERATION CLIMATE CHANGE LITIGATION

Given the coalescence of factors described in the previous part, this may well be the opportune moment for thinking about a next generation of climate change litigation in Australia. In the United States, which has led the climate change litigation movement globally and inspired many Australian efforts, the actions of President Trump's administration may also usher in a new era of pro-regulatory litigation as environmental advocates challenge his regulatory approaches and explore alternative avenues under constitutional and common law as statutory avenues are closed down. As noted in the introduction, the US Supreme Court's blocking of the federal public nuisance pathways, in particular, was premised on the *Clean Air Act's* regulatory authority displacing that approach. However, if the Republican Congress eliminates that regulatory authority, public nuisance lawsuits might gain a new viability in the United States that could potentially provide impetus for Australian experimentation. Similarly, the success thus far of the public trust claims in *Juliana* provides a potential model for Australian advocates to frame a case using that doctrine.

While there is considerable enthusiasm for new approaches, how this new-generation climate change litigation might be progressed, including what legal causes of action might be used, are issues that have not been systematically explored. The embrace of a next generation of litigation also raises questions as to how such cases relate to earlier ones. In particular, an ongoing debate in the environmental advocacy community is whether next-generation litigation should be pursued in the alternative to, or alongside, cases that build on strategies or lessons from first-generation cases. This part considers these questions in order to provide guidance on strategies for taking forward a next generation of climate change litigation.⁸⁹

⁸⁸ See Part III.

⁸⁹ Our focus here is on domestic law pathways, although environmental groups might also consider potential international law pathways (including transboundary harm) or accounta-

A Avenues for Next-Generation Climate Change Litigation

Lawyers and advocacy organisations involved in climate change litigation have generally taken a creative approach in exploring the possibilities for strategic lawsuits to advance action on climate change. Nonetheless, unlike the United States, Australia has not seen cases pursuing common law, rights-based or constitutional pathways, including actions in negligence, nuisance or public trust, or raising issues of human rights violations. Similarly, beyond the ACCC cases, there have been only limited efforts to date to harness corporate law mechanisms to forward climate change action.

In planning a next generation of climate change litigation in Australia, lawyers and advocates have envisaged a suite of lawsuits pursuing different legal avenues or defendants than have been tried in the past, and encompassing a broader array of claimants with increasingly diverse interests. There are a range of potential avenues that are currently receiving considerable attention, including:

- claims in negligence against government or corporate actors for a breach of duty of care to protect citizens from climate change impacts;⁹⁰
- actions under corporations law, suing companies or their directors, auditors or advisors for failures to disclose adequately or act appropriately on climate change risks to their businesses;⁹¹
- human rights, indigenous rights or (environmental) constitutional rights claims asserting that failures of mitigation or adaptation violate rights protections;⁹² and

bility mechanisms. For a discussion of international law relevant to climate change, see Rosemary Rayfuse and Shirley V Scott (eds), *International Law in the Era of Climate Change* (Edward Elgar, 2012). For a more targeted discussion of the legal duties and potential liabilities of states with regard to human-induced climate change damage under international law, see Roda Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (Martinus Nijhoff Publishers, 2005).

⁹⁰ See, eg, Jolene Lin, 'The First Successful Climate Negligence Case: A Comment on *Urgenda Foundation v The State of the Netherlands (Ministry of Infrastructure and the Environment)*' (2015) 5 *Climate Law* 65; Baxter, 'Urgenda-Style Climate Litigation Has Promise in Australia' (n 44).

⁹¹ See, eg, Hutley and Hartford-Davis (n 86); 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 *Australian Environment Review* 56.

⁹² There is increasing interest in this avenue for climate change litigation globally. For a discussion of the intersections between climate change and human rights, see Knox (n 39). On specific litigation efforts, see Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 *Transnational Environmental Law* (forthcoming). In the

- claims based on ancient common law notions of the public trust, perhaps along the lines of *Juliana*,⁹³ arguing that this doctrine requires the protection of natural resources (coastal wetlands, water resources, the atmosphere) for the benefit of the public.⁹⁴

Australian context, however, the possibilities for human rights claims are limited given the lack of a national bill of rights: 'How Are Human Rights Protected in Australian Law?', *Australian Human Rights Commission* (Web Page, 2006) <www.humanrights.gov.au/how-are-human-rights-protected-australian-law>, archived at <<https://perma.cc/8J4M-VDJP>>. Rights-based claims would need to rely on other avenues such as: international avenues of complaint (eg a complaint to the United Nations Human Rights Committee under the *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*') on the basis that Australia's domestic action is inadequate to safeguard rights in accordance with international obligations; judicial review of federal administrative decision-making on the basis that international human rights obligations must be taken into account; or actions at the state level, raising arguments under human rights charters in the Australian Capital Territory and Victoria. For a consideration of the viability of a complaint under the *ICCPR*, contending that Australia's ongoing failure to adopt sufficient measures to reduce GHG emissions constitutes a violation of the rights of Torres Strait Islanders, see Owen Cordes-Holland, 'The Sinking of the Strait: The Implications of Climate Change for Torres Strait Islanders' Human Rights Protected by the *ICCPR*' (2008) 9 *Melbourne Journal of International Law* 405.

⁹³ The United States has seen a wave of lawsuits in the last few years based on arguments that government failures to adequately constrain GHG emissions breach a public trust obligation to safeguard natural resources in the public interest. For a discussion of the atmospheric public trust law suits, see Mary Christina Wood, 'Atmospheric Trust Litigation Across the World' in Ken Coghill, Charles Sampford and Tim Smith (eds), *Fiduciary Duty and the Atmospheric Trust* (Ashgate, 2012) 99. The most recent of these US cases is *Juliana* (n 1) in which Aiken J of the US District Court for District of Oregon issued an opinion and order denying the US government and fossil fuel industry's motions to dismiss a constitutional climate change lawsuit filed by 21 youths on 10 November 2016. This preliminary decision confirmed that the plaintiffs have a justiciable case and standing to pursue their case at trial. The plaintiffs argued that the defendants' actions in not adequately mitigating climate change violate their substantive due process rights to life, liberty, and property, as safeguarded in the *United States Constitution* and that the defendants violated their obligation to hold certain natural resources in trust for the people and for future generations. They sought a declaration that their constitutional and public trust rights had been violated and an order enjoining the defendants from violating those rights and directing them to develop a plan to reduce carbon dioxide emissions: see at 1233–4. The case is ongoing. For a recent review of the potential impact of this case, see Michael C Blumm and Mary Christine Wood, 'No Ordinary Lawsuit: Climate Change, Due Process, and the Public Trust Doctrine' (2017) 67 *American University Law Review* 1.

⁹⁴ To date, there has been only limited consideration of the potential applicability of the public trust doctrine to an Australian environmental litigation and policy context and limited opportunity for Australian judges to consider its applicability: see, eg, Tim Bonyhady, 'A Usable Past: The Public Trust in Australia' (1995) 12 *Environmental and Planning Law Journal* 329; Jessica Simpson, 'The Public Trust Doctrine and Its Relevance in Australia' (Conference Paper, Environmental Defender's Office New South Wales Coastal Solutions Forum, 15

The discussion in the following sections focuses on the first two avenues, which are arguably the most likely to be pursued in Australia in the near future. We focus on identifying some significant considerations and developments, rather than engaging in a detailed, substantive assessment of the possibilities of success. The final section addresses the question of how the emergence of a suite of next-generation cases might potentially interact with first-generation litigation.

1 *An Australian Urgenda?*

As noted above, the success of *Urgenda* in the Netherlands in 2015 has prompted substantial consideration of the potential to bring a similar action in negligence against government or corporate actors for a breach of duty of care owed to Australians (or to a particular, vulnerable group) to safeguard them from harms caused by climate change.⁹⁵

The *Urgenda* case was brought by a Dutch NGO, the Urgenda Foundation ('Urgenda'), which also acted on behalf of 886 Dutch citizens. The case centred on the question of whether the State of the Netherlands had a legal obligation towards Urgenda (and Dutch citizens more broadly) to pursue more ambitious GHG emission reductions. Urgenda argued that the Netherlands' official emissions reduction target at the time (which was likely to result in a 14–17% reduction on 1990 emissions levels by 2020) was unlawful because it was insufficient to prevent foreseeable harm.⁹⁶

While Urgenda pursued a number of different lines of argument in the case (including alleging breaches of constitutional rights under the *Dutch Constitution*,⁹⁷ of human rights under the *European Convention on Human*

November 2003); Bruce Thom, 'Climate Change, Coastal Hazards and the Public Trust Doctrine' (2012) 8(2) *Macquarie Journal of International and Comparative Environmental Law* 21.

⁹⁵ This question has also prompted academic consideration: see, eg, Baxter, 'Urgenda-Style Climate Litigation Has Promise in Australia' (n 44). Baxter seeks to unpack the legal hurdles that might prevent the Commonwealth being found liable in negligence for their insufficient efforts to mitigate climate change.

⁹⁶ *Urgenda* (n 18) [3.2], [4.26].

⁹⁷ *The Constitution of the Kingdom of the Netherlands 2008* art 21 [Ministry of the Interior and Kingdom Relations, Constitutional Affairs and Legislation Division in collaboration with the Translation Department of the Ministry of Foreign Affairs trans, *The Constitution of the Kingdom of the Netherlands 2008* (2008) <www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008>, archived at <<https://perma.cc/AV5T-4UUK>>]. Article 21 provides that '[i]t shall be the concern of the authorities to keep the country habitable and to protect and improve the environment'. Urgenda argued that the Netherlands, by adopting a GHG reduction target below the 25–40% range, was not fulfilling its constitutional duty under art 21: *Urgenda* (n 18) [3.2], [4.36]–[4.44].

Rights,⁹⁸ and of the Netherlands' obligations under international and European climate change law),⁹⁹ the Court's decision centred on the general negligence provisions of the *Dutch Civil Code*.¹⁰⁰

The Court's reasoning in finding that the State of the Netherlands owed a duty of care to Urgenda and had indeed breached this duty has been described and analysed in detail elsewhere.¹⁰¹ Our focus here is on the potential for a similar claim in negligence to be brought in a common law context, such as Australia. In contemplating an Australian *Urgenda*, local environmental advocacy groups are well aware of the lack of direct correlates between the civil code provisions noted above and similar doctrines in domestic tort law.¹⁰² As Baxter notes, '[m]any aspects of the claim in the Dutch context are simpler than they are in Australia because of the *Dutch Civil Code*.'¹⁰³ In

⁹⁸ Urgenda advanced arguments that by failing to adopt adequate emissions reduction targets, the State was infringing or acting contrary to art 2 (the right to life) and art 8 (respect for private and family life) of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953): *Urgenda* (n 18) [3.2], [4.45]–[4.50].

⁹⁹ Urgenda relied on a large body of international and EU climate law, including the *UNFCCC* and the *Kyoto Protocol*, EU Directives on climate change, and the *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2009] OJ C 115/199 (entered into force 1 November 1993) in its arguments that the State was causing damage to others by its failure to adopt an adequate mitigation policy, despite its international legal obligations, and that the State was acting unlawfully towards Urgenda by failing to fulfil its international legal obligations: *Urgenda* (n 18) [4.35]–[4.44]. The Court concluded that 'a legal obligation of the State towards Urgenda cannot be derived' from the above rules and instruments: at [4.52]. However, these rules and instruments were found to be relevant in determining both the degree of discretionary power that the State is entitled to in exercising its functions and the minimum degree of care that the State is expected to observe: at [4.35]–[4.52].

¹⁰⁰ *Urgenda* (n 18) [4.52], [4.109]. See also *Dutch Civil Code* art 6:162 [Hendrik Goossens trans, 'Dutch Civil Code', *Dutch Civil Law* (Web Page, 4 February 2014) <www.dutchcivillaw.com/civilcodegeneral.htm>, archived at <<https://perma.cc/U9RE-VQJS>>] provides:

A person who commits a tortious act ... against another person that can be attributed to him, must repair the damage that this person has suffered as a result thereof.

As a tortious act is regarded as a violation of someone else's right ... an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour.

¹⁰¹ See, eg, Lin (n 90); KJ de Graaf and JH Jans, 'The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change' (2015) 27 *Journal of Environmental Law* 517; Cox (n 68).

¹⁰² Nelson, 'Dutch Climate Change Case No Roadmap for Aus' (n 48).

¹⁰³ Baxter, 'Urgenda-Style Climate Litigation Has Promise in Australia' (n 44) 70. For example, Baxter notes that while an organisation's generalised standing to sue in tort is complex in an Australian context, the *Dutch Civil Code* has clear provisions granting organisations, such as

particular, the substance of the law of negligence is contained in just one provision, art 6:162, which is supported by the case law. Indeed, prior to the *Urgenda* decision, a number of Australian commentators had highlighted the significant doctrinal and practical difficulties of mounting a successful claim in negligence in Australia in relation to climate change harms, largely dismissing these claims as unworkable.¹⁰⁴ It is useful here to survey these difficulties and reconsider them in light of the line of argument that was successfully taken in *Urgenda*, and the significant recent developments in climate science and climate change law and policy at international and domestic levels.¹⁰⁵

For these purposes, we focus on the detailed consideration of hypothetical potential actions in tort against corporate entities responsible for GHG emissions, which was undertaken by Abbs, Cashman and Stephens in 2012.¹⁰⁶ In this piece, the authors foreshadowed a range of probable difficulties in establishing various elements of the claim and cautioned that ‘the legal context in Australia provides reasons for circumspection.’¹⁰⁷ For example, they suggested that Australian courts would be reluctant to recognise a duty of care in situations where there is no direct or specific relationship between a defendant and plaintiff, but rather the defendant’s actions in emitting GHG to the atmosphere ‘with respect to the world at large’ have contributed (together with a multitude of other diverse entities over space and over time) to the harm experienced by the plaintiff.¹⁰⁸ They add that even if a duty of care was recognised, proving a breach would be problematic as a plaintiff would be

Urgenda, standing to bring a claim to protect the interests of others to the extent that this aligns with the organisation’s objectives and constitution: at 71. See also *Dutch Civil Code* (n 100) art 3:305a.

¹⁰⁴ See, eg, Nicola Durrant, ‘Tortious Liability for Greenhouse Gas Emissions? Climate Change, Causation and Public Policy Considerations’ (2007) 7 *Queensland University of Technology Law and Justice Journal* 403; Peter Cashman and Ross Abbs, ‘Liability in Tort for Damage Arising from Human-Induced Climate Change’ in Rosemary Lyster (ed), *In the Wilds of Climate Law* (Australian Academic Press, 2010) 235; Ross Abbs, Peter Cashman and Tim Stephens, ‘Australia’ in Richard Lord et al (eds), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press, 2012) 67, 85–98 [5.49]–[5.76].

¹⁰⁵ See Part II(B)(1).

¹⁰⁶ Abbs, Cashman and Stephens (n 104).

¹⁰⁷ *Ibid* 85–6 [5.50]. This analysis is referenced in the law applicable to NSW and refers particularly to the *Civil Liability Act 2002* (NSW), but as the authors note, the common law of torts is uniform throughout Australia, and the statutory regimes in various states and territories are in many respects directly comparable: at 86 [5.50] n 82.

¹⁰⁸ *Ibid* 88 [5.55]. Relevant case law suggests an extreme reluctance on the part of courts to attribute a duty of care where there are a multitude of diverse agents who have contributed to the harm and where it would be disproportionately burdensome to impose liability on any one particular defendant: at 88 [5.56].

required to establish that a reasonable person in the position of the defendant should have anticipated not just the risk of climate change but also the risk of the particular harm to the plaintiff occurring as a result of climate change, and that the defendant should have taken precautions against that risk.¹⁰⁹ Even if it could be successfully argued that the nature of the harm experienced was foreseeable, establishing that the defendant should have taken precautions to avoid that risk (essentially by ceasing to emit GHG) would likely be very difficult given the social utility of the activities which caused the harm (eg providing fuel for power generation) and the fact that these very activities have been long sanctioned by society.¹¹⁰ Further, Abbs, Cashman and Stephens argue that establishing factual causation presents near insurmountable barriers for potential tortfeasors due to the multitude and highly dispersed nature of the individual agents responsible for the emission of GHG to the atmosphere and the consequent difficulty of establishing that the negligence of one particular entity was a precondition to the realisation of particular climate change impacts.¹¹¹ They consider the limited exceptions to the ‘but for’ causation test and explore situations where courts have been prepared to consider a material contribution to the loss or damage as being sufficient to establish causation.¹¹² However, even if some level of material contribution to causation of harm could be successfully established in a climate change context, Abbs, Cashman and Stephens submit that it is unlikely that an Australian court would conclude that it is ‘appropriate’ to attribute liability and award damages for the emission of GHG and associated harm.¹¹³

Abbs, Cashman and Stephens’s consideration was framed in relation to suing a corporate entity for loss or damage experienced as a result of climate

¹⁰⁹ Ibid 90 [5.61].

¹¹⁰ Ibid 90–1 [5.62]–[5.63].

¹¹¹ Ibid 94 [5.67].

¹¹² Ibid 95–6 [5.70]–[5.71]. The authors do acknowledge potentially applicable lines of precedent in the case law (including in the dust diseases context) to overcome the limitations of the ‘but for’ test of causation in this context and note that ‘[t]he question of causation would ... revolve around whether making some definite contribution to a process resulting from the cumulative effect of a multitude of such contributions (as well as extrinsic causes) could or should be regarded as a legal cause’: at 97 [5.73]. The applicable statutory test of causation (such as that contained in s 5D of the *Civil Liability Act 2002* (NSW)) would be relevant here.

¹¹³ Ibid 97–8 [5.75]–[5.76]. The authors note this would be a likely result in situations where the defendant’s negligent actions were only a minor contribution to the damage, where the damage is distant in space and time from the actions of the defendant or in light of broader policy considerations, such as the broader consequences of imposing liability on a particular defendant in these complex circumstances.

change.¹¹⁴ This focus on compensating harms already experienced by a plaintiff is the traditional path of negligence law in common law jurisdictions. However, in *Urgenda*, the negligence claim was not directed to compensating loss and damage *ex post*, but rather to preventing foreseeable future harms. As such, the remedy awarded was not compensation, but rather a court order requiring the State of the Netherlands to take more action to reduce GHG emissions.¹¹⁵ Baxter argues that a claim in negligence against a governmental defendant along these lines is worthy of renewed consideration in an Australian context.¹¹⁶

Baxter notes that negligence claims in Anglo-Australian jurisdictions have, until recently, only ever been successful where the primary remedy sought was damages.¹¹⁷ He argues, however, that seeking a remedy in equity in the form of an injunction to prevent future breach and damage occurring (either by enjoining the defendant not to breach their duty or ordering the defendant to take steps to prevent damage occurring) provides a more promising approach that would potentially bypass some of the difficulties in establishing breach and damage that were noted by Abbs, Cashman and Stephens.¹¹⁸ Baxter cites a recent decision of the Federal Court of Australia where a claim in negligence in an immigration context was brought on an entirely *ex ante* basis.¹¹⁹ In this case, the court was prepared to issue a remedy in equity against the governmental defendant in the form of an injunction to prevent the breach and anticipated damage.¹²⁰ Essentially, Baxter argues that taking

¹¹⁴ See *ibid* 85–6 [5.49]–[5.50].

¹¹⁵ *Urgenda* (n 18) [5.1].

¹¹⁶ Baxter, ‘Urgenda-Style Climate Litigation Has Promise in Australia’ (n 44). See also Tim Baxter, ‘Can the Commonwealth’s Climate Targets Be Legally Negligent? An Australian Urgenda’ (Seminar, Australian-German Climate and Energy College, 22 August 2016) <<http://climate-energy-college.org/seminar/can-commonwealth%E2%80%99s-climate-targets-be-legally-negligent-australian-urgenda>>, archived at <<https://perma.cc/S2JV-H97L>>.

¹¹⁷ Baxter, ‘Urgenda-Style Litigation Has Promise in Australia’ (n 44) 70–1.

¹¹⁸ *Ibid*. Cf Abbs, Cashman and Stephens (n 104).

¹¹⁹ Baxter, ‘Urgenda-Style Litigation Has Promise in Australia’ (n 44) 71.

¹²⁰ *Plaintiff S99/2016 v Minister for Immigration and Border Protection* (2016) 243 FCR 17. In this decision, it was determinative that the plaintiff was able to prove that the defendant intended to breach his duty of care and there was near absolute certainty that doing so would harm the plaintiff in a way that could not possibly be remedied by an *ex post* claim in damages: at 113–14 [405], 137–8 [490]–[495]; Baxter, ‘Urgenda-Style Climate Litigation Has Promise in Australia’ (n 44) 71. Baxter notes, however, that this is a novel area of law, and refers to only one case heard by a single judge as precedent: at 71–2.

this novel approach to a negligence claim offers a higher chance of a court being prepared to award a remedy.¹²¹

However even pursuing this approach, it would still be necessary to establish that a defendant owed a duty of care, for example, to take action to prevent dangerous climate change, and that the alleged breach of this duty would lead to the anticipated damage.¹²² The factual basis on which such a claim could be brought continues to improve due to a number of factors, such as: recent developments in climate change science, including the ability to attribute climate change impacts to GHG emissions and to calculate comparative contributions to global emissions;¹²³ the growing body of international and domestic legal and policy instruments acknowledging the extensive threats posed by climate change and the concrete mitigation measures needed to minimise these risks (including the *Paris Agreement*); and the fact that the Australian government has consistently participated in and ratified international climate change treaties and has the authority and capacity to implement required mitigation measures.¹²⁴

Nonetheless, the experiences of first generation litigation in Australia, particularly in arguing causation,¹²⁵ underscore the challenges that would-be litigants may face in launching an *Urgenda*-style action. For example, in the context of judicial review of decisions relating to particular fossil fuel projects (which have formed such a large part of first-generation climate change litigation in Australia), Australian courts have responded only slowly to

¹²¹ Baxter, 'Urgenda-Style Litigation Has Promise in Australia' (n 44) 70–1.

¹²² *Ibid* 72–3. Baxter's argument is based on a claim brought against a governmental defendant by a plaintiff who stands to be affected by direct climate change impacts for which there is strong scientific evidence demonstrating the link between GHG emissions and the impact. On his analysis of the case law, he presents a number of arguments that would support a finding of a duty of care, including the foreseeability of harm, the degree of control the defendant can exercise, the plaintiff's vulnerability, any assumption of responsibility by the defendant, and the nature and degree of hazard likely to occur. For example, in relation to the issue of control, he notes that the Australian Government exerts considerable control over the nation's emissions via multiple legislative and executive functions including: controlling the National Electricity Market which is responsible for the largest share of Australia's emissions; project assessment and approval processes under *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act*') which apply to emissions intensive projects such as coal mines and power stations; market mechanisms such as the Emissions Reduction Fund which forms the centrepiece of the Australian Government's climate change policy; and controlling transport emissions via vehicle emissions standards.

¹²³ See Heede (n 77); Committee on Extreme Weather Events and Climate Change Attribution (n 74).

¹²⁴ See, eg, Turnbull, Bishop and Frydenberg (n 51).

¹²⁵ Durrant (n 104) 414–19.

scientific evidence and arguments put by claimants that the emissions related to a particular fossil fuel project will contribute significantly to cumulative global emissions and climate change impacts, and are therefore relevant when considering the environmental impact of a specific project.¹²⁶ While there has been an incremental acceptance of these arguments and also the climate change scientific evidence over time, no Australian court has yet been prepared to refuse a fossil fuel project purely on climate change grounds. Often courts have fallen back on the ‘market substitution defence’ — that a particular project ‘will not have an impact on climate change, because if that proponent does not mine and sell coal, someone else will.’¹²⁷ Similar difficulties would likely be encountered in arguing that Australia’s GHG emissions were a material contribution to the global problem of climate change sufficient to satisfy tests of causation.¹²⁸

Further, while the Hague District Court came to the conclusion in *Urgenda* that it would not be an intrusion on the separation of powers doctrine for the court to make an order requiring the government to take further action on climate change,¹²⁹ Australian courts have tended to take a very restrictive view of their role with regards to ‘political questions’ or justiciability.¹³⁰ Indeed, it is worth noting that the *Urgenda* decision has been appealed by the State of the Netherlands, and one of the primary grounds for appeal is that the District Court improperly interfered with the doctrine of the separation of powers.¹³¹ It is likely that similar arguments would also be a feature of any

¹²⁶ For a discussion of these developments in merits review cases heard by the Queensland Land Court, see Bell-James and Ryan (n 73) 531–6. This issue is the subject of the current appeal in the Adani coal mine litigation: see n 154.

¹²⁷ Bell-James and Ryan (n 73) 535.

¹²⁸ For a discussion of the approach to causation that was taken by the Hague District Court in *Urgenda* (and which set aside traditional causation requirements), see Lin (n 90) 79–80.

¹²⁹ *Ibid* 80. Lin notes that little justification was given by the court for this approach. See *Urgenda* (n 18) [4.102].

¹³⁰ See, eg, *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 553–5, where Gleeson CJ discusses justiciability in the context of a negligence claim against a governmental authority: ‘Courts have long recognised the inappropriateness of judicial resolution of complaints about the reasonableness of governmental conduct where such complaints are political in nature ... In the case of a governmental authority, it may be a very large step from foreseeability of harm to the imposition of a legal duty, breach of which sounds in damages, to take steps to prevent the occurrence of harm. And there may also be a large step from the existence of power to take action to the recognition of a duty to exercise the power.’

¹³¹ For progress on the appeal, see ‘Climate Case’, *Urgenda* (Web Page) <www.urgenda.nl/en/climate-case>, archived at <<https://perma.cc/CL4E-95MU>>. For a critique of the *Urgenda* judgment as an exercise of excessive judicial activism and an intrusion on the doctrine of the separation of powers, see Lucas Bergkamp, ‘The *Urgenda* Judgment: A “Victory” for

Australian litigation attempting to pursue the federal government over its weak emissions-reduction targets.

2 *Suing Companies and Their Directors?*

In other common law jurisdictions, such as the United States and more recently, the United Kingdom, both of which have similar albeit not identical corporations law regimes to Australia,¹³² litigation trends are emerging. Actions are increasingly brought against corporations and their directors for misleading disclosure of business risks associated with climate change and for related breach of directors' duties arising from failure to disclose and properly account for these climate risks.¹³³ These legal interventions are taking place under existing, general laws that require the disclosure of material business risks and which govern directors' duties to a company and its shareholders. They are being initiated by regulators, by environmental advocacy groups, and increasingly, by shareholders claiming compensation for associated financial losses.

For example, in the United States, there has been a series of high-profile regulatory investigations into the disclosure practices of major fossil fuel companies, including Peabody Energy Corporation¹³⁴ and Exxon Mobil.¹³⁵

the Climate That Is Likely to Backfire', *energypost* (Web Page, 9 September 2015) <<http://energypost.eu/urgenda-judgment-victory-climate-likely-backfire>>, archived at <<https://perma.cc/W28D-AE76>>.

¹³² For example, Australia, the United Kingdom and the United States all require publicly listed companies to make regular disclosures of their financial position and any material business risks facing the company. The relevant provisions are discussed in Anita Foerster et al, 'Keeping Good Company in the Transition to a Low Carbon Economy? An Evaluation of Climate Risk Disclosure Practices in Australia' (2017) 35 *Company and Securities Law Journal* 154, 163–4, 175 n 111, 177 n 124. Where the regimes differ is in relation to the prescriptions requiring disclosure of the particular risks posed by climate change. For example, in the United States, the Securities and Exchange Commission ('SEC') issued specific guidance in 2010 on how the existing disclosure requirements under federal securities laws applied to climate change matters: *Commission Guidance regarding Disclosure Related to Climate Change*, 75 Fed Reg 6290 (8 February 2010). In the United Kingdom, while the disclosure requirements are broadly similar to Australia, listed companies are also explicitly required to report on GHG emissions in their annual reports: *Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013* (UK) SI 2013/1970, pt 7.

¹³³ Sarah Barker and Maged Girgis, 'A New COP on the Beat: Heightened Expectations for Corporate Sustainability Governance and Disclosure' (Guidance, Minter Ellison, 2016).

¹³⁴ The New York Attorney General investigated the SEC filings from Peabody Energy Corporation and found that these disclosures misled shareholders by understating the severe potential impacts of carbon risk to its business and claiming an inability to predict the financial impacts of future climate policy laws or regulations. This investigation, under state laws prohibiting false or misleading conduct in connection with securities transactions, was

These investigations have been launched both by state Attorneys General under state laws prohibiting false or misleading conduct in connection with securities transactions,¹³⁶ and at a national level by the SEC.¹³⁷ In general terms, these investigations have alleged that the companies involved have misled shareholders by understating the severe potential impacts of climate change risk to their businesses. In November 2016, a shareholder class action was launched against Exxon Mobil and its directors,¹³⁸ alleging that the company made false and/or misleading statements in relation to the value of its oil and gas reserves, leading to a material overstatement of the value of these reserves.¹³⁹ Class members are seeking compensation for a drop in share value that occurred following the public reporting of the regulatory investiga-

settled in November 2015 and Peabody, without admitting to fraudulent disclosure practices, undertook to improve climate risk disclosure: see New York State Office of the Attorney General (n 85); Attorney General of the State of New York Environmental and Investor Protection Bureaus, 'Assurance of Discontinuance', *In the Matter of Investigation by Eric T Schneiderman, Attorney General of the State of New York, of Peabody Energy Corporation* (Assurance No 15-242, 8 November 2015) <<https://ag.ny.gov/pdfs/Peabody-Energy-Assurance-signed.pdf>>, archived at <<https://perma.cc/QD5K-FTVP>>.

¹³⁵ Gillis and Krauss (n 85); Penn (n 85).

¹³⁶ For example, the New York investigation is taking place under the 1921 *Martin Act*, now codified within the New York General Business Law: NY Gen Bus Law §§ 352-c, 353 (McKinney 2017). Sections 352 and 353 of the Act taken together grant wide powers to the Attorney General to regulate, investigate and take enforcement action against securities fraud.

¹³⁷ The SEC has also launched an investigation into how Exxon calculates the impact to its business from climate change, including what figures the company uses to account for the future costs of complying with regulations to curb GHGs as it evaluates the economic viability of its projects: see Bradley Olsen and Aruna Viswanatha, 'SEC Probes Exxon over Accounting for Climate Change', *The Wall Street Journal* (New York, 20 September 2016) <www.wsj.com/articles/sec-investigating-exxon-on-valuing-of-assets-accounting-practices-1474393593>.

¹³⁸ 'Exxon Mobil Corporation (NYSE:XOM) Investor Securities Class Action Lawsuit 11/07/2016', *Shareholders Foundation* (Web Page) <<http://shareholdersfoundation.com/case/exxon-mobil-corporation-nyse-xom-investor-securities-class-action-lawsuit-11072016>>, archived at <<https://perma.cc/MW5J-Z5AM>>. This suit was filed in the US District Court for the Northern District of Texas, over alleged violations of Federal Securities Laws by Exxon Mobil in connection with certain allegedly false and misleading statements made between 19 February and 27 October 2016. The class includes purchasers of Exxon Mobil Corporation (NYSE:XOM) common shares between 19 February and 27 October 2016.

¹³⁹ *Ibid.* Specifically, the claim states that Exxon failed to disclose internal reports about climate change risks to their business model, failed to disclose that a material portion of Exxon's reserves were likely to be stranded and therefore should have been written down, and that Exxon had, in order to materially overstate the value of its reserves, used an inaccurate carbon price in evaluating certain of its future oil and gas prospects.

tions into Exxon Mobil's disclosure practices noted above.¹⁴⁰ The emergence of this class action is particularly significant as it underscores the shift taking place to recognise climate change as a material consideration for business, rather than as a purely ethical, sustainability issue.

In a similar vein, in the United Kingdom, a leading environmental law NGO has recently submitted regulatory complaints to the Financial Reporting Council ('FRC'),¹⁴¹ alleging that two major oil and gas companies have failed to disclose climate-related risks to investors.¹⁴² The complaints argue that the lack of any substantive discussion of climate change risks in the annual reports of these companies does not meet statutory requirements including: to provide 'a fair review of the company's business';¹⁴³ a proper account of 'the main trends and factors likely to affect the future development, performance and position of the company's business';¹⁴⁴ and a proper 'description of the principal risks and uncertainties facing the company'.¹⁴⁵ The claim is that the reports therefore prevent shareholders from assessing how the directors have performed their legal duties to promote the success of the company.¹⁴⁶

Given the similarities between US, UK and Australian corporate law regimes, such disclosure-focused actions may also be viable in Australia.¹⁴⁷ Indeed, after considering the statutory provisions governing disclosure and director's duties and the relevant case law, the legal opinion provided by Noel Hutley SC and Sebastian Hartford-Davis concludes that '[i]t is likely to be

¹⁴⁰ See Olsen and Viswanatha (n 137); 'Exxon Mobil Corporation (NYSE:XOM) Investor Securities Class Action Lawsuit 11/07/2016' (n 138).

¹⁴¹ The FRC is the UK regulator responsible for monitoring and enforcing corporate reporting requirements: see 'Role and Responsibilities', *Financial Reporting Council* (Web Page) <www.frc.org.uk/about-the-frc/role-and-responsibilities>, archived at <<https://perma.cc/28S4-EP64>>.

¹⁴² ClientEarth, Referral to the FRC's Conduct Committee: SOCO International plc (18 August 2016) <www.documents.clientearth.org/wp-content/uploads/library/2016-08-18-soco-regulatory-complaint-ce-en.pdf>, archived at <<https://perma.cc/Z95C-SJVY>>; ClientEarth, Referral to the FRC's Conduct Committee: Cairn Energy plc (18 August 2016) <www.documents.clientearth.org/wp-content/uploads/library/2016-08-18-cairn-regulatory-complaint-ce-en.pdf>, archived at <<https://perma.cc/V9PC-XD5Z>>; ClientEarth, 'Complaints Filed against SOCO International plc and Cairn Energy plc' (Investor Briefing, 2016) <www.documents.clientearth.org/library/download-info/investor-briefing-complaints-filed-against-soco-international-plc-and-cairn-energy-plc>, archived at <<https://perma.cc/EBT4-MSFG>>.

¹⁴³ As required under the *Companies Act 2006* (UK) s 414C(2)(a).

¹⁴⁴ *Ibid* s 414C(7)(a).

¹⁴⁵ *Ibid* s 414C(2)(b).

¹⁴⁶ *Ibid* s 172.

¹⁴⁷ See Foerster and Peel (n 91).

only a matter of time before we see litigation against a director who has failed to perceive, disclose or take steps in relation to a foreseeable climate-related risk that can be demonstrated to have caused harm to a company'.¹⁴⁸ Specifically, the opinion confirms that Australian company and securities law requires companies to disclose material business risks to shareholders and to the market via annual reports and other continuous disclosure measures.¹⁴⁹ It also opines that, increasingly, climate change is recognised as posing significant material risks to Australian businesses across all sectors, but particularly the resource, energy and finance sectors.¹⁵⁰ Further, company directors under Australian corporations law are bound by legal duties, including to manage the interests of the company with due care and diligence.¹⁵¹ To fulfil these duties, directors should consider and disclose all material and foreseeable risks posed to their business: as the Hutley and Hartford-Davis opinion notes, the materiality and foreseeability of risks posed by climate change is increasingly acknowledged.¹⁵²

B *Relationship between First- and Next-Generation Litigation*

While there is a palpable excitement in many parts of the Australian environmental advocacy community about next-generation climate litigation approaches, strategic questions around the relationship between such cases and prior climate change litigation efforts remain unresolved. Some groups — such as the Victorian-based Environmental Justice Australia — have been actively involved in investigating next-generation litigation options as part of their commitment to 'seek[ing] out new and innovative ways to tackle environmental problems'.¹⁵³ Thus, one vision for next-generation climate change litigation is that it would constitute a break with the past and an opportunity to put litigation resources into new cases seen as more likely to offer prospects for transformative change.

¹⁴⁸ Hutley and Hartford-Davis (n 86) [51].

¹⁴⁹ Periodic disclosure requirements are found in ss 292–301 of the *Corporations Act 2001* (Cth). Continuous disclosure obligations are found at ss 674–7. Additional guidance is provided in various ASX Listing Rules and Corporate Governance Principles. For a detailed discussion, see Anita Foerster et al (n 132) 163–4.

¹⁵⁰ Hutley and Hartford-Davis (n 86) [14]–[34].

¹⁵¹ *Corporations Act 2001* (Cth) s 180(1).

¹⁵² Hutley and Hartford-Davis (n 86) [14]–[41].

¹⁵³ 'Who We Are', *Environmental Justice Australia* (Web Page) <<https://envirojustice.org.au/who-we-are>>, archived at <<https://perma.cc/C2LM-YNFL>>.

However, equally a next generation of climate change litigation in Australia could coexist with ongoing efforts to build on and expand past and existing first-generation cases. Under this strategy, first generation-style cases would continue. For example, despite the lack of previous success in federal climate change cases, the Australian Conservation Foundation ('ACF') decided to appeal the Federal Court decision in the Adani Carmichael mine case¹⁵⁴ — a case based on judicial review under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) — as far as possible through the appeals process to try to clarify the requirements for consideration of 'scope 3' GHG emissions under federal environmental law.¹⁵⁵ Public interest lawyers at the NSW EDO also foresee an important ongoing role for first-generation climate change cases. Their present litigation strategy involves embedding cases with a 'core' climate change focus within a broader program of related litigation that advances other goals relevant to climate change action, such as improving decision-making transparency, resisting fossil fuel projects including coal

¹⁵⁴ For the latest decision in this litigation, see *Australian Conservation Foundation Inc v Minister for the Environment and Energy* [2017] FCAFC 134. This is the most recent in a series of lawsuits through which the Australian Conservation Foundation ('ACF') has challenged the federal government's approval under the *EPBC Act* of the Adani Carmichael coal mine in the Galilee basin that will be the largest such mine in the Southern hemisphere. In *Australian Conservation Foundation Inc v Minister for the Environment* [2016] FCA 1042, [165], the Federal Court dismissed the legal challenge to the *EPBC Act* approval of the mine and accepted that the Minister concluded that the combustion emissions from the proposed mine would have no relevant impact on the Great Barrier Reef. On 25 August 2017, the Full Federal Court in *Australian Conservation Foundation Inc v Minister for the Environment and Energy* [2017] FCAFC 134 then dismissed an appeal lodged in September 2016 by the ACF challenging the lawfulness of the Minister's finding that the burning of coal from the Carmichael mine will not have an impact on global warming and the Great Barrier Reef.

¹⁵⁵ This terminology is consistent with language used in the Greenhouse Gas Protocol, the most widely used protocol internationally in accounting for greenhouse gas emissions: 'Companies and Organizations', *Greenhouse Gas Protocol* (Web Page) <www.ghgprotocol.org/companies-and-organizations>, archived at <<https://perma.cc/ZDX7-68XY>>. Scope 1 emissions are direct emissions from an activity; scope 2 emissions are indirect emissions from generation of purchased energy; and scope 3 emissions are all other indirect emissions occurring in the reporting entity's value chain: *The Greenhouse Gas Protocol: A Corporate Accounting and Reporting Standard* (World Business Council for Sustainable Development and World Resources Institute, rev ed, 2004) 25. The main source of scope 3 emissions in coal mining comes from burning harvested coal: Peel and Osofsky (n 8) 88–9 n 143. It was accepted that that 98% of the Adani Carmichael coal mine's GHG emissions would be scope 3 emissions; however, the Court did not accept that such emissions were relevant to consider in assessing the degree of likely environmental impact from the mine on the nearby Great Barrier Reef: see *Australian Conservation Foundation Inc v Minister for the Environment* [2016] FCA 1042, [136]–[138], [173]–[174].

seam gas, and advancing necessary adaptation.¹⁵⁶ This approach has the benefit of building upon a well-established Australian litigation tradition, and so may have a higher rate of success than more innovative approaches.

A 'middle-way' strategy would involve a combination of both first-generation and next-generation litigation, with the latter supplementing the former. Advocates would continue advancing lower risk cases that build from the base of existing litigation while simultaneously attempting novel approaches. If sufficient resources existed, such an approach would have the benefit of allowing for more likely wins paired with high-profile innovation that might capture the public imagination. For example, in the United States, the human rights petition and nuisance cases brought on behalf of Alaska Natives brought a great deal of public attention to climate change and their plight at the same time as statutory cases and challenges to coal-fired power plants achieved more formal success and direct regulatory impact.¹⁵⁷ A middle-way strategy also offers the potential for a fruitful division of labour between different environmental advocacy organisations with differing missions and experience. Some groups with extensive first-generation litigation experience might continue primarily to pursue these efforts. Other groups could take forward next-generation litigation options. A key goal would be to ensure coordination between these efforts as far as possible so they form part of a coherent litigation strategy and do not cut across each other.

As these options reinforce, how Australian groups approach next-generation climate change litigation is intimately linked with the question of its relationship to the first generation of cases. If one takes the view that these initial cases have been unsuccessful and unproductive, then next-generation litigation might be designed to displace these cases in favour of new, potentially more productive avenues. However, as indicated in Part I, in our view, the first generation of Australian cases, although not as transformative as many advocates might have wished, still have had a significant impact. This litigation has helped to build practices of consideration of climate change as part of ESD, has raised the public profile of the climate change issue, and has

¹⁵⁶ See Mick Daly, 'Environmental Defenders Lawyer Sue Higginson', *The Saturday Paper* (Melbourne, 18 June 2016) <www.thesaturdaypaper.com.au/news/environment/2016/06/18/environmental-defenders-lawyer-sue-higginson/14661720003383>, archived at <<https://perma.cc/5FV2-4Z8A>>; Bell-James and Ryan (n 73). In October 2017, EDO NSW appointed a new Chief Executive Officer, Mr David Morris, formerly of EDO Northern Territory.

¹⁵⁷ On the Inuit claim to the Inter-American Commission on Human Rights, see Hari M Osofsky, 'The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights' (2007) 31 *American Indian Law Review* 675.

made both courts and litigators more accustomed to climate change arguments and climate science.¹⁵⁸ Given these successes, the middle-way strategy of concurrently pioneering new legal causes of action for climate change purposes while expanding upon pathways that have been successful seems like the most productive approach.

IV ENABLERS AND CHALLENGES FOR NEXT-GENERATION CLIMATE CHANGE LITIGATION

As first-generation climate change cases in Australia have shown, litigation in this area faces some significant potential barriers. To be successful, these barriers have to be minimised and enabling conditions that favour successful outcomes maximised. This part considers key enablers of, and barriers to, climate change litigation that will help to shape the prospects for success of any next-generation cases. While these factors are also relevant for first-generation cases and public interest environmental litigation more generally, they are likely to manifest in different ways in next-generation litigation given the different causes of action being pursued. This part is divided into three sections that consider procedural aspects related to getting cases before courts, evidentiary aspects related to the presentation of cases in court and partnering opportunities which may ameliorate some procedural hurdles and offer opportunities to leverage the impacts of cases to wider effect.

A Procedural Barriers

Constructing and advancing clever legal arguments in respect of climate change is only one part of the challenge advocates face in bringing climate change cases before courts. Before a lawsuit sees its 'day in court' there are numerous procedural questions that must be addressed including the following:

- Is there a suitable claimant with standing to bring the claim?
- Are capable legal representatives (especially barristers) and other experts available and able to assist with the case, often on a pro bono basis?
- Is there a suitable court that will have jurisdiction to hear the contemplated claims?

¹⁵⁸ See Bell-James and Ryan (n 73).

- Is merits review (de novo review of law and facts) available or are claimants limited to bringing a judicial review claim (review of legal process and validity)?
- Are there significant costs risks associated with bringing the litigation and if so are clients or funders willing or able to shoulder those costs?¹⁵⁹

The first generation of climate change cases in Australia has been heavily shaped by these considerations, which will be equally pertinent for next generation lawsuits. This has often led to a preference for cases that can be pursued through merits review under planning and environmental legislation before specialist environmental courts and tribunals that have open or relaxed standing rules and less stringent requirements around the allocation of litigation costs.¹⁶⁰ These cases also tend to be those that are within the ‘wheelhouse’ of the EDOs (as the principal legal organisations involved in representing claimants) and for which there is a well-defined group of barristers and experts able to assist.

In considering a next generation of climate change litigation with the potential for more transformative impact, Australian environmental advocates need to be aware that some of the procedural hurdles that have been side-stepped or minimised in first generation cases may re-emerge as major barriers. One example is that of standing, which has posed minimal problems for climate change litigants taking merits or judicial review claims under Australian environmental legislation.¹⁶¹ For private law claims in torts or under corporations law, standing is likely to be a more significant hurdle given the need to demonstrate some special interest or loss to the plaintiffs to found a claim.¹⁶² The recent US judgment in *Juliana* illustrates some of the ways that a standing case can be made even in a situation of diffuse harms with broad-

¹⁵⁹ These challenges are common to many areas of public interest environmental litigation: see Chris McGrath, ‘Flying Foxes, Dams and Whales: Using Federal Environmental Laws in the Public Interest’ (2008) 25 *Environmental and Planning Law Journal* 324.

¹⁶⁰ For example, the NSWLEC has open standing rules and a merits review jurisdiction that has facilitated environmental and climate litigation in NSW: see generally EDO NSW, *EDO NSW Report: Merits Review in Planning in NSW* (Report, July 2016) <www.edonsw.org.au/merits_review_in_planning_in_nsw>, archived at <<https://perma.cc/6JGA-JC7Q>>.

¹⁶¹ In many cases, environmental legislation includes open or relaxed standing requirements. Even in the case of the federal *EPBC Act*, the definition of a ‘person aggrieved’ for the purposes of judicial review is expanded to include individuals and organisations with a record of involvement with environmental issues: *EPBC Act* (n 122) s 487.

¹⁶² For the common law ‘special interest’ test, see *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493.

ranging effects.¹⁶³ Nonetheless, with some of the next generation litigation avenues there is a greater risk of cases being struck out at a threshold stage than would be the situation for more traditional merits or judicial review cases under planning or environmental legislation.

Conversely, some of the other potential procedural barriers to climate change litigation may be less critical for next-generation cases than for first-generation lawsuits. In particular, finding willing claimants, litigation funders and barristers may be easier in the context of high-profile litigation brought under legal theories that extend beyond environmental law and which may offer the potential for recovery of damages. For example, in climate-related cases such as the ‘Dieselgate’ litigation in the United States and Australia over Volkswagen’s cheating of emissions testing of vehicles, or actions suing government and private actors over flooding damage from the Queensland Wivenhoe dam release, a new constellation of litigation actors are emerging including plaintiff law firms specialising in class action litigation and major litigation funders such as IMF Bentham.¹⁶⁴ This broadening of actors involved

¹⁶³ *Juliana* (n 1) 1242–8. Aiken J applied a multi-part test to determine if the plaintiffs had standing to bring the case. For the first limb of the test, the plaintiffs were required to demonstrate ‘concrete and particularized, not abstract or indefinite’ harms to their interests (personal, economic and aesthetic) and that these harms were actual and imminent: at 1244. In this case, the plaintiffs led evidence of the types of climate change impacts affecting their interests (eg lead plaintiff Kelsey Juliana alleged algae blooms harmed the water she drinks, and low water levels caused by drought killed the wild salmon she eats): at 1242. The plaintiffs also established that harms caused by climate change are ongoing and likely to continue in the future. Aiken J found that this limb of the test would be satisfied: at 1244. For the second limb of the test, plaintiffs were required to establish a line of causation between the actions of the defendant and the harms suffered by the plaintiffs that was ‘more than attenuated’: at 1244. Aiken J noted that it was inappropriate to make a finding on this limb of the test without the benefit of further evidence being led. She therefore deferred the issue to the next stage of the proceedings, but did comment on the extent of GHG emissions at issue in these proceedings (emissions controlled by the federal US government which allegedly amount to 25% of global emissions) and the advances in climate science which would support the plaintiff’s case: at 1245–6. The final limb of the test requires the plaintiffs to establish redressability — a substantial likelihood that the requested remedy would redress the injury: at 1246–7. The plaintiffs sought a court order that the defendants prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric carbon. Aiken J noted that ‘[i]f plaintiffs can show, as they have alleged, that defendants have control over a quarter of the planet’s greenhouse gas emissions, and that a reduction in those emissions would reduce atmospheric CO₂ and slow climate change, then plaintiffs’ requested relief would redress their injuries’: at 1247.

¹⁶⁴ Australian law firm Maurice Blackburn has launched class action lawsuits in both the Volkswagen and Queensland flooding cases: ‘Class Actions’, *Maurice Blackburn Lawyers* (Web Page) <www.mauriceblackburn.com.au/general-law/class-actions>. IMF Bentham is providing litigation funding in the latter action: ‘Wivenhoe Dam’, *IMF Bentham* (Web

in climate change litigation is related to the growing range of parties pursuing such litigation, the expanding nature of these claims (eg financial loss or damage claims) and the different range of motives and interests that are driving the litigation. Indeed, the involvement of third-party commercial litigation funders is explicitly on the basis that if litigation is successful, the funder will be entitled to a percentage of the awarded amount. A wider range of barristers than the usual advocates tapped into environmental cases have also expressed interest in novel cases such as an *Urgenda*-style action that might involve constitutional, tortious or administrative law claims.

B Evidentiary Aspects

If threshold procedural issues can be suitably resolved, challenges may still remain in adequately presenting and proving a climate change claim to the satisfaction of the deciding court. One of the issues that has posed a perpetual trial for climate change cases, particularly ‘mitigation’ lawsuits, is that of sufficiently proving causal links between a particular project (eg a coal mine) and broader climate change effects.¹⁶⁵ This challenge has been less salient in an adaptation context where the focus is on the likelihood that climate change will affect adversely a particular project or development through, for instance, future sea level rise or increased risks of storms and coastal flooding.¹⁶⁶ Evidentiary issues may manifest in the form of questions over the relevance of cumulative impacts from multiple projects similar to a particular project assessed, or deciding whether certain indirect climate change effects are ‘too speculative’ to be evaluated. They also may arise — as has happened in a number of Queensland coal mine cases, including the most recent Adani Carmichael coal mine litigation¹⁶⁷ — through the defendant’s presentation of the insidious ‘substitution’ argument: that if this particular emissions-intensive project does not go ahead its environmental effects will simply be

Page) <www.imf.com.au/cases/detail/wivenhoe-dam>, archived at <<https://perma.cc/8VSE-SUBN>>.

¹⁶⁵ See generally Jacqueline Peel, ‘Issues in Climate Change Litigation’ (2011) 5 *Carbon and Climate Law Review* 15.

¹⁶⁶ For a discussion of Australian climate adaptation cases of this kind, see Brian J Preston, ‘The Role of Courts in Relation to Adaptation to Climate Change’ in Tim Bonyhady, Andrew Macintosh and Jan McDonald (eds), *Adaptation to Climate Change: Law and Policy* (Federation Press, 2010) 157.

¹⁶⁷ See *Australian Conservation Foundation Inc v Minister for the Environment* [2017] FCAFC 134, [55]–[61].

substituted by other such projects approved elsewhere, including in other parts of the world.

As *Urgenda* illustrated, there are ways of overcoming arguments of this kind where convincing evidence can be presented to courts that every emission of GHG contributes to climate change through accumulation of atmospheric GHG.¹⁶⁸ For example, in *Urgenda*, the State of the Netherlands argued that the Dutch contribution to worldwide emissions was only 0.5% and that adopting a higher emissions reduction target would result in ‘a very minor, if not negligible, reduction of global greenhouse gas emissions’ and would have little influence on achieving the 2°C temperature goal without additional action by other countries with high emissions.¹⁶⁹ The Court rejected this argument, finding that

[t]he fact that the amount of the Dutch emissions is small compared to other countries does not affect the obligation to take precautionary measures ... After all, it has been established that any anthropogenic greenhouse gas emission, no matter how minor, contributes to an increase of CO₂ levels in the atmosphere and therefore to hazardous climate change.¹⁷⁰

The Court also noted that the Dutch per-capita emissions are among the highest in the world and took into account that Annex 1 countries like the Netherlands, having taken the lead in taking mitigation measures under the UNFCCC, have ‘therefore committed to a more than proportionate contribution to reduction.’¹⁷¹

Application of the precautionary principle offers another avenue for challenge in this regard, since where scientific uncertainty exists and serious or irreversible environmental threats can be identified,¹⁷² the general position under Australian environmental law is that the occurrence of such threats

¹⁶⁸ *Urgenda* (n 18) [4.79].

¹⁶⁹ *Ibid* [4.78].

¹⁷⁰ *Ibid* [4.79].

¹⁷¹ *Ibid*. Similarly, in *Juliana* (n 1) 1244–6, Aiken J distinguished earlier decisions which have found that the emissions from a particular fossil fuel project or small group of projects were insufficient to satisfy causation requirements in relation to climate change harms. She noted however that in the case before the court, the emissions at issue make up a significant share of global emissions.

¹⁷² The precautionary principle provides that ‘[w]here there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation’: *Intergovernmental Agreement on the Environment* (Australian Government, 1 May 1992) s 3.5.1.

should be assumed and the burden of proof rests with the defendant to show otherwise.¹⁷³

Nonetheless, convincing courts of the legal merits of these arguments frequently rests on a strong supporting scientific case presented by credible, well-qualified experts. In this article there is not scope to address the many complexities and challenges that can arise in seeking to present scientific evidence in the courtroom in a way that judges will find persuasive.¹⁷⁴ Suffice to say that first-generation cases have amassed considerable experience with different ways of approaching this challenge and generally have had better success in specialist environmental courts with flexible procedures for dealing with expert evidence.¹⁷⁵

For next-generation climate change cases, the evidentiary hurdles highlighted above are likely to be even more salient, particularly in those suits (based on public trust, torts and rights) where proof of the claim at issue relies on demonstrating causal links between legal breaches of rights or duties, and harm to particular plaintiffs or communities.¹⁷⁶ It is also likely that such cases involving governmental or corporate defendants will be fiercely fought, with high levels of resources allocated to defending these claims, leading to lengthy, expensive legal battles.

C Partnering and Facilitation

As business perceptions shift to recognise both the range of risks posed to companies by climate change (including physical, regulatory and market risks) and the associated business opportunities,¹⁷⁷ new possibilities are

¹⁷³ *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256, 273 [150] (Preston CJ).

¹⁷⁴ See generally Lee Godden and Jacqueline Peel, *Environmental Law: Scientific, Policy and Regulatory Dimensions* (Oxford University Press, 2010) ch 5; Bell-James and Ryan (n 73).

¹⁷⁵ The NSWLEC and the Queensland Planning and Environment Court are two examples of such courts. For a discussion of procedures used to manage expert evidence in environmental cases in the Queensland Planning and Environment Court, see ME Rackemann, 'The Management of Experts' (2012) 21 *Journal of Judicial Administration* 168.

¹⁷⁶ See generally Siobhán McInerney-Lankford, 'Climate Change and Human Rights: An Introduction to Legal Issues' (2009) 33 *Harvard Environmental Law Review* 431, 433.

¹⁷⁷ For a discussion of business risks and opportunities associated with climate change, see Task Force on Climate-Related Financial Disclosures, *Phase I Report of the Task Force on Climate-Related Financial Disclosures* (Report, 31 March 2016) 24. Climate changes risks are often categorised as physical and non-physical. Physical risks, associated with both acute weather events and longer term changes to rainfall, temperature and other factors, include potential disruptions to operations, transportation, supply chains; damage to physical assets; and

emerging for advocacy organisations to partner in climate change litigation and related legal interventions with commercial players who have aligned interests in clean energy transition and adaptation. This can take a variety of forms, from public joint action (eg submitting regulatory complaints or lodging legal challenges) to behind-the-scenes facilitation of legal interventions (eg identifying causes of action, approaching potential litigants or providing legal advice and support). For environmental groups, this is potentially a way to facilitate innovative legal interventions using different areas of law that would otherwise have been difficult or impossible to access due to rules of standing. Partnering with commercial players may also mean that regulatory interventions, such as complaints to regulators, carry more weight and attain more visibility, heightening their impact. In addition, working together with a different range of partners potentially opens up new sources of funding and other resources to support litigation activities.

Next-generation climate change litigation strategies that take a partnering approach are emerging in other jurisdictions, particularly in the fields of competition law and company and investment law. By collaborating with clean technology companies seeking better market access and policy settings that support clean energy transition, and with investors with long-term risk horizons, advocacy groups are opening up new avenues for climate change litigation. Two recent examples from the United Kingdom are discussed briefly below to stimulate further discussion of the potential for growing this strategy in Australia and to invite consideration of the nature and extent of aligned interests, the strategic value of partnering, the various forms this might take, and the potential challenges that may arise.

1 *Partnering in the Area of Energy Policy and Competition Law*

European competition law, and particularly state aid rules, set limits and conditions on how European Union member states can subsidise certain sectors and industries.¹⁷⁸ These rules are an important influence on the

reduced resource availability. Non-physical risks refer to a range of interacting legal, technological, market and reputational risks. For example, new laws and policies introduced to address climate change are likely to impose compliance costs and liabilities and lead to restrictions on the use of carbon-intensive assets. On the flipside of this multitude of risks is the range of potential commercial opportunities associated with transition to a low carbon economy, including the development of new clean energy markets and improved operating efficiencies.

¹⁷⁸ *Treaty on the Functioning of the European Union* (n 99) arts 107–9 provide the genesis for state aid rules. Article 107 prohibits ‘any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods ... in so far as it affects trade

realisation of clean energy transition and climate change mitigation objectives to the extent that they support or constrain market access for renewable and other clean energy technologies. For this reason, state aid rules have become a focus for legal interventions by UK public interest environmental lawyers — ClientEarth — who view them as ‘a powerful tool to further the EU’s climate and energy goals, if they effectively support burgeoning industries like renewables’.¹⁷⁹ However, direct legal interventions (eg alleging that subsidies to fossil fuel industries unfairly disadvantage clean energy and are unlawful) are largely restricted to commercial entities who are involved in the relevant market and who stand to be affected by any state aid payments, and therefore have legal standing to make a complaint. Strategic partnering and facilitation is one way for advocacy groups to overcome this barrier and access the available legal interventions.

In late 2014, ClientEarth was involved in supporting a legal challenge in the General Court of the European Union by a UK clean energy company, Tempus Energy, that stood to suffer from state aid payments associated with the UK government’s capacity mechanism.¹⁸⁰ This case is an interesting

between Member States’, and then provides for a series of exceptions to this prohibition, including ‘aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest’. Article 108 grants power to the European Commission to adjudicate over state aid, including approving state aid proposals and initiating a procedure in the European Court of Justice to rule on the compatibility of state aid with the internal market. The European Commission has produced guidelines setting out conditions under which aid for energy and environmental protection policy objectives (eg to support clean energy transition and climate change mitigation goals) may be considered compatible with the internal market: *Guidelines on State Aid for Environmental Protection and Energy 2014–2020*, [2014] OJ C 200/1. The recent decision of the General Court of the European Union regarding Germany’s renewable energy law illustrates how state aid for clean energy transition goals (in this case, feed-in tariffs and market premiums, which guarantee producers of renewable energy a higher price for the electricity they produce than the market price) may be found to be compatible with the internal market: *Federal Republic of Germany v European Commission* (General Court, T-47/15, 10 May 2016).

¹⁷⁹ ‘Document Library: State Aid’, *ClientEarth* (Web Page) <www.documents.clientearth.org/library/download-category/state-aid>, archived at <<https://perma.cc/69LG-FLSY>>.

¹⁸⁰ See *Action Brought on 4 December 2014 — Tempus Energy and Tempus Energy Technology v Commission (Case T-793/14)*, [2015] OJ C 81/21. The case involved a challenge to the European Commission’s decision to approve the UK capacity mechanism which had been set up to offer subsidies to reliable forms of power capacity to ensure sufficient energy was available in the grid to cover peak demand. Tempus Energy argued that the way the UK capacity mechanism was designed prioritised fossil fuel generation over demand side initiatives and was therefore unlawful: Simon Evans, ‘“Brave” Legal Challenge Launched against UK Capacity Market’, *Carbon Brief* (Web Page, 4 December 2014) <www.carbonbrief.org/brave-

example of strategic partnering and facilitation for a number of reasons. The strategic goals of ClientEarth and Tempus Energy relevantly align. Media statements made by ClientEarth surrounding the case clearly make this point:

If allowed to go ahead, the UK's 'capacity mechanism' will artificially prop up the existing coal-reliant energy system by paying generators extra to produce more electricity at peak times. The costs will be passed on to consumers, regardless of when they use power. This is bad for the environment and for our pockets. We are supporting their action because it's crucial to driving progress on climate change.¹⁸¹

Further, ClientEarth, as an NGO, would not have standing to bring such an action. Unless it partners on some level with a commercial player it is limited to advocacy from the sidelines. If the General Court of the European Union finds in favour of Tempus Energy, the case will be of considerable significance in setting a precedent for ensuring market access and support for clean energy within the national capacity mechanisms that are currently being developed across Europe.

A detailed consideration of the potential for environmental groups to partner with renewable or other clean energy businesses in Australia to bring similar claims is beyond the scope of this article. The above example is included, not because it is directly transferable to an Australian context, but rather with the aim of inspiring investigation of the various litigation angles that could be pursued to hasten the development of market conditions supporting clean energy transition in Australia.¹⁸² The Australian National Electricity Market has been the subject of much recent public policy consideration including in relation to (perceived) tensions between greater uptake of

legal-challenge-launched-against-uk-capacity-market>, archived at <<https://perma.cc/DG57-KGB8>>. The Court has not yet handed down a decision.

¹⁸¹ Oliver Tickell, 'UK's "Unlawful" £35 Billion Support to Fossil Fuels in ECJ Challenge', *Ecologist* (Web Page, 4 December 2014) <www.theecologist.org/News/news_round_up/2662841/uks_unlawful_35_billion_support_to_fossil_fuels_in_ecj_challenge.html>, archived at <<https://perma.cc/TN35-GFK8>>.

¹⁸² For discussion of the various regulatory, policy and market barriers to greater uptake of renewables in the Australian electricity market, see Anne Kallies, 'The Impact of Electricity Market Design on Access to the Grid and Transmission Planning for Renewable Energy in Australia: Can Overseas Examples Provide Guidance?' (2011) 2 *Renewable Energy Law and Policy Review* 147; Anne Kallies, 'A Barrier for Australia's Climate Commitments? Law, the Electricity Market and Transitioning the Stationary Electricity Sector' (2016) 39 *University of New South Wales Law Journal* 1547.

renewables or clean energy technologies and energy security.¹⁸³ While not exclusively focused on the enabling conditions for clean energy transition, ongoing public policy consideration is expected to shed some further light on aspects of market governance and market behaviour that may constrain energy transition and greater uptake of renewables. It may well be that litigation avenues to address some of the barriers faced by renewables and clean energy technologies, such as battery storage, emerge. Indeed, there has been some recent commentary exploring market concentration and market manipulation issues adversely affecting investment in renewable energy in Australia.¹⁸⁴

2 *Partnering with Shareholders and Investors*

As discussed in Part III, interest in using company and investment law avenues to advance action on climate change is growing in many jurisdictions. It has gained impetus with recent, high-profile investigations of the reporting practices of US fossil fuel companies, Peabody Coal and Exxon Mobil, and related litigation.¹⁸⁵ The launch of the first shareholder class action of this nature against Exxon Mobil in November 2016 suggests that the commercial motivations for such legal intervention are increasing.¹⁸⁶ As such, this approach may well escalate in a range of jurisdictions. There is, however, also potential for advocacy groups to engage in strategic partnering and facilitation in this area of law to help stimulate and facilitate further legal action by third parties. These parties might include groups of shareholders or pension (superannuation) fund members who have direct interests in enforcing legal obligations to disclose climate change risks and to take these into account in decision-making.

¹⁸³ Alan Finkel et al, *Independent Review into the Future Security of the National Electricity Market: Blueprint for the Future* (Final Report, June 2017).

¹⁸⁴ See, eg, Dylan McConnell and Mike Sandiford, *Winds of Change: An Analysis of Recent Changes in the South Australian Electricity Market* (Report, Melbourne Energy Institute, August 2016) 30–7, which notes concerns about market concentration and the improper exercise of market power which favours incumbent integrated energy companies and disadvantages smaller renewables or clean technology companies. See also Bruce Mountain, 'Market Power and Generation from Renewables: The Case of Wind in the South Australian Electricity Market' (Working Paper No 51, Centre for Strategic Economic Studies, January 2013) 21–2, which argues similarly that the exercise of market power in South Australia results in a bias against investment in wind farms.

¹⁸⁵ See n 85 and accompanying text.

¹⁸⁶ See 'Exxon Mobil Corporation (NYSE:XOM) Investor Securities Class Action Lawsuit 11/07/2016' (n 138).

One of the most common areas where advocacy groups have engaged with corporations law on climate change to date is in supporting shareholders to bring resolutions to company annual general meetings seeking better disclosure of climate change risks and the adoption of more sustainable energy business strategies. The first climate change resolution was put to Exxon Mobil in 1997 and climate change proposals now represent a significant proportion of total proposals brought to US companies.¹⁸⁷ Similar approaches are increasingly being implemented in other jurisdictions, including the United Kingdom and Australia.¹⁸⁸ Public interest lawyers work with investor partners who have access to a wide range of investors and resources dedicated to lobbying and engagement in order to bring shareholder resolutions on climate change.¹⁸⁹

There are also examples of advocacy groups partnering with investors to put pressure on regulators to clarify and enforce the law around climate change risk disclosure. For example, a group of 16 investment managers signed a letter to the UK FRC in early 2016, together with ClientEarth.¹⁹⁰ The letter detailed long-term investors' view that fossil fuel-dependent companies

¹⁸⁷ See generally Dashka Slater, 'Resolved: Public Corporations Shall Take Us Seriously,' *The New York Times Magazine* (New York, 12 August 2007) <www.nytimes.com/2007/08/12/magazine/12exxon-t.html>; Cynthia E Clark and Elise Perrault Crawford, 'Influencing Climate Change Policy: The Effect of Shareholder Pressure and Firm Environmental Performance' (2012) 51 *Business and Society* 148, 153–4.

¹⁸⁸ For example, the Australasian Centre for Corporate Responsibility ('ACCR') lodged a number of special shareholder resolutions with the big banks in the 2015 annual general meeting ('AGM') season, seeking amendments to the various company constitutions such that 'each year at about the time of the release of the Annual Report, at reasonable cost and omitting any proprietary information, the Directors report to shareholders their assessment of the quantum of greenhouse gas emissions [the company is] responsible for financing calculated, for example, in accordance with Greenhouse Gas (GHG) Protocol guidance': 'Big Banks,' *Australasian Centre for Corporate Responsibility* (Web Page) <www.accr.org.au/big_banks>, archived at <<https://perma.cc/ZM9J-89T8>>. See also ACCR, 'Financed Emissions: "Unburnable Carbon" Risk and the Major Australian Banks, ACCR, 2014' (Update Note, 2014).

¹⁸⁹ In 2015 and 2016, ClientEarth partnered with the Aiming for A coalition of investors to bring special resolutions to the AGMs of large fossil fuel companies, including Shell, BP, Rio Tinto, Glencore and Anglo American. If 75% of the meeting support these special resolutions, they become binding on the board. Resolutions at BP and Shell in 2015 passed with more than 98% approval: 'Mining Giant Anglo American Backs Climate Change Resolutions,' *ClientEarth* (Web Page, 14 March 2016) <www.clientearth.org/mining-giant-anglo-american-backs-climate-change-resolutions>, archived at <<https://perma.cc/J9MG-DJWD>>.

¹⁹⁰ Letter from Natasha Landell-Mills et al to Nick Land, Chairman, Codes and Standards Committee, FRC, 29 January 2016 <www.documents.clientearth.org/library/download-info/letter-to-frc-on-viability-statements>, archived at <<https://perma.cc/9GFP-863W>>.

should address climate-related risks in the newly introduced viability statements in their annual reports and sought a commitment that the FRC engage with investors in developing any future regulatory guidance.¹⁹¹ Following this, two regulatory complaints were lodged against particular fossil fuel companies alleging inadequate climate risk disclosure and breach of directors' duties, as described above.¹⁹² While these complaints were lodged by ClientEarth, investors were urged to support the complaints via a targeted investor briefing,¹⁹³ and other organisations have highlighted the issue in public statements.¹⁹⁴

Another example of foundation-laying facilitative legal intervention by advocacy groups is the development of legal briefing papers targeted specifically at commercial players who may have an interest in identifying potential breaches and enforcing the law. Recent examples include an investor report prepared by ShareAction and ClientEarth on the extent of legal duties of pension funds to consider climate risks in their investments and the implementation gaps in practice,¹⁹⁵ and the release of an opinion by a Senior Counsel on the scope of these legal duties.¹⁹⁶

The examples discussed above — both in competition law and corporations law — highlight some of the advantages for advocacy groups of partnering with commercial players and the various facilitating roles played by public interest lawyers in these contexts. Yet there are also challenges to pursuing these strategies in an Australian context. Stretched resources and limited expertise in these and other potentially relevant areas of commercial law are the greatest initial barriers for public interest lawyers. In this context, there is

¹⁹¹ Ibid.

¹⁹² See n 142.

¹⁹³ ClientEarth, 'Complaints Filed against SOCO International plc and Cairn Energy plc' (n 142).

¹⁹⁴ See, eg, Heather Jimaa, 'ClientEarth Points Finger at SOCO and Cairn over Alleged Sustainability Reporting Failures', *The Accountant* (Web Page, 23 August 2016) <www.theaccountant-online.com/news/clientearth-points-finger-at-soco-and-cairn-over-alleged-sustainability-reporting-failures-4986830>, archived at <<https://perma.cc/NBU2-RMR4>>.

¹⁹⁵ ShareAction and ClientEarth, 'The Hot Debate on Climate Risk and Pension Investments: Does Practice Stack Up against the Law?' (Investor Report, September 2016) <<https://shareaction.org/wp-content/uploads/2016/09/ClimateInvestmentDuties-InvestorReport.pdf>>, archived at <<https://perma.cc/3LWR-CPUZ>>.

¹⁹⁶ Keith Bryant and James Rickards, 'The Legal Duties of Pension Fund Trustees in Relation to Climate Change' (Abridged Joint Opinion, 25 November 2016) <www.documents.clientearth.org/wp-content/uploads/library/2016-12-02-the-legal-duties-of-pension-fund-trustees-abridged-opinion-ext-en.pdf>, archived at <<https://perma.cc/M36R-6VMR>>.

likely to be some reticence to allocating capacity to these new, untested and potentially risky approaches. There are also potential trade-offs to be negotiated in situations where the interests of NGOs and associated commercial players do not perfectly align — for example, around the level of control of strategy and the extent of publicity around partnerships and interventions. However, it seems that given the potential benefits of these partnering approaches, there will be increasing interest and experimentation with them in Australia also.

V CONCLUSION: SHAPING THE NEXT GENERATION OF AUSTRALIAN CLIMATE LITIGATION

Developments around the world create important opportunities for an innovative next generation of Australian climate change litigation. New cases in the United States, the Netherlands, Pakistan and the Philippines help to put a human face on climate victims¹⁹⁷ and provide models for how successful cases focused on rights, duties and common law principles might be framed.¹⁹⁸ In addition, evolving efforts to use corporate and other commercial law mechanisms around the world, paired with growing attention in Australia to corporate disclosure of climate change risks, suggest interesting new possibilities for litigation. These emerging approaches create an opportunity for Australian advocates to explore new pathways while political change in the United States may simultaneously prompt innovation there.

As advocates here explore these new approaches, however, it will be critical for them to weigh the prospects of success against possibilities for negative opinions that could undermine further efforts. The more limited US experiments in public nuisance and human rights illustrates potential for courts to cut off novel pathways, and any next-generation climate change litigation in

¹⁹⁷ A focus on human ‘victims’ of climate change arguably offers a more compelling narrative for climate change litigation by making ‘climate change more tangible and more immediate’: David B Hunter, ‘The Implications of Climate Change Litigation: Litigation for International Environmental Law-Making’ in William CG Burns and Hari M Osofsky (eds), *Adjudicating Climate Change: State, National, and International Approaches* (Cambridge University Press, 2009) 357, 360.

¹⁹⁸ A recent case relying in part on a constitutional rights claim in a climate change context is South Africa’s first climate change decision. The North Gauteng High Court ruled in favour of environmental justice organisation, Earthlife Africa Johannesburg, and referred an appeal against the environmental authorisation for a new coal-fired power station back to the Minister of Environmental Affairs on the basis that its climate change impacts had not properly been considered: *Earthlife Africa Johannesburg v Minister of Environmental Affairs* [2017] 2 All SA 519 (GP) (8 March 2017).

Australia will need to be framed in ways that minimise those risks. In addition, because existing approaches have achieved important successes and may represent the greatest likelihood for positive outcomes in the future, they should not be neglected as these new pathways are explored.

Election results in Australia and in the United States highlight the precarious nature of climate change policy, which is all the more worrying in a broader context in which current efforts are not nearly enough to prevent the worst impacts of climate change.¹⁹⁹ Litigation remains an important tool to push and block government action, and to advance necessary mitigation and adaptation efforts. In that context, an innovative and effective next generation of Australian climate change litigation is critical.

¹⁹⁹ See United Nations Framework Convention on Climate Change Secretariat, *Synthesis Report on the Aggregate Effect of the Intended Nationally Determined Contributions*, UN Doc FCCC/CP/2015/7 (30 October 2015) 11. This report assesses countries' current NDCs and concludes that they are not sufficient to limit the estimated temperature rise to below the 'safe' level of 2°C.