



Commonwealth
Lawyers Association



Dr Chris McGrath
Australia



Fiona Ey
Moderator
Samoa

The Commonwealth Lawyers Association
Climate Justice committee presents a workshop on

"Strategic climate litigation opportunities: a Pacific case study"

Workshop on Wednesday 30th August at 5am BST /
2pm Brisbane / 4pm Tuvalu / 5pm Samoa

Thank you to David Denniston of the Commonwealth Lawyers Association (CLA) in Papua New Guinea and Fiona Ey of the CLA in Samoa for organising this workshop.



OBJECTIVES

The Commonwealth Lawyers' Association (CLA) exists to maintain and promote the rule of law throughout the Commonwealth by ensuring that an independent and efficient legal profession serves the people of the Commonwealth.

Commonwealth countries share a substantial common ground in their legal systems. The CLA is committed to the preservation of the highest standards of ethics and integrity and to the furtherance of the rule of law for the benefit of the citizens of the Commonwealth.

<https://www.commonwealthlawyers.com>

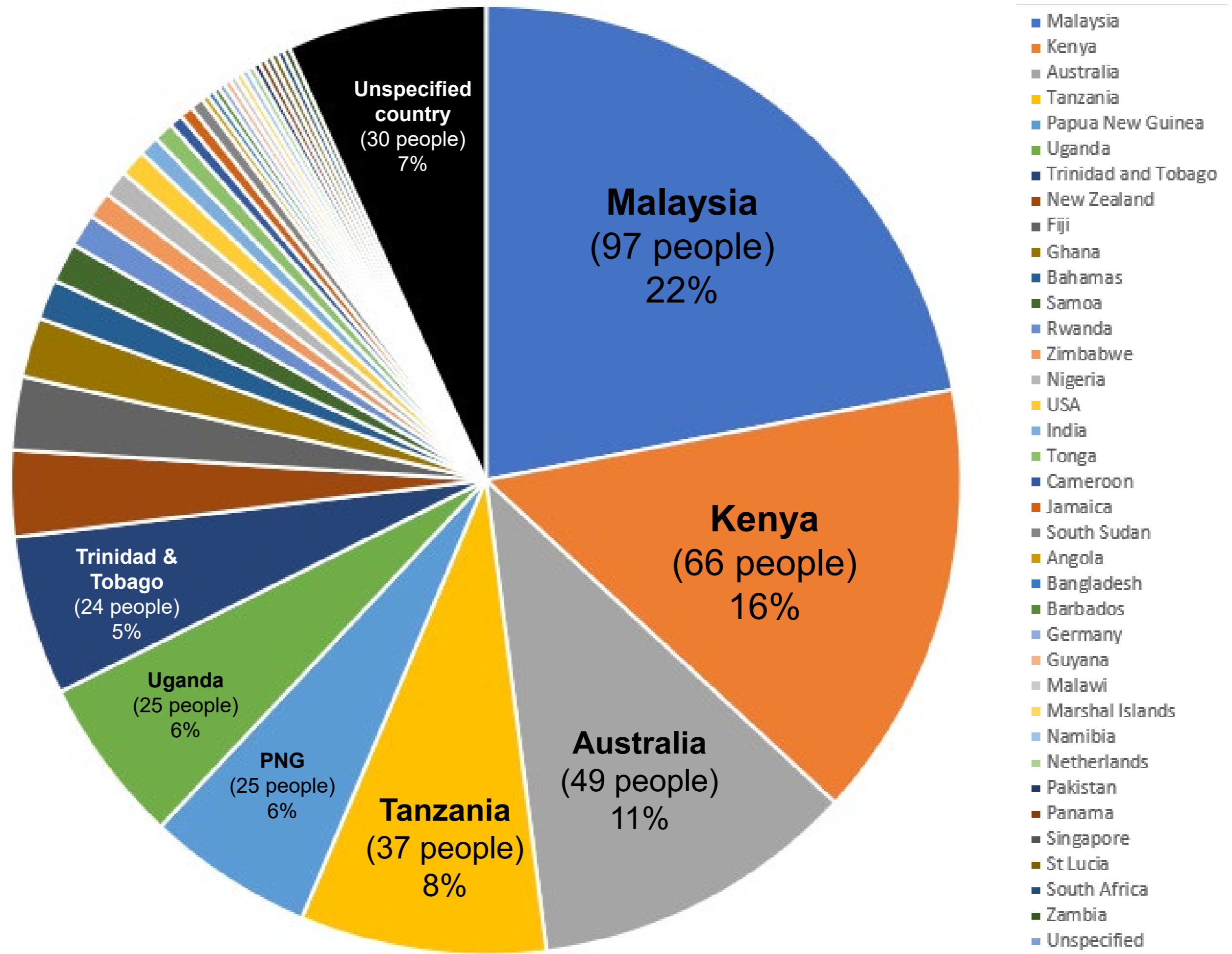


Welcome to the international audience predominantly from Commonwealth countries registered for this workshop (447 people from at least 36 countries)

447 people registered for this workshop from at least 36 countries*

* As at 29 August 2023

30 people did not state their country when registering



This workshop aims to empower lawyers acting for people harmed by climate change.

It uses a case study from the Pacific as window to explore opportunities for strategic climate litigation, with lessons for other jurisdictions.



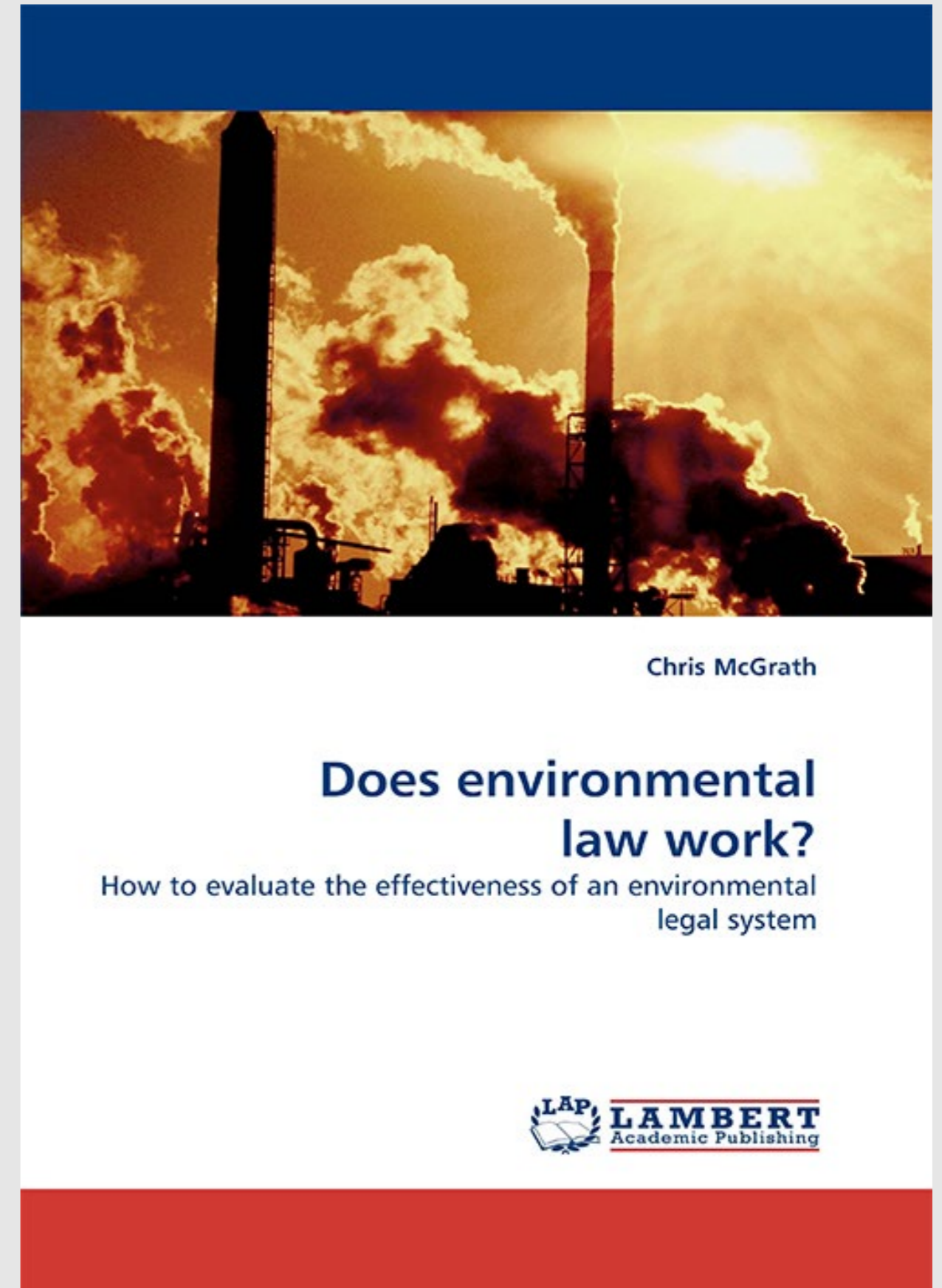
Photo: Chris McGrath (2018)

My personal driver for working in climate litigation for the past 20 years started in 2004 during my PhD research on laws protecting Australia's Great Barrier Reef.

After mass coral bleaching occurred in 1998 and 2002 driven by extreme heat caused by climate change, it was obvious that climate change threatened the survival of coral reefs and the millions of people who depended upon them. But the obvious danger did not spur political action.

As a lawyer, I looked to work with the tools available to me, which was litigation. I spent over a decade representing clients fighting large coal mines in Queensland, where I live in Australia. **I've learnt that we (in Australia) are very good at making excuses for not taking action to address our huge contribution to climate change.**

In 2018 I became involved in litigation against illegal logging in Papua New Guinea.



[Cover of a book based on my PhD, published in 2008]

This workshop draws both on lessons from climate litigation globally (e.g. the Urgenda case in the Netherlands), my own 20 years of experience in strategic climate litigation in Australia and more recent work in PNG against illegal logging.

During a site visit to PNG in 2018 for a case against illegal logging, I stayed on an island ~50cm above high tide. I watched locals eat fish caught from the surrounding coral reef and thought: “what are they going to eat when climate change destroys their reef & where will they live when sea level rise floods their island?”



Photo: Chris McGrath (2018)

General references for workshop

Recording of workshop, slides & other references available at <http://envlaw.com.au/cla/>, including:

- Chris McGrath “Identifying Opportunities for Climate Litigation: A Transnational Claim by Customary Landowners in Papua New Guinea against Australia’s Largest Climate Polluter” (2020) 37(1) *Environmental and Planning Law Journal* 42-66.
- Chris McGrath, “Survival strategies for climate litigators” (2021) 27 *Pandoras Box* 39-51.

Workshop outline

1. Starting point: 2 propositions about climate litigation

2. Exploring a framework for strategic climate litigation:

- A case study of representing customary landowners on the Carteret Islands, Papua New Guinea, seeking remedies for damage due to climate change.
- What is “strategic climate litigation” and why might our clients pursue it?
- 10 key issues for identifying climate litigation opportunities, including identifying:
 - The plaintiff/s & the defendant/s
 - Causes of action
 - Evidence: key points relevant to the litigation (e.g. limitation periods)
 - Procedural issues

3. Conclusions & key take-away points

4. Questions (please type your questions into the Q&A for Fiona to moderate)

Starting point:

Two propositions about
climate litigation

Proposition 1:

Liability for climate change is widespread but largely unrealised.

Common law causes of action and modern environmental and human rights laws are wide on their face. If they do not address climate change, a well-known, major threat facing human society and the environment, which will cause huge loss of life and property, there is something seriously wrong with them. Don't assume this is the case.

Billions of people and trillions of dollars of property are already being impacted by climate change and these impacts will increase dramatically in the future.

Where someone suffers loss, judges strive to find remedies, however imperfect.

Proposition 2:

When considering opportunities for strategic (or any future) climate litigation, we should move from abstract theories to real & specific case studies (who, what, which court, how, etc).

Because, as Gageler J (as he then was) said in a decision of the High Court of Australia, *Clubb v Edwards* (2019) 267 CLR 171; [2019] HCA 11, at [137] in the context of why courts should not consider hypotheticals:

“Legal analysis is then directed only to issues that are real and not imagined. Legal principle is then honed through practical application. Academic abstraction is then curbed by the parameters of a concrete dispute.”

For this workshop, assume we act for customary landowners on the Carteret Islands in the Autonomous Region of Bougainville, Papua New Guinea.



Carteret Islands

The Carteret Islands (also known as Tulun or Kilinailau Islands)* are six (or seven) islands on a coral atoll 86 km NE of Bougainville.

* The islands are named (in English) after the British navigator Philip Carteret who arrived on the HMS *Swallow* in 1767.

100 km

The maximum elevation of the six (or seven) islands in the Carteret Islands is 1.5m above sea level.

The largest island is Han Island.



Han Island

1 km

Google Earth



Part of the
village on
Han Island




Picture by Dareen James
(2018) [ABC News](#)



Around 2000 still people live on the Carteret Islands.

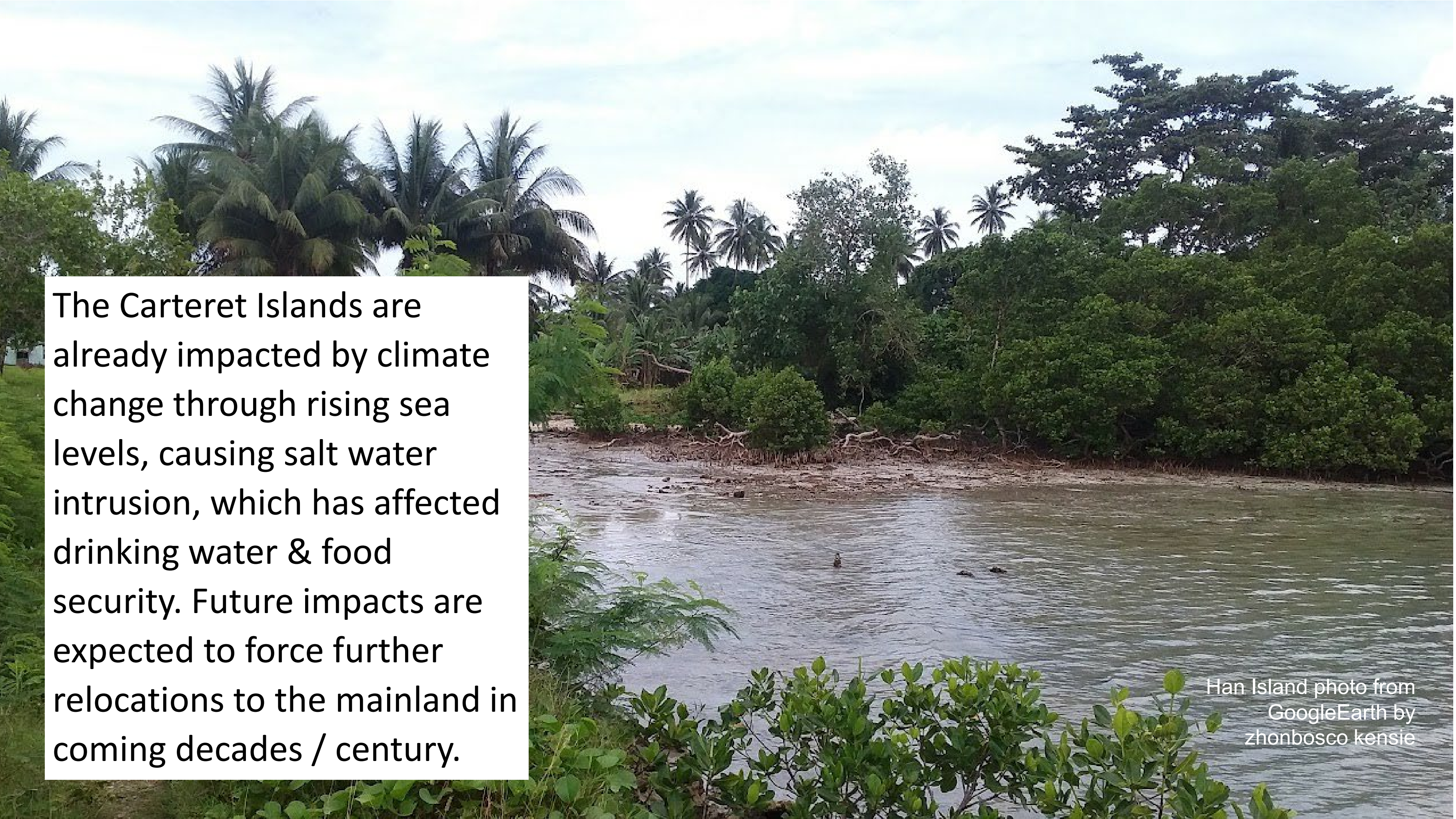
A school on the Carteret Islands. Picture by Dareen James (2018) [ABC News](#)

A portrait of Ursula Rakova, a woman with dark skin and a large, dark afro hairstyle. She is smiling and wearing a light-colored, patterned top with lace detailing at the shoulders, a white beaded necklace, and small earrings. The background is a blurred green outdoor setting.

Land ownership under customary law is matriarchal (passed to the eldest woman in a clan)

This is a picture of Ursula Rakova, executive director of NGO Tulele Peisa (in the Halia language translated to mean “Sailing the waves on our own”), who has fought for over a decade to protect her people and the Carteret Islands. She led 200 people relocating to the mainland of Bougainville (see Carteret Islanders Responding to Climate Change Facebook page).

Picture: Kalolaine Fainu / The Guardian (2021)

A photograph of a tropical coastline. In the foreground, there is a body of water with a person swimming. The middle ground shows a sandy beach with some driftwood and dense green vegetation, including mangroves. The background is filled with tall palm trees and other tropical foliage under a cloudy sky.

The Carteret Islands are already impacted by climate change through rising sea levels, causing salt water intrusion, which has affected drinking water & food security. Future impacts are expected to force further relocations to the mainland in coming decades / century.

Han Island photo from
GoogleEarth by
zhonbosco kensie

Damage is already occurring in the Carteret Islands and other small islands due to climate change driven predominantly by burning fossil fuels in industrialised countries like Australia and this damage is expected to increase dramatically in coming decades

“Small islands are increasingly affected by increases in temperature, the growing impacts of tropical cyclones (TCs), storm surges, droughts, changing precipitation patterns, sea level rise (SLR), coral bleaching and invasive species, all of which are already detectable across both natural and human systems (*very high confidence*).

IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the IPCC*, Cambridge University Press, 2022, Ch 15 (Small Islands), p 2045.

For our workshop, assume we (as lawyers in private practice) represent customary landowners on the Carteret Islands, PNG, seeking remedies for damage due to climate change.*

We will use this as the “parameters of a concrete dispute” to explore a framework for strategic climate litigation.

* I am not currently retained in any capacity for the Carteret Islanders, so I am not bound by any client confidentiality. The impacts of climate change on the Carteret Islands are publicly available in news reports. I am using this as a case study to make the issues real for practising lawyers acting for clients.

What is “strategic climate litigation” and why might our clients pursue it?

Litigation can be thought of as “strategic” when it aims to achieve a wider beneficial outcome than merely the remedy sought from the court.*

For example:

- A government regulator might prosecute partially to deter others from similar conduct (general deterrence).
- A private litigant acting in the public interest to protect the environment (such as a conservation group) might litigate to establish a principle to better protect the environment in other cases (in addition to winning their own case).

* Of course, the proceedings must have merit and be legitimate in its own right, not an abuse of process. The wider purpose must be *in addition* to the underlying legitimacy of the proceedings.

In climate litigation, the biggest strategic objective right now is making large fossil fuel producers and users liable for the damage they cause.

Large fossil fuel companies, such as Shell or BP, will continue to extract and sell their products (and drive climate change), and banks will lend them money, **for as long as they are profitable.**

They are only profitable now because these companies do not have to pay for the harm the pollution from their products causes.

So, we act for customary landowners on the Carteret Islands who:

- seek remedies for the damage they are suffering (and will suffer) due to climate change; and
- want to achieve wider outcomes that help others, so they are interested in opportunities for strategic litigation.

10 issues for identifying future climate litigation opportunities:*

1. Who are the potential plaintiffs (i.e. who can sue)?
2. Who are the potential defendant/s & who is the best to choose?
3. What causes of action are available (e.g. judicial review, tort, etc)?
4. What evidence is available to establish the cause/s of action?
5. How should the evidence be presented/framed to best explain the facts & avoid defence strategies to avoid liability? [expect a dirty fight]
6. What remedies are available that a court will realistically grant?
7. What court should the litigation be commenced in?
8. What are the procedural obstacles & can they be overcome?
9. What resources are needed & available for the litigation (i.e. money, experts & lawyers)?
10. How do you avoid being overwhelmed by a big opponent?

* See Chris McGrath “Identifying Opportunities for Climate Litigation: A Transnational Claim by Customary Landowners in Papua New Guinea against Australia’s Largest Climate Polluter” (2020) 37(1) Environmental and Planning Law Journal 42-66, available at <http://envlaw.com.au/climate-litigation/> .

Our clients' perspective
(we seek to help the judge to reach the right answer but not naïve)

Think from 3 perspectives

Judge
(smart lawyer without background in climate science)

Opposing lawyers
(will seek to confuse the judge & play procedural tricks to win)

3 ethical principles for litigation lawyers:

- Our goal (as lawyers) is to help the court reach the right decision according to law.
- We should be honest and reasonable (but don't expect our opponent will be).
- Narrowing and avoiding disputes through negotiation and compromise are important and we should always pursue them where possible but sometimes we need to fight, and we need **courage and tenacity** to do this.

Issue 1:

Who are the potential plaintiffs
(i.e. who can sue)?



Carteret Islanders:

- Around 2000 people (including children) live on the Carteret Islands
- Around 200 have relocated to Bogainville
- Land ownership under customary law is matriarchal (passed to the eldest woman in a clan)

Damage to land and surrounding coral reefs is damage to customary ownership rights, which gives standing to sue.

See, e.g. *Louis Medaing v Ramu Nico Management (MCC) Ltd* [2011] PGNC 95; N4340.



Carteret Islands.
Picture by Daren James
(2018) [ABC News](#)



Class action for wider group of customary landowners in PNG?

“Between 50,000 and 70,000 coastal inhabitants rely on coral reefs for their food, livelihoods and shelter” in PNG: Office of Climate Change and Development (PNG), *National Climate Compatible Development Management Policy* (Office of Climate Change and Development, 2014) 38

Options for framing the plaintiff group:*

- 1. Representative action:** all plaintiffs named in the originating process, including people represented with their consent evidenced in writing. (Order 5, Rule 13 *National Court Rules 1983* (PNG); *Philip v Tiliyago* [2019] PGSC 17; SC1783 at [23]-[32]).
- 2. Class action:** named plaintiffs appointed to represent a class of people where people in the class cannot be ascertained or cannot readily be ascertained, etc. (Order 5, Rule 14 *National Court Rules 1983* (PNG); rarely used but see class represented in *Ampaoi v Bougainville Copper Ltd* [2012] PGSC; SC1166).

* PNG courts at times refer to the first category (actions under O 5, r 13 of the NCR) as “class actions” but, here, I will separate cases under O 5, r 13 and r 14.

Contrast alternative approaches in, e.g., Tuvalu:

...

Head of family may sue and be sued.

Any person entitled in accordance with custom, to represent any community, line or group of natives, may sue and be sued on behalf of or as representing such community, line or group.

Order 17 (Parties), Rule 8, *High Court (Civil Procedure) Rules 1964* (Tv).

Here, for simplicity, we will limit the plaintiffs to Carteret Islanders who can be identified, give (written) consent and are named in the proceedings, as opposed to a wider class of people in PNG.

(i.e. an action under O 5, r 13 of the *National Court Rules 1983* (PNG)).

Issue 2:

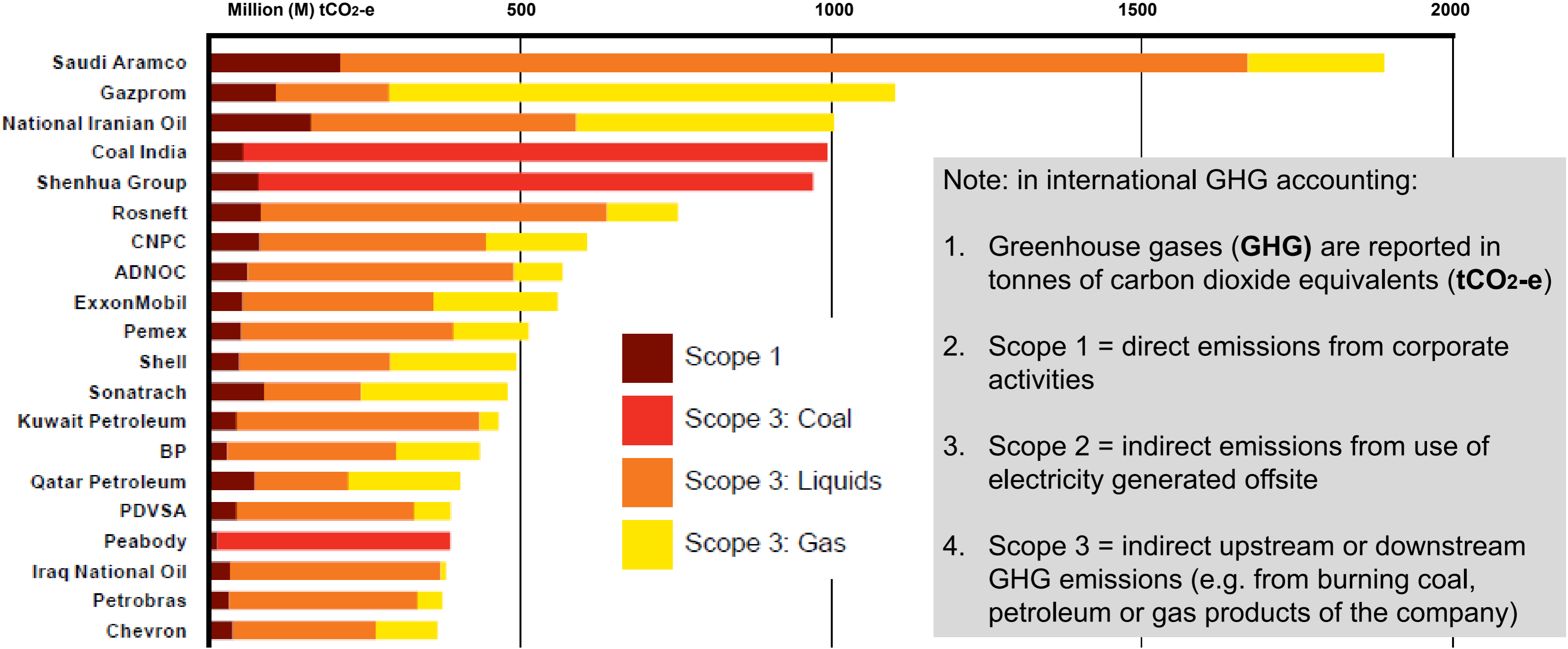
Who are the potential defendant/s
& who is the best to choose?

The potential to sue large corporate groups (e.g. BP) across the Commonwealth was significantly enhanced by recent decisions of the UK Supreme Court in relation to parent company (joint tortfeasor) liability:

- *Vedanta Resources PLC v Lungowe* [\[2019\] UKSC 20](#); [2019] 3 All ER 1013; [2019] 2 WLR 1051.
- *Okpabi v Royal Dutch Shell* [\[2021\] UKSC 3](#); [2021] 3 All ER 191; [2021] WLR 1294.

See, e.g., Chris McGrath “Implications of the UK’s approach to parent company liability in Australia” (2021) 38 C&SLJ 577-582.

Potential defendants: top 20 “Carbon Majors” globally



Source: Moss and Fraser (2019) *Australia’s Carbon Majors Report*, p5 based on Griffin (2017) *The Carbon Majors Database: CDP Carbon Majors Report 2017*.

If possible, limit any litigation to one corporation and one activity in a jurisdiction where judgment can be enforced.

Trying to sue multiple, large corporations (or government/s) for multiple activities simultaneously multiplies the complexity exponentially.

You can simply be overwhelmed.

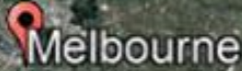
Here, to test potential liability, we will choose the largest, single direct polluter in Australia:*

The operator of Loy Yang A Power Station in Australia.

* Part of the reason for choosing an Australian defendant that a money order made by the National Court of Justice in PNG can be enforced in Australia under the *Foreign Judgments Act 1991* (Cth). That Act has simplified the common law rules for recognition of foreign judgments of 35 countries/jurisdictions that have reciprocal arrangements with Australia, even noting the criticisms by James Allsop, “Incoherence in Australian Private International Laws” [\[2013\] Federal Judicial Scholarship 8](#).

The Loy Yang A Power Station is located in the Latrobe Valley, 160km east of Melbourne

Melbourne



Melbourne



Latrobe Valley



50 km

Image Landsat / Copernicus
Image © 2019 TerraMetrics
Data SIO, NOAA, U.S. Navy, NGA, GEBCO

Google Earth

Power stations in the Latrobe Valley



Yallourn Power Station



Loy Yang A and B Power Stations



Hazelwood Power Station (closed 2017)

5 km

Loy Yang A & B Power Stations adjacent to the open-cut mine supplying them with brown coal.

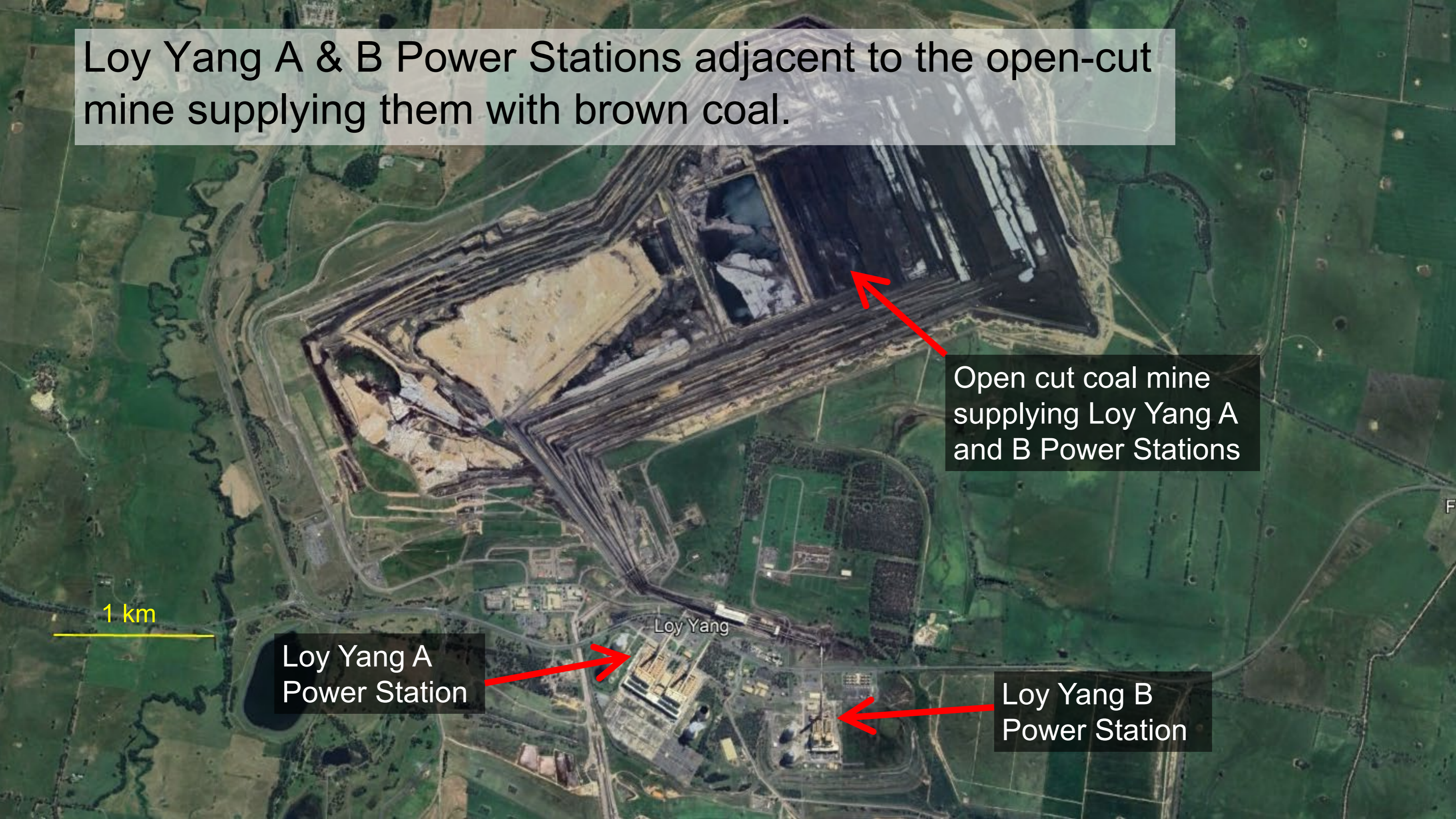
Open cut coal mine supplying Loy Yang A and B Power Stations

Loy Yang A Power Station

Loy Yang B Power Station

Loy Yang

1 km



Loy Yang A & B Power Stations adjacent to the open-cut mine supplying brown coal.

Loy Yang A Power Station licenced to AGL Loy Yang Pty Ltd (ACN 077 985 758) under various names since 1997

Loy Yang B Power Station licenced to LYB Operations & Maintenance Pty Ltd (ACN 055 563 696) since 1991

500 m

Google Earth

**Loy Yang B
Power Station**

**Loy Yang A
Power Station**

**Conveyor belt taking
coal from mine**

Coal excavator

Loy Yang Mine and Power Stations (photo: LYP)





Loy Yang A Power Station in foreground with Loy Yang B Power Station obscured in background. Photo: <http://www.absafe.com.au/loy-yang-agl-power-station.html>

Loy Yang A Power Station & the adjacent mine is Australia's largest single source of direct (Scope 1) GHG emissions (averaging 18.5 MtCO₂-e/yr from 2012-2022).

Loy Yang B Power Station is Australia's 6th largest single source of direct (Scope 1) GHG emissions (averaging 9.7 MtCO₂-e/yr from 2012-2022).

(Based on data reported under Australia's national GHG reporting laws, the *National Greenhouse and Energy Reporting Act 2007* (Cth)).



Loy Yang A Power Station in foreground with Loy Yang B Power Station in background

Photo: <http://www.absafe.com.au/loy-yang-agl-power-station.html>

Identifying the corporate entity to sue can be complex:

Loy Yang A Power Station and its adjacent mine is operated by AGL Loy Yang Pty Ltd (ACN 077 985 758) under licences granted under the *Environment Protection Act 1970* (Vic).

AGL Loy Yang Pty Ltd has changed its name several times since its registration in 1997.

AGL Loy Yang Pty Ltd is a wholly-owned subsidiary of the AGL Group.

A single company, AGL Loy Yang Pty Ltd (ACN 077 985 758), has held the licences to operate the Loy Yang A Power Station and mine since 1997.

It (and its parent company) plans to operate them until at least 2035 (recently reduced from 2045).



ENVIRONMENT PROTECTION ACT 1970
SECTION 20

LICENCE

AGL LOY YANG PTY LTD

Holder of

Licence: 11149

Issued: 24/02/1997

Last Amended: 05/03/2021

ACN: 077 985 758

Registered Address: LEVEL 24 200 GEORGE STREET
SYDNEY NSW 2000

Premises Address: BARTONS LANE
TRARALGON VIC 3844

Scheduled Categories: A05 Landfills
C01 Extractive Industry and Mining
K01 Power Stations

Description: This licence applies to a premises where brown coal is mined and electricity is generated in a brown coal fired power station with generating capacity approx 2200 MW exported. The licence allows the discharge of wastes to air and water, and the deposition of waste to land.

TIM EATON
Executive Director

Delegate of the Environment Protection Authority

Issued under the *Environment Protection Act 1970*, Section 20

AGL Loy Yang Pty Ltd is a wholly-owned subsidiary of the AGL Group, which is the largest direct GHG polluter in Australia.

While it is possible to sue the parent company, here, for simplicity, we will focus on the subsidiary only.

Power companies top list of nation's biggest emitters

By Cole Latimer
February 28, 2019 – 1.00pm

The Sydney Morning Herald

1. AGL (COAL/GAS) – 43.1 million tonnes (Position in 2016/17: 1)

AGL is once again the largest carbon emitter in the country, although it has reduced its overall carbon emission levels by 200,000 tonnes year on year. AGL takes the top spot due to its ownership of the Bayswater and Liddell coal-fired power stations in the NSW Hunter Valley and the Loy Yang A coal-fired power station in Victoria's Latrobe Valley. It plans to close Liddell in 2022, slashing about 14 million tonnes from its emission levels.

2. EnergyAustralia (COAL/GAS) – 21.7 million tonnes (Position in 2016-17: 2)

EnergyAustralia runs the Yallourn coal-fired power station in Victoria's Latrobe Valley, the Mt Piper coal-fired power station in NSW's Lithgow region, and has a number of smaller gas-fired power stations in NSW and Victoria.

3. Stanwell Corporation (COAL) – 18.4 million tonnes (Position in 2016-17: 3)

Stanwell owns the enormous Tarong coal-fired power station, which accounts for almost half of all of Queensland's coal power.

4. Origin Energy (COAL/GAS)– 18.1 million tonnes (Position in 2016-17: 4)

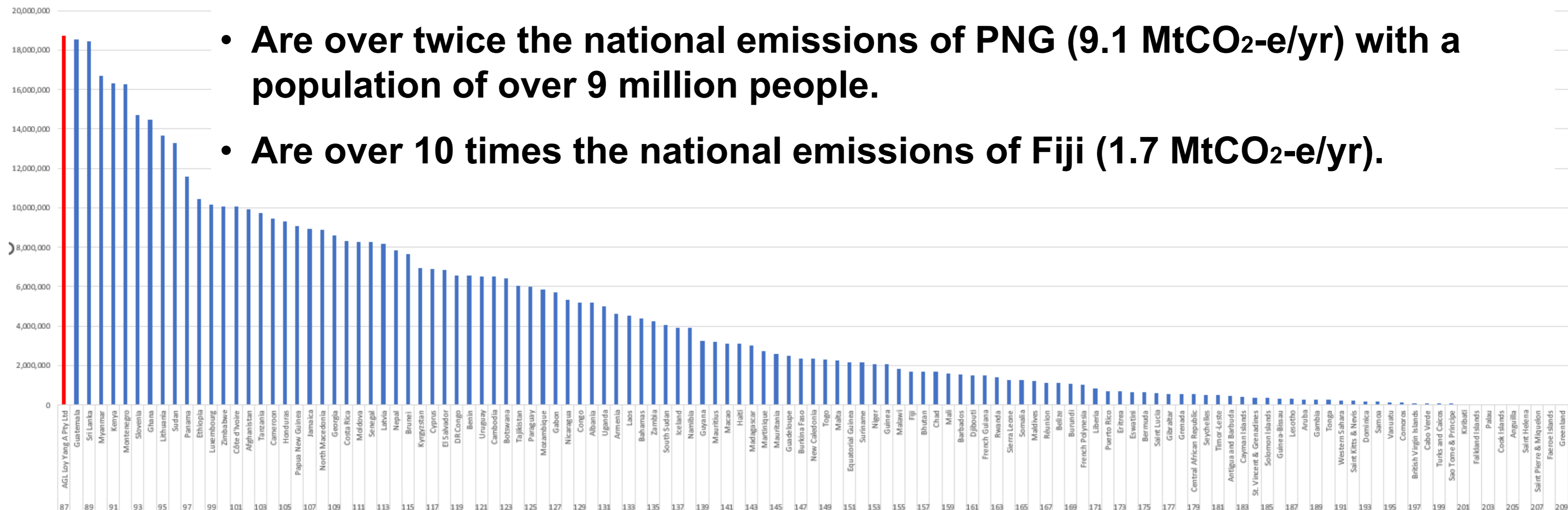
Origin owns the country's largest coal-fired power station, Eraring, on NSW's Lake Macquarie. Origin said its plans to close Eraring in 2032 would slash its emissions levels in half. The group

<https://www.smh.com.au/business/the-economy/the-dirty-top-ten-these-are-australia-s-biggest-polluters-20190228-p510u5.html>

Using data for 2016, the company's direct (scope 1) emissions of 18.7 MtCO₂-e/yr:

- Are 0.05% of global emissions (China's emissions are 30%)
- Would make it, if it were a country, the 87th largest GHG polluter globally.
- Are larger than the annual emissions of over 100 countries (including Kenya (16.3 MtCO₂-e/yr) with a population of 53 million).
- Are over twice the national emissions of PNG (9.1 MtCO₂-e/yr) with a population of over 9 million people.
- Are over 10 times the national emissions of Fiji (1.7 MtCO₂-e/yr).

GHG emissions (tCO₂-e)



Countries with emissions <18.7 MtCO₂-e/yr in 2016. Country data source: <https://www.worldometers.info/co2-emissions/co2-emissions-by-country/>

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.”

Issue 3:

What causes of action are available
(e.g. judicial review, tort, etc)?

- International law cannot compel payment for loss and damage
- Transnational liability arises for damage within a country from actions taken outside it
- A “material contribution” is the touchstone of causation for multiple causes
- PNG Constitutional causes of action – the Right to Life
- Common law causes of action – nuisance

International law cannot compel payment for climate change loss and damage

In terms of international legal liability – that is, liability between nations – industrialised countries, including Australia, have so far stifled any effective international mechanism to pay developing countries for climate change loss and damage under the *United Nations Framework Convention on Climate Change* (UNFCCC).

Two current examples of international litigation that, while worthy in their aims, cannot compel large GHG emitters to pay for loss or damage are:

- [the request for an Advisory Opinion from the International Tribunal for the Law of the Sea \(ITLOS\) submitted by the Commission of Small Island States on Climate Change and International Law in 2022](#) on the obligations under the *United Nations Convention on the Law of the Sea* to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change and to protect and preserve the marine environment in relation to climate change; and
- [the advisory opinion from the International Court of Justice \(ICJ\)](#) on the legal obligations of States under international law in relation to climate change sought after a resolution by the United Nations General Assembly sponsored by a coalition led by the Republic of Vanuatu.

Transnational liability

Transnational liability is a term that can be used in different ways but here is intended to mean legal liability that spans two or more domestic legal systems.

It is intended here to be distinguished from litigation:

- occurring between nations under international law (i.e. ***international litigation***); or
- occurring in a purely domestic legal setting, such as a personal injuries claim involving a car accident in a single country (i.e. ***domestic litigation***).

Transnational liability arises for damage occurring within a country caused by actions taken outside that country:

The position at common law is that a person may be liable for an act done outside the territory of a state that has a result inside the territory of a state:

“Where a certain result is an essential part of conduct constituting a given offence, then that conduct may be relevantly regarded as local if the result in question is one occurring within the territory in question. In *Secretary of State for Trade v Markus* [1977] AC 35 at 61, Lord Diplock, referring to *R v Ellis* [1899] 1 QB 230, said:

‘... That case is well-established authority for the proposition that, in the case of what is a result crime in English law, the offence is committed in England and justiciable in an English court if any part of the proscribed result takes place in England.’”

: *Brownlie v State Pollution Control Commission* (1992) 27 NSWLR 78 (Gleeson CJ with whom Curruthers J and Lee AJ agreed).

Where there are multiple causes or sources of harm, liability typically arises for making a “material contribution” to the harm.

As a judge of the High Court of Australia, McHugh J, said in *Henville v Walker* (2001) 206 CLR 459, 493 [106]:

If the defendant’s breach has “materially contributed”[1] to the loss or damage suffered, it will be regarded as a cause of the loss or damage, despite other factors or conditions having played an even more significant role in producing the loss or damage. As long as the breach materially contributed to the damage, a causal connection will ordinarily exist even though the breach without more would not have brought about the damage.

[1] *Bonnington Castings Ltd v Wardlaw* [1956] AC 613, 620 (Lord Reid).



















A majority of the High Court of Australia recognised the origins of the concept of a “material contribution” in causation for tort in *Strong v Woolworths Ltd* (2012) 246 CLR 182 at 192–193 [22] (French CJ, Gummow, Crennan and Bell JJ) (footnotes omitted):

“The expression can be traced to developments in the law of nuisance in Scotland in the nineteenth century. In a case in which several factories had contributed to the pollution of a river [*Duke of Buccleuch v Cowan* (1866) 5 M 214], the defendant factory owner was held liable in nuisance for the discharge of pollutants from his factory which had ‘materially contributed’ to the state of the river. Liability was not dependent upon proof that the pollutants discharged by the defendant’s factory alone would have constituted a nuisance.”

Constitutional causes of action across the Pacific:

many Pacific countries have a written constitution protecting human rights and incorporating the common law.

Based on Paclii as at 13 July 2023

No	Country	Constitution with human rights	Common law	English laws & courts
1.	 American Samoa	✓	✓	✓
2.	 Cook Islands	✓	✓	✓
3.	 Fiji	✓	✓	✓
4.	 Federated States of Micronesia	✓	✓	✓
5.	 Kiribati	✓	✓	✓
6.	 Marshall Islands	✓	✓	✓
7.	 Nauru	✓	✓	✓
8.	 Niue	✗	✓	✓
9.	 Nouvelle Calédonie	✓	✗	✗
10.	 Palau	✓	✓	✓
11.	 Papua New Guinea	✓	✓	✓
12.	 Pitcairn Islands	✓	✓	✓
13.	 Samoa	✓	✓	✓
14.	 Solomon Islands	✓	✓	✓
15.	 Tokelau	✓	✗ ²	✓
16.	 Tonga	✓	✓	✓
17.	 Tuvalu	✓	✓	✓
18.	 Vanuatu	✓	✓ <small>(mixed system combining English common law, French civil law and customary law)</small>	✓ <small>(English & French)</small>

Constitutional causes of action (in PNG)

(Note: PNG & the Autonomous Region of Bougainville have written constitutions that are presently linked)

INDEPENDENT STATE OF PAPUA NEW GUINEA.



Constitution of the Independent State of Papua New Guinea.

1975

(PNG Constitution)

**THE CONSTITUTION
OF THE
AUTONOMOUS REGION OF BOUGAINVILLE**

2004

(Bougainville Constitution)

Constitutional causes of action in PNG

A claim for compensation under s 184 of the Bougainville Constitution for contravening guaranteed rights and freedoms under the PNG Constitution in sections:*

- 35 (Right to Life)
- 37 (Protection of the law) (with reference to the protection against causing unlawful serious environmental harm under the *Environment Act 2000* (PNG) & the principles of extra-territorial liability for “result offences”)**
- 53 (Protection from unjust deprivation of property) **

* Maintained in the Autonomous Region of Bougainville by s178 of the Bougainville Constitution.

** Discussed in Chris McGrath “Identifying Opportunities for Climate Litigation: A Transnational Claim by Customary Landowners in PNG against Australia’s Largest Climate Polluter” (2020) 37(1) EPLJ 42 at 53-56.

PNG Constitution

National Goals and Directive Principles include:

4. Natural resources and environment

We declare our fourth goal to be for Papua New Guinea's natural resources and environment to be conserved and used for the collective benefit of us all, and be replenished for the benefit of future generations.

WE ACCORDINGLY CALL FOR—

- (1) wise use to be made of our natural resources and the environment in and on the land or seabed, in the sea, under the land, and in the air, in the interests of our development and in trust for future generations; and
- (2) the conservation and replenishment, for the benefit of ourselves and posterity, of the environment and its sacred, scenic, and historical qualities; and
- (3) all necessary steps to be taken to give adequate protection to our valued birds, animals, fish, insects, plants and trees.

PNG Constitution, s 35

Subdivision B. – Fundamental Rights.

35. RIGHT TO LIFE.

(1) No person shall be deprived of his life intentionally except—

- (a) in execution of a sentence of a court following his conviction of an offence for which the penalty of death is prescribed by law; or
- (b) as the result of the use of force to such an extent as is reasonable in the circumstances of the case and is permitted by any other law—
 - (i) for the defence of any person from violence; or
 - (ii) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or
 - (iii) for the purpose of suppressing a riot, an insurrection or a mutiny; or
 - (iv) in order to prevent him from committing an offence; or
 - (v) for the purpose of suppressing piracy or terrorism or similar acts; or
- (c) as the result of a lawful act of war.

(2) Nothing in Subsection (1)(b) relieves any person from any liability at law in respect of the killing of another.

No PNG court has yet considered whether climate change is a breach of the Right to Life in s 35 of the Constitution, however in:

- *Alex Bernard v Nixon Duban* [2016] PGNC 121; N6299 at [105]-[106], Kandakasi J (as he then was) referred to the Right to Life in rejecting an argument by a large gas developer concerning protecting traditional landowners from irreparable harm due to gas development.
- *Ginson Goheyu Saonu v Wera Mori* [2021] PGNC 384; N9170 at [98]-[105], Kandakasi DCJ discussed climate change science in some detail in the context of assessing the impacts of deep sea disposal of mine tailings.

Comparison of language of s 35 of the PNG Constitution with international human rights declarations & conventions

Source (in chronological order)	Text
Universal Declaration of Human Rights 1948, Art 3	“Everyone has the right to life, liberty and security of person.”
European Convention for the Protection of Human Rights 1950, Art 2.	“Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”
International Covenant on Civil & Political Rights 1966, Art 6	“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
PNG Constitution 1975, s 35 (Right to Life)	“No person shall be deprived of his life intentionally except – (a) in execution of a sentence ...”

The famous Urgenda case (2013-2019)

District Court at The Hague (2013-2015), Court of Appeals at The Hague (2018) and Supreme Court of the Netherlands (2019), based on Art 2 & 8 of the *European Convention for the Protection of Human Rights* 1950 (ECHR).



See <https://www.urgenda.nl/en/themas/climate-case/>

In the Urgenda case (2013-2019), the Dutch courts held that:

- the right to life in Art 2 of the *European Convention for the Protection of Human Rights* “includes environment-related situations that affect or threaten to affect the right to life” such as climate change
- the Dutch government must reduce GHG emissions immediately in line with its human rights obligations.

“Torres Strait 8” Case in UNHRC (2022)



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PRESS RELEASES | TREATY BODIES

Australia violated Torres Strait Islanders' rights to enjoy culture and family life, UN Committee finds

23 September 2022

<https://www.ohchr.org/en/press-releases/2022/09/australia-violated-torres-strait-islanders-rights-enjoy-culture-and-family>

Map of Torres Strait (between Australian & PNG)



Source: https://www.researchgate.net/figure/Map-of-the-Torres-Strait-regions-of-Australia-10_fig2_227712806

Lots of news stories:

UN Human Rights Committee finds Australia violated Torres Strait Islanders' rights by failing to protect them from climate change

By Marian Faa, with wires
Posted Fri 23 Sep 2022 at 6:59pm, updated Fri 23 Sep 2022 at 9:19pm



'Stand and fight for our future generations'

Yessie Mosby, one of the Torres Strait Islander claimants from Masig Island, said he was speechless at the news.

"I am over the moon. I thank the heavenly father, I thank my ancestors and I thank all the people who fought and helped in this case," he said.

"This morning when I woke up on Masig, I saw that the sky was full of frigatebirds. In my culture, we take this as a sign from my ancestors that we would be hearing good news very soon about this case."

Mr Mosby said it had been a long journey since the group first lodged its landmark complaint three years ago.

"Still to this present day, we [have] seen a lot of our homes being eaten away," he told the ABC.

He said he had decided to lodge the complaint after finding his great-grandmother's remains unearthed by rising seas.



Yessie Mosby. (Supplied: Mary Harm)

<https://www.abc.net.au/news/2022-09-23/un-finds-australia-violated-torres-strait-islanders-rights/101470524>

Advance unedited version

Distr.: General
22 September 2022

Original: English

Human Rights Committee

**Views adopted by the Committee under article 5 (4) of the
Optional Protocol, concerning communication No.
3624/2019^{*,**,**}**

<i>Communication submitted by:</i>	Daniel Billy et al. (represented by counsel, ClientEarth)
<i>Alleged victims:</i>	The authors and six of their children
<i>State party:</i>	Australia

***Billy v Australia* (2022) UNHRC**

International Covenant on Civil & Political Rights 1966

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Billy v Australia (2022) UNHRC

(extract from communication by majority of 18 members of the UNHRC, who went on to find Australia had not violated Art 6 but found other contraventions. 7 other members delivered separate views that found Australia had violated Art 6 due to climate change).

Article 6

8.3 The Committee notes the authors' claim that the events in this case constitute a violation by act and omission of their right to a life with dignity under article 6 of the Covenant, owing to the State party's failure to perform its duty to provide adaptation and mitigation measures to address climate change impacts that adversely affect their lives, including their way of life. With respect to the State party's position that article 6 (1) of the Covenant does not obligate it to prevent foreseeable loss of life from climate change, the Committee recalls that the right to life cannot be properly understood if it is interpreted in a restrictive manner, and that the protection of that right requires States parties to adopt positive measures to protect the right to life.³⁶ The Committee also recalls its general comment No. 36 (2018) on the right to life, in which it established that the right to life also includes the right of individuals to enjoy a life with dignity and to be free from acts or omissions that would cause their unnatural or premature death (para. 3).³⁷ The Committee further recalls that the obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life.³⁸ States parties may be in violation of article 6 of the Covenant even if such threats and situations do not result in the loss of life.³⁹ The Committee considers that such threats may include adverse climate change impacts, and recalls that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.⁴⁰ The Committee recalls that States parties should take all appropriate measures to address the general conditions in

Cases such as Urgenda and the Torres Strait 8 case can influence the interpretation of the Right to Life in s 35 of the PNG Constitution

Common law causes of action in private & public nuisance

The elements of **private nuisance** are that:

- the defendant's conduct will interfere with use and enjoyment of the plaintiff's land; and
- the conduct of the defendant is unlawful, unwarranted or unreasonable.

The elements of **public nuisance** are that:

- the conduct of the defendant causes inconvenience, damage or harm to the general public; and
- the plaintiff is a member of a class of persons who incurs some particular or special loss over and above the ordinary inconvenience and annoyance suffered by the general public; and
- the conduct of the defendant is unlawful, unwarranted or unreasonable.

See Louis Medaing v Ramu Nico Management (MCC) Ltd [2011] PGNC 95; N4340 (Cannings J) for interaction of common law nuisance, Environment Act 2000 (PNG), defence of statutory authority & PNG Constitution.

Common law defence of statutory authority

A person is not liable for private or public nuisance caused by works expressly or impliedly authorised by a statute.

The defence is only available where the nuisance is an inevitable result of the authorised activity and the works were performed with all reasonable regard and care and not negligently performed.

See, e.g., *Allen v Gulf Oil Refining Ltd* [1981] AC 1001; 1 All ER 353

What is “reasonable” changes as circumstances change.

What may have been reasonable in 1990 or 2000 for generating electricity and emitting GHGs may be viewed very differently in 2023 or 2030, as knowledge of climate change, its impacts and the cost of renewable energy have changed dramatically.

Business Companies Earnings season

‘Extremely challenging:’ AGL posts \$2b loss as clean energy shift pummels profits



By Nick Toscano

August 12, 2021 – 9:05am

The Sydney Morning Herald

AGL, the nation’s largest power supplier, has sunk to a \$2.06 billion loss as the rapid rise of renewable energy continues to rock the industry and pummel the company’s profits.

With the influx of new wind and solar power driving down wholesale electricity prices across the country, the ASX-listed energy giant described the past financial year as “extremely challenging” and warned of further pain to come.



AGL operates the Loy Yang A coal-fired power plant in Victoria's Latrobe Valley. JUSTIN MCMANUS

Evidence that burning brown coal at Loy Yang A Power Station to generate electricity is **unreasonable** (if not now, well before 2035).

https://coaltransitions.files.wordpress.com/2018/09/coal_australia_final.pdf

<https://reneweconomy.com.au/no-future-even-existing-coal-to-be-beaten-by-renewables-and-storage-on-costs-51136>



Frank Jotzo, from the ANU says it is clear to him that a cross-over point is fast approaching, where the combination of renewables, storage, demand response and portfolio diversity will beat the operating costs of existing coal-fired power stations.

“At that point, it will make commercial sense to replace coal plants with new renewables installations irrespective of their remaining technical lifetime, and even before taking into account carbon emissions and local air pollution,” he said.

RenewEconomy, 7 Sep 2018: <https://reneweconomy.com.au/no-future-even-existing-coal-to-be-beaten-by-renewables-and-storage-on-costs-51136/>

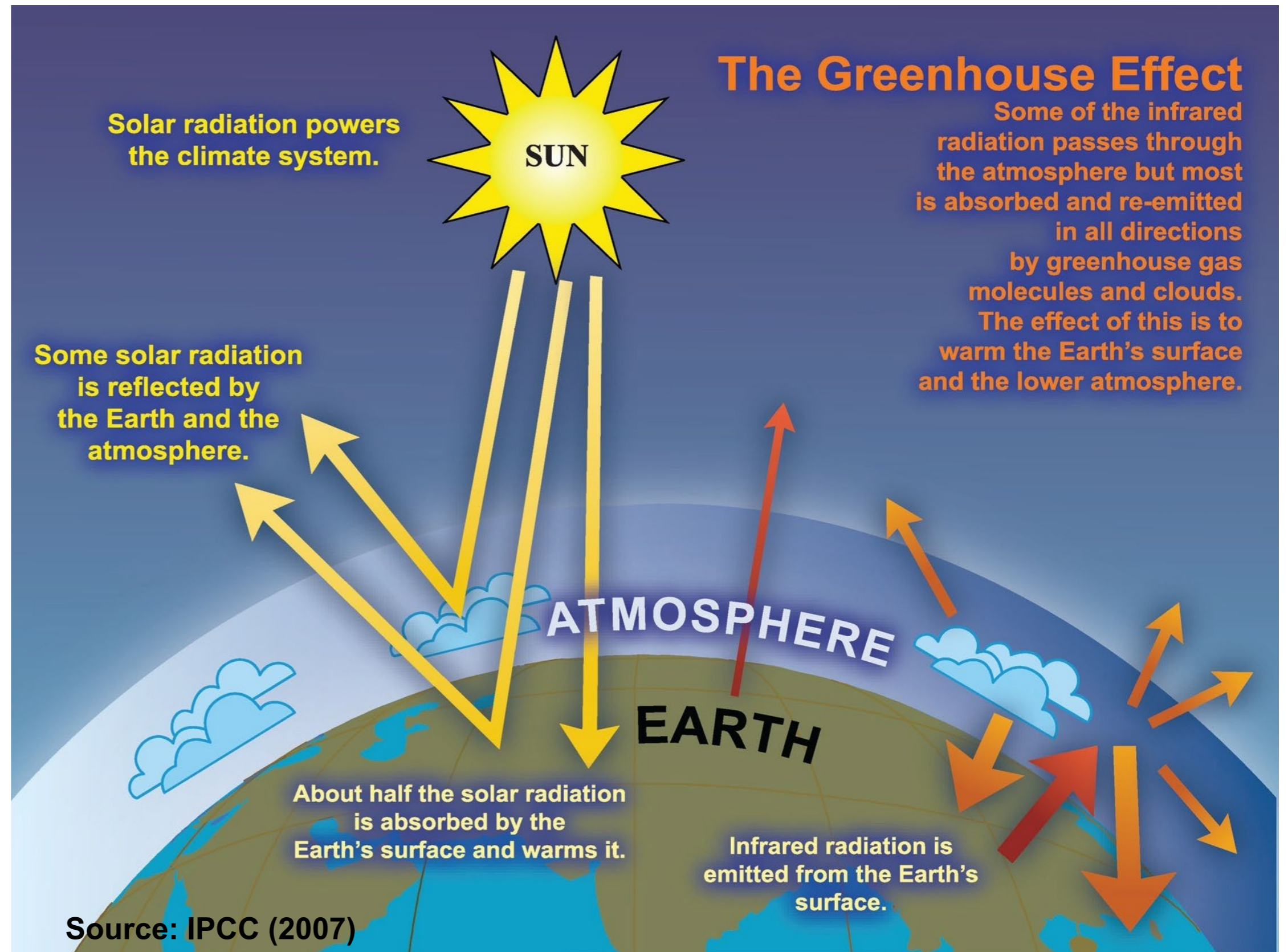
**Can an Australian polluter
be liable for damage in PNG
& Bougainville?**

Yes

Issues 4 & 5:

- What evidence is available to establish the cause/s of action?
- How should the evidence be presented/framed to best explain the facts & avoid defence strategies to avoid liability? [expect a dirty fight]

The basics of climate science are simple, well understood (and supported by mainstream science), easy to explain and unlikely to be disputed.



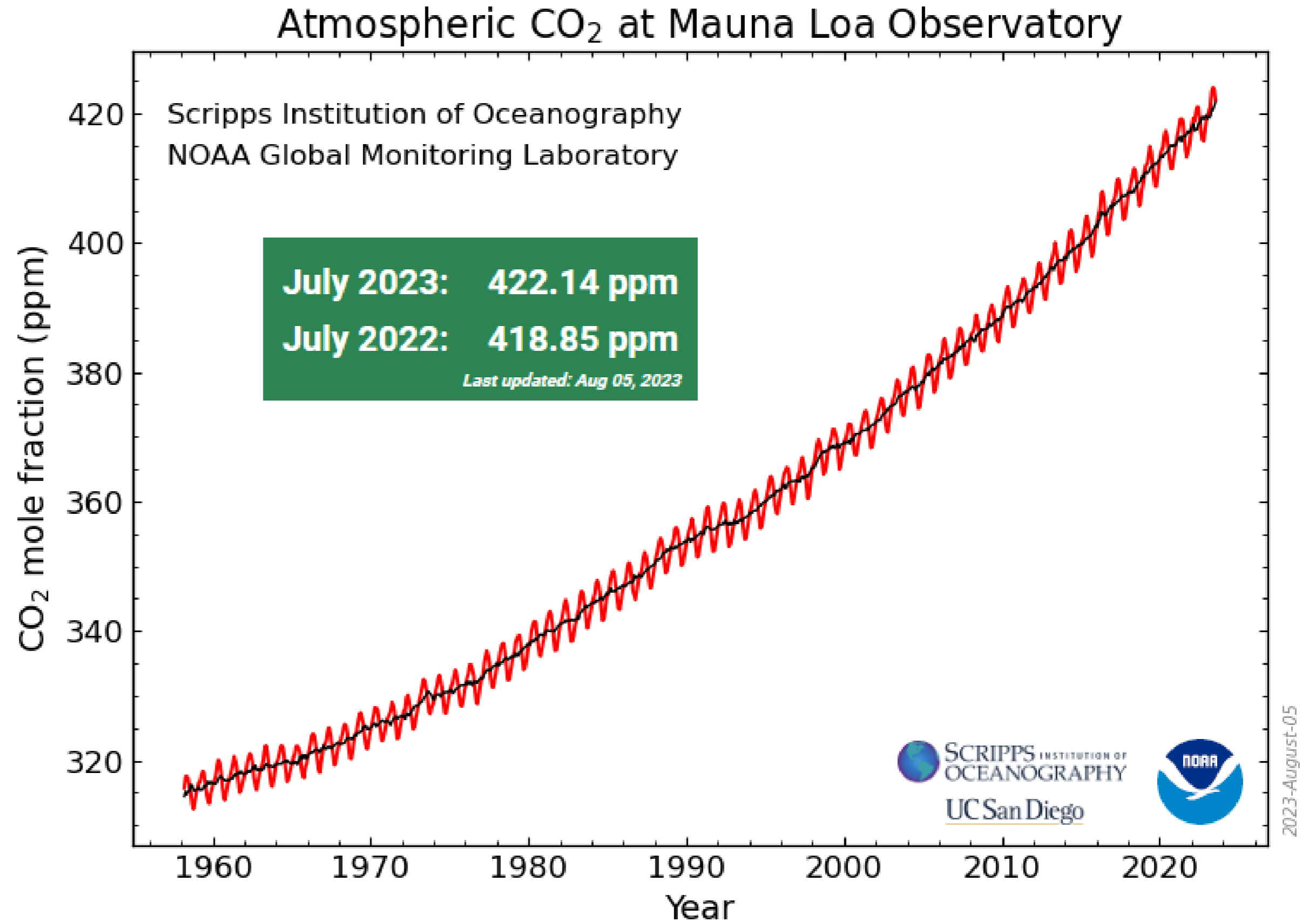
The Greenhouse Effect warms the Earth like a blanket keeps you warm on a cold night: it slows the loss of heat.



Facts such as rising GHGs in the atmosphere driven by human activity burning fossil fuels are extremely well documented.

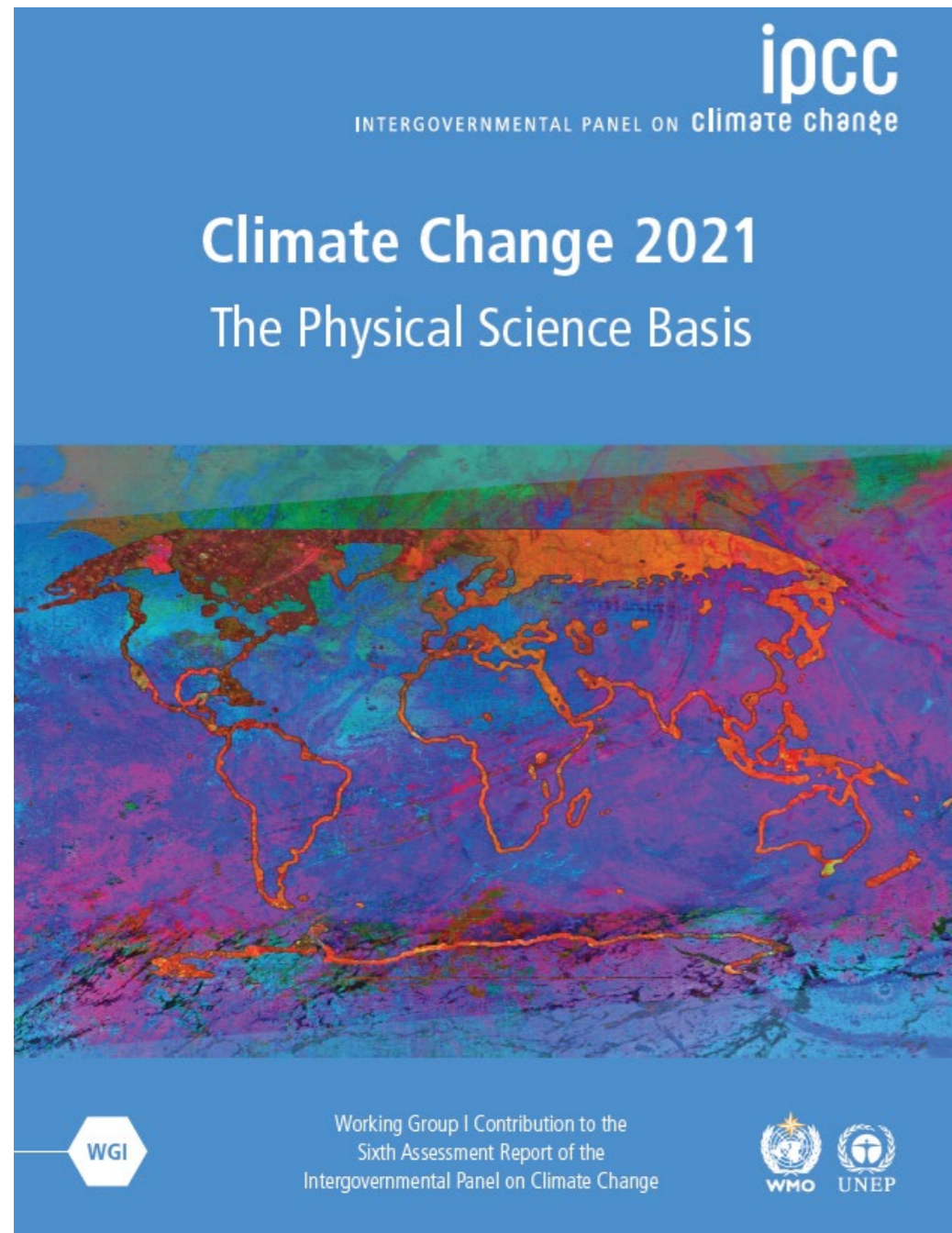
Source: NOAA

<https://gml.noaa.gov/ccgg/trends/>

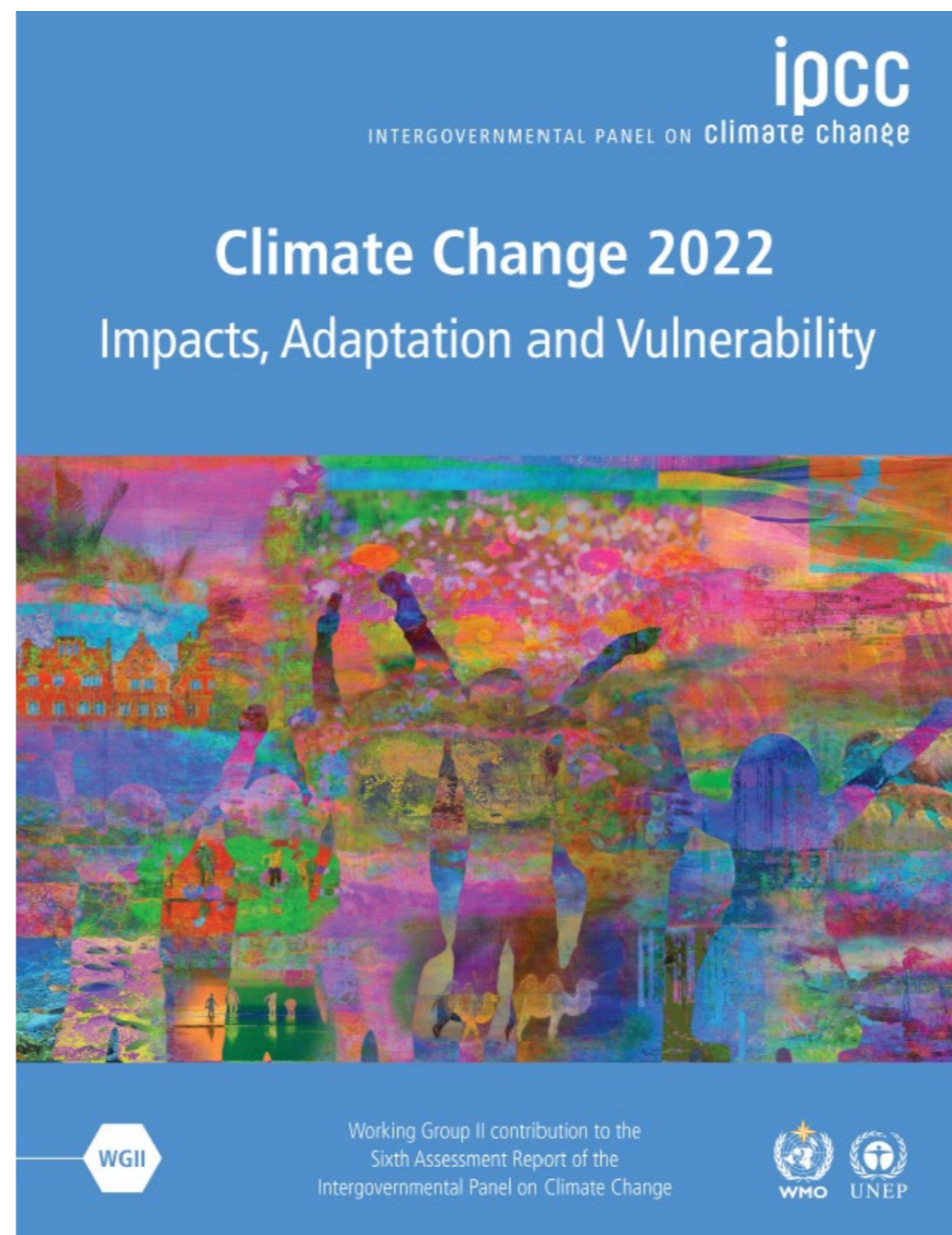


There is a huge amount of information available

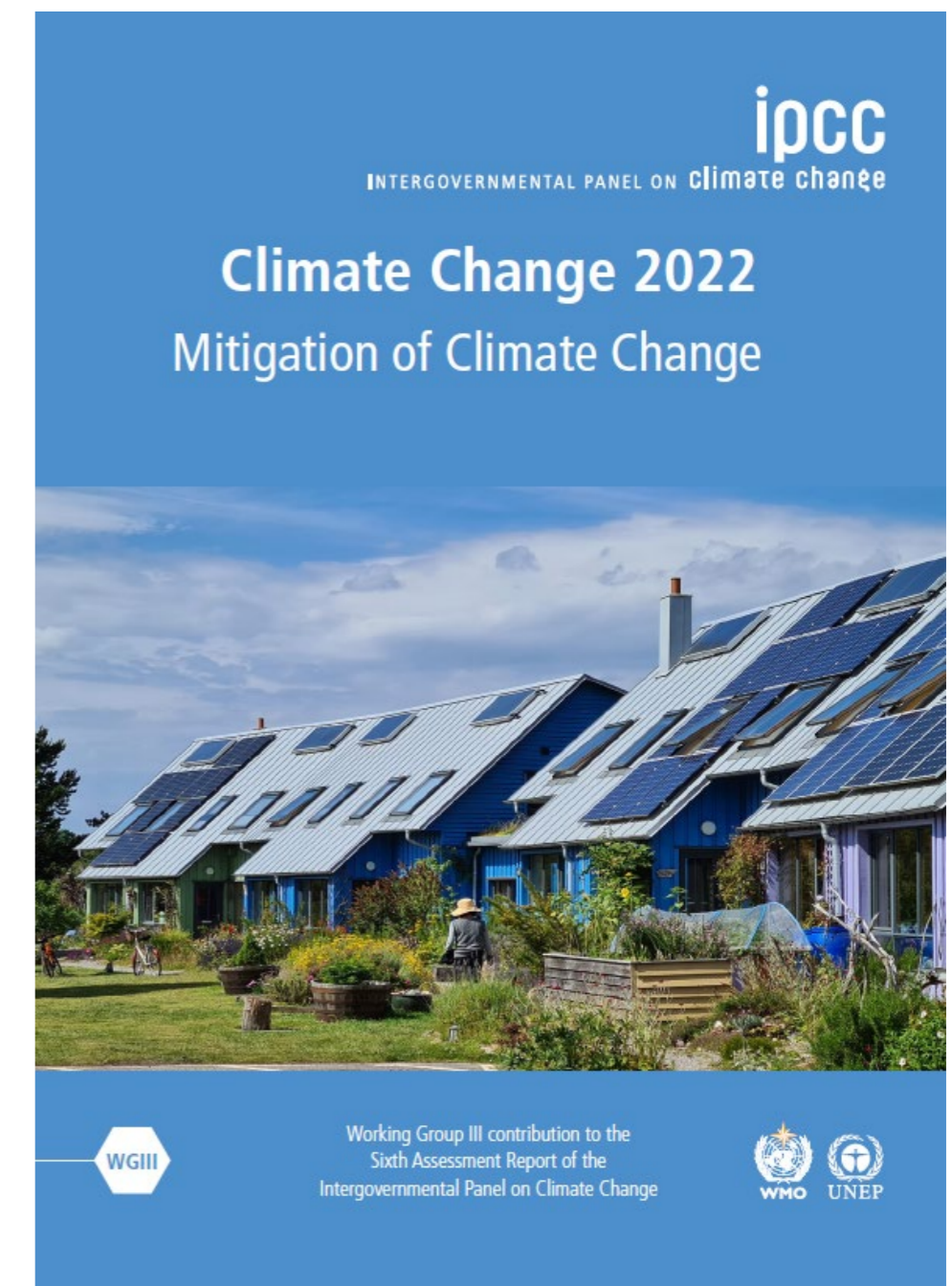
e.g. IPCC AR6 – 9,000 pages in 3 volumes



2904 pages, released 9 August 2021



3068 pages, released 28 February 2022



2913 pages, released 4 April 2022

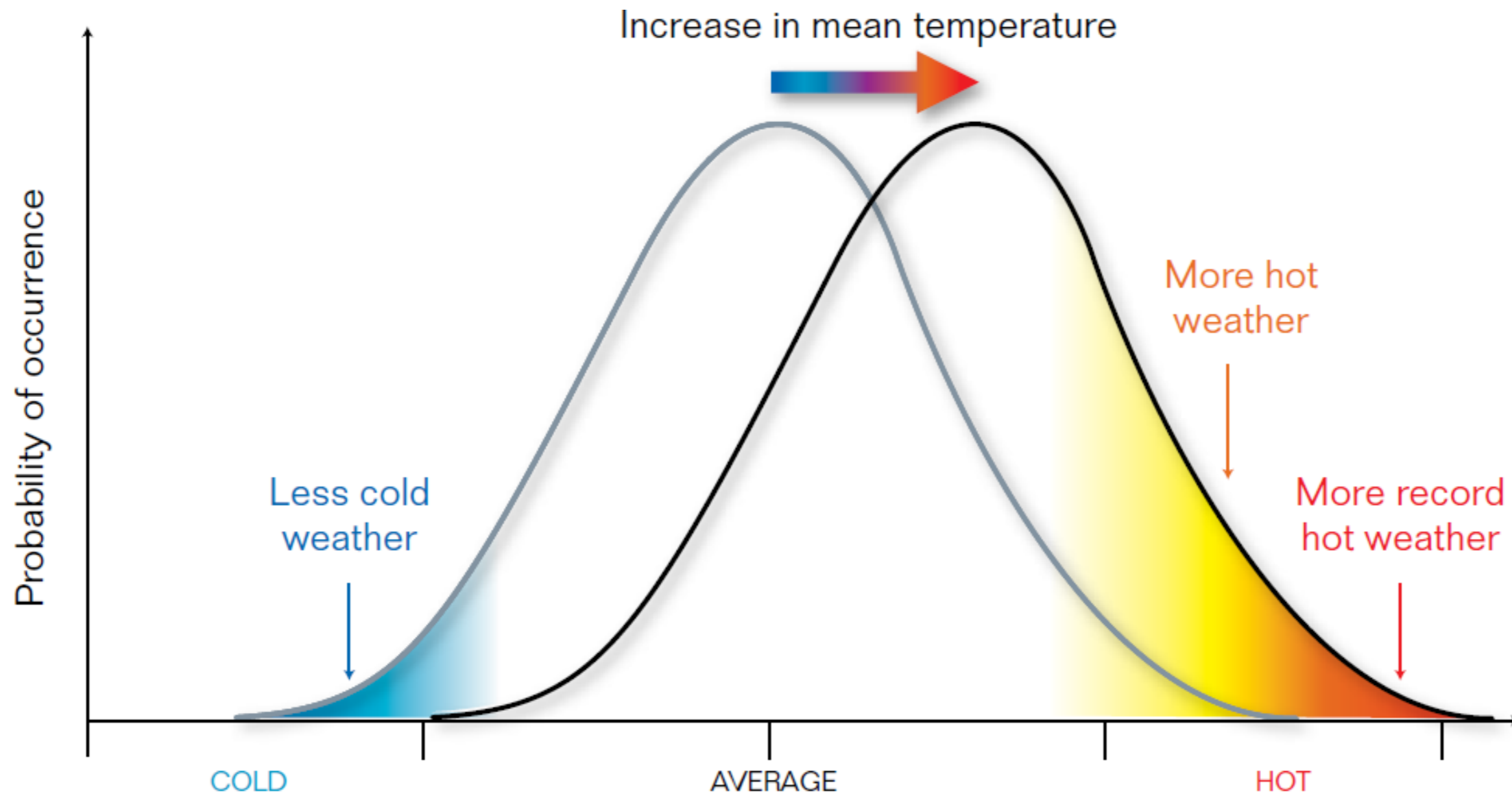
<https://www.ipcc.ch/assessment-report/ar6/>

While some facts are simple, we also need to help the judge overcome common misconceptions about climate change.

“Our mental models lead to persistent errors and biases in complex dynamic systems like the climate and economy. **Where the consequences of our actions spill out across space and time, our mental models have narrow boundaries and focus on the short term.** Where the dynamics of complex systems are conditioned by multiple feedbacks, time delays, accumulations and nonlinearities, we have difficulty recognizing and understanding feedback processes, underestimate time delays, and do not understand basic principles of accumulation or how nonlinearities can create regime shifts.”

John Sterman “Communicating climate change risks in a skeptical world” (2011) 108 Climatic Change 811-826

e.g. one of the common errors / misconceptions about climate change is that a 1.5°C or 2°C mean global temperature rise is seen as a “small” change – it is not.



Source: Garnaut 2008 based on IPCC (2001b: Figure 4.1)

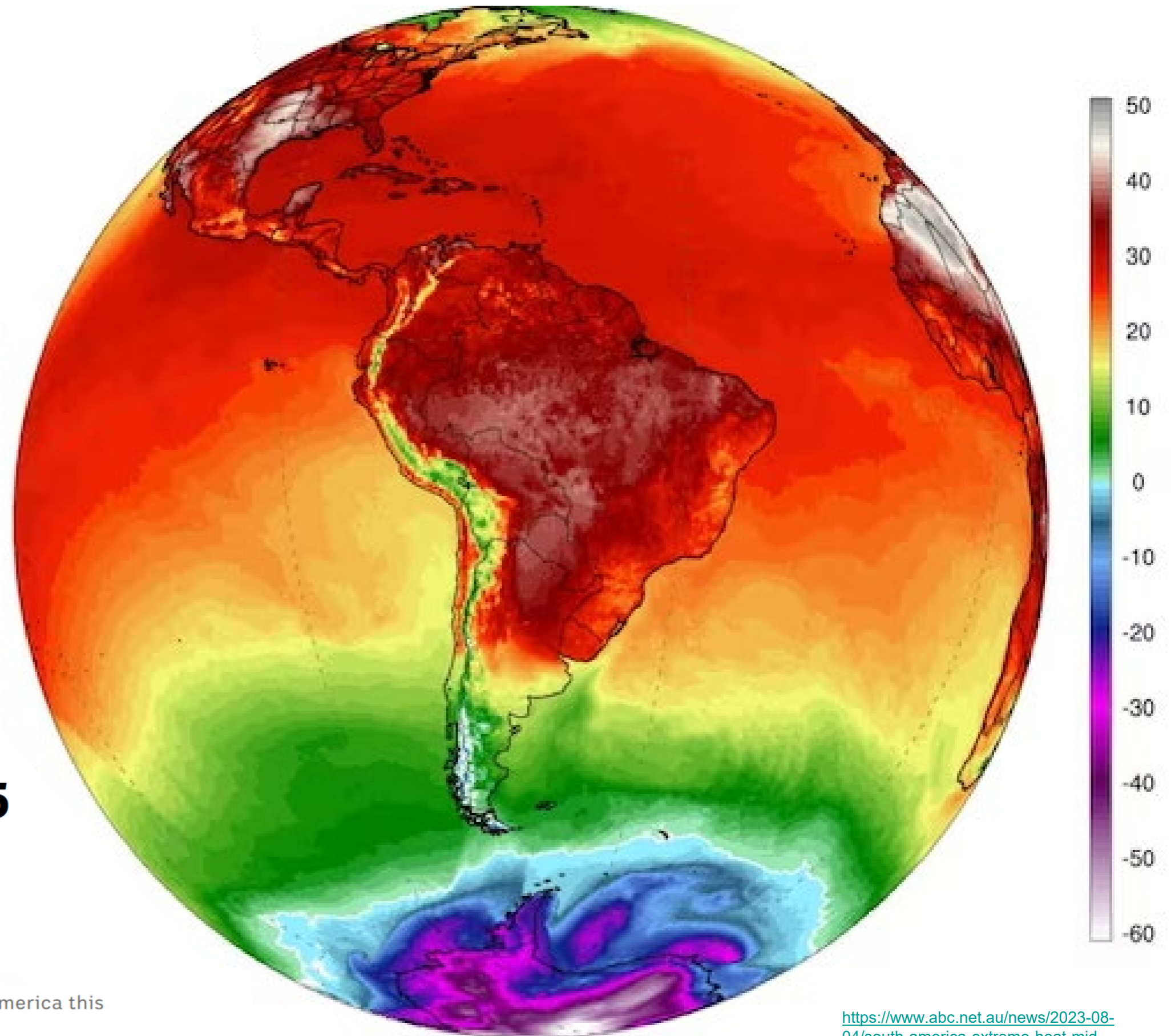
Recent extreme heatwaves reflect what is expected to occur as climate change drives a rise in mean global temperatures.

ABC NEWS

4 August 2023

Mid-winter temperatures above 35 degrees Celsius in South America leaves climatologists in disbelief

Maximum mid-winter temperatures upwards of 35C have been recorded in South America this week. (Supplied: University of Maine/Climate Reanalyzer)

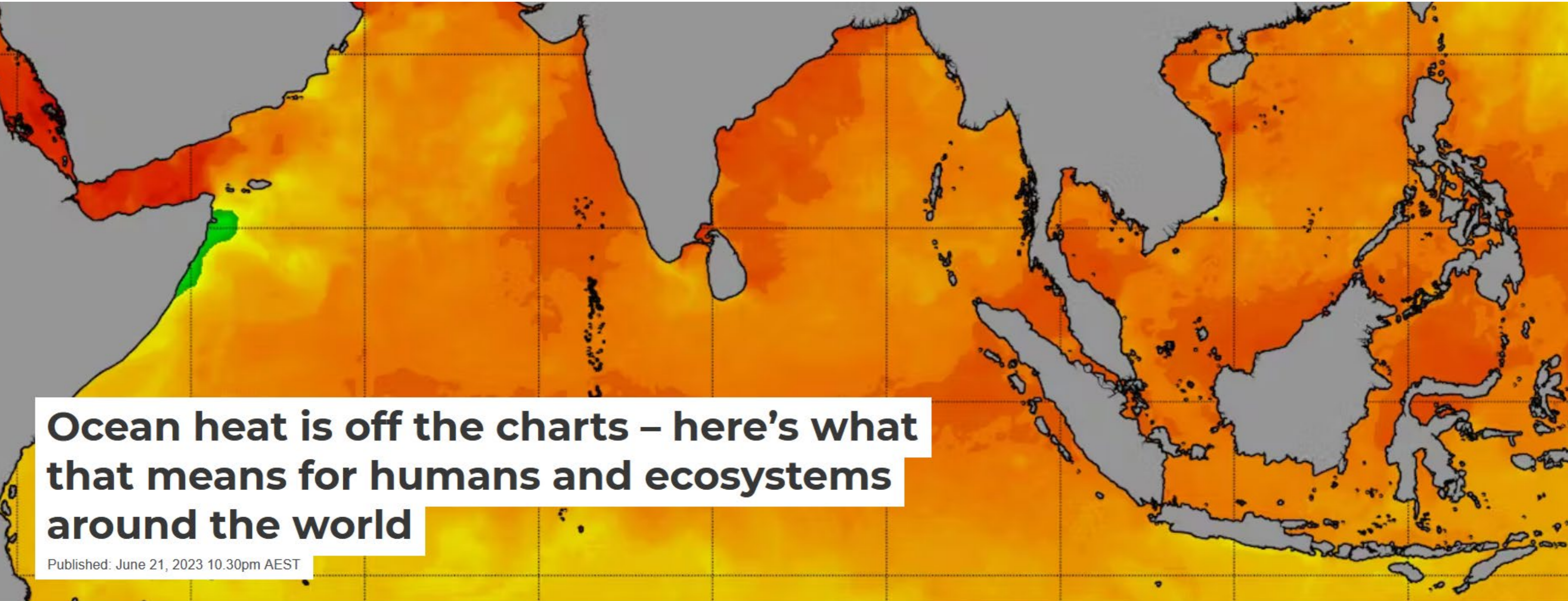


<https://www.abc.net.au/news/2023-08-04/south-america-extreme-heat-mid-winter-climate-change-scientists/102678662>



Extreme events like the wildfires in Hawaii that devastated the town of Lahaina, leaving over 100 dead, are what is expected to occur as climate change drives a rise in mean global temperatures.

Extreme events like the exceptionally high ocean temperatures at present (which fuel stronger tropical storms) are what is expected to occur as climate change drives a rise in mean global temperatures



Another common misconception involves the timeframes of harm.*

The impact of carbon dioxide released from burning fossil fuels is not short lived. Rather it is “nearly irreversible for more than 1,000 years.”

Solomon et al (2009), “Irreversible climate change due to carbon dioxide emissions” PNAS 116 (6) 1704-1709.

* The long effects of carbon pollution mean that cumulative emissions, not just annual emissions, are crucial. The **Carbon Budget** is one way of placing cumulative emissions in context. Given the limited time available, I will not address it in this workshop.

Effect of ongoing harm from burning fossil fuels for limitation periods

Where damage is an element of a cause of action, if damage is ongoing a fresh cause of action arises constantly and is not statute barred by limitation periods.

: Konze Kara v Public Curator of Papua New Guinea [2010] PGNC 44; N4055 (Hartshorn J) at [9], [12] and [13]; *Public Curator v Konze Kara* [2014] PGSC 58; SC1420 (David J, Yagi J & Murray J) at [83]-[89]; and *Habolo Building & Maintenance Limited v Hela Provincial Government & Anor* [2016] PGSC 67; SC1549 (Cannings, Kassman and Poole JJ) at [12]-[18]; *Augus Wialu v John Andreas* [2020] PGSC 60; SC1970 (Cannings, Shepherd and Tamate JJ) at [10]-[18]

Issue 6:

What remedies are available that a court will realistically grant?

PNG Constitution, s 57

57. ENFORCEMENT OF GUARANTEED RIGHTS AND FREEDOMS.

(1) A right or freedom referred to in this Division shall be protected by, and is enforceable in, the Supreme Court or the National Court or any other court prescribed for the purpose by an Act of the Parliament, either on its own initiative or on application by any person who has an interest in its protection and enforcement, or in the case of a person who is, in the opinion of the court, unable fully and freely to exercise his rights under this section by a person acting on his behalf, whether or not by his authority.

...

(3) A court that has jurisdiction under Subsection (1) may make all such orders and declarations as are necessary or appropriate for the purposes of this section, and may make an order or declaration in relation to a statute at any time after it is made (whether or not it is in force).

(Similar power in Bougainville Constitution, s 183)

PNG Constitution, s 58(2)

58. COMPENSATION.

...

(2) A person whose rights or freedoms declared or protected by this Division are infringed (including any infringement caused by a derogation of the restrictions specified in Part X.5 (*internment*)) on the use of emergency powers in relation to internment is entitled to reasonable damages and, if the court thinks it proper, exemplary damages in respect of the infringement.

...

Bougainville Constitution, s 184(2)

184. DAMAGES FOR BREACH OF RIGHTS.

...

(2) A person whose human rights are infringed is entitled to reasonable damages and, if the Court thinks it proper, exemplary damages in respect of the infringement.

...

A benefit of seeking only compensation / damages for the harm caused (rather than an injunction to stop the harm by shutting down the power station) is that:

- If unlawful harm is established, a court's discretion not to award damages is limited (i.e. damages will normally follow as a matter of course).
- In contrast, injunctive relief is more discretionary:
Warringah Shire Council v Sedevcic (1987) 10 NSWLR 335 at 339-341 (Kirby P).

Joint, several, whole or proportionate liability for damages?

Whether AGL Loy Yang Pty Ltd can be held jointly and severally liable for the whole or a proportionate share of the damages suffered by PNG customary landowners due to climate change is a matter that would no-doubt be a live issue in any litigation. The company may be held liable for the whole of the damage, at least for the claims in tort, because, as Lord Scott stated in *Barker v Corus UK Ltd* [2006] 2 AC 572; [2006] UKHL 20, [60]:

“It is a well established principle in the law of tort that if more than one tortfeasor causes the damage of which complaint is made, and if it is not possible to attribute specific parts of the damage to a specific tortfeasor or tortfeasors in exoneration, as to those parts of the damage, of the other tortfeasors, the tortfeasors are jointly and severally liable for the whole damage.”

Statutory reforms to civil liability in Australia and many other countries have departed from the regime of liability for tort at common law and, instead, provide a regime of proportionate liability in which liability is apportioned to each wrongdoer according to the court’s assessment of the extent of their responsibility.

There is no such legislation in PNG but s 58(2) of the PNG Constitution and s 184(2) of the Bougainville Constitution allow for “reasonable damages” so proportional liability is arguable at least for any constitutional claims.

**How do you
quantify
damage for
people living
traditional
lifestyles?**



Picture by Daren James
(2018) [ABC News](#)

In assessing damages for climate change, such as forced relocation of villages, awards for **exemplary damages** to remove commercial profits of polluters should play a substantial role, applying similar reasoning to the PNG Supreme Court in *Rimbunan Hijau (PNG) Ltd v Ina Enei* [\[2017\] PGSC 36; SC1605](#) at [51], given the ongoing enormous GHG emissions and extraction of fossil fuels in countries such as Australia, which are done for naked commercial profit in total disregard and disrespect for the rights and interests of people of small island states in the Pacific and elsewhere impacted by climate change.

*Rimbunan Hijau
(PNG) Ltd v Ina
Enei* [2017] PGSC
36; SC1605 at [51]:

(ii) Exemplary damages

51. Turning then to the award of K150, 000.00 in exemplary damages, we note the relevant principles are clear. In *Abel Tomba v. The State*,⁴⁷ the Supreme Court considered the circumstances in which exemplary damages could be awarded. Relying on *McGregor on Damages*, 5th Edition, Amet CJ (as he then was) expressed the view that exemplary damages may come into play “whenever the defendant’s conduct is sufficiently outrageous to merit punishment, as where it discloses malice, fraud, cruelty, insolence or the like.” This easily covers cases in which a defendant acts illegally and is in breach of clear legislative provisions and other requirements in total disregard and disrespect for the rights and interests of others. This is why as the learned trial Judge noted, “exemplary damages are vindictive and punitive in nature” to punish the party against whom the award is made. It is usually at the discretion of the Court to award such amounts as the Court considers appropriate in exemplary damages having regard to the conduct of a defendant in the particular circumstances of each case. The main purpose of awarding exemplary damages is dual in purposes. The first is to punish and the second is to deter the party against whom the award is made as well as others from engaging in future and further such conduct or behaviour.⁴⁸

⁴⁷ (1997) SC518.

⁴⁸ *Toglai Apa & Ors v. The Independent State of Papua New Guinea* [1995] PNGLR 43; *Pike Dambe v. Augustine Peri & The Independent State of Papua New Guinea* [1993] PNGLR 4; *Helen Jack v. The*

Given that the company operating the Loy Yang A Power Station has made hundreds of millions of dollars profit from its activities, exemplary damages should be in the order of many millions of dollars.

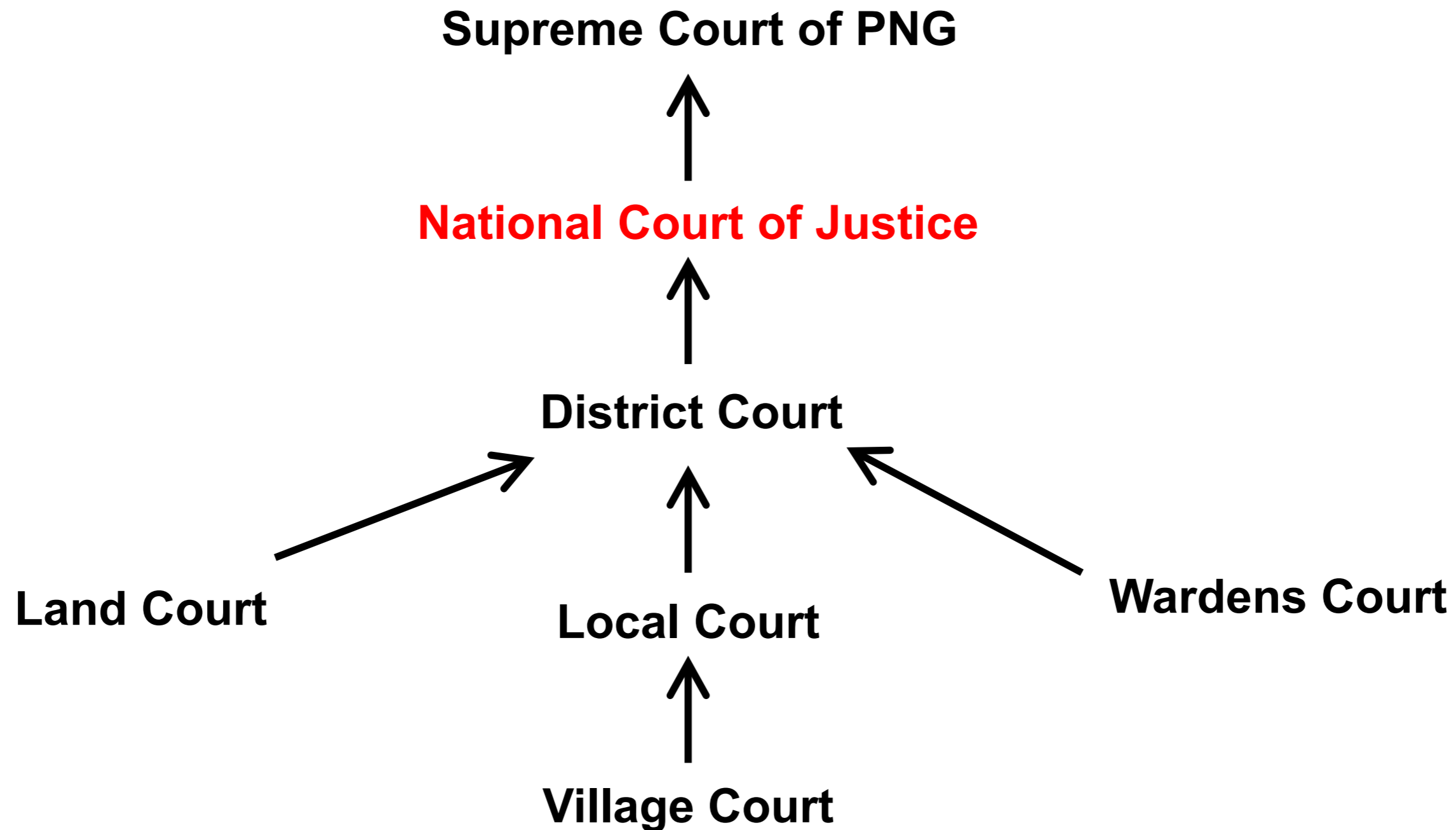


Photo: <http://www.absafe.com.au/loy-yang-agl-power-station.html>

Issue 7:

**What court should the litigation
be commenced in?**

PNG court hierarchy*



* No appeal lies to the Privy Council. The Bougainville Constitution provides for a High Court of Bougainville to be established but this has not yet occurred and the National Court of Justice continues to operate in Bougainville.

Issue 8:

What are the procedural obstacles &
can they be overcome?

4 stages of proposed strategic climate case:

1. Application (ex parte) in the PNG National Court of Justice for leave to serve the defendant in Australia.
2. Service of the proceedings on the defendant in Australia.
3. Once service of the proceedings is effected, a trial in the PNG National Court of Justice (and any appeal).
4. If damages are awarded by the PNG National Court of Justice, enforcement of the award of damages in Australia under the *Foreign Judgments Act 1991* (Cth) (and any appeal).

Application for leave to serve the defendant in Australia

Leave from the PNG National Court of Justice is required to serve the operator of Loy Yang A Power Station in Australia.

Order 6, rule 19 of the *National Court Rules 1983* (PNG) provides that originating process may be served outside PNG in a range of circumstances that link the proceedings to PNG, including where:

...

- (e) the proceedings are founded on, or are for the recovery of, damage suffered wholly or partly in PNG caused by a tortious act or omission wherever occurring; or ...

Political issues are irrelevant for the grant of leave to serve outside the jurisdiction:

Humane Society International Inc v Kyodo Senpaku Kaisha Ltd [2006] FCAFC 116; (2006) 154 FCR 425; (2006) 232 ALR 478.

Procedural issues: enforcement in Australia

An order for damages for climate change impacts against the operator of Loy Yang A Power Station from the PNG National Court of Justice appears to be enforceable in Australia as the PNG National Court of Justice is a superior court listed in the *Foreign Judgments Regulations 1992 (Cth)*.

Therefore, an order for damages and costs from it could be registered under the *Foreign Judgments Act 1991 (Cth)*, and then enforced in the Victorian Supreme Court.

Issues 9 & 10:

What resources are needed & available for the litigation (i.e. money, experts & lawyers)?

How do you avoid being overwhelmed by a big opponent?

Billionaire Michael Bloomberg pledges \$715 million to close US coal power plants

Former New York City Mayor Michael Bloomberg has said he will contribute \$US500 million (\$715 million) toward closing coal-fired power plants across the United States, in a clash with White House efforts to revive a fossil fuel blamed for climate change.

The billionaire's foundation, Bloomberg Philanthropies, said its Beyond Carbon initiative would lobby to close about 250 coal-fired power plants by 2030 and make the country fully reliant on clean energy.



Litigation funding

One of the strategic objects of test cases establishing liability for damages is to encourage a wave of litigation against climate polluters undertaken by commercial law firms and **litigation funders.**

Conclusions & take-away points: [slide 1 of 6]

- A global challenge for lawyers now and in coming decades is to find remedies for people harmed by climate change.
- Widespread liability for climate change already exists under current national laws but is largely unrealised at present.

Conclusions & take-away points: [slide 2 of 6]

- Transnational liability for climate change arises under both the common law and statute for actions in one country that result in damage in another country.
- Transnational litigation between private individuals provides an avenue to sue under existing domestic laws in national courts for harm caused by emissions in other countries, such as Australia, and compel payment for damages through existing frameworks in many countries recognising foreign money judgments.

Conclusions & take-away points: [slide 3 of 6]

- Transnational claims for climate damages are strategic litigation in the sense they are undertaken for wider purposes than simply the specific legal remedy between the parties before the court. Their strategic purposes include to:
 - empower people and communities suffering from climate damage to take action and fight for justice in their own national courts, thereby providing access to justice;
 - demonstrate widespread legal liability exists under current laws and many people can claim compensation for the harm they suffer from climate change;
 - demonstrate that large climate polluters can be held liable for the damage they knowingly or wilfully cause for commercial profit;
 - encourage a wave of litigation against climate polluters undertaken by commercial law firms and litigation funders; and
 - deter companies and industries undertaking or financing climate polluting activities for profit, thereby mitigating future climate change.

Conclusions & take-away points: [slide 4 of 6]

- The human rights protected under many Pacific constitutions offer valuable causes of action for transnational climate litigation, coupled with common law claims such as public nuisance.

Conclusions & take-away points: [slide 5 of 6]

- In cases where there are multiple sources of harm, such as climate change, legal liability for individuals typically arises from making a “material contribution” to the harm.
- Limitation periods for many causes of action are not a barrier to climate litigation as damage such as sea level rise from past carbon pollution is ongoing, therefore, a cause of action continues to arise for many claims such as common law claims for public nuisance.

Conclusions & take-away points: [slide 6 of 6]

- In assessing damages for climate change, such as forced relocation of villages, awards for exemplary damages to remove commercial profits of polluters should play a substantial role, applying similar reasoning to the PNG Supreme Court in *Rimbunan Hijau (PNG) Ltd v Enei* [\[2017\] PGSC 36; SC1605](#) at [51], given the ongoing enormous greenhouse gas emissions and extraction of fossil fuels in countries such as Australia, which are done for naked commercial profit in total disregard and disrespect for the rights and interests of people of small island states in the Pacific and elsewhere impacted by climate change.

Workshop outline

1. Starting point: 2 propositions about climate litigation

2. Exploring a framework for strategic climate litigation:

- A case study of representing customary landowners on the Carteret Islands, Papua New Guinea, seeking remedies for damage due to climate change.
- What is “strategic climate litigation” and why might our clients pursue it?
- 10 key issues for identifying climate litigation opportunities, including identifying:
 - The plaintiff/s & the defendant/s
 - Causes of action
 - Evidence: key points relevant to the litigation (e.g. limitation periods)
 - Procedural issues

3. Conclusions & key take-away points

4. Questions (please type your questions into the Q&A for Fiona to moderate)