Legal briefing

1 June 2022

Recent trends in climate change litigation

In this issue	

In Australia and across the world, climate change litigation has been increasing. The cumulative number of climate change-related cases has more than doubled since 2015, with over 1,000 new cases brought in the past 6 years worldwide.[1] Recent cases in Australia demonstrate that climate change issues are being raised in novel ways with the potential to impact upon many different Commonwealth agencies. Climate change issues are being litigated in a wide range of matters including those relating to administrative law, torts, consumer law and company law. Although the scope of climate change litigation is expanding, governments remain frequent defendants in such matters.[2] Notably, on 15 March 2022, the Full Court of the Federal Court unanimously found that the Minister for the Environment does not owe a duty of care to Australian children when deciding to approve or not approve a proposed coal mine extension. This overturned a previous decision of a single judge of the Court which recognised a novel duty of care.

This legal briefing aims to provide AGS clients with an outline of recent trends in climate change litigation with a focus on issues affecting government. First, we provide an overview of recent trends in climate change litigation. Second, we discuss areas of law where cases commonly arise – administrative law and enforcement of statutory duties, tort, consumer law and human rights – and highlight some recent cases. The appendix to this briefing contains summaries of further recent and ongoing significant climate change cases.

1 Joana Setzer and Catherine Higham (2021) *Global trends in climate change litigation: 2021 snapshot*. London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science.

2 Michal Nachmany et al. (2017) *Global trends in climate change legislation and litigation: 2017* update. London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science.

Overview of climate change litigation and recent trends

Climate change litigation is a broad term and can encompass a range of cases, including those which are not centrally 'about' climate change, but are indirectly linked due to the interconnectedness of climate change issues with many areas of law.[3] The 2020 Global Climate Litigation Report by the United Nations Environment Programme describes climate change litigation as 'cases that raise material issues of law or fact relating to climate change mitigation, adaptation, or the science of climate change'.[4] While the success in climate change litigation has been variable, each decision has contributed to a developing jurisprudence addressing climate change issues.

In Australia, climate change issues have typically arisen in the context of judicial or merits reviews of decisions under environmental and planning legislation. The first case expressly raising climate change issues is generally considered to be a 1994 challenge to a decision to approve a coal-fired power station on the basis that the power station would unacceptably contribute to the greenhouse effect.[5] Many cases involve the judicial review of administrative decision-making on the grounds that the decision-maker failed to take into account climate change. These administrative law challenges are sometimes referred to as the 'first wave' or 'first generation' of climate change litigation,[6] and they continue to maintain a strong presence in the Australian climate change litigation landscape.

'...climate change litigation is increasing and diversifying.'

Academics have variously described second and third waves of climate change litigation, where cases have shifted the focus to private litigation against companies,[7]actions relying on human rights or seeking to establish or enforce duties relating to climate change. Of course, the categories of litigation overlap depending on the specific legal context. The key takeaway is that climate change litigation is increasing and diversifying. Four particular categories of ongoing interest are administrative law, tort, consumer protection (climate risk disclosure) and human rights, discussed below.

Administrative law and civil enforcement

Whether administrative law challenges are successful depends highly on the particular statutory and factual context of the decision. Commonly, applications for judicial review are made on the basis that a decision-maker failed to take into account climate change or matters relevant to climate change (such as greenhouse gas [GHG] emissions), or the decision-maker erred in their consideration of such matters.

The Chief Judge of the NSW Land and Environment Court has suggested that 'as attitudes to climate change continue to shift, assisted by the recognition of the importance of mitigating climate change in the Paris Agreement, existing legislative frameworks are more likely to be interpreted by the courts as requiring a decision-maker to take climate change into account.'[8] However, the extent to which climate change may be relevant to a decision will largely depend on the terms, express or implied, of the statute or instrument under which a decision is made.

3 Jacqueline Peel and Hari M Osofsky, 'Climate Change Litigation' (2020) 16 *Annual Review of Law and Social Science* 21, 23.

4 United Nations Environment Programme (2020) *Global Climate Litigation Report: 2020 Status Review*, available at: https://www.unep.org/resources/report/global-climate-litigation-report-2020-status-review.

5 *Greenpeace Australia Ltd v Redbank Power Company Pty Ltd and Singleton Council* (1994) 86 LGERA 143. See also, Brian Preston, 'Mapping Climate Change Litigation' (2018) 92 *Australian Law Journal* 774.

6 In the US, the first wave of climate change litigation also involved a number of actions in tort relying on the public trust doctrine. See for example, Brian Preston, 'Influence of the Paris Agreement on Climate Change Litigation: Legal Obligations and Norms (Part I)' (2021) 33(1) *Journal of Environmental Law* 1, 27; Jacqueline Peel et al, 'Shaping the Next Generation of Climate Change Litigation in Australia' (2017) 41 *Melbourne University Law Review* 793, 796.

7 Geetanjali Ganguly, Joana Setzer and Veerle Heyvart, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38(4) *Oxford Journal of Legal Studies* 841.

8 Preston, above n 6, 28.

A number of courts around the world, and in Australia, have found that direct and indirect GHG emissions (and their contribution to global GHG emissions and climate change) are relevant considerations in decisions determining whether to approve activities involving fossil fuel extraction or combustion.[9] Such a requirement may be made express in legislation, or implied from the subject matter, purpose or scope of the statute. The impacts of climate change have also been held to be a mandatory relevant consideration. In *Sharma v Minister for Environment*,[10] a single judge of the Federal Court found that the Minister for Environment was required to take into account the risk to human safety arising from a proposed coal mine extension's contribution to GHG emissions, in exercising her discretion to approve or not approve the project. The Court held that this requirement was found in the 'subject matter, scope and purpose' of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).[11] The Full Court of the Federal Court allowed the Minister's appeal and unanimously found that human safety was not a mandatory consideration and the primary judge had erred in construing the EPBC Act in this way.[12] This case is discussed further in the 'Torts' section of this briefing.

In *North East Forest Alliance Inc v Commonwealth of Australia & Anor*, the applicant seeks a declaration that a Regional Forest Agreement entered into by the Commonwealth and the State of New South Wales, and varied by deed of variation, is not a 'Regional Forest Agreement' within the meaning of s 4 of the *Regional Forest Agreements Act 2002* (RFA Act) or s 38 of the *Environment Protection and Biodiversity Conservation Act 1999*. The applicant claims, inter alia, that the Commonwealth was required to have regard to assessments of the impacts of climate change before agreeing to materially extend the term of the RFA. That case was heard before the Federal Court in March 2022 and judgment is reserved.

While administrative law challenges have historically been brought against decisions made under environmental and planning legislation, these challenges are expanding. For example, in *Environment Centre Northern Territory v Minister for Resources and Water*,[13] an environmental group sought judicial review of decisions of the Minister for Resources and Water providing for grants to an oil and gas company for exploratory drilling. The applicant claimed that the Minister failed to make reasonable inquiries in respect of climate change related risks and as a consequence failed to comply with s 71 of the *Public Governance, Performance and Accountability Act 2013* (Cth) (the PGPA Act). The applicant also claimed that the Minister's decisions were legally unreasonable, illogical and/or irrational because the Minister did not have regard, or adequate regard, to climate change related risks. The Court rejected the applicant's grounds relating to climate change, but upheld a challenge to one of the impugned decisions on other grounds. The Court found that the requirement in s 71(1) of the PGPA Act for 'reasonable inquiries' to be made before determining whether expenditure of public money would be a proper use of that money involved the subjective assessment of the Minister as to whether and what inquiries were reasonable. The Court held that there was no requirement for the Minister to make reasonable inquiries into the climate change risks raised by the applicant in the particular circumstances of the impugned decisions.

Litigants have also sought mandamus to compel government authorities to comply with duties imposed in legislation by reference to climate change-focussed arguments.

Cases spotlight: Administrative Law

Australian Conservation Foundation v Minister for Environment (2016) 251 FCR 308

This was a judicial review application in relation to the Minister for Environment's decision to approve the Adani open-cut and underground coal mine. The challenge alleged that the Minister did not comply with the EPBC Act in deciding to approve the mine.

9 *Gloucester Resources Limited v Minister for Planning* (2019) 234 LGERA 257 at [499] and the cases cited in the judgment from [500]–[513].

10 [2021] FCA 560.

11 *Sharma v Minister for Environment* [2021] FCA 560 at [404].

12 *Minister for Environment v Sharma* [2022] FCAFC 35 at [214]-[217] (Allsop CJ), [589]–[592] (Beach J), [847] (Wheelahan J).

13 [2021] FCA 1635.

One aspect of the challenge was that the Minister failed to consider the impacts of the downstream GHG emissions of the coal mine (the GHG emissions arising from the transport and combustion of coal overseas), being the physical effects of climate change, as a 'relevant impact' under s 82 of the EPBC Act. The Minister had found that the downstream emissions were not a direct consequence of the proposed action, and considered that emissions occurring overseas were subject to a range of variables. The Minister found that it was difficult to identify the necessary relationship between taking the action and possible impacts to relevant environmental matters, including the Great Barrier Reef. Griffiths J found no reviewable error in the Minister's reasoning and the judgment was upheld on appeal.

The applicant also claimed that the Minister had erred by failing to consider or apply the precautionary principle – s 391(2) of the Act. The Court accepted that this principle is only engaged where there are threats of serious or irreversible environmental damage. As the Minister did not find that that the mine posed such a threat, there was no legal requirement to apply the precautionary principle.

Another aspect of the challenge related to the application of s 137 of the Act, which requires the Minister not to act inconsistently with Australia's obligations under the World Heritage Convention. The applicant claimed that the approval of the mine posed a risk to the World Heritage listed Great Barrier Reef due to the GHG emissions of the mine. The Court accepted that challenges on this basis were justiciable, but all that was required was for the Minister to reach a conclusion on that issue supported by proper legal grounds, which he had done here.

Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd [2021] NSWLEC 110

A community group brought judicial review proceedings challenging a decision of the Independent Planning Commission (IPC) to grant development consent to a coal seam gas project. The community group claimed that the IPC had erred in its consideration of 2 key issues. First, in considering the GHG emissions of the project, the IPC considered the acceptability of the GHG emissions by comparing the potential GHG emissions of the project with hypothetical alternative coal projects. Second, the IPC considered that downstream GHG emissions (the emissions arising from the combustion of the gas by the end-user) were outside the control of the proponent and therefore not reasonably able to be conditioned.

On the first issue, the applicant claimed that, by focusing on the relative comparison of the GHG emissions from CSG with those of coal, the IPC had failed to have regard to the likely impacts of the project. The Court rejected this argument, finding that the IPC had evaluated the acceptability of the GHG emissions of the project and found that they were acceptable for reasons including, but not limited to, the emissions of the project relative to emissions arising from coal-based alternatives: [58].

The Court found that 'an evaluation of the acceptability of a project's GHG emissions can be assisted by placing them in context and measuring them against the yardsticks of the GHG emissions of other comparable projects'. However, the Court cautioned that blind application of such comparisons could lead to a misunderstanding of a project's contribution to climate change. Nevertheless, this was not an irrelevant consideration (at [67]) and the IPC had not erred by considering this factor (at [79]).

As to the second issue, the Court accepted that the IPC was required to consider whether to issue the consent for the project subject to conditions to ensure that the GHG emissions, including downstream emissions, of the development were minimised to the greatest extent practicable. However, the Court found that the IPC had done so (at [108]).

Bushfire Survivors for Climate Action v Environment Protection Authority [2021] NSWLEC 92

A climate action group sought to compel the NSW EPA to perform a statutory duty to develop environmental policies to ensure the protection of the environment from climate change.

The Protection of the *Environment Administration Act 1991* (NSW) (POEA Act) requires the NSW EPA to develop environmental quality objectives, guidelines and policies 'to ensure environment protection'. The applicants had claimed that the EPA was required to develop instruments to ensure protection of the environment in

NSW from climate change, including by regulating GHG emissions in a way consistent with limiting global temperature rise to 1.5°C above pre-industrial levels. The NSW Land and Environment Court found that the duty under the POEA Act included a duty to develop instruments to ensure the protection of the environment from climate change specifically, but not to the level of specificity contended for by the applicants. While the EPA had a discretion as to the specific content of the instruments developed, its existing instruments did not comply with the statutory duty.

The Court found that it was appropriate to make an order in the nature of mandamus compelling the EPA to perform its duty.

Tort

> 'Climate litigation against companies was historically concentrated in the USA from 2005 to 2015 ...'

Climate litigation against companies was historically concentrated in the USA from 2005 to 2015, with a number of unsuccessful tortious claims brought against major energy companies in nuisance or negligence.[14] For example in *Native Village of Kivalina v Exxon Mobil*[15], an Inupiat village in Alaska impacted by rising sea levels and melting artic ice unsuccessfully brought a series of common law tort claims against a number of major energy companies for their contributions to the impacts of climate change on the village. Nevertheless, many groups continue to bring similar actions against private companies. In a landmark decision in the Netherlands handed down in May 2021, the District Court of The Hague ordered Shell to reduce its overall CO_2 emissions by at least 45% from 2019 levels by 2030.[16] The decision relies on the 'unwritten standard of care' contained in article 6:162 of the Dutch Civil Code. The Court found that Shell would act contrary to its duty of care if it did not meet the reduction target ordered by the Court. The Court found that Shell 'may be expected to take the necessary steps to remove or prevent the serious risks ensuing from the CO_2 emissions generated by them, and to use its influence to limit any lasting consequences as much as possible'.[17]

Claims in tort have also been brought against governments, including in Australia. On 26 October 2021, a representative proceeding was brought against the Commonwealth by applicants who are indigenous to the Torres Strait Islands. The applicants in *Pabai Pabai v Commonwealth* allege that the Commonwealth owes a duty of care to Torres Strait Islanders to take reasonable steps to protect Torres Strait Islanders, their traditional way of life and the marine environment including the Torres Strait Islands from the current and projected impacts of climate change.[18]

Cases spotlight – Tort

Minister for Environment v Sharma [2022] FCAFC 35

A coal mining company applied under the EPBC Act for approval to expand and extend an existing approved coal mine (the Extension Project). The applicants, 8 Australian children, brought proceedings on behalf of themselves and as a representative proceeding on behalf of Australian children (the Children). They claimed that the Minister owed each of the Children a duty to exercise her power under s 130 and s 133 of the EPBC Act with reasonable care so as not to cause them harm. The applicants sought declaratory and injunctive relief to restrain an apprehended breach of that duty, being the potential exercise of the Minister's discretion to approve the Extension Project.

14 Ganguly et al, above n 7, 846.

15 *Kivalina v ExxonMobil Corporation et al* 696 F.3d 849, 2012 WL 4215921 (9th Cir 2012).

16 *Milieudefensie et al. v Royal Dutch Shell plc* ECLI:NL:RBDHA:2021:5339.

17 Ibid [4.4.55].

18 Federal Court of Australia, proceedings VID622/2021.

The judgment at first instance[19]

At first instance, the Court (Bromberg J) accepted that there was a real risk of harm to the Children arising from climatic hazards, such as bushfires, brought about by increases to global average surface temperatures. The Court found that the Extension Project would lead to the emission of 100 million tonnes of CO_2, causing a small but measurable increase to global average temperatures.

The Court found that the Minister had a duty to take reasonable care to avoid causing personal injury to the Children when deciding, under s 130 and s 133 of the EPBC Act, to approve or not approve the Extension Project. Applying the salient features approach to determine whether this novel duty existed, the Court found that:

- it was reasonably foreseeable that the approval of the Extension Project posed a real risk of harm
- the Minister had substantial control over the risk of harm
- the Children were vulnerable to that risk of harm and relied on the Minister to avoid that harm
- the imposition of a duty of care was consistent with the statutory scheme and coherent with administrative law principles
- the risk of harm to human safety was a relevant consideration that the Minister must take into account in making her decision.

The Court refused the application for an injunction as it was not satisfied that it was probable that the Minister would breach the duty of care.

The judgment on appeal

The Full Court of the Federal Court (Allsop CJ, Beach J and Wheelahan J) unanimously allowed the Minister's appeal, finding that the Minister did not owe the posited duty of care. The Court also found, unanimously, that human safety was not an implied mandatory statutory consideration. The Court dismissed the Minister's ground concerning the factual findings made by the primary judge on the basis that the evidence was not challenged in the court below and the primary judge's findings were open on that evidence.

While the 3 judges were unanimous in finding that the Minister did not owe a duty of care to the Children, they delivered separate judgments and the reasoning differs quite significantly between the judgments. Allsop CJ and Wheelahan J took a broadly similar approach on 3 key matters. First, their Honours emphasised that the relationship between the parties as established by the EPBC Act did not support the recognition of a duty. Second, the posited duty would be inconsistent and incoherent with the discharge of the Minister's statutory functions under the EPBC Act. Finally, their Honours accepted that the posited duty would, at the breach stage, give rise to policy questions unsuitable to determination by the judiciary.

In contrast, Beach J did not accept that the posited duty was incoherent with the EPBC Act or that the duty should not be recognised due to questions of policy. His Honour instead focused on the closeness and directness between the Minister's decision and likely risk of harm to the Children, and the 'indeterminate liability' that would arise if a duty were imposed.

In summary, Allsop CJ found the duty should not be imposed because:

- the nature of the relationship between the parties was 'one of government' and governed in connection with the protection of species, communities and water resources in a limited decision under the EPBC Act: [346]
- the posited duty called forth 'core policy' that was unsuitable for judicial determination: [246]–[266]. In particular, the duty called forth the question of whether, not to be negligent, the Minister needed to make a decision about this coal mine that reflected a change or re-evaluation of existing international and national policy: [265]

19 *Sharma v Minister for Environment* [2021] FCA 560; *Sharma v Minister for Environment (No 2)* [2021] FCA 774.

- the posited duty was incoherent with the text and structure of the EPBC Act, and the legal and government framework for the protection of the environment reflected therein: [267]–[272]. The imposition of the duty would 'change the whole nature of the decision-making in question': [268]
- the Minister did not have control over the harm, or had 'extremely faint' control, noting that the risk could be mitigated by countless others around the world or by international agreement: [335]
- the claimants were in the same position as everyone in the world at the time the harm would occur. There was no special reliance upon the Minister different to other Australians: [338]–[340].

Beach J found that the duty of care should not be imposed for 2 key reasons:

- There was no special relationship, closeness and directness between the Minister and claimants: [678]–[701]. There was no physical, temporal or relational closeness between the Minister and her exercise of power and its consequences, and the claimants: [695].
- The posited duty of care could not be sustained by reason of the indeterminacy of liability: [742]–[747].

Beach J otherwise found that the Minister's other submissions did not, individually or collectively, mean that the duty could not be recognised.

Wheelahan J found that the duty of care should not be imposed because:

- the Minister's functions under the EPBC Act did not erect or facilitate a relationship between the parties that supported the recognition of a duty of care: [852]
- the posited duty of care was inconsistent with the Act. Discharging that duty would require the Minister to deviate from the decision-making required under the EPBC Act and radically alter the scope and subject-matter of the decision-making obligation of the Minister under s 130 of the EPBC Act: [850], [852]
- establishing a 'standard of care' would involve political issues uniquely suited to elected representatives and the executive: [868]. Those questions were unsuitable for judicial determination: [868]
- a decision to approve the Extension Project would not give rise to a foreseeable risk of injury: [872].

Smith v Fonterra [2021] NZCA 552

This was an appeal to the New Zealand Supreme Court brought by a Ngāpuhi and Ngāti Kahu elder and the climate change spokesperson for the Iwi Chairs Forum. It involved an appeal against an interlocutory decision to strike out a claim in tort brought against several New Zealand companies. The claim alleged that those companies owed a novel duty of care to the people of New Zealand, and were required to take steps to limit or fully offset their GHG emissions. The Court, in dismissing the appeal, reasoned that tort law was an inappropriate avenue for these claims to be agitated.

While noting a description of climate change as 'the biggest challenge facing humanity in modern times', the Court reasoned that tort law was an ad hoc way of addressing climate change that could result in arbitrary outcomes and ongoing litigation. The Court identified difficulties with the novelty of the duty of care, noting it was far reaching and that it involved 'a scenario in which every person in New Zealand – indeed, in the world – is (to varying degrees) both responsible for causing the relevant harm, and the victim of that harm'. The appellant was essentially seeking a 'net-zero' requirement to be imposed through tort law on emitters in New Zealand. The Court reasoned that it was inappropriate for it to effectively create a net-zero regulatory regime through tort law, due to the judiciary's lack of institutional skill, experience and democratic credentials. Instead, it was more appropriate for the Court to enforce statutory regimes that address climate change.

In *Minister for Environment v Sharma*, Allsop CJ quoted with approval the New Zealand Court of Appeal's comments that 'Courts are... ill-equipped to address the issues that the claim raises', which call for 'a level of institutional expertise, democratic participation and democratic accountability that cannot be achieved through a court process': at [255].

Consumer protection – climate change risk disclosure and due diligence

There has also been an increase in interest in the law concerning the reporting and disclosure of climate change risks. Much attention has been given to the disclosure of climate risks by companies. Noel Hutley SC and Sebastian Hartford Davis have published several legal opinions advising that company directors will in many circumstances have obligations to consider and disclose climate risks in accordance with the duty of care and diligence imposed upon company directors by s 180(1) of the *Corporations Act 2001* (Cth) and general law.[20] In their 2021 opinion, the authors opined that a company (and its directors) could be found to have engaged in misleading or deceptive conduct or other breaches of law by engaging in 'greenwashing'. For example, this might occur where a company has made a commitment to reduce GHG emissions but did not have reasonable grounds to support the express and implied representations contained within that commitment, or where it had not accurately conveyed its progress on climate change commitments.

'Much attention has been given to the disclosure of climate risks by companies.'

In *McVeigh v REST*,[21] a fund member brought proceedings against his superannuation fund alleging that REST had breached the *Corporations Act 2001* and the *Superannuation Industry (Supervision) Act 1993* by failing to provide adequate information regarding climate change risks and the fund's management of such risks. The parties agreed to settle the litigation, with REST acknowledging that 'climate change is a material, direct and current financial risk to the superannuation fund' and agreeing to implement climate change risk management strategies.[22]

While the legal context applying to the Commonwealth differs, there has also been recent action regarding the disclosure of climate change risks by the Commonwealth.

Case spotlight – Climate risk disclosure

O'Donnell v Commonwealth of Australia (Federal Court of Australia, VID482/2020)

The applicant is the holder of and an investor in certain exchange-traded Australian Government Bonds (Bonds). She has brought proceedings on her behalf, and on behalf of other holders of and investors in the Bonds.

The applicant claims that the Commonwealth failed to disclose information about the financial risks arising from climate change in promoting the Bonds (material climate change information). The applicant alleges that by failing to disclose material information about climate change, the Commonwealth:

- engaged in conduct that is misleading or deceptive in breach of s 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) (the misleading or deceptive conduct claim)
- breached a duty, said to be owed, of utmost candour and honesty to investors who acquire or intend to acquire bonds (the disclosure duty claim)
- breached the duty of due diligence in s 25(1) of the *Public Governance, Performance and Accountability Act 2013* (Cth) (PGPA Act) (the PGPA Act claim).

20 Noel Hutley SC and Sebastian Hartford-Davis, 'Climate Change and Directors' Duties' (Memorandum of Opinion, Centre for Policy Development and Business Council, 7 October 2016); Noel Hutley SC and Sebastian Hartford Davis, 'Climate Change and Directors' Duties: Supplementary Memorandum' (Supplementary Memorandum of Opinion, Centre for Policy Development, 26 March 2019); Noel Hutley SC and Sebastian Hartford-Davis, 'Climate Change and Directors' Duties: Further Supplementary Memorandum' (Further Supplementary Memorandum of Opinion, Centre for Policy Development and Business Council, 23 April 2021).

21 Federal Court of Australia, NSD1333/20184.

22 See REST's media release: https://rest.com.au/why-rest/about-rest/news/rest-reaches-settlement-with-mark-mcveigh.

On 8 October 2021, the Court struck out the disclosure duty claim and PGPA Act claim on the basis that the applicant does not have standing: *O'Donnell v Commonwealth of Australia* [2021] FCA 1223. The Court declined to strike out the misleading or deceptive conduct claim but commented that the pleading 'will require improvement'.

The Court noted that whether there is a standing requirement and the nature of that requirement depends on the relief sought. On the disclosure duty claim, for which the applicant sought declaratory relief, the applicant must demonstrate a 'real interest' in raising the questions the declaration would go to. For the PGPA Act claim, the applicant accepted that to have standing to enforce the public duty she must have a 'special interest in the subject matter of the litigation'. The Court disallowed the disclosure duty and PGPA Act claims from proceeding but permitted the misleading or deceptive conduct claim to proceed. The hearing of this aspect of the matter will occur at a later time.

Human rights

Rights-based actions have commenced in many jurisdictions with varying degrees of success. Typically, rights-based actions have been successful in countries with comprehensive human rights legislation or express constitutional rights. In the seminal case in the Netherlands, *Urgenda Federation v Netherlands*,[23] the Supreme Court found that the Netherlands has a duty, grounded in human rights law, to take reasonable measures to prevent climate change. In *Leghari v Federation of Pakistan*[24] the Lahore High Court held that the State's delay in implementing climate change policies breached the petitioner's constitutional right to life (Art 9) and right to human dignity (Art 14). Rights-based actions have also been commenced in a number of other jurisdictions including Ireland, India, Norway, Canada, France and Belgium. See the case summaries in the appendix for further information.

'Typically, rights-based actions have been successful in countries with comprehensive human rights legislation or express constitutional rights.'

In Australia, climate change litigation has not typically relied on human rights law. The first case to attempt to link climate change and human rights in Australia is currently ongoing in Queensland, as discussed in the case spotlights below.

Case spotlight – Human rights

Urgenda Federation v Netherlands (ECLI NL HR 2019 2006)

Urgenda sought an order in the nature of a mandatory injunction requiring the Netherlands to reduce GHG emissions on the basis that the State had breached its duty of care grounded in the European Convention on Human Rights (ECHR), United Nations Framework Convention on Climate Change (UNFCCC), Kyoto Protocol, customary law 'no harm' principle and the Dutch Civil Code.

The Hague District Court found for the applicants on the basis of the doctrine of hazardous negligence, arising from Art 6:162 of the Dutch Civil Code, under which behaviour is tortious if it unnecessarily creates danger and is contrary to what 'according to unwritten law is deemed fit in societal interrelations'. The District Court ordered the State to achieve a 25% reduction in GHG emissions by 2020 compared to 1990 levels. However, the Court declined to recognise a duty arising from the ECHR.

Both the Court of Appeal and Supreme Court of the Netherlands affirmed the order, however, on the basis of the rights to life and private and family life in articles 2 and 8 of the ECHR.

The Supreme Court found that the Netherlands was required to take suitable measures where a real and

23 (ECLI NL HR 2019 2006).

24 PLD 2018 Lahore 364 (WP No 25501/2015).

immediate risk to people's lives or welfare exists in accordance with the ECHR. The Supreme Court accepted that the warming of the earth beyond 1.5°C or 2.0°C may have dire consequences to the lives, welfare and living environment of people. The State's existing climate change policies were insufficient, and the Court upheld the earlier decisions of the Hague District Court and Court of Appeal, ordering the State to achieve a 25% reduction in GHG emissions by 2020 compared to 1990 levels. The Supreme Court rejected the State's submissions that it was not for the courts to consider the political considerations necessary for determining the appropriate reduction of GHG emissions. It was appropriate for the Court to decide whether the government had acted within the limits of the laws by which it was bound.

Waratah Coal Pty Ltd v Youth Verdict Ltd (Queensland Land Court, MRA050-20 (ML70454) EPA051-20 (EPML00571313))

Waratah Coal applied for a mining lease and environmental authority to develop a thermal coal mine. A number of environmental groups objected to the applications. The Queensland Land Court is a specialised judicial tribunal and it hears objections to the grant of mining leases and environmental authorities. The Land Court's function is to make a recommendation on each application to the ultimate administrative decision-maker.

Section 58(1) of the *Human Rights Act 2019* (Qld) provides that it is unlawful for a public authority to act or make a decision in a way that is not compatible with human rights, or, in making a decision, to fail to give proper consideration to a human right relevant to the decision. The objectors contend that the mine would contribute to climate change and that to grant the applications would be incompatible with the following rights:

- rights to recognition and equality before the law
- right to life
- property rights
- the right to not have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with
- the rights of children
- the cultural rights of Aboriginal and Torres Strait Islander peoples.

The matter is ongoing. An application to strike-out the objections was dismissed on 4 September 2020: [2020] QLC 33.

Summaries of selected recent and ongoing significant climate change cases

The appendix to this legal briefing summarises recent and ongoing significant climate change cases, including cases of significance to the Commonwealth. This table is by no means exhaustive, noting the vast number of cases in this area, but provides a snapshot of climate change litigation in key areas.

AGS contacts

This Legal briefing was prepared by Isobel Leonard, Lawyer, and Emily Nance, Senior Executive Lawyer with the assistance of Olivia Ronan, AGS Counsel and Rian Terrell, Lawyer.

AGS has a large national team of lawyers with expertise in advising and assisting Government with all matters related to regulating Australia's offshore waters. For Government lawyers wanting further information, please contact any of our lawyers listed below.

Climate change litigation	Emily Nance	03 9242 1316
	Jonathon Hutton	02 9581 7408
	Christopher Behrens	02 6253 7543
Climate change advice	Sacha Moran	02 6253 7403
	Helen Chisholm	02 6253 7588

All AGS emails are **firstname.surname@ags.gov.au**

Offices

Canberra 4 National Circuit, Barton ACT 2600
Sydney Level 10, 60 Martin Place, Sydney NSW 2000
Melbourne Level 34, 600 Bourke Street, Melbourne VIC 3000
Brisbane Level 33, 300 George St, Brisbane QLD 4000
Perth Level 21, 2 The Esplanade, Perth WA 6000
Adelaide Level 5, 101 Pirie Street, Adelaide SA 5000
Hobart Level 8, 188 Collins Street, Hobart TAS 7000
Darwin Level 10, TIO Centre, 24 Mitchell Street, Darwin NT 0800

www.ags.gov.au

General enquiries and subscriptions:
T 02 6253 7246
E publications@ags.gov.au

ISSN 1443-9549 (Print)
ISSN 2204-6550 (Online)

Client Services 072–2022 04/22

APPENDIX

Selected climate change cases: Tort and human rights

Citation	*Court*	*Outcome*	*Summary*
Claims in negligence in common law countries			
***Minister for the Environment v Sharma* [2022] FCAFC 35**	Full Court of the Federal Court of Australia	The Full Federal Court allowed the Minister's appeal, finding that the Minister did not have a duty of care to the respondents.	A coal mining company had applied under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) for approval to expand and extend an approved coal mine (the Extension Project). The applicants, 8 Australian Children, claimed that the Minister owed each of the Children a duty to exercise her power under s 130 and s 133 of the EPBC Act with reasonable care so as not to cause them harm. The applicants sought declaratory and injunctive relief to restrain an apprehended breach of that duty, being the potential exercise of the Minister's discretion to approve the Extension Project. **Judgment at first instance** At first instance, the Court accepted that there was a real risk of harm to the Children arising from climatic hazards, such as bushfires, brought about by increases to global average surface temperatures. The Extension Project would lead to the emission of 100 million tonnes of CO2, causing a small but measurable increase to global average temperatures. The Court found that the Minister had a duty to take reasonable care to avoid causing personal injury to the Children when deciding, under s 130 and s 133 of the EPBC Act, to approve or not approve the Extension Project [491]. Applying the salient features approach to determine whether this novel duty existed, the Court found that: • it was reasonably foreseeable that the approval of the Extension Project posed a real risk of harm • the Minister had substantial control over the risk of harm • the children were vulnerable to that risk of harm and relied on the Minister to avoid that harm • the imposition of a duty of care was consistent with the statutory scheme and coherent with administrative law principles • the duty of care was a relevant consideration that the Minister must take into account in making her decision. The Court refused the application for an injunction as the Court was not satisfied that it was probable that the Minister would breach the duty of care. **The judgment on appeal** The Full Court of the Federal Court (Allsop CJ, Beach J and Wheelahan J) unanimously allowed the Minister's appeal, finding that the Minister did not owe the posited duty of care. The Court also found, unanimously, that human safety was not an implied mandatory statutory consideration. The Court dismissed the Minister's ground concerning the factual findings made by the primary judge on the basis that the evidence was not challenged in the court below and the primary judge's findings were open on that evidence: [273]-[293], [412], [834]. While the 3 judges were unanimous in finding that the Minister did not owe a duty of care to the Children, they delivered separate judgments and the reasoning differs quite significantly between the judgments. Allsop CJ and Wheelahan J took a broadly similar approach on 3 key matters. First, their Honours emphasised that the relationship between the parties as established by the EPBC Act did not support the recognition of a duty: [218]-[232], [852]. Second, the posited duty would be inconsistent and incoherent with the discharge of the Minister's statutory functions under the EPBC Act: [267]-[272], [850]-[852]. Finally, their Honours accepted that the posited duty would, at the breach stage, give rise to policy questions unsuitable to determination by the judiciary: [246]-[266], [868].

***Minister for the Environment v Sharma* [2022] FCAFC 35 (cont.)**			In contrast, Beach J did not accept that the posited duty was incoherent with the EPBC Act or that the duty should not be recognised due to questions of policy: [633]. His Honour instead focused on the closeness and directness between the Minister's decision and likely risk of harm to the Children, and the 'indeterminate liability' that would arise if a duty were imposed. In summary, Allsop CJ found: • the nature of the relationship between the parties was 'one of government' and governed in connection with the protection of species, communities and water resources in a limited decision under the EPBC Act: [346] • the posited duty called forth 'core policy' that was unsuitable for judicial determination: [246]-[266]. In particular, the duty called forth the question of whether, not to be negligent, the Minister needed to make a decision about this coal mine that reflected a change or re-evaluation of existing international and national policy: [265] • the posited duty was incoherent with the text and structure of the EPBC Act, and the legal and government framework for the protection of the environment reflected therein: [267]–[272]. The imposition of the duty would 'change the whole nature of the decision-making in question': [268] • the Minister did not have control over the harm, or had 'extremely faint' control, noting that the risk could be mitigated by countless others around the world or by international agreement: [335] • the claimants were in the same position as everyone in the world at the time the harm would occur. There was no special reliance upon the Minister different to other Australians: [338]–[340] • there was a reasonable foreseeability of harm to the Children from the release of emissions caused by the combustion of the coal from the project: [331]–[332] • the potential liability of the Minister was indeterminate and there was a lack of proportionality between the tiny contribution to the increased risk and the relevant liability for damage: [341]–[243]. Beach J found: • there was no special relationship, closeness and directness between the Minister and claimants: [678]–[701]. There was no physical, temporal or relational closeness between the Minister and her exercise of power and its consequences, and the claimants: [695] • the posited duty of care could not be sustained by reason of the indeterminacy of liability: [742]–[747] • the primary judge was correct to find that reasonable foreseeability was established, noting that reasonable foreseeability is not a test of causation and involves a more general inquiry at the duty stage: [414]–[442] • human safety was not a mandatory relevant consideration that could be implied from the text, context and purpose of the Act, but was permissible as part of 'social and economic' considerations: [598]–[592] • the EPBC Act did not stand against the Minister giving appropriate weight to a risk of harm to human safety, and refusing approval if that risk outweighs the economic and social benefits of the action. While there was 'a modicum of incoherency' this was not a strong feature against recognising the duty of care: [607]–[609] • the duty of care should not be denied due to questions of policy: [601]–[633]. Whatever policy questions arose, they could be dealt with at the breach stage: [633] • the Minister had control over the risk flowing from approval: [668]. The Minister's approval would 'ignite the hypothesised causal chain' [658] and it was no argument to say that third parties also had control over the risk: [662]. Wheelahan J found: • the Minister's functions under the EPBC Act did not erect or facilitate a relationship between the parties that supported the recognition of a duty of care: [852]

***Minister for the Environment v Sharma* [2022] FCAFC 35 (cont.)**			• the posited duty of care was inconsistent with the Act. Discharging that duty would require the Minister to deviate from the decision-making required under the EPBC Act and radically alter the scope and subject-matter of the decision-making obligation of the Minister under s 130 of the EPBC Act: [850], [852] • establishing a 'standard of care' would involve political issues uniquely suited to elected representatives and the executive: [868]. Those questions were unsuitable for judicial determination: [868] • a decision to approve the Extension Project would not give rise to a foreseeable risk of injury: [872] • the bare existence of a statutory obligation to decide whether to approve the project did not equate to control over the risk of harm: [838]. Climate change and the protection of the public from its consequences, were not roles that the Commonwealth Parliament conferred on the Minister under the EPBC Act: [839] • the EPBC Act is not concerned with the protection of the environment generally, and it is not concerned with the control of CO2 emissions: [844] • human safety is not an implied mandatory consideration: [847]. This error of the primary judge distorted the basis on which he addressed the legislative scheme and the relationship between the parties.
***Pabai Pabai v Commonwealth of Australia* (Federal Court of Australia, VID622/2021)**	Federal Court of Australia	Ongoing – originating application filed 26 October 2021	The applicants commenced representative proceedings on behalf of themselves and 'all persons who at any time during the period from about 1985 and continuing, are of Torres Strait Islander descent and suffered loss and damage as a result of the conduct of the Respondent'. The applicants are seeking a declaration that the Commonwealth owes a duty of care to Torres Strait Islanders to take reasonable steps to protect Torres Strait Islanders, their traditional way of life including *Ailan Kastom*[25], and to protect the marine environment including the Torres Strait Islands from the current and projected impacts of climate change. The applicants also seek a declaration that the Commonwealth is in breach of the duty of care, damages, and an injunction requiring the Commonwealth to implement measures to protect the environment and the cultural and customary rights of Torres Strait Islanders from GHG emissions, reduce Australia's GHG emissions, and avoid injury and harm to Torres Strait Islanders from GHG emissions.
***Smith v Fonterra Co-operative Group Ltd* [2021] NZCA 552**	Court of Appeal New Zealand	Claim struck out	Mr Smith, an elder of Ngāpuhi and Ngāti Kahu and the climate change spokesperson for the Iwi Chairs' Forum, issued proceedings in the High Court of New Zealand against 7 companies involved in GHG emitting activities. The statement of claim pleaded 3 causes of action in tort: public nuisance, negligence and a proposed new tort described as breach of duty. The plaintiff sought declarations that the respondent companies had unlawfully caused or contributed to the effects of climate change or breached duties said to be owed to Mr Smith and injunctions requiring the respondent companies to achieve net zero emissions by 2030. At first instance, the High Court struck out the claims in negligence and public nuisance, but refused to strike out the breach of duty claim. The Court of Appeal dismissed Mr Smith's appeal and upheld a cross-appeal to strike out the breach of duty claim. The Court of Appeal held that 'climate change simply cannot be appropriately or adequately addressed by common law tort claims' (at [16]). The Court noted that the diffuse nature of the causes of climate change, including the fact that no single contributor of GHG emissions makes 'a material contribution to climate change' (at [19]), makes the law of tort an inappropriate response to the risk of harm caused by climate change. The Court emphasised the difficulties with establishing causation in climate change matters, noting that it cannot be said that the plaintiff would not have been injured 'but for' the negligence of the respondent companies. It was not sufficient to show that the respondents had contributed to climate change. The recognition of a duty would create a 'limitless' class of potential plaintiffs and defendants.

25 *Ailan Kastom* or 'Island custom' is defined in the *Acts Interpretation Act 1954* (Qld) as the body of customs, traditions, observances and beliefs of Torres Strait Islanders generally, or of a particular community or group of Torres Strait Islanders, and includes any such customs, traditions, observances and beliefs relating to particular persons, areas, objects or relationships.

Citation	*Court*	*Outcome*	*Summary*
Claims partly in tort in civil law countries			
***Urgenda Foundation v Netherlands* (ECLI NL HR 2019 2006)**	Supreme Court of the Netherlands	Finalised: Court ordered the State to reduce its emissions by 25% compared to 1990 within 12 months	Urgenda sought an order in the nature of a mandatory injunction requiring the Netherlands to reduce GHG emissions on the basis that the State had breached its duty of care grounded in the European Convention on Human Rights (ECHR), UNFCCC, Kyoto Protocol, customary law 'no harm' principle and the Dutch Civil Code. The Hague District Court found for the applicants on the basis of the doctrine of hazardous negligence, arising from Art 6:162 of the Dutch Civil Code, under which behaviour is tortious if it unnecessarily creates danger and is contrary to what 'according to unwritten law is deemed fit in societal interrelations'. The District Court declined to recognise a duty arising from the ECHR or UNFCCC. The Court of Appeal affirmed the order but allowed the cross-appeal, basing its order directly on Articles 2 and 8 of the ECHR (rights to life, and private and family life). Similarly, the Supreme Court found a positive duty to take appropriate measures to prevent climate change grounded in human rights law. Without adequate climate policy, the combined effect of risks of climate change would be immense, but the fact that risks would not become apparent for some time did not prevent the role of Articles 2 and 8 (see section 5.6.2). The Court rejected the State's submission that the order amounted to an order for the creation of legislation (see section 8.2) and that this was a political matter that was inappropriate for judicial consideration (see section 8.3). In particular, this was an exceptional situation in which measures were said to be urgently needed (see section 8.3.4).
VZW Klimaatzaak v Kingdom of Belgium	Brussels Court of First Instance	Found that the State and regions breached their duty of care for failure to enact good climate governance; declined relief. Appeal to Court of Appeal filed November 2021	Adult plaintiffs sought mandatory injunctions requiring Belgium and 3 regions to reduce GHG emissions, on the basis of a duty of care under Article 1382 of the Civil Code and the EHCR. The Court found that to grant an injunction would infringe the separation of powers: 'The judiciary cannot assess the appropriateness of the action of the public authority when the latter is exercising its competence nor exercise itself the discretionary power which belongs to this public authority … the way in which Belgium will participate in the global GHG emissions reduction target is currently a matter for its legislative and executive bodies to decide' (at 2.3.2). The Court then distinguished between its capacity to note a breach of the duty of care, which was within its power, and its capacity to issue the injunction sought, which it denied. The Court held that, in pursuing their climate policies, the defendants had contravened the Civil Code and EHCR.
Claims of a duty grounded in constitutional, international and/or human rights law			
***Friends of the Irish Environment v Fingal County Council* [2017] IEHC 695**	Ireland High Court	Court recognised constitutional right to an environment but declined to find that the Council had violated this right	Applicants challenged the Council's decision to issue an extension to the Dublin Airport Authority for planning permission to construct a new runway, arguing that standing was afforded by a constitutional right to an environment. The Court found the existence of an 'unenumerated personal constitutional right to an environment' (at [241]), which is an 'essential condition for the fulfilment of all human rights' and 'not so utopian a right that it can never be enforced' (at [264]), grounded in the rights to life, health and work under the Irish Constitution (at [263]). The Court accepted that the applicants enjoyed the alleged constitutional right to an environment, but found that they did not have a right to participate in the extension decision under the *Planning and Development Act 2000* and that the applicants had failed to establish any disproportionate interference with that right. The relevant power and decision were no more than a 'proper and proportionate legislative interference' with the right (at [264]).

Citation	*Court*	*Outcome*	*Summary*
***Greenpeace Norway v Norway* (18-060499ASD-BORG/03, 2020)**	Supreme Court of Norway	Claim dismissed at first instance. Appealed to the European Court of Human Rights in June 2021	Greenpeace sought declarations that Norway's Ministry of Petroleum and Energy violated Norway's constitutional duty to protect the environment by issuing petroleum exploration licences. Article 112 of the Norwegian Constitution establishes a right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. The Oslo District Court held that the licences were valid. The Court of Appeal upheld the validity of the licences, but found that Article 112 created substantive rights that could be reviewed before the courts, and that it applied to the relevant environmental harms raised by the applicant. In assessing whether the rights under Article 112 were violated, the Court of Appeal took into account GHG emissions released overseas as a result of the licences. The Court found that the threshold for finding a violation of Article 112 was very high and involved balancing socio-economic and political factors. That threshold had not been breached in the particular circumstances of the decision. The Supreme Court overturned the Court of Appeal's broad reading of Article 112. The Court held that, while the Norwegian Constitution protects citizens from environmental and climate harms, the decision was not a violation of the Constitution as it was uncertain whether or to what extent the decision would lead to greenhouse gas emissions. Similarly, the Supreme Court held that the granting of petroleum exploration licences was not in breach of Articles 2 and 8 of the European Convention on Human Rights.
***La Rose v Her Majesty the Queen in the Right of Canada* (2020) FC 1008**	Federal Court at Ontario	Claim struck out at first instance for failure to disclose a reasonable cause of action. Appealed to the Federal Court of Appeal in November 2020	Children plaintiffs claimed that Canada emits and contributes to climate change in violation of the children's rights under the Canadian Charter of Rights and Freedoms, and the rights of present and future Canadian children under the public trust doctrine. The Court granted the Defendants' motion to strike out the claim, finding that the claims under the Charter were not justiciable. While the public trust claims were justiciable, there was no reasonable cause of action: '[t]he breadth of the claim under the alleged public trust doctrine and the lack of material facts to support any legal basis suggests this claim is reflective of an "outcome" in search of a "cause of action". The scope of obligations proposed by the Plaintiffs are both extensive and without definable limits…' (at [88]). The recognition of the public trust doctrine would be 'inconsistent with the Court's' approach to the development of the common law, namely that these evolutions are incremental, unlike the developments in the law that may be taken by the legislature.' (at [95]).
***Leghari v Republic of Pakistan* (WP No 25501/2015)**	Lahore High Court Green Bench	Court ordered Pakistan to establish a Climate Change Commission to implement its climate change policies, finding that the delay in implementation offended the petitioner's constitutional rights	A farmer brought proceedings against the State alleging that Pakistan failed to implement various climate change policies. The Court held that the State's delay in implementing its climate policies offended the petitioner's constitutional rights to life (Article 9) and human dignity (Article 14). These constitutional rights, read with broader constitutional principles (such as democracy and political justice) 'include within their ambit and commitment, the international principles of sustainable development, precautionary principle, environmental impact assessment, inter and intra-generational equity and public trust doctrine' such that the 'existing environmental jurisprudence has to be fashioned to meet the needs of something more urgent and overpowering i.e. Climate Change' (at [7]). The Court ordered the State to establish a Climate Change Commission to implement its climate change policies.

***Lho'imggin v Her Majesty the Queen in Right of Canada* (2020) FC 1059**	Federal Court at Ontario	Struck out the Statement of Claim for non-justiciability, failure to disclose a reasonable cause of action and unavailability of remedies sought. Appeal filed December 2020	An Indigenous group sought declaratory relief and amendments to environmental laws for alleged violations by Canada of constitutional and human rights, as well as failures to meet international climate obligations. The Court struck out the statement of claim, finding that the issue of climate change 'while undoubtedly important, is inherently political, not legal, and is of the realm of the executive and legislative branches of government' (at [77]). The Court also noted (at [65]) that '[c]limate change is a complex and multifaceted problem, with a host of provincial, municipal and international actors making supervision impossible or meaningless in this case.'
***Notre Affaire à Tous v France* (No 1904967, 1904968, 1904972, 1904976/4-1, 2021)**	Administrative Court of Paris	Court held that France's inaction had caused climate change and awarded symbolic damages of 1 euro; ordered the State to take actions to comply with its commitments to reduce GHG emissions and repair damages caused by its inaction	Plaintiffs sought orders requiring France to take necessary measures to mitigate climate change and reduce GHG emissions and symbolic compensation for breach of general and specific duties to act, grounded on a 'general principle' for a right to a 'preserved climate system', French Charter for the Environment and ECHR (Articles 2 and 8). In February 2021, the Court deferred its decision on whether to issue injunctive relief, but ordered symbolic damages to the plaintiffs, finding that France had failed to implement public policies to enable it to achieve the emissions reduction targets it had set. The Court found that France had, through its various international and national commitments on climate change, acknowledged that it is in a position to take direct action on greenhouse gas emissions (at [29]-[31]). France had substantially exceeded the carbon budgets it had set, failing to comply with the path it had set for itself. The Court declined compensatory damages on the basis that the Civil Code only allows for compensation when reparation is impossible or insufficient, and this was not made out by the plaintiffs (at [35]-[37]). However, the Court ordered symbolic damages for moral damage caused to the plaintiff groups due to the State's failure to achieve its targets (at [40]-[45]). On 14 October 2021, the Court ordered the State to take action to comply with its emissions reduction commitments and repair the damages caused by its inaction. The Court quantified the total emissions France had emitted in exceedance of its targets, and ordered France to increase its emissions reductions for 2021 and 2022 to rectify this.

Citation	*Court*	*Outcome*	*Summary*
Objection to environmental approval based on human rights law			
***Waratah Coal Pty Ltd v Youth Verdict Ltd* (Queensland Land Court, MRA050-20 (ML70454) EPA051-20 (EPML00571313))**	Queensland Land Court	Ongoing – application to strike-out unsuccessful	Waratah Coal applied for a mining lease and environmental authority to develop a thermal coal mine. A number of environmental groups objected to the applications. The Queensland Land Court is a specialised judicial tribunal and it hears objections to the grant of mining leases and environmental authorities. The Land Court's function will be to make a recommendation on each application to the ultimate administrative decision-maker. Section 58(1) of the *Human Rights Act 2019* (Qld) provides that it is unlawful for a public authority to act or make a decision in a way that is not compatible with human rights, or, in making a decision, to fail to give proper consideration to a human right relevant to the decision. The objectors contend that the mine would contribute to climate change and to grant the applications would be incompatible with the following rights: • rights to recognition and equality before the law • right to life • property rights • the right to not have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with • the rights of children • the cultural rights of Aboriginal and Torres Strait Islander peoples. The matter is ongoing. An application to strike out the objections was dismissed on 4 September 2020: [2020] QLC 33.

Selected climate change cases: Consumer protection/climate risk

Citation	*Court*	*Outcome*	*Summary*
Claims based on a duty to disclose or manage climate change risks			
***O'Donnell v Commonwealth of Australia* (Federal Court of Australia, VID482/2020)**	Federal Court of Australia	Ongoing – the application to strike out the proceedings was partially successful	The applicant claims that the Commonwealth failed to disclose information about the financial risks arising from climate change in promoting the Bonds (material climate change information). The applicant alleged that by failing to disclose material information about climate change, the Commonwealth: • engaged in conduct that is misleading or deceptive in breach of s 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) (the misleading or deceptive conduct claim) • breached a duty, said to be owed, of utmost candour and honesty to investors who acquire or intend to acquire bonds (the disclosure duty claim) • breached the duty of due diligence in s 25(1) of the *Public Governance, Performance and Accountability Act 2013* (Cth) (PGPA Act) (the PGPA Act claim). On 8 October 2021, the Court struck out the disclosure duty claim and PGPA Act claim on the basis that the applicant does not have standing: *O'Donnell v Commonwealth of Australia* [2021] FCA 1223. The Court declined to strike out the misleading or deceptive conduct claim but commented that the pleading 'will require improvement': [9]. The Court noted that whether there is a standing requirement and the nature of that requirement depends on the relief sought. On the disclosure duty claim, for which the applicant sought declaratory relief, the applicant must demonstrate a 'real interest' in raising the questions the declaration would go to: [134]. For the PGPA Act claim, the applicant accepted that to have standing to enforce the public duty she must have a 'special interest in the subject matter of the litigation': [135]. The Court disallowed the disclosure duty and PGPA Act claims from proceeding but permitted the misleading or deceptive conduct claim to proceed. The hearing of this aspect of the matter will occur at a later time.
***McVeigh v REST* (Federal Court of Australia, NSD1333/2018)**	Federal Court of Australia	Settled	A superannuation fund member brought proceedings against his superannuation fund (REST) alleging that REST had breached the *Corporations Act 2001* and the *Superannuation Industry (Supervision) Act 1993* by failing to provide adequate information regarding climate change risks and the fund's management of such risks. The proceedings were settled. REST agreed to implement climate change policies and acknowledge climate risks.
***Abrahams v Commonwealth Bank of Australia* (Federal Court of Australia, VID879/2017)**	Federal Court of Australia	Proceedings discontinued	Shareholders of the Commonwealth Bank of Australia (CBA) alleged that the company had failed to disclose climate change risks in its 2016 annual report, in breach of its disclosure obligations under the *Corporations Act 2001*. The applicants discontinued the proceedings after CBA released an annual report acknowledging the risks of climate change and pledging to undertake analysis of climate risks.

Climate change cases: Administrative law

Citation	*Court*	*Outcome*	*Summary*
Merits review of decisions involving the approval of a GHG emitting activity under environment legislation			
***Gloucester Resources v Minister for Planning* [2019] NSWLEC 7**	NSW Land and Environment Court	Application dismissed	A company sought consent for a proposed open cut coal mining project. The consent authority, the Independent Planning Commission (IPC), refused to grant the consent. The company sought merits review of the decision in the Land and Environment Court. An environmental group that had objected to the mine was joined to the proceedings and contended that the project should not be approved because, amongst other things, the direct and indirect greenhouse gas emissions of the mine would contribute to climate change. The Court determined to refuse consent to the application. In making its decision, the Court found that the direct and indirect GHG emissions of the mine were relevant considerations under the statutory scheme, the requirement to consider the public interest and principles of ecologically sustainable development, and as part of assessing the 'impacts' of the mine. The Court found that all of the direct and indirect GHG emissions of the mine would impact on the environment. The Court noted: 'It matters not that this aggregate of the Project's GHG emissions may represent a small fraction of the global total of GHG emissions. The global problem of climate change needs to be addressed by multiple local actions to mitigate emissions by sources and remove GHGs by sinks.' (at [515]) While the Court accepted that the refusal of consent would prevent a meaningful amount of GHG emissions, the Court found that 'the better reason' for refusal was the project's poor environmental and social performance in relative terms and should be refused on the basis of its planning, visual and social impacts alone (at [556]). The GHG emissions of the project and their likely impacts on the climate system provided another reason for refusal.
Judicial review of decisions involving the approval of a GHG emitting activity under environment legislation			
***Australian Conservation Foundation v Minister for Environment* (2016) 251 FCR 308**	Federal Court of Australia	Application dismissed	This was an application for judicial review of the Minister for Environment's decision to approve the Adani open-cut and underground coal mine. The challenge alleged that the Minister did not comply with the EPBC Act in deciding to approve the mine. One aspect of the challenge was that the Minister failed to consider the impacts of the downstream GHG emissions of the coal mine (the GHG emissions arising from the transport and combustion of coal overseas), being the physical effects of climate change, as a 'relevant impact' under s 82 of the EPBC Act. The Minister had found that the downstream emissions were not a direct consequence of the proposed action, and considered that emissions occurring overseas were subject to a range of variables. The Minister also found that it was difficult to identify the necessary relationship between taking the action and possible impacts to relevant environmental matters, including the Great Barrier Reef. Griffiths J found no reviewable error in the Minister's reasoning. The applicant also claimed that the Minister had erred by failing to consider or apply the precautionary principle (s 391(2) of the EPBC Act). The Court accepted that this principle is only engaged where there are threats of serious or irreversible environmental damage. As the Minister did not find that that the mine posed such a threat, there was no legal requirement to apply the precautionary principle. Another aspect of the challenge related to the application of s 137 of the EPBC Act, which requires the Minister not to act inconsistently with Australia's obligations under the World Heritage Convention. The applicant claimed that the approval of the mine posed a risk to the World Heritage listed Great Barrier Reef due to the GHG emissions of the mine. The Court accepted that challenges on this basis were justiciable, but all that was required was for the Minister to reach a conclusion on that issue supported by proper legal grounds, which the Minister had done.

Citation	*Court*	*Outcome*	*Summary*
***North East Forest Alliance Inc v Commonwealth of Australia & Anor* (Federal Court of Australia, NSD773/2021)**	Federal Court of Australia	Ongoing	The applicant seeks a declaration that the Regional Forest Agreement 'Regional Forest Agreement for North East New South Wales (Upper North East and Lower North East Regions)' (RFA) entered into by the Commonwealth and the State of New South Wales on 31 March 2000, and varied by a deed of variation executed on 28 November 2018, is not a 'Regional Forest Agreement' within the meaning of s 4 of the *Regional Forest Agreements Act 2002* (RFA Act) or s 38 of the *Environment Protection and Biodiversity Conservation Act 1999*. A 'Regional Forest Agreement' is defined under s 4 of the RFA Act to mean an agreement in force between the Commonwealth and a State in respect of a region or region that satisfies certain conditions, including: 'the agreement was entered into having regard to assessments of the following matters that are relevant to the region or regions: (i) environmental values, including old growth, wilderness, endangered species, national estate values and world heritage values; (ii) indigenous heritage values; (iii) economic values of forested areas and forest industries; (iv) social values (including community needs); (v) principles of ecologically sustainable management.' (s 4(a)) The applicant claims, inter alia, that the Commonwealth was required to have regard to assessments of the impacts of climate change before agreeing to materially extend the term of the RFA.
***Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd* [2021] NSWLEC 110**	NSW Land and Environment Court	Application dismissed	A community group brought judicial review proceedings challenging a decision of the Independent Planning Commission (IPC) to grant development consent to a coal seam gas project. The community group claimed that the IPC had erred in its consideration of 2 key issues. First, in considering the GHG emissions of the project, the IPC considered the acceptability of the GHG emissions by comparing the potential GHG emissions of the project with hypothetical alternative coal projects. Second, the IPC considered that downstream GHG emissions were outside the control of the proponent and therefore not reasonably able to be conditioned. On the first issue, the applicant claimed that by focusing on the relative comparison of the GHG emissions from CSG with those of coal, the IPC had failed to have regard to the likely impacts of the Project. The Court rejected this argument, finding that the IPC had evaluated the acceptability of the GHG emissions of the project and found that they were acceptable for reasons including, but not limited to, the emissions of the project relative to emissions arising from coal based alternatives: [58]. The Court found that 'an evaluation of the acceptability of a project's GHG emissions can be assisted by placing them in context and measuring them against the yardsticks of the GHG emissions of other comparable projects'. However, the Court cautioned that blind application of such comparisons could lead to a misunderstanding of a project's contribution to climate change. Nevertheless, this was not an irrelevant consideration (at [67]) and the IPC had not erred by considering this factor (at [79]). As to the second issue, the Court accepted that the IPC was required to consider whether to issue the consent for the project subject to conditions to ensure that the greenhouse gas emissions, including downstream emissions, of the development were minimised to the greatest extent practicable. However, the Court found that the IPC had done so (at [108]).

Citation	*Court*	*Outcome*	*Summary*
***KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc* [2021] NSWCA 216**	NSW Court of Appeal	Appeal dismissed. The appellants applied for special leave to appeal to the High Court on 14 October 2021. Special leave was refused on 10 February 2022	On appeal, the appellant submitted that the primary judge erred by failing to find that the Commission had erred. Amongst other things, the appellant claimed that the Commission erred by: • having regard to the NSW Climate Change Policy Framework • considering whether the company had minimised GHG emissions to the greatest extent possible, rather than considering whether the Commission could impose conditions having that effect • failing to consider the possible impacts on GHG emissions if the company was forced to seek alternative sources of coal for the purpose of electricity generation in South Korea, or in the alternative, by acting unreasonably or irrationally in concluding that it had no evidence to determine whether the company would secure an alternative source of coal of inferior quality, such that refusal of the proposed action would not reduce GHG emissions. The NSW Court of Appeal dismissed the appeal. The Court of Appeal found that the Commission was required to have regard to State and national policies concerning GHG emissions and had not erred by having regard the NSW Climate Change Policy Framework: [63]–[65]. The Commission was required, by cl 14(1)(c) of the Mining SEPP, to consider whether or not consent should be issued subject to conditions, including conditions to ensure that GHG emissions are minimised to the greatest extent possible. The Commission's reasons did not demonstrate that it had misconstrued cl 14(1)(c): [35], [36], [44]. The Commission had regard to the company's claims that it would need to secure an alternative source of coal which may be of inferior quality, leading to poorer environmental outcomes: [73]. It was open to the Commission to conclude that it had no evidence to support the claim that alternative sources of coal would be secured, leading to poorer environmental outcomes: [80]. On 10 February 2022, the High Court dismissed the appellants' application for special leave to appeal: *KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc* [2022] HCASL 8. The Court found that 'the applicant identifies no question of principle which it would be in the interests of justice for this Court to consider. An appeal to this Court would not enjoy sufficient prospects of success to warrant the grant of special leave to appeal'.
***Plan B Earth v Secretary of State for Transport* [2020] UKSC 52**	United Kingdom Supreme Court	Appeal allowed, reversing Court of Appeal decision finding that decision to approve new runway was unlawful	The Secretary of State for Transport designated the Airports National Policy Statement (ANPS) as a national policy statement. The ANPS supported the addition of a third runway at Heathrow airport. Various interested groups sought judicial review of the decision to designate the ANPS as a national policy statement. The applicants were unsuccessful in the High Court and appealed to the England and Wales Court of Appeal. The Court of Appeal held that the decision was unlawful as the Secretary had failed to take into account the Paris Agreement and the UK Government's international climate commitments. The Court of Appeal found that the Secretary was required to consider the Paris Agreement as part of a statutory requirement to consider 'government policy' and statutory requirement to act with the objective of 'sustainable development'. The Supreme Court overturned the Court of Appeal decision, finding that the Paris Agreement itself was not 'government policy' (at [112]), nor had the Secretary failed to act with the objective of sustainable development because the Secretary had in fact taken into account the Paris Agreement by considering whether to take it into account beyond the extent to which is was already reflected in domestic legislation (at [125], [129]). It was open to the Secretary to conclude that it was not appropriate to do so. The Supreme Court further held that the Secretary did not breach obligations under EU directives and was not required to take into account emissions post-2050 and non-CO2 emissions.

Citation	*Court*	*Outcome*	*Summary*
Judicial review of decisions funding GHG emitting activities			
***Environment Centre Northern Territory v Minister for Resources and Water* (NSD758/2021)**	Federal Court of Australia	Climate change grounds dismissed; decision to enter into contracts set aside on other grounds	An environmental group sought judicial review of decisions of the Minister for Resources and Water relating to funding provided to an oil and gas company for gas exploration. Pursuant to s 33 of the *Industry Research and Development Act 1986* (Cth) (IRD Act), the Minister made an instrument prescribing the Beetaloo Cooperative Drilling Program (Program) to provide for funding for exploration activities in the Beetaloo sub-basin (Instrument). Under s 34 of the IRD Act, the Commonwealth may make, vary or administer arrangements for activities under the prescribed program. On 17 June 2021, the Minister approved approximately $21 million in funding under that program to be paid to an oil and gas company (Approval decision). On 9 September 2021, the Commonwealth entered into contracts with the oil and gas company giving effect to the Approval Decision (Contracts decision). The applicant challenged the Minister's decision to make the Instrument, the Approval decision and the Contracts decision. The applicant claimed that the Minister failed to make reasonable inquiries in respect of climate change related risks and as a consequence failed to comply with s 71 of the *Public Governance, Performance and Accountability Act 2013* (Cth) (the PGPA Act). Section 71 provides that a minister must not approve proposed expenditure of relevant money unless satisfied, after making reasonable inquiries, that the expenditure would be a proper use of relevant money. Additionally, the applicant claimed that by failing to have adequate regard to climate change related risks and the future economic viability of the extraction of gas in the Beetaloo basin, the Minister acted in a way that was legally unreasonable, illogical or irrational. The Court accepted that climate change 'presents a serious threat to Australia and the world, including threats to the environment, human health and the economy': [31]. The Court found that the requirement to make 'reasonable inquiries' in s 71 of the PGPA Act was not an objective jurisdictional pre-condition to the power to approve the expenditure of money, rather the matter was for the Minister's discretion. The Court noted that 'the concept of "reasonable inquiries" in the context of determining a "proper use" of money is highly evaluative and may involve a weighing of competing policy and political considerations': [63]. Even if the requirement to conduct reasonable inquiries was viewed as an objective jurisdictional pre-condition to the exercise of the power, there was no requirement for the Minister to make reasonable inquiries into the matters claimed by the applicant: [89]. For climate change risks, the funding was not with respect to activities involving the extraction or use of gas, rather exploratory activities. There was no evidence that these exploratory activities themselves contributed to the climate change risks identified by the applicant. Those matters would, to the extent relevant, arise for consideration in future decisions directed to the management of environmental risks: [89]. On the economic viability of the future extraction of gas, these economic risks were not directly relevant to whether the provision of funding was a 'proper' use of money in the context of the Program and its outcomes and objectives. Further, the Court held that the Minister was not required, when making the Approval decision, to consider the climate change risks and economic risks advanced by the applicant. In any event, it was not unreasonable for the Minister not to consider those matters in the particular circumstances of the decisions. The Court set aside the Contracts decision on other grounds not relating to climate change.

Citation	*Court*	*Outcome*	*Summary*
***Friends of the Earth Limited v Secretary of State for International Trade & President of the Board of Trade and the HM Treasury* [2022] EWHC 568 (Admin)**	High Court of England and Wales	Application dismissed	An environment group challenged the decision of UK Export Finance (UKEF) to provide $1 billion in financing support to a natural gas development in Mozambique. The claimant alleged that the decision to finance the project was unlawful because of deficiencies in assessments of the climate, environmental and human rights impacts, as well as the lack of transparency and disclosure around the decision. On 22 April 2021, the claimant was granted permission to proceed to judicial review on 2 grounds: '(1) the decision was made on the incorrect basis that the project was consistent with the UK and/or Mozambique's commitments under the Paris Agreement; (2) the defendants failed to consider essential issues or carry out the necessary analysis to properly determine if supporting the project aligned with the UK's and Mozambique's obligations under the Paris Agreement'.[26] On 15 March 2022, the High Court of England and Wales refused the application. The matter was heard by Stuart-Smith LJ and Thornton J. The 2 members of the Court disagreed as to whether the decision-maker had erred. Given the judgment of Stuart-Smith LJ, the claim failed. Stuart-Smith LJ held: • UKEF was entitled to a significant margin of appreciation in the inquiries it chose to make and materials it commissioned, in circumstances where it was assessing climate change in the context of a long-term foreign project: [103]–[104]. The Court should adopt a 'relatively low intensity of review' given that the decision involved balancing different public interests: [218] • the decision made by UKEF was whether to 'provide export finance support … in a project that was going to proceed anyway'. The decision was not about emissions, and was going to have 'no material or relevant impact on global emissions': [215] • UKEF took steps to be informed on matters relating to climate change and the Paris Agreement, but consistency with the Paris Agreement was not a requirement or a pre-requisite for the decision: [216] • there was no legal or policy obligation for UKEF to have considered an assessment of the project's Scope 3 emissions for the purpose of the decision: [237]. Thornton J held: • UKEF failed to discharge its duty of inquiry in relation to the calculation of Scope 3 emissions. This meant that UKEF's view that its review of the emissions was sufficient, was unreasonable: [331] • the failure to quantify Scope 3 emissions, and other flaws in climate assessment, meant that there was no rational basis on which to demonstrate that the funding for the project was consistent with the Paris Agreement: [335].

Civil enforcement of statutory duties and functions relating to climate change

***Bushfire Survivors for Climate Action v Environment Protection Authority* [2021] NSWLEC 92**	Land and Environment Court of NSW	Environment Protection Authority (EPA) ordered to develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change	A climate action group sought to compel the NSW EPA to perform a statutory duty to develop environmental policies to ensure the protection of the environment from climate change. The *Protection of the Environment Administration Act 1991* (NSW) (POEA Act) requires the NSW EPA to develop environmental quality objectives, guidelines and policies 'to ensure environment protection'. The applicants had claimed that the EPA was required to develop instruments to ensure protection of the environment in NSW from climate change, including by regulating GHG emissions in a way consistent with limiting global temperature rise to 1.5°C above pre-industrial levels. The NSW Land and Environment Court found that the duty under the POEA Act included a duty to develop instruments to ensure the protection of the environment from climate change specifically, but not to the level of specificity contended for by the applicants. While the EPA had a discretion as to the specific content of the instruments developed, its existing instruments did not comply with the statutory duty: [142]. The Court found that it was appropriate to make an order in the nature of mandamus compelling the EPA to perform its duty: [148].

26 See the media release of the applicants: https://cdn.friendsoftheearth.uk/sites/default/files/downloads/UKEF_Briefing_updated_June_2021.pdf.