

A “Next Generation” of Climate Change Litigation?: an Australian Perspective

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Abstract

Since conclusion of the Paris Agreement and the high-profile *Urgenda* case, potential new avenues for strategic climate litigation have received considerable attention in many countries, including Australia. Australia already has a substantial climate jurisprudence, primarily involving administrative challenges under environmental laws. This paper aims to examine the prospects for a “next generation” of cases focused on holding governments and corporations to account for the climate change implications of their actions. We draw on analysis of existing legal precedent and emerging cases to explore four key aspects: drivers for next generation lawsuits, potential legal avenues, and likely enablers and barriers. The paper uses the Australian experience as a case study but draws also on litigation trends globally. We find that the most fruitful strategy for future climate change litigation is likely to be one that advances lower risk cases building from the base of existing litigation, while simultaneously attempting novel approaches.

Key words

Strategic litigation; climate change; impact litigation; legal avenues; access to justice; accountability

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Resumen

Desde los Acuerdos de París y el caso Urgenda, varios países han prestado mayor atención a los litigios estratégicos sobre el clima. Australia ya tiene una notable jurisprudencia sobre el clima, especialmente en cuanto a los desafíos que para la administración suponen las leyes ambientales. Este artículo analiza las posibilidades de una "nueva generación" de casos basados en pedir responsabilidades gubernamentales y empresariales. Partimos de antecedentes jurídicos y de casos emergentes para explorar cuatro cuestiones claves: los motores para demandas judiciales, posibles vías legales, y capacitadores y obstáculos probables. Se usa la experiencia de Australia como estudio de caso, pero también se traen a colación tendencias judiciales globales. Hallamos que la estrategia más provechosa es impulsar casos de menor riesgo desde la base de los litigios existentes, a la vez que ensayar nuevos abordajes.

Palabras clave

Litigación estratégica; cambio climático; litigación de impacto; vías legales; acceso a la justicia; responsabilidades

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This is an opportunity to be bold spirits rather than timorous souls and provide a lead for the common law world. (Stein 2000, p. 3)

1. Introduction

Strategic climate change litigation generally involves the use of the law and court action to advance beneficial outcomes for addressing climate change (Barber 2012). Climate change cases first emerged in the 1990s and have since been brought in more than 25 countries globally (Nachmany *et al.* 2017). With over 600 decided cases, the United States has the most established record of climate change case law (Sabin Center for Climate Change Law 2017). However, a significant body of climate change litigation has also emerged in other parts of the world, including in Australia, which has the second largest number of cases (Nachmany *et al.* 2017).

The first Australian climate change case of *Greenpeace v Redbank Power Company* (1994) was decided in 1994 by Justice Pearlman of the New South Wales Land and Environment Court (NSWLEC). That case involved a challenge by Greenpeace, supported by the NSW Environmental Defenders Office (EDO),¹ 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. The *Redbank Power* case has served as a model for much of the ensuing climate change litigation in Australia over the subsequent twenty 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. These cases have sought 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).² One stream of this litigation has targeted GHG emissions reduction (mitigation) by challenging coal-fired power and coal mines. A second "adaptation" stream has focused on climate change impacts for development, such as the risks posed by sea level rise and increased coastal flooding. These first generation challenges mirror similar cases in the United States, as well as emerging cases in Europe and South Africa, seeking to improve compliance with environmental laws in ways that will advance climate change goals (United Nations Environment Programme 2017).

The achievements of first generation climate change litigation have been significant in a number of ways (Peel and Osofsky 2015). 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 (Peel 2016). More broadly, the cases have raised awareness of climate change as a key environmental issue in the public, business, professional and government sectors (Peel and Osofsky 2015).

In Australia, however, first generation climate change litigation 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 United States. The US Supreme Court's decision in that case (*Massachusetts v EPA*, 2007) required the Environmental Protection Agency (EPA) either to regulate motor vehicle GHG emissions or better justify its refusal to do so. On the basis of this decision, the Obama administration found that GHG emissions cause pollution that threatens public health and welfare, and introduced regulations to limit such emissions from motor

¹ EDOs are an Australia-wide network of environmental legal organizations providing advice and advocacy on public interest environmental issues and litigation.

² 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" (Council of Australian Governments 1992, Part 1). In legislation it is often expressed as a series of ESD "principles" including those of biodiversity conservation, polluter pays, inter-generational equity and the precautionary principle. See further, Bates 2013, pp. 219-258.

vehicles (United States Environmental Protection Agency 2009, Peel and Osofsky 2015, pp. 65-68) and stationary sources, such as power plants (Clean Power Plan Final Rule, Oct. 23, 2015, 80 F.R. 64965). However, the Trump administration has rolled back many of these Obama administration regulations (see Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Oct. 16, 2017, 40 CFR Part 60, in EPA 2017), which has led to legal challenges under *Massachusetts v EPA* and other legal pathways (Sabin Center 2017).

Australia also has not seen the kind of common law actions that have been brought in the United States, alleging government or corporate responsibility for likely climate change damage on the basis of actions in nuisance, negligence or under the public trust doctrine (Sabin Center 2017). These cases have faced challenges. 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 (*AEP v Connecticut*, 2011). Although that avenue could reopen if the Republican Congress – without the veto constraints under President Trump that President Obama provided – eliminates that authority, such a legislative move appears unlikely at the present time, especially as the Trump administration uses executive authority to unwind Obama administration regulations. 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 v United States*, 2016 [known as *Juliana* case] that constitutional due process and public trust claims against the federal government for its failure to address climate change sufficiently had been adequately alleged to survive a motion to dismiss. While the ultimate resolution of the *Juliana* case – and other pending US common law cases – on the merits remains unclear (Sabin Center 2017), these cases provide models for how Australian common law cases might be framed.

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 the *Urgenda* decision finding that the Dutch government's 2020 GHG emissions reduction target was inadequate in light of international climate science and international climate policy (*Stichting Urgenda v Netherlands 2015*) [known as *Urgenda* Case]. The Court ordered 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. 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 (*Ashgar Leghari v Pakistan 2015*). 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. The petition claims that major contributors to climate change, including the fifty largest fossil fuel companies, are violating Filipinos' fundamental human rights (Greenpeace Philippines 2015). 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 temperature rises to "well below 2°C" and pursuing efforts to limit temperature rises to no more than 1.5°C (Paris Agreement, Art 2.1).

In light of these international developments, there has been increasing discussion in environmental advocacy and legal communities in Australia and elsewhere of the potential to launch a next generation of climate change litigation modelled on some of the high-profile emerging cases, such as *Urgenda* and *Juliana*. While there is a high level of interest in pursuing such cases, many questions remain about what exactly next generation climate change litigation might involve. What causes of action may be pursued and which might offer the best prospects of success? 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 paper provides a systematic analysis of these questions, with a focus on the Australian context where conversations around the future of climate change litigation are well advanced.

Following an examination of ways of defining “next generation” climate change litigation, part 2 of the paper considers the impetus for such discussions. It identifies key drivers, including 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 3 then turns to the question of how next generation climate change litigation might be taken forward, with a focus on the Australian context, albeit with reference to developments in other jurisdictions, particularly the United States and United Kingdom. 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 4 considers 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 aligning interests in clean energy transition or adaptation initiatives. Part 5 concludes with a discussion of the competing strategic considerations that are likely be in play as groups, both in Australia and other parts of the world, work to shape a next generation of climate change litigation.

2. Why a next generation of climate change litigation?

In countries like Australia that already have a significant history of climate change litigation (Wilensky 2015), discussions around a next generation of lawsuits are less focused on how to *start* a climate change justice movement than questions of whether and how that movement might be revitalised, potentially through bringing different sorts of lawsuits to those that have characterised the first 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 and how its strategic impact might be maximised.

2.1. Defining “next generation climate change litigation”

A central concern in assessing the potential for a next generation of climate change litigation 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 (Markell and Ruhl 2010, p. 10647, Hilson 2010). As Peel and Osofsky (2015, p. 8) 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 below). 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.

FIGURE 1

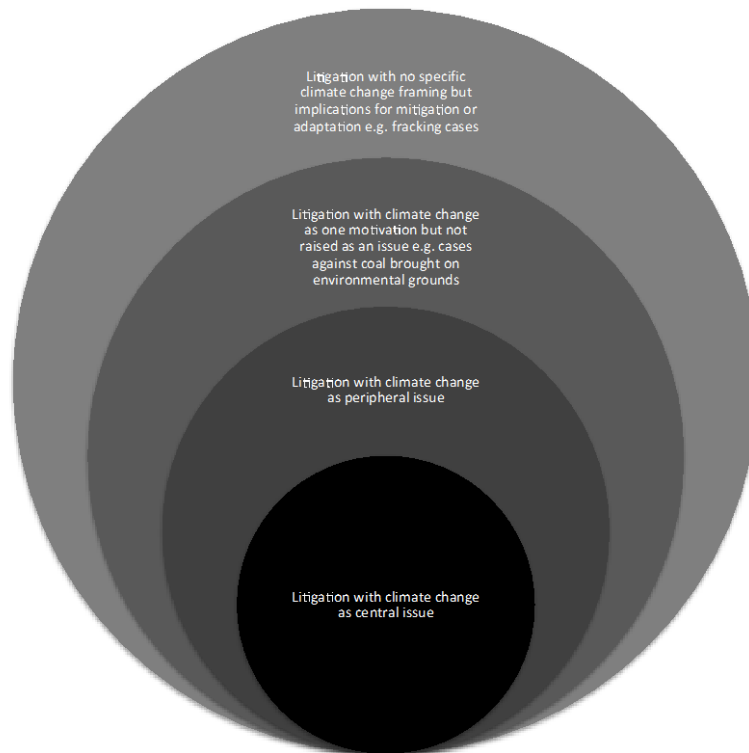


Figure 1. Conceptualising climate change litigation.
(Peel and Osofsky 2015, p. 8).

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 build upon what has gone before. In Australia (and also the United States), 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 (Peel and Osofsky 2015, p. 40). 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 adaptation. In Australia, there have also been a number of cases brought by the Australian Competition and Consumer Commission (ACCC) relating to misleading “green” product claims (Preston 2011a, pp. 12-14). In addition, in the broader penumbra of climate change litigation – cases in the outer circles depicted in Figure 1 – there have been (an increasing) number of cases focusing on issues such as the use of hydraulic fracturing (fracking) for unconventional gas exploitation, access to information, and class actions for damage from extreme weather events such as major floods and wildfires (Tobin 2012, *The New Lawyer* 2012). 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*. These cases have generally challenged governmental decision-making, for example, on the basis of a failure to take climate change considerations into account, as a strategy to avoid or condition the approval of these projects.

By contrast what we have termed “next generation” litigation in this paper often represent 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. 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 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 lawsuits brought by shareholders and investors against companies and directors over inadequate disclosure of climate change risk. It is also evident in emerging US public trust lawsuits (involving youth plaintiffs arguing on behalf of future generations' interests) or human rights cases (highlighting the linkage between violation of rights' protections and environmental harms, including climate change).

Proposed next generation cases also build upon the first-generation administrative law strategies by exploring causes of action found in the common law or in other areas of law beyond the environmental field. This broadening of the scope of legal avenues 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 (Ruddock 2013), 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 older legal precedents, well-established mechanisms in other areas of law, and "ancient" common law doctrines such as the public trust, the architects of next generation climate change litigation seek to repurpose these existing legal tools for new climate-related ends.

2.2. Drivers for next generation lawsuits

2.2.1. International legal developments

Our starting point for this consideration of next generation cases is the perception that recent international legal developments have created impetus or opportunities for thinking about strategic climate change litigation in new ways. The *Urgenda* case, which generated significant media attention globally (e.g. Lake 2015, Anton 2015), is often cited as an important development in this regard. The legal prospects of an *Urgenda* style case in other countries 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 common law systems (discussed further in section 3.1.1. below). Nonetheless, the Hague District Court's decision on June 24, 2015 undoubtedly inspired and energised many in the environmental advocacy community regarding the potential for climate change litigation to achieve policy change. In addition, the *Urgenda* case put climate 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 legal advocates. This has encouraged a fresh perspective on possible avenues for bringing climate change cases especially within the legal community (Nelson 2015a, 2015b).

Another pivotal development that has helped to re-enliven interest in climate change litigation is the Paris Climate Agreement concluded by 195 nations at the end of 2015. This treaty entered into force on 4 November 2016 and will come into effect from 2020. Australia announced its formal ratification in November 2016, joining over 170 other countries that are now party to the treaty. Australia's 2030 emissions reduction pledge – of a 26-28 per cent cut in emissions from 2005 levels – is widely considered inadequate (e.g. Thorpe 2015, Climate Change Authority 2015), and there are also serious questions about the capacity of existing national climate change measures to

meet even that weak target (Burke and Jotzo 2014, Hannam and Swan 2014, Jotzo 2015, Christoff 2015). For Australia and many other states parties, participation in the Paris Agreement is thus likely to increase domestic and international scrutiny of their actions on climate change.

That said, the announcement by US President Trump in June 2017 that "the US will withdraw from the Paris climate accord (...) [b]ut begin negotiations to re-enter either the Paris accord or an entirely new transaction on terms that are fair to the US, its business, its workers, its people, its taxpayers" (President Trump 2017) cast significant doubt over the Agreement's future. To some extent, it has also undermined early efforts by the international community to develop the rules and approaches for implementation of the Agreement. However, following Trump's announcement, there was a groundswell of commitments made by state and local governments in the U.S. to implement the Paris Agreement within their borders, as well as strong signals of support from US businesses and investors (<https://www.wearestillin.com/>; <https://www.usclimatealliance.org/>). Further, the formal withdrawal process from the Paris Agreement will take up to four years i.e. until November 2020 when the next US presidential election is scheduled to occur; given the divergent views on climate change among US political leaders, that election will likely play a significant role in shaping the US future direction. In this context, it is difficult to gauge the full impact of US government's position on the Paris Agreement, both in terms of efforts to reduce US emissions and in terms of undermining international cooperation under the Agreement.

Even without considering the potential impact of US withdrawal from the Paris Agreement, it is important to note that the Agreement itself offers limited *direct* prospects for climate change litigation to enforce its requirements (Paris Agreement Arts. 15 and 24). The central requirements of the Agreement are mostly directed to states parties' preparation, implementation and review of their "nationally determined contributions" (NDCs) to the global climate change response (Paris Agreement, Arts. 3-4). In particular, the Paris Agreement does not provide specific legal causes of action that could be pursued by individuals or groups to enforce parties' obligations under the Agreement. Despite these limitations, the Paris Agreement does provide a goal for international climate change action and an approach to achieving that goal that are 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 Article 2 of the Agreement that sets out its overarching objective of strengthening the global response to the threat of climate change by, *inter alia*:

Holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue 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 (...). (Paris Agreement, Art. 2(1)(a))

This "long-term temperature goal", as it is referred to in the Paris Agreement, provides guidance on the maximum permissible global temperature rise considered acceptable by the international community. 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 (Meinshausen *et al.* 2009, Intergovernmental Panel on Climate Change – hereinafter, IPCC – 2014b, pp. 20, 64, Kartha 2016). Although the 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 light of equity and the best available science" (Paris Agreement, Art. 14(1)). 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. For instance, an understanding of the

Paris Agreement's 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.³

A second key provision of the Paris Agreement is Article 4.1, which provides:

In 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.

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 (Gerrard 2015). Although Article 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, Article 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 Article 2 of the Paris Agreement, it may aid plaintiffs in establishing factual points such as the sustainability of continued fossil fuel development.

2.2.2. Improvements in climate change science

Another potential impetus for a renewed interest in climate change litigation and the pursuit of a next generation of cases is continued development of climate change science. More granular understandings of how to trace GHG emissions to their source and their contribution to climate change impacts is an important input for many new litigation avenues. The most recent assessment by the IPCC articulates the strong scientific consensus on the existence and human causes of climate change, as well as the likely nature of its impacts (IPCC 2014a). In the *Urgenda* case, 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 (paras. 2.8-2.21). In Australia – despite the expression of openly sceptical views of climate change science in some early cases – judgments have increasingly embraced the international scientific consensus on the causes and effects of climate change (Bell-James and Ryan 2016).

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 (National Academies of Sciences, Engineering and Medicine 2016). 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" (King and Karoly 2016). For some climate change impacts, such as those related to increased temperatures (e.g. heat waves, coral bleaching, sea level rise), the scientific understanding of causation is far more advanced than for others (Black *et al.* 2015, Mengel *et al.* 2016, Heron *et al.* 2016, van Hooidonk *et al.* 2016).

³ For example, the *Urgenda* case 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. 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. See summary and extensive discussion of the judgement in Cox, 2015.

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 (Heede 2014). 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. It was also central to a group of claims in nuisance and negligence brought by various US municipalities in California against 37 major fossil fuel companies seeking compensatory damages (for the cost of assessing climate impacts and adaptive civil works) and punitive damages (for climate change impacts caused by the business activities of these companies) [see, e.g. *County of Marin et al v Chevron et al* 2017].

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 contribution to climate change made by a particular mine proposal – evidence which assists in determining the significance of a project's environmental impacts (e.g. *Xstrata Coal and anor v Friends of the Earth* [2012], *Hancock v Kelly and anor* [2014]).

2.2.3. 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 (RE 100 2015). This engagement is evidence of an ongoing change in business culture as more and more companies and investors recognise the financial risks posed by climate change and begin to take initiatives to transition to clean energy sources and adapt to a changing climate so as to manage these risks and pursue associated opportunities. While, some companies, particularly in the fossil fuel sector, remain resistant to this view and may be emboldened by the US Trump administration and its plans to expand coal, gas and oil production (Bartreau 2016), the broader shift to treat climate change as a material business risk has gained considerable momentum (Barker *et al.* 2016).

A particularly important driver has been the Financial Stability Board's Taskforce on Climate-related Financial Disclosures (TCFD) which released its final recommendations for climate risk disclosure in June 2017 (TCFD 2017). The TCFD has greatly increased awareness of the financial implications of climate change and its final recommendations provide a new benchmark for companies and investors to identify and manage climate risks. Other significant early drivers have been investigations launched by state Attorney-Generals and the Securities Exchange Commission in the United States into alleged misleading and deceptive disclosure practices of major coal and oil companies, specifically relating to the disclosure of climate risks (New York State Office of the Attorney General 2015, Gillis and Krauss 2015, Penn 2016, Wattles 2016). In Australia key developments have included the issue of an opinion from a leading barrister, Noel Hutley QC, on the obligations of company directors to consider and act on climate change risk (Hutley and Hartford-Davis 2016, Irvine 2016); and the subsequent announcements by Australia's financial regulators foreshadowing increasing regulator attention to climate risk disclosure. For example, the Australian Prudential Regulation Authority (APRA), has stated 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 (Summerhayes 2017). More recently, the Australian Securities and Investments Commission (ASIC) has made similar statements highlighting the importance of climate risk disclosure and its relevance to the legal duties held by company directors (Price 2018).

This changing business environment raises possibilities for pursuing a range of new climate change litigation pathways using corporations' law mechanisms (discussed further in section 3.1.2 below). 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.

3. 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 the United States, which has led the climate change litigation movement globally and inspired many efforts in other countries, the actions of President Trump's administration are spurring significant pro-regulatory litigation as environmental advocates, state and local governments, and individuals challenge his regulatory approaches through statutory, constitutional, and common law mechanisms. These cases will provide additional models for Australian advocates.

While there is considerable enthusiasm for new approaches, how a new generation climate change litigation might be advanced, 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 that pursue administrative, often lower-profile, legal avenues. This part considers these questions in order to provide guidance on strategies for taking forward a next generation of climate change litigation. Our focus here is on domestic law pathways, focusing on the Australian legal context, although environmental groups might also consider potential international law pathways (including transboundary harm) or accountability mechanisms (Verheyen 2005, Rayfuse and Scott 2012).

3.1. Avenues for next generation climate change litigation

Lawyers and advocacy organizations involved in climate change litigation have generally taken a creative approach to scoping strategic lawsuits. 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.

In planning a next generation of climate change litigation in Australia and other countries, 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;⁴

⁴ In an Australian context, there has been comparatively less consideration of torts law avenues other than negligence, such as public nuisance. This differs from the United States, where there have been a number of high profile (but to date unsuccessful) public nuisance suits brought against major corporate emitters, including *Kivalina v ExxonMobil* and the *AEP v Connecticut* (2011) case. More recently there have also been a number of nuisance claims launched against carbon majors by state and municipal authorities (see, e.g. discussion of Californian claims against carbon majors at 2.2.2). Early indications are however that these suits will also struggle to succeed. For example, the public nuisance suits by Oakland and San Francisco against the largest oil companies claiming for the costs of erecting seawalls and other protections against sea level rise were dismissed in July 2018 by the US District Court for the Northern District of California. Judge Alsup stated that while the court accepted the science of climate change, this was a global matter for decision by Congress and the executive, not the courts. See, *City of Oakland v BP p.l.c.*

- 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;
- Human rights, indigenous rights or (environmental) constitutional rights' claims asserting that failures of mitigation or adaptation violate rights' protections (Knox 2009, Peel and Osofsky 2017);⁵
- Claims based on ancient common law notions of the public trust, perhaps along the lines of *Juliana v USA*,⁶ arguing that this doctrine requires the protection of natural resources (coastal wetlands, water resources, the atmosphere) for the benefit of the public (Wood 2012, Blumm and Wood 2017).⁷

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. Other countries may present better prospects for rights-based litigation, particularly those that have constitutional environmental rights' protections (Peel and Osofsky 2017). Our treatment of torts-based and corporate law avenues focuses 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.

3.1.1. Replicating *Urgenda*?

As noted above, the success of the *Urgenda* case in the Netherlands in 2015 has prompted substantial consideration of the potential to bring a similar action in other countries. In an Australian context, this would involve a claim 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 (e.g. Baxter 2017).

The *Urgenda* case was brought by the 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 per cent reduction on 1990 emissions levels by 2020) was unlawful because it was insufficient to prevent foreseeable harm.

While *Urgenda* pursued a number of different lines of argument in the case (including alleging breaches of constitutional rights under the Dutch Constitution (*Urgenda* Case, paras. 3.2 and 4.36-4.44), of human rights under the European Convention on Human Rights (paras. 3.2 and 4.45-4.50), and of the Netherlands' obligations under international and European climate change law (paras. 4.35-4.52), the Court's

⁵ In the Australian context, however, the possibilities for human rights claims are limited given the lack of a national Bill of Rights.

⁶ 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. The most recent of these US cases is *Juliana v USA* in which Judge Ann Aiken 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 youth 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 US Constitution and that defendants have violated their obligation to hold certain natural resources in trust for the people and for future generations. They sought a declaration their constitutional and public trust rights have been violated and an order enjoining defendants from violating those rights and directing defendants to develop a plan to reduce carbon dioxide emissions.

⁷ 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 for example, Bonyhady (1995), Simpson (2003) and Thom (2012).

decision centred on the general negligence provisions of the Dutch Civil Code (Art. 6:162).⁸

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 (e.g. Lin 2015, de Graaf and Hans 2015, Cox 2015). Our focus here is on the potential for a similar claim in negligence to be brought in a common law context, such as Australia. A key constraint in this regard is the lack of direct correlates between the civil code provisions noted above and similar doctrines in domestic tort law (Baxter 2017). 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 (e.g. Durrant 2007, Cashman and Abbs 2010, Abbs *et al.* 2012). They 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" (see Abbs *et al.* 2012, para. 5.50). More generally, Abbs and coworkers argued 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 (Abbs *et al.* 2012, para. 5.67).

This consideration by Abbs *et al.* was framed in relation to suing a corporate entity for loss or damage experienced as a result of climate change. This focus on compensating harms already experienced by a plaintiff is the traditional path of negligence law in common law jurisdictions. However, in the *Urgenda* case, the negligence claim was not directed to compensating loss and damage *ex ante*, 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 (*Urgenda* Case, para. 5.1). Baxter (2017) argues that a claim in negligence against a governmental defendant along these lines is worthy of renewed consideration in an Australian, and potentially other national contexts.

However, even pursuing this approach, it would still be necessary to establish 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. As the factors discussed in section 2.2. above highlight, the factual basis on which such a claim could be brought continues to improve. These include 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; 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 many national governments, including the Australian Government, have consistently participated in and ratified international climate change treaties and have the authority and capacity to implement required mitigation measures.

Nonetheless, the experiences of first generation cases in well-established climate litigation jurisdictions like Australia in arguing causation, underscore the challenges that would-be litigants may face in launching a *Urgenda*-style action. For example,

⁸ Dutch Civil Code, Book 6 – *The Law of Obligations*, 6.3 *Tort (unlawful acts)*, Article 162 – as provided in the official English translation - provides that "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. A tortious act is regarded as a violation of someone else's rights (...) 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".

in the context of judicial review of decisions relating to particular fossil fuel projects (which have formed a large part of first-generation climate change litigation in Australia), Australian courts have responded only slowly to 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 (Bell-James and Ryan 2016, pp. 531-536). 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" (Bell-James and Ryan 2016, p. 535). Similar difficulties would likely be encountered in arguing Australia's GHG emissions were a material contribution to the global problem of climate change sufficient to satisfy tests of causation. However, the *Urgenda* decision does provide an example of a court being prepared to apportion causation in this context (Lin 2015, pp. 79-80).

Further, while the Hague District Court came to the conclusion in the *Urgenda* case 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 (Lin 2015, p. 80), courts in common law countries, including Australia and the United States have tended to take a very restrictive view of their role with regards to "political questions" or justiciability. 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 (Bergkamp 2015, AFP 2018). It is likely that similar arguments would also be a feature of litigation in other countries attempting to pursue governments over weak emissions reduction targets.

3.1.2. Suing companies and their directors?

In some 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 (Foerster *et al.* 2017), litigation trends are emerging against corporations and their directors for misleading disclosure of business risks associated with climate change (Barker and Girgis 2016). These legal interventions are taking place under existing company and securities laws that require the disclosure of material business risks and which govern directors' duties to the 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 have been a series of high profile regulatory investigations into the disclosure practices of major fossil fuel companies, including Peabody Energy Corporation (New York State Office of the Attorney General 2015) and ExxonMobil (Gillis and Krauss 2015). These investigations have been launched both by state Attorney Generals under state laws prohibiting false or misleading conduct in connection with securities transactions, and at a national level by the Securities and Exchange Commission (Olsen and Viswanatha 2016). 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 ExxonMobil and its directors (Shareholders Foundation 2016), 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. Class members are seeking compensation for a drop in share value that occurred following the public reporting of the regulatory investigations into ExxonMobil's disclosure practices noted above (Gillis and Krauss 2015).

In a similar vein, in the United Kingdom, a leading environmental law NGO submitted regulatory complaints to the Financial Reporting Council (FRC, the UK regulator responsible for monitoring and enforcing corporate reporting requirements), alleging that two major oil and gas companies have failed to disclose climate-related risks to investors (ClientEarth 2016b, 2016c). The complaints argued that the lack of any substantive discussion of climate change risks in the annual reports of these companies did not meet statutory requirements under the Companies Act 2006 (UK) including those: to provide a fair review of the company's business [Companies Act 2006, s414C(2)(a)]; a proper account of the main trends and factors likely to affect the future development, performance and position of the company's business [Companies Act 2006, s414C(7)(a)]; and a proper description of the principal risks and uncertainties facing the company [Companies Act 2006, s414C(2)(b)]. 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 (Companies Act 2006, s172).

Given the similarities between Anglo-American corporate law regimes, such disclosure-focused actions may also be viable in other common law jurisdictions, including Australia (Foerster and Peel 2017b). Indeed, after considering the statutory provisions under the Australian Corporations Law governing disclosure and director's duties and the relevant case law, the legal opinion provided by Noel Hutley QC noted above concluded that "it 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" (Hutley and Hartford-Davis 2016, para. 51). 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 (see also Foerster *et al.* 2017, p. 163). 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 (Hutley and Hartford-Davis 2016, paras. 14-34). 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 [Corporations Act 2001 (Cth), s 180(1)]. To fulfil these duties, directors should consider and disclose all material and foreseeable risks posed to their business. As the Hutley opinion notes, the materiality and foreseeability of risks posed by climate change is increasingly acknowledged (Hutley and Hartford-Davis 2016, paras. 14-34, 35-41).

The first case to test these arguments in Australia was initiated in August 2017. A shareholder of the Commonwealth Bank of Australia (one of the four major Australian banks) lodged a claim in the Federal Court alleging that the bank had failed to disclose the risks associated with climate change that may impact on lending and investment activities, strategies and prospects in its 2016 Annual Report. As a consequence, the bank had allegedly failed to present a true and fair view of its position and prospects as required by governing law [Corporations Act 2001 (Cth), ss 292(1)(b), 295, 297, 298(1) and (1AA); Foerster and Peel 2017a]. The case was subsequently dropped when the bank released its 2017 Annual Report which included an acknowledgement from directors that climate change posed a significant risk to the bank's operations and a promise to undertake climate change scenario analysis to assess the risks posed to the business (Hutchens 2017).

3.2. Relationship between first and next generation litigation

While there is a palpable excitement in many parts of the 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. For some groups, the vision of a next generation of climate change litigation that breaks with the past and puts litigation resources into new

cases seen as more likely to offer prospects for transformative change is an attractive one. However, equally a next generation of climate change litigation could co-exist with ongoing efforts to build on and expand past and existing first generation cases. Under this strategy, first generation-style cases would continue in an effort to “hold the line” against project-level and other governmental decisions with poor climate and other environmental outcomes. Indeed, many groups see value in expanding a first generation litigation strategy to encompass cases that are more indirectly related to climate change action, such as improving decision-making transparency, resisting fossil fuel projects including unconventional gas, improving measures for dealing with air pollution and advancing necessary adaptation (Higginson 2016b). In countries like Australia, this approach has the benefit of building upon a well-established 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 (see Figure 2).

FIGURE 2

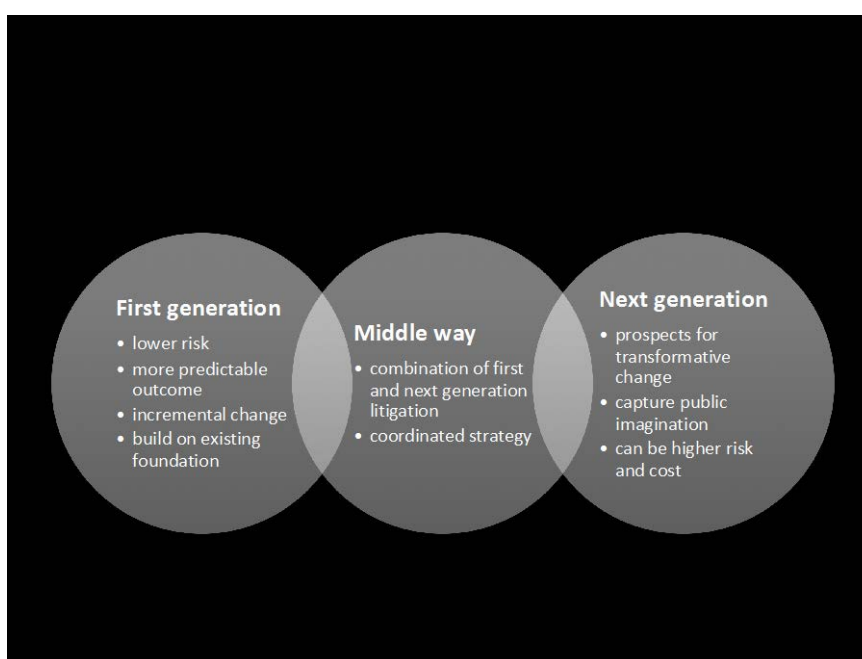


Figure 2. Relationship between first and next generation strategies.

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 (Osofsky 2007). 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 groups in Australia 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 the introduction, 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 (see also, Preston 2011b). 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 made both courts and litigators more accustomed to climate change arguments and climate science (Bell-James and Ryan 2016). 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.

4. Enablers and challenges for next generation climate change litigation

As first generation climate change cases 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 as much as possible. 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. While a number of these issues are common to climate litigation efforts globally (Peel 2011), the precise content of legal procedural rules will differ from jurisdiction to jurisdiction. Here the Australian context and relevant rules are again considered as an illustrative example.

4.1. Procedural barriers

Coming up with clever legal arguments 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:

- Is there a suitable claimant with standing to bring the claim?
- Are capable legal advocates 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?
- 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?

In Australia, the first generation of climate change cases was heavily shaped by these considerations (McGrath 2008) and they are likely to be equally pertinent for next generation lawsuits. In the past there has thus been 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, for example, the NSWLEC (Higginson 2016a). These cases also tend to be those that are within the "wheelhouse" of local environmental NGOs and for which there is a well-defined group of legal advocates and experts able to assist.

In considering a next generation of climate change litigation with the potential for more transformative impact, 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 – in an Australian context – has posed minimal problems for climate change litigants taking merits or judicial review claims under environmental legislation. 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. The November 2016 US judgment in *Juliana v USA* illustrates some of the ways that a standing case can be made even in a situation of diffuse harms with broad-ranging effects. To satisfy the relevant threshold tests of standing in this case, the plaintiffs led evidence of the types of climate change impacts affecting their personal interests and established that the harms caused by climate change are ongoing and likely to continue in the future. They also relied on advances in climate science to link the substantial GHG emissions controlled by the federal US Government (allegedly 25% of global emissions) to these particular climate impacts. Finally, they established that the requested relief (a court order requiring the US Government to reduce emissions) would slow climate change and therefore redress their injuries (see *Juliana*, pp. 18-28). Despite this particular success in establishing standing, 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 advocates 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 damages' recovery. 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 suits 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 (e.g. IMF Bentham n.d.). This broadening of actors involved in climate change litigation is related to the growing range of parties pursuing such litigation, the expanding nature of these claims (e.g. 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 legal advocates than those usually tapped in environmental cases have also expressed interest in novel cases such as an *Urgenda*-style action that might involve constitutional, tortious or administrative law claims.

4.2. 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 (e.g. a coal mine) and broader climate change effects (Peel 2011). 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, for instance, through future sea level rise or increased risks of storms and coastal flooding (Preston 2010). Evidentiary issues may manifest in terms of questions over the relevance of cumulative impacts from multiple similar projects in assessing a single project or whether certain indirect climate

change effects are "too speculative" to be evaluated. They also may arise – as has happened in a number of Australian coal mine cases including the most recent Adani Carmichael coal mine litigation – through the defendant's presentation of the insidious "substitution" argument: that if a particular emissions-intensive project does not go ahead its environmental effects will simply be substituted by other such projects approved elsewhere, including in other parts of the world.

As the *Urgenda* case 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 a cumulative process of accumulating levels of atmospheric GHG (*Urgenda*, para. 4.79). In this case, 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 degree temperature goals of the Paris Agreement without additional action by other countries with high emissions (*Urgenda*, para. 4.78). The Court rejected this argument finding that "the 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" (*Urgenda*, para. 4.79). The Court also noted that the Dutch per capita emissions are one of the highest in the world and took into account that Annex 1 countries like the Netherlands have taken the lead in taking mitigation measures under the United Nations Framework Convention on Climate Change and have therefore committed to a more than proportionate contribution to reduction.

Application of the precautionary principle also offers another avenue in this regard, since where scientific uncertainty exists and serious or irreversible environmental threats can be identified, the general position under the environmental law of many countries, including Australia, is that the occurrence of such threats should be assumed and the burden of proof rests with the defendant to show otherwise (e.g. *Telstra v Hornsby Shire Council 2006*).

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 paper 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 (Godden and Peel 2010, p. 203, Bell-James and Ryan 2016). 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 (e.g. Rackermann 2011).

For next generation climate change cases, the evidentiary hurdles highlighted above are likely to be even more salient, particularly in those suits (public trust, torts, 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 (McInerney-Lankford 2009). 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.

4.3. Partnering and facilitation

As business perceptions shift to recognise both the range of risks posed to companies by climate change (physical, regulatory, market) and the associated business opportunities (TCFD 2016a, Table 3b), new possibilities are emerging for advocacy organisations to partner in climate change litigation and related legal interventions with commercial players who have aligning interests in clean energy transition and adaptation. This can take a variety of forms, from public joint action (e.g. submission

of regulatory complaints or lodging legal challenges) to behind-the-scenes facilitation of legal interventions (e.g. identifying causes of action, approaching potential litigants, providing legal advice and support). For environmental groups, this is potentially a way to facilitate innovative legal interventions using different avenues 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 the United States and Europe, 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 examples from the United Kingdom are discussed briefly below to stimulate further discussion of the potential for growing this strategy elsewhere and to invite consideration of the nature and extent of aligning interests, the strategic value of partnering, the various forms this might take, and the potential challenges that may arise.

4.3.1. 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 (EU) member states can subsidise certain sectors and industries (European Commission 2014). These rules are an important influence on the 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. However, direct legal interventions (e.g. 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 European Court of Justice (ECJ) by a UK clean energy company (Tempus Energy) that stood to suffer from state aid payments associated with the UK Government's capacity mechanism (*Tempus v Commission* 2014).⁹ This case is an interesting example of strategic partnering and facilitation for a number of reasons. There are clearly aligning interests between the strategic goals of ClientEarth and Tempus Energy. 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. (Tickell 2014)

Further, ClientEarth as an NGO would not have standing to bring such an action and, therefore, without some level of partnering with a commercial player would otherwise be limited to advocacy from the sidelines. If the ECJ judgment finds in favour of

⁹ 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. The court has not yet handed down a decision.

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 or elsewhere to bring similar style claims is beyond the scope of this paper. The above example is included, not because it is directly transferable to other contexts, but rather with the aim of inspiring further investigation of different litigation angles that could be pursued to hasten the development of market conditions that support clean energy transition.

4.3.2. Partnering with shareholders and investors

As discussed in section 3.1.2. above, interest in using company and investment law avenues to advance action on climate change is growing in many jurisdictions, and has gained impetus with recent, high profile investigations of the reporting practices of fossil fuel companies, Peabody Coal and Exxon, in the United States. The launch of the first shareholder class action of this nature against ExxonMobil in November 2016 suggests that the commercial motivations for such legal interventions are increasing, and as such, this approach may well escalate in a range of different jurisdictions. There is, however, also the 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 fund members, who have direct interests in enforcing legal obligations to disclose climate change risks and to take these into account in decision-making.

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 (AGMs) seeking better disclosure of climate change risks and the adoption of clean energy practices as part of business strategy. The first climate change resolution was put to ExxonMobil in 1997, and climate change proposals now represent a significant proportion of total proposals brought to US companies (Slater 2007, Clark and Crawford 2012). Similar approaches are increasingly being implemented in other jurisdictions, including the United Kingdom and Australia (e.g. Australasian Centre for Corporate Responsibility 2014). Indeed, over the last two AGM seasons in Australia, there has been a significant number of resolutions on climate change issues. Some of these resolutions have been spearheaded by advocacy groups, sometimes in partnership with large institutional investors such as superfunds. These resolutions are increasingly receiving a significant proportion of the vote (Foerster and Peel 2018).

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 (Local Authority Pension Fund Forum 2016). The letter detailed the expectations of long-term investors that fossil-fuel-dependent companies 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 the development of any future regulatory guidance. 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 (ClientEarth 2016b, 2016c). While these complaints were lodged by ClientEarth, investors were urged to support the complaints via a targeted investor briefing (ClientEarth 2016a), and some provided supportive public statements (e.g. Jimaa 2016).

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 (Shareaction and ClientEarth 2016), and the release of a senior barrister's opinion on the scope of these legal duties (Bryant and Rickards 2016).

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 that are being played by public interest lawyers in these contexts. Yet there are also challenges to pursuing these strategies. 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 likely to be some reticence to allocating capacity to these new, untested 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.

5. Conclusion

Developments around the world create important opportunities for an innovative next generation of climate change litigation. New cases in the United States, the Netherlands, Pakistan, and the Philippines help to put a human face on climate victims (Hunter 2009, p. 360), and provide models for how successful cases focused on rights, duties, and common law principles might be framed.¹⁰ In addition, evolving efforts to use corporate and other commercial law mechanisms around the world, paired with growing attention in many developed countries to corporate disclosure of climate change risks, suggest interesting new possibilities for litigation. These emerging approaches create an opportunity for advocates in Australia and other countries to explore new pathways at the same moment as the political change in the United States may prompt innovation there also.

As advocates 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 reinforce the possibilities of courts cutting off novel pathways, and any next generation climate change litigation will need to be framed in ways that minimises 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 the United States reinforce 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 (UNFCCC 2015). Litigation remains an important tool to push and block government action, and to try to advance needed mitigation and adaptation efforts. In that context, an innovative and effective next generation of climate change litigation is critical.

¹⁰ Other case examples along these lines include a decision of Austria's Federal Administrative Court blocking the expansion of the Vienna airport, partly because of its impacts on climate change. This decision rested in part on the Austrian Federal Constitution. For an unofficial English translation of the decision, by Columbia University student Pooja B. Chawdra, see <https://systemchange-not-climatechange.at/wp-content/uploads/2017/03/unofficial-translation.pdf>. Another case relying in part on constitutional rights' claims in a climate change context is South Africa's first climate change decision, in which the North Gauteng High Court ruled in favour of environmental justice organization, 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. The Court's decision can be found at <http://cer.org.za/wp-content/uploads/2017/03/Judgment-Earthlife-Thabametsi-Final-06-03-2017.pdf>.

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