



Environmental  
Defenders Office



# Trends in climate change litigation

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# Outline

## First generation

- Environment and planning law

## Second generation

- Private law
- Corporate accountability

## Third generation

- Public law

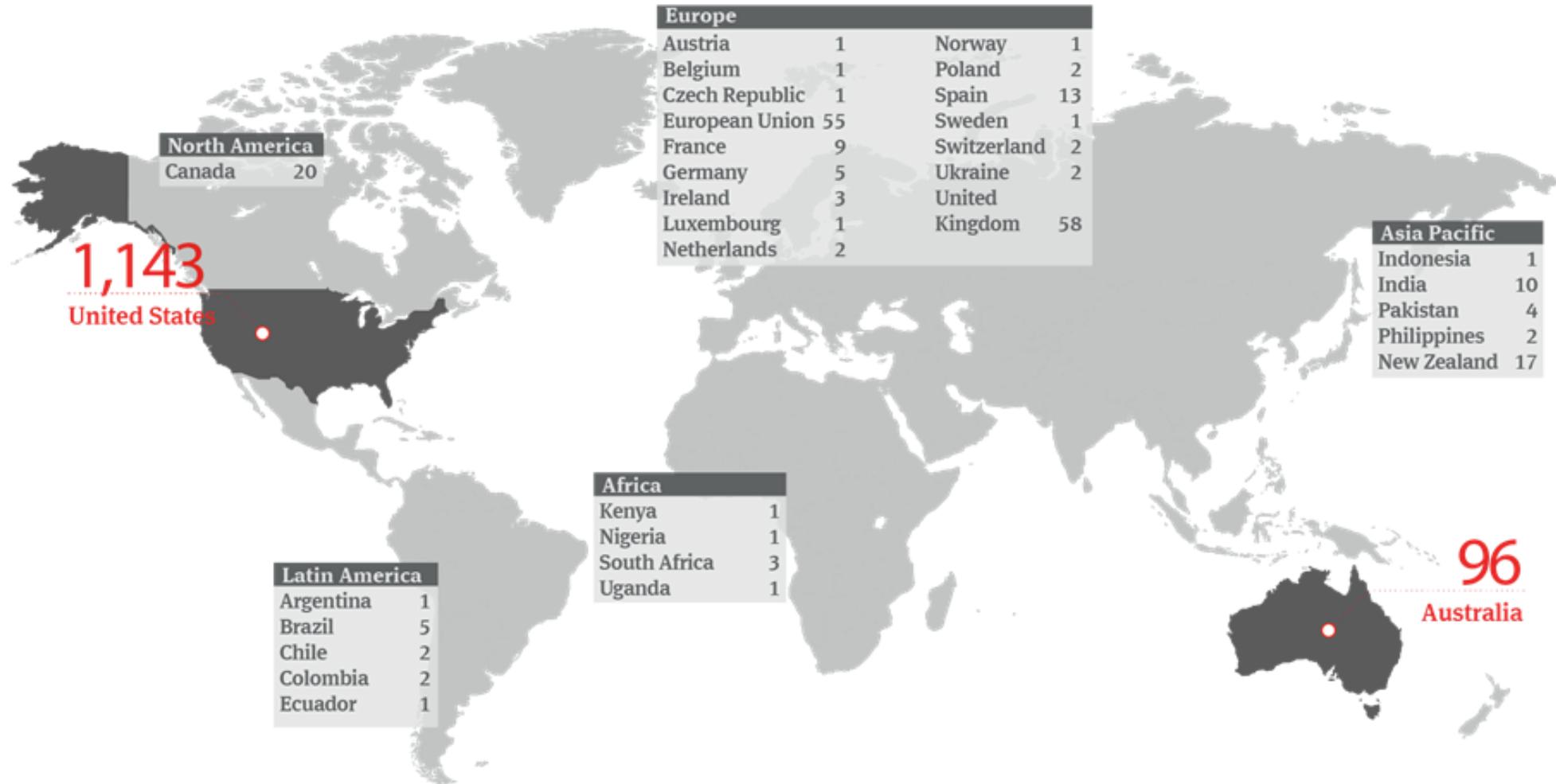
## Future directions

- Where to from here?

# Climate change as a “wicked problem”

1. There is no definitive formulation of a wicked problem.
2. Wicked problems have no “stopping rule” (i.e., no definitive solution).
3. Solutions to wicked problems are not true or false, but good or bad.
4. There is no immediate and no ultimate test of a solution to a wicked problem.
5. Every (attempted) solution to a wicked problem is a “one-shot operation”; the results cannot be readily undone, and there is no opportunity to learn by trial and error.
6. Wicked problems do not have an enumerable (or an exhaustively describable) set of potential solutions, nor is there a well-described set of permissible operations that may be incorporated into the plan.
7. Every wicked problem is essentially unique.
8. Every wicked problem can be considered to be a symptom of another problem.
9. The existence of a discrepancy representing a wicked problem can be explained in numerous ways.
10. The planner has no “right to be wrong” (i.e., there is no public tolerance of experiments that fail).

# World map of climate change cases



First generation of  
climate change cases



# First generation of NSW climate change cases

	Judicial review	Merits review
Mitigation	<ul style="list-style-type: none"> <li>• <i>Gray v Minister for Planning</i> (2006) 152 LGERA 258</li> <li>• <i>Barrington-Gloucester Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure</i> (2012) 194 LGERA 113</li> <li>• <i>Wollar Progress Association Inc v Wilpinjong Coal Pty Ltd</i> [2018] NSWLEC 92</li> <li>• <i>Australian Coal Alliance Incorporated v Wyong Coal Pty Ltd</i> [2019] NSWLEC 31</li> </ul>	<ul style="list-style-type: none"> <li>• <i>Greenpeace Australia Ltd v Redbank Power Pty Ltd</i> (1994) 86 LGERA 143</li> <li>• <i>Hunter Environment Lobby Inc v Minister for Planning</i> [2011] NSWLEC 221</li> <li>• <i>Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure</i> (2013) 194 LGERA 347</li> <li>• <i>Gloucester Resources Ltd v Minister for Planning</i> (2019) 234 LGERA 257</li> </ul>
Adaptation	<ul style="list-style-type: none"> <li>• <i>Walker v Minister for Planning</i> (2007) 157 LGERA 124; <i>Minister for Planning v Walker</i> (2007) 157 LGERA 124</li> <li>• <i>Aldous v Greater Taree City Council</i> (2009) 167 LGERA 13</li> </ul>	

# *Greenpeace Australia Ltd v Redbank Power Pty Ltd* (1994) 86 LGERA 143

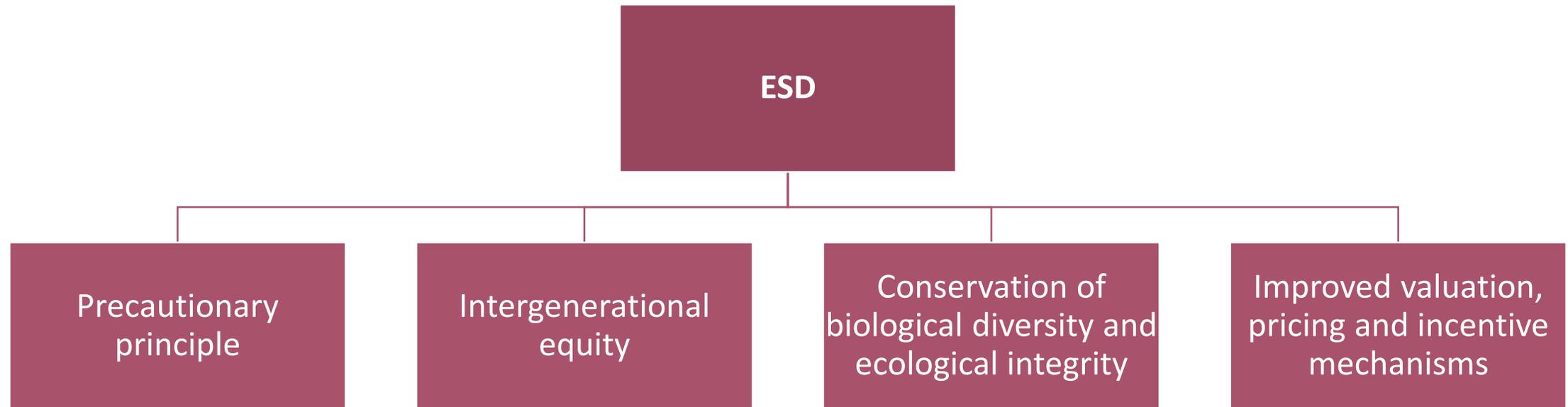
- **Facts**

- Merits appeal under former s 98 of the *Environmental Planning and Assessment Act 1979* against development consent for designated development
- Greenpeace submitted that GHG emissions from the power station would unacceptably exacerbate the greenhouse effect and Court should apply precautionary principle and refuse development consent

- **Decision (Pearlman CJ)**

- The precautionary principle did not require that GHG issue should outweigh all other issues
- Appeal dismissed

# Ecologically sustainable development (ESD)



*Protection of the Environment Administration Act 1991 (NSW), s 6(2)*

# *Gray v Minister for Planning (2006)*

## 152 LGERA 258

- **Facts**

- Judicial review application in relation to Minister's approval of an Environmental Assessment (EA) of the Anvil Hill Project coal mine
- EA considered mine's expected Scope 1 and 2 GHG emissions but not Scope 3 emissions

- **Decision (Pain J)**

- EA declared void
- Scope 3 emissions are a relevant consideration in the environmental assessment of the coal mine, in accordance with the precautionary principle and intergenerational equity

# *Walker v Minister for Planning (2007) 157 LGERA 124; Minister for Planning v Walker (2007) 157 LGERA 124*

- **Facts**
  - Minister for Planning approved a Concept Plan for a development at Sandon Point
  - The proposed development was for up to 285 homes and an aged care facility to be built on flood-prone coastal land
  - Walker argued that the Minister failed to apply the principles of ESD
  - NSWLEC (Biscoe J) found that the Minister had failed to consider ESD by failing to consider whether the impacts of the proposed development would be compounded by climate change
- **Decision (Hodgson J)**
  - Appeal upheld
  - However: “[T]he principles of ESD are likely to come to be seen as so plainly an element of the public interest, in relation to most if not all decisions, that failure to consider them will become strong evidence of failure to consider the public interest”

# *Aldous v Greater Taree City Council* (2009) 167 LGERA 13

- **Facts**

- Judicial review application in relation to a development consent for a dwelling on beachfront property
- Aldous submitted that Council had failed to take into account the principles of ESD, specifically the principles of intergenerational equity and the precautionary principle by failing to assess climate change-induced coastal erosion

- **Decision (Biscoe J)**

- Approval upheld
- Council had mandatory obligation to consider the public interest, which included the principles of ESD, but Council had indeed considered the issue of coastal erosion

# *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221; *Hunter Environment Lobby Inc v* *Minister for Planning (No 2)* [2012] NSWLEC 40

- **Facts**

- Merits appeal against the Minister for Planning's approval for an expansion of Ulan Coal mine's underground mining operations and new open cut mining operation

- **Decision (Pain J)**

- [2011]: Approval should in principle be granted to Ulan's project, subject to further submissions from the parties in order to finalise the conditions in relation to groundwater, biodiversity offsets and the offsetting of Ulan's scope 1 GHG emissions
- [2012]: Court found Scope 1 GHG condition lawful but declined to impose the GHG condition because it found that the *Clean Energy Act 2011* and related legislation would cover most of the mine's activities which result in scope 1 emissions and therefore the purpose of the condition would be met by the legislation. Court did not decide on the lawfulness of Scope 2 or 3 emissions

# *Barrington-Gloucester Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure (2012) 194 LGERA 113*

- **Facts**

- Judicial review application against two decisions of the Planning Assessment Commission (PAC) to approve parts of the AGL Gloucester Gas Project
- The Alliance argued that the PAC had failed to properly apply the precautionary principle in approving the development on the basis of only preliminary groundwater investigations, and that certain conditions imposed in relation to groundwater and wastewater left open the possibility of a significantly different development from that for which approval was sought and were therefore uncertain

- **Decision (Pepper J)**

- Application dismissed
- “... the time has come that the principles of ESD can now be seen as so plainly an element of the public interest”

# *Wollar Progress Association Inc v Wilpinjong Coal Pty Ltd* [2018] NSWLEC 92

- **Facts**

- Judicial review application in relation to decision by PAC to allow extension of Wilpinjong open cut coal mine near Wollar, Mudgee
- WPA argued that approval was invalid because the PAC had not considered climate change impacts according to Mining SEPP and NSW Climate Change Policy Framework

- **Decision (Sheahan J)**

- Application dismissed
- Accepted Wilpinjong's submissions that the Paris Agreement and NSW CCPF did not provide applicable guidance to the PAC in assessing the development application, and that the PAC had sufficient material before it to satisfy the requirement to consider the greenhouse gas emissions of the Project

# *Gloucester Resources Ltd v Minister for Planning* (2019) 234 LGERA 257

- **Facts**

- Merits appeal in relation to decision of PAC to refuse consent for Rocky Hill Coal Mine Project
- Groundswell Gloucester (GG) applied to join as a party to the proceedings.
- GG raised two issues:
  - Unacceptable social impacts on the residents and community of Gloucester
  - Impact of development on GHG emissions

- **Decision (Preston CJ)**

- Appeal dismissed
- Public interest, ESD, precautionary principle, intergenerational equity
- Climate change reasoning
  - Scope 3 emissions relevant
  - Project's direct and indirect GHG emissions will contribute cumulatively
  - Casual link between Project's emissions and climate change (carbon budget)
  - Declined to adopt blanket rule of no new fossil fuel development

# *Gloucester Resources Ltd v Minister for Planning* (2019) 234 LGERA 257

- **Decision (Preston CJ)**

- “In short, an open cut coal mine in this part of the Gloucester valley would be in the wrong place at the wrong time. Wrong place because an open cut coal mine in this scenic and cultural landscape, proximate to many people’s homes and farms, will cause significant planning, amenity, visual and social impacts. Wrong time because the GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at a time when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions. These dire consequences should be avoided. The Project should be refused.”

# *Australian Coal Alliance Incorporated v Wyong Coal Pty Ltd* [2019] NSWLEC 31

- **Facts**

- Judicial review application in relation to decision of PAC to approve Wallarah 2 coal mine west of Wyong
- ACA argued that PAC failed to consider an assessment of downstream emissions from the project

- **Decision (Moore J)**

- Application dismissed
- Court found PAC had considered downstream emissions in deciding to approve the project
- “The greenhouse gas emission merit issues, which led to the conclusion by the PAC that these did not warrant refusal of this project, are not ones which I am considering. To do so would be a fundamental error in my exercise of the Class 4 judicial review jurisdiction of this Court”
- “That the PAC, in this case, and Preston CJ in the *Gloucester Resources* case, reached differing conclusions on these merit matters does not arise as a factor for my consideration in these proceedings. The Chief Judge determined the *Gloucester Resources* case on the basis of the evidence presented to him, whilst the PAC dealt with this proposed mine on the material presented to it.”

# *R (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214

- **Facts**

- Judicial review application in relation to proposed development of third runway at Heathrow Airport
- Key issue was whether designation of the Airports National Policy Statement was unlawful because the Secretary of State, in breach of the Planning Act, failed to have regard to the desirability of mitigating, and adapting to, climate change in the light of the UK's commitment to the Paris Agreement, the non-carbon dioxide climate impacts of aviation, the effect of emissions beyond 2005, and to the ability of future generations to meet their needs

- **Decision (Court of Appeal)**

- Key issue decided in favour of the applicants
- “In our view, the Government’s commitment to the Paris Agreement was clearly part of “Government policy” by the time of the designation of the ANPS. First, this followed from the solemn act of the United Kingdom’s ratification of that international agreement in November 2016. Secondly, as we have explained, there were firm statements re-iterating Government policy of adherence to the Paris Agreement by relevant Ministers, for example the Rt. Hon. Andrea Leadsom MP and the Rt. Hon. Amber Rudd MP in March 2016.”

# *R (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214

- **Decision (Court of Appeal)**

- “However, for the reasons we have given, we have concluded that in one important respect the ANPS was not produced as the law requires, and indeed as Parliament has expressly provided. The statutory regime for the formulation of government policy in a national policy statement, which Parliament put in place in the Planning Act, was not fully complied with. The Paris Agreement ought to have been taken into account by the Secretary of State in the preparation of the ANPS, but was not (see paragraphs 222 to 238, and 242 to 261 above). What this means, in effect, is that the Government when it published the ANPS had not taken into account its own firm policy commitments on climate change under the Paris Agreement.”

# Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019

## Amendment of *Environmental Planning and Assessment Act 1979*

### Insert after section 4.17—

#### **4.17A Prohibited conditions**

- (1) A condition of a development consent described in this section has no effect despite anything to the contrary in this Act.
- (2) A condition imposed for the purpose of achieving outcomes or objectives relating to—
  - (a) the impacts occurring outside Australia or an external Territory as a result of the development, or
  - (b) the impacts occurring in the State as a result of any development carried out outside Australia or an external Territory.

# Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019

*Amendment of State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*

## **Clause 14 Natural resource management and environmental management**

Without limiting subclause (1), in determining a development application for development for the purposes of mining, petroleum production or extractive industry, the consent authority must consider an assessment of the greenhouse gas emissions **(including downstream emissions)** of the development, and must do so having regard to any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions.

**Omit “(including downstream emissions)” from clause 14(2)**

# Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019

- The new section 4.17A is not limited to the mining and extractive industries only, but may extend to all development requiring development consent
- The use of the term 'impacts' is broad and goes beyond greenhouse gas or environmental effects
- The new section 4.17A prevents any conditions being placed on an approval, even those voluntarily proposed by an applicant
- Proposed section 4.17A(2)(a) is not limited to the regulation of downstream Scope 3 greenhouse gas emissions occurring outside Australia as a result of the development
- Proposed section 4.17A(2)(b) would prevent a consent authority taking into account a range of environmental impacts occurring inside New South Wales itself



# Second generation of climate change cases



# Second generation of climate change cases

- Corporate claims against public companies and directors, auditors, advisors:
  - “Failure properly to disclose climate change risks to the market”
  - “Failure to assess properly, and take adequate action to mitigate, climate change risks”
  - “Failure to appropriately value a company’s assets and investments, taking into account those risks”
  - “Securities class actions” (Korbel 2019)
- *Corporations Act 2001, Competition and Consumer Act 2010* (Australian Consumer Law), ASX Rules
- Tort – public or private nuisance, negligence, misrepresentation

# Hutley Opinion

Oct 2016

- Potential breaches of duty of care and diligence

Mar 2019

- Increased climate risk for companies: “exposure of individual directors to ‘climate change litigation’ is increasing, probably exponentially, with time”

# Regulator initiatives

- 2016 – G20 Financial Stability Board – Taskforce for Climate-related Financial Disclosures
- Jun 2018 – TCFD framework for climate-related financial disclosures
- Sep 2018 – ASIC report recommending climate risk disclosures
  - Section 299A(1)(c) of the Act regarding the disclosure of material business risks within a company's Operating and Financial Review (OFR) may require companies to disclose their exposure to climate risk
- Caldwell (2020): “climate risk disclosure may indeed be a mandatory requirement of companies' existing financial reporting obligations in Australia”
  - “The analysis shows that s 299A(1)(c) requires companies to disclose information with respect to governance and risk management practices in place to address climate risks, while mandatory disclosure of specific risk information remains subject to a materiality threshold. Finally, upon review of current legal precedent on the enforceability of s 299A generally, this analysis concludes that climate risk disclosure obligations under s 299A(1)(c) may be legally enforceable under ss 344 and 1308 of the Act.”

# *McVeigh v REST*

- **Facts**

- “An amended claim was filed in September 2018. It alleged the trustee had failed to satisfy the duties it owed to Mark when investing his money.
- Those duties include the requirement to act in the best interests of members, and to exercise care, skill and diligence to the standard of a prudent superannuation trustee when investing.
- The duties appear in section 52 of the Superannuation Industry (Supervision) Act.
- To satisfy those duties the claim alleges that, among other things, the trustee should have:
  - required its investment managers give the fund information about climate change risks to investments for that information to be considered by the board or the investment committee, and
  - ensured its internal processes and public disclosures complied with the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD).”

<https://www.equitygenerationlawyers.com/mcveigh-v-rest/>

# *McVeigh v REST*

- **Facts**

- “The trustee filed a reply to the claim in April 2019. It admitted that climate change will cause physical and transition impacts and that those risks ‘are foreseeable, and in some contexts, material’.
- It said ‘climate change is one of many material factors’ and provided information on the consideration of other such factors ‘which may be considered for particular investments’.
- The trustee’s defence said Mr McVeigh ‘has not identified any investment of REST [upon which climate change] ... will pose a material or major risk to its financial position’.
- The trustee denied significant parts of the claim.”

# *The People of the State of New York v Exxon Mobil Corporation*

- **Facts**

- “The core allegation by the New York Attorney General was that Exxon’s publicly disclosed projected climate change costs were inconsistent with internal projections, which had the effect of misleading investors and the investment community. The common law fraud claims were withdrawn during closing remarks, leaving the remaining statutory fraud claims under New York’s Martin Act and Executive Act”

- **Decision (NY Supreme Court)**

- “Court found Exxon not guilty of perpetrating a longstanding fraudulent scheme concerning the management of business risks relating to climate change”
- “The case largely turned on the fact that the misrepresentations were not “material” as required by the Martin Act, as the majority of the evidence indicated that investment decisions were not based on speculative assumptions of future climate change costs. The New York Attorney General did not provide testimony from any investor who was allegedly misled. There was also no evidence that Exxon’s stock price increased immediately following publication of the alleged misrepresentations.”



Third generation of  
climate change cases



# Third generation of climate change cases

Human rights  
claims

Constitutional

Public trust

United Nations

# *Urgenda Foundation v State of the Netherlands*

- **Facts**

- Urgenda Foundation and almost 900 Dutch citizens sued the Dutch government to compel the Netherlands to reduce greenhouse gas emissions in line with human rights obligations.

- **Decision**

- The Hague District Court determined the Dutch government must reduce greenhouse gas emissions by at least 25 percent by 2020 to fulfill its duty of care to prevent dangerous climate change
- Dec 2019 – Supreme Court of Netherlands ruled state owes a duty of care to protect its citizens from climate change in accordance with obligations under European Convention for the Protection of Human Rights and Fundamental Freedoms
- “climate change threatens human rights”
- “in order to ensure adequate protection from the threat of those rights resulting from climate change, it should be possible to invoke those rights against individual states”

# *Juliana v United States*

- **Facts**

- Plaintiffs, represented by Our Children's Trust, sued the US on the basis of constitutional rights and the public trust doctrine, seeking relief for governmental action in regulating carbon dioxide pollution

- **Decision (Ninth Circuit Appeal Court)**

- Claim dismissed
- “We reluctantly conclude... that the plaintiffs’ case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box. That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes”: Judge Hurwitz

# UN cases

- *Sacchi et al v Argentina et al*
  - UN Convention of the Rights of the Child
- Petition of Torres Strait Islanders to the UN Human Rights Committee Alleging Violations Stemming from Australia's Inaction on Climate Change
  - International Covenant on Civil and Political Rights

# Future directions



# Future directions

## First generation

- Merits review and judicial review
- Mitigation and adaptation
- Development of ESD
- Development of scientific evidence

# Future directions

## Second generation

- Increased regulatory guidance and directions
- Development of scientific evidence
- Cross-jurisdictional convergence

# Future directions

## Third generation

- Challenges to non-justiciability
- Transnational claims
- Cross-jurisdictional convergence

# Future directions

## Other developments

- COP26 – UN Climate Change Summit, Glasgow – ratchet mechanism
- Development of causation arguments (e.g. proportion of emissions produced)
- Federal EPBC Act reform? GHG trigger?

# References

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Thank you.