Questions and Answers for Commonwealth Lawyers Association workshop on "Strategic climate litigation: a case study of the Pacific" held on 30 August 2023

[These questions were posted in the Q&A function during the workshop or in the feedback form. Answers were provided by Dr Chris McGrath on 8 September 2023]

No.	Question	Answer
1.	What are the challenges of pursuing climate justice cases?	This is a big question! There are many challenges to pursuing climate justice cases. For me, I think the major challenge is that we have come to assume we are impotent and can't take action or litigate to hold governments and big polluters accountable for climate change because it is a global problem. Big wins like the famous Urgenda Case in the Netherlands are inspiring because they show successful action is possible. As lawyers, we should have a mindset of identifying the tools available to us to protect our clients and our community, including litigation, then work to overcome the challenges for successfully using those tools. Our job as lawyers is to solve our clients' problems as best we can. There are no magic solutions to the climate crisis humanity faces, but there are many opportunities for lawyers to help our clients and our community mitigate the harm they will suffer.
2.	Fa'afetai tele lava for this informative session, Dr Chris! How would you approach the issue of causation given the indirect harm caused by climate change? Courts appear to be willing to impose a duty but are unable to find causal connection between the breach and the harm suffered.	You raise a good point. We need to think about causation carefully and have clear and compelling arguments for the judge. As I discussed in the workshop, the key to establishing causation in climate litigation is that the defendant made a *material contribution* to the harm. I discussed this in more detail in the article I referred to in the workshop, as well as the concept of the Carbon Budget, which I didn't discuss during the workshop due to the limited time.[1] Using the facts of the case study discussed in the workshop, the Australian company emits 0.05% of global carbon pollution annually. Its emissions (of 18.5 $MtCO_2$-e) are twice the entire nation of PNG. It is a simple, compelling argument to say to a judge (in PNG): "This single company has emissions twice the entire nation of PNG. Its emissions are greater than 100 nations. Clearly, its emissions are a material contribution to climate change." That's the main argument I would use in the case discussed in the workshop. Simple, clear and compelling for a judge.

[1] Chris McGrath "Identifying Opportunities for Climate Litigation: A Transnational Claim by Customary Landowners in PNG against Australia's Largest Climate Polluter" (2020) 37(1) Environmental & Planning Law Journal 42, at 46 and 50-52.

3.	Do you think it might be easier and a more strategic objective to stop further emissions (e.g. though declarations/injunctions) rather than make emitters pay for past emissions?	There is no black and white answer to this question. Declaratory and injunctive relief can be very strategic and powerful. It is also true that damages do not stop the pollution occurring (at least directly). For the case study used in this workshop, of PNG customary landowners suing an Australian polluter in PNG courts, the major reason for identifying damages as the relief to be sought is that a money order made by the PNG National Court of Justice can be enforced in Australia. In contrast, an injunction by a PNG court cannot be enforced in Australia. A big reason for choosing to sue in the PNG courts (where the only relief that can be enforced is damages) is to empower local people by helping them use their own courts for harm occurring in their country. Seeking a substantial award of damages is also strategic because removing the profits of polluters will strongly deter them and others from further pollution. So, for the case study used, declaratory or injunctive relief would not be a good choice. Damages would be a better remedy to seek. The choice depends on the facts and circumstances of each case.
4.	If damages are the relief sought, how does that then cause impact on the company sued and others alike to reduce emissions especially in the case of big companies? Is that really practical when looking at the long run i.e. for the purpose of strategic climate litigation?	There is no silver bullet that will stop climate change, so no single court case or action is going to solve it entirely. The idea of suing large fossil fuel producers and users for damages is one way people damaged by climate change can take action to seek compensation as well as reduce further harm. The rationale is this: Large fossil fuel producers and users are only operating for the huge profits they can make at present. A major reason for their huge profits is that they don't have to pay for the damage their pollution causes (they are "free loaders"). If they had to pay for that damage, they would not be profitable and would stop their business. Suing for damages is also sustainable and scalable because litigation funders can provide the resources needed for commercial lawyers to run the cases. We should expect to see a tidal wave of this litigation in the future. That tidal wave will have enormous impacts in reducing emissions, so building its momentum is very strategic.
5.	Call me conservative but is there any funding for such cases?	Yes, there is substantial funding available internationally for climate litigation from public interest (philanthropic) funders.[2] Increasingly, commercial litigation funders are providing funding and that is likely to spur a wave of litigation in the future.[3] One of the strategic goals of the case outlined in the workshop was to attract more litigation funders into more climate litigation.

[2] e.g., https://www.eqt.com.au/about-us/media-centre/news-items/whats-new/climate-and-nature-funders-step-up-as-environment-faces-critical-challenge

[3] See https://www.the-wave.net/climate-litigation-as-investment/

6.	Why would your instructors not sue Loy Yang in the Federal Court in Australia? Part IVA (class action) is available and the company being Australian gives the court jurisdiction.	Why should PNG customary landowners who suffer damage in PNG choose to sue in an overseas court when they can sue in their own courts? The Ok Tedi litigation in the 1990s is notable and illustrates some of the potential obstacles of litigating in Australia too. It involved a claim by PNG customary landowners in the Victorian Supreme Court (in Australia) against an Australian company for pollution from the Ok Tedi copper mine in PNG. Byrne J held that the trespass and nuisance claims were founded on possessory rights to PNG land and, hence, were not justiciable in an Australian court.[4] Even if such issue were not relevant for a potential climate claim, my question would still be: why would PNG landowners sue in Australia for harm to their land when they can sue in PNG courts?
7.	What if the Plaintiff loses? What's the repercussions?	The repercussions depend in part on why the case is lost and at what court level. A plaintiff who loses is likely to be ordered to pay the costs of the defendant, which are likely to be very substantial. However, overall, a loss is likely to be only a temporary set-back for climate litigation generally. The huge damage that millions of people around the world are already suffering is generating a growing tidal wave of climate litigation. Courts will not sit idle when people who have suffered damage come before them with strong claims seeking remedies for the harm they are suffering.
8.	Are Rio Tinto or BHP significant climate polluters?	Yes, Rio Tinto and BHP are significant climate polluters. Both are within the top 100 largest corporate polluters (often called "Carbon Majors"). BHP was the 20th largest carbon polluter globally from 1988-2015 (with 0.91% of global emissions). Rio Tinto was the 24th largest carbon polluter globally (with 0.75% of emissions).[5]
9.	Will the recent test case in Montana, USA, impact cases in the Asia-Pacific region?	The recent Montana Youth case[6] is inspiring but the trial has only just finished and the decision is virtually certain to be appealed, so it needs to be seen in that light. The trial judge declared that the State of Montana violated the youth's constitutional rights under the Constitution of Montana, including their rights to equal protection, dignity, liberty, health and safety, and public trust, which are all predicated on their right to a clean and healthful environment. There are lessons and inspiration for climate litigation around the world in the decision, not just in the Asia-Pacific. Its importance will grow or shrink depending on what happens on appeal.

[4] *Dagi v Broken Hill Pty Co Ltd (No 2)* [1997] 1 VR 428, 441–442 (Byrne J).
[5] See a 2017 news report summarising research on the "Carbon Majors" at this link: https://www.theguardian.com/sustainable-business/2017/jul/10/100-fossil-fuel-companies-investors-responsible-71-global-emissions-cdp-study-climate-change
[6] See https://www.youthvgov.org/ and https://www.ourchildrenstrust.org/montana

10.	Would you say part of the magic of the common law is that small island Pacific and Caribbean states etc, receive the benefits of case law being decided in much larger and richer jurisdictions?	Yes, to a point, but that magic builds when local judges use broader principles of the common law and apply them to local circumstances. The flexibility and adaptability of the common law is a big reason for its ongoing success and adoption in many, diverse countries. For instance, in the PNG case I mentioned in the workshop, *Rimbunan Hijau (PNG) Ltd v Enei* [2017] PGSC 36; SC1605, the PNG Supreme Court held at [27]: "The common law requiring possession may be relevant and applicable in England and the rest of the common law world. However it is not the law in PNG. … no land is waste and vacant and ownerless in PNG." This was an important and powerful decision for millions of customary landowners in PNG. It illustrates both the value of the common law as a backbone of principles and the capacity to adapt these principles to suit local circumstances.
11.	Most constitutions provide for the rule of law. Would you say the environmental rule of law (i.e. environmental laws operating as designed and also properly resourced) is a corollary to this and a right under a constitution that can be claimed?	While the rule of law is one of the hallmarks of any constitution, how rights under it can be enforced (or not) varies greatly. In PNG, s 37 of the PNG Constitution provides a right "to the full protection of the law". In the article I referred to in the workshop, I noted:[7] "The right to the full protection of the law in s 37 includes protection from unlawful environmental harm … under ss 10–13 of the *Environment Act 2000* (PNG)." So, in PNG, environmental laws provide rights that can be claimed and enforced under (ss 57 and 58 of) the Constitution.

[7] McGrath, n 1, at 55 (footnotes omitted).