# Identifying Opportunities for Climate Litigation: A Transnational Claim by Customary Landowners in Papua New Guinea against Australia's Largest Climate Polluter

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*Existing laws in many jurisdictions provide opportunities for climate litigation in the context of the extensive harm climate change is causing and will cause in the future. This article examines 10 key questions for identifying opportunities for climate litigation and applies them to a case study of potential transnational litigation by customary landowners in Papua New Guinea (PNG) against the company that operates the largest, single source of greenhouse gas emissions in Australia, the Loy Yang A Power Station in Victoria. Remarkably, at current rates the emissions from this single company are double PNG's entire direct annual national emissions and cumulatively equate to a century of PNG's emissions. The PNG legal system offers remarkable scope for claims against such large overseas polluters. Transnational litigation such as this is a relatively new frontier for climate litigation. The real prospect of liability for transnational climate damages has enormous implications for Australia, PNG and the global climate regime.*

## I. Introduction

Extensive and severe damage will occur to billions of people, trillions of dollars of property and ecosystems even if the global community achieves the objectives of the *Paris Agreement* to stabilise mean global temperature rises beneath the hard target of 2°C or the aspirational target of 1.5°C above pre-industrial levels.[1] For instance, if mean global temperatures rise to 1.5°C above pre-industrial levels, most coral reefs are expected to be lost around the globe, while at 2°C virtually all coral reefs are expected to be lost, severely impacting hundreds of millions of people who depend on them for food.[2] In Papua New Guinea (PNG), for instance, "[b]etween 50,000 and 70,000 coastal inhabitants rely on coral reefs for their food, livelihoods and shelter".[3] Many developed countries, which have made by far the

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[1] The *Paris Agreement*, agreed in Paris on 12 December 2015, opened for signature 22 April 2016, [2016] ATS 24 (entered into force generally on 4 November 2016 and for Australia on 9 December 2016). UNTS reference: C.N.92.2016.TREATIES-XXVII.7.d <https://unfccc.int/>.

[2] Intergovernmental Panel on Climate Change (IPCC), *Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* (WMO, 2018) 10, 226, 229–230, 235, 254 <http://www.ipcc.ch/report/sr15/>; Chris McGrath, "Paris Agreement Goals Slipping Away & with Them Australia's Chance to Save the Great Barrier Reef" (2019) 36 EPLJ 3.

[3] Office of Climate Change and Development (PNG), *National Climate Compatible Development Management Policy* (Office of Climate Change and Development, 2014) 38 <https://www.pacificclimatechange.net/node/58>.

greatest contribution to climate change, see liability for climate change loss and damage as a threat and aggressively fought against its inclusion as a separate pillar of the *Paris Agreement*.[4]

In this context, it is unsurprising that people turn to the courts seeking to change government policies and decisions and seeking remedies for the damages they are suffering and will suffer because of climate change. A core function of the courts is to provide remedies for people who suffer damage due to the actions of others. Much of the harm – such as inundation of entire islands in the Pacific to the point of extinction[5] and displacement of entire populations[6] – will be impossible to prevent or fully redress. But perfection is not the measure of the law; nor are legal remedies refused merely because they do not fully redress harm.[7]

In broad terms, "climate litigation" or "climate change litigation" is litigation where a substantial purpose is to address climate change impacts either directly or indirectly.[8] There is now a large body of literature in the emerging field of climate litigation.[9] Most climate litigation has occurred in the United States (US), where over 800 cases have been recorded, but Australia, Europe and over 25 other jurisdictions, including in the Global South, are experiencing increasing numbers of climate cases.[10] Most past climate litigation in Australia and in other countries has been based on statutory causes of action but the scope for novel forms of climate change litigation is very wide and the outer boundaries are difficult to identify.[11]

Most climate litigation has involved domestic laws operating within a domestic context (although often set within the context of the international climate regime). An exception to this is the litigation commenced in 2015 and still before the courts in Germany by a Peruvian farmer and mountain guide, Saúl Luciano Lliuya, challenging the German energy utility RWE for its immense emissions threatening his family, his property as well as a large part of his home city of Huaraz in Peru.[12] That litigation is transnational in nature: it crosses national borders, yet is not international in the sense of involving a dispute between nations.[13]

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[4] Meinhard Dolle, "Loss and Damage in the UN Climate Regime" in Daniel Farber and Marjan Peeters (eds), *Encyclopedia of Environmental Law: Volume 1: Climate Change Law* (Edward Elgar, 2016) Ch 50, 222; MJ Mace and Roda Verheyen, "Loss, Damage and Responsibility after COP21: All Options Open for the Paris Agreement" (2016) 25(2) *Review of European, Comparative & International Environmental Law* 197; Sven Harmeling, "Climate Change Impacts Human Rights in Climate Adaptation and Loss and Damage" in Sébastien Duyck, Sébastien Jodoin and Alyssa Johl (eds), *The Routledge Handbook of Human Rights and Climate Governance* (Routledge, 2018) Ch 7, 98–99; Angela Bruckner, "The Global Pact for the Environment: Implications for Climate Change Loss and Damage" (2019) 36 EPLJ 642, 645.

[5] See Kya Raina Lal, "Legal Measures to Address the Impacts of Climate Change-induced Sea Level Rise on Pacific Statehood, Sovereignty and Exclusive Economic Zones" (2017) 23 *Auckland University Law Review* 35.

[6] See Thea Philip, "Climate Change Displacement and Migration: An Analysis of the Current International Legal Regime's Deficiency, Proposed Solutions and a Way Forward for Australia" (2018) 19 *Melbourne Journal of International Law* 1.

[7] Saul Holt and Chris McGrath, "Climate Change: Is the Common Law up to the Task?" (2018) 24 *Auckland University Law Review* 10, 11.

[8] See the discussion in Jacqueline Peel and Hari Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (CUP, 2015) 4–9.

[9] See the following publications and the literature cited in them: Peel and Osofsky, n 8; Sabrina McCormick et al, "Strategies in and Outcomes of Climate Change Litigation in the United States" (2018) 8 *Nature Climate Change* 829; Abby Rubinson Vollmer "Mobilizing Human Rights to Combat Climate Change through Litigation" in Sébastien Duyck, Sébastien Jodoin and Alyssa Johl (eds), *The Routledge Handbook of Human Rights and Climate Governance* (Routledge, 2018); Jacqueline Peel and Jolene Lin, "Transnational Climate Litigation: The Contribution of the Global South" (2019) 113(4) *American Journal of International Law* 679.

[10] See Peel and Lin, n 9.

[11] See Hari Osofsky and Jacqueline Peel, "The Role of Litigation in Multilevel Climate Change Governance: Possibilities for a Lower Carbon Future?" (2013) 30 EPLJ 303, 304–305.

[12] See Germanwatch, *Saúl versus RWE - The Huaraz Case* (20 December 2019) <https://germanwatch.org/en/huaraz>.

[13] For a recent analysis of transnational litigation in tort for human rights abuses involving PNG and Australia, see Gabrielle Holly, "Transnational Tort and Access to Remedy under the UN Guiding Principles on Business and Human Rights: Kamasaee v Commonwealth" (2018) 19(1) *Melbourne Journal of International Law* 52.

Transnational liability for climate change arises under both common law and statute for actions in one country that result in damage in another 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. In Australia, these so-called, "result offences", were recognised in the important decision in *Brownlie v State Pollution Control Commission* ,[14] in which a Queensland farmer who polluted a river flowing into New South Wales (NSW) resulting in a fish kill was held liable for an offence against the *Clean Waters Act 1970* (NSW). Gleeson CJ (with whom Curruthers J and Lee AJ agreed) stated:[15]

> 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* [1976] AC 35 at 61, Lord Diplock, referring to *R v Ellis* [1899] 1 QB 230, said:
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> > "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 by an English court if any part of the proscribed result takes place in England."

Transnational liability for climate change can logically arise for "result offences" and this reflects the normal choice of law rules in private international law and for interstate disputes in Australia for torts. Under choice of law rules Australian courts favour the law of the place where the tort occurred (the *lex loci delicti*).[16] Normally, the place where the tort occurred is the place where the injury occurred (the *lex loci damni*), irrespective of the country in which the event giving rise to the injury occurred.[17] Thus, one of the standard reasons for a domestic court exercising jurisdiction over foreign defendants – often called a court's "long arm jurisdiction" – is "where the proceedings, wholly or partly, are founded on, or are for the recovery of damages in respect of, damage suffered in the State caused by a tortious act or omission wherever occurring."[18]

No international climate litigation (ie, litigation between nations) has yet been commenced but, while limited, there appear to be some international courts and tribunals where such litigation may occur in the future. For instance, as Australia has accepted the compulsory jurisdiction of the International Court of Justice (ICJ), it appears open to other countries that have also accepted the court's jurisdiction to bring a claim against Australia for breaching the no harm principle and other obligations under international law due to its poor track record and current lack of action on climate change.[19] Ironically, Australia and New Zealand's successful litigation in 2014 in the ICJ against Japan for whaling[20] illustrates the potential for future litigation for breach of international obligations around climate change.

Within the context of the large and rapidly evolving field of climate litigation, this article aims to help climate litigators in the task of identifying potential new cases. It begins with two propositions about climate litigation and proposes 10 key questions for identifying opportunities for climate litigation. It then applies these questions to a case study of potential transnational litigation by PNG customary

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[14] *Brownlie v State Pollution Control Commission* (1992) 27 NSWLR 78, 84; 76 LGRA 419.

[15] *Brownlie v State Pollution Control Commission* (1992) 27 NSWLR 78; 76 LGRA 419. See also *Lipohar v The Queen* (1999) 200 CLR 485, 499 [21] (Gleeson CJ); [1999] HCA 65.

[16] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; [2000] HCA 36; *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491; [2002] HCA 10; Robert Pietriche, "The Ascendancy of the lex loci delicti: The Problematic Role of Theory in Australian Choice of Tort Law Rules" (2015) 16 *Melbourne Journal of International Law* 86.

[17] See the discussion of differences in the US, UK and Australia in Owen Webb, "Kiobel, the Alien Tort Statute and the Common Law: Human Rights Litigation in this 'Present, Imperfect World'" (2013) 20 *Australian International Law Journal* 131, 153–154.

[18] Quoting the now repealed *Supreme Court Rules 1970* (NSW) Pt 10 r 1A, discussed in *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491; [2002] HCA 10. Now, to similar effect, see *Uniform Civil Procedure Rules 2005* (NSW) r 11.4 Sch 6(a)(ii) which allows service outside Australia without leave where "when the claim is founded on a tortious act or omission in respect of which the damage was sustained wholly or partly in Australia".

[19] See Holt and McGrath, n 7, 29–31, referring to Christina Voigt, "The Potential Roles of the ICJ in Climate Change-related Claims", in Daniel Farber and Marjan Peeters (eds), *Climate Change Law* (Edward Elgar, 2016) Ch I.13.

[20] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* [2014] ICJ Rep 228.

landowners against the company that operates the largest, single source of greenhouse gas (GHG) emissions in Australia.

## II. Two Propositions about Climate Litigation

### A. Move from Abstract Theories to Real and Specific Case Studies

The first of two propositions that underpin this analysis is: when considering opportunities for future climate litigation, we should move from abstract theories to real and specific case studies (who, what, which court, how, etc.). This is because, to crystallise realistic proposals for potential climate litigation it is important to move from abstract principles to examining concrete, specific examples with potential parties and descending into the nitty-gritty of the procedural, substantive and evidentiary obstacles of the potential litigation (eg, by identifying the corporate entity that will be a defendant, quantifying its GHG emissions and examining licences, etc., that may provide it with a defence).

The application of the law, including potential constitutional constraints, is best done in the context of specific facts and circumstances and, indeed, cannot properly be done in the abstract. As Gageler J said in *Clubb v Edwards*,[21] by limiting the analysis to what is necessary to resolve a dispute:

> 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.

A case study of specific potential defendants offers an excellent methodology to examine opportunities for climate litigation and represents "real world research".[22]

### B. Liability Is Widespread but Largely Unrealised

The second proposition that underpins this analysis is: liability for climate change is widespread but largely unrealised. This proposition flows logically from the facts that:

- billions of people and trillions of dollars of property are being and will be impacted by climate change;[23]
- common law causes of action and modern environmental laws are wide on their face and apply to activities that cause climate change in the same way as other forms of pollution;
- a core function of the courts is to provide remedies for people who suffer damage due to the actions of others; and
- despite, on its face, widespread liability, only relatively few cases have been brought globally (somewhere in the order of 1,000[24]), which means that liability is largely unrealised.

In relation to the second of these points, if the common law and modern environmental laws do not address climate change – a well-known, major threat facing human society and the environment, which will cause huge property losses – there is something seriously wrong with them. It would be wrong to assume this is the case or to assume that judges, faced with clear evidence of harm, will not use the "creative element of both inductive and deductive reasoning in the work of the courts"[25] to fashion appropriate remedies. To the contrary, the opposite is a logical conclusion: widely framed modern environmental laws address climate change impacts, just as they regulate other forms of pollution, and judges will strive to find remedies for clear harm. Yet this liability is largely unrealised as countless human activities across the globe continue to contribute to climate change without attracting legal sanction.

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[21] *Clubb v Edwards* (2019) 93 ALJR 448, [137]; 366 ALR 1; [2019] HCA 11.

[22] Colin Robson and Kieran McCartan, *Real World Research* (Wiley, 4th ed, 2015).

[23] See, eg, IPCC, n 2.

[24] See Peel and Lin, n 9.

[25] *PGA v The Queen* (2012) 245 CLR 355, 370–374 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); [2012] HCA 21.

A lack of resources is a key limiting factor to climate litigation at present, not lack of liability. Climate litigation will expand exponentially when commercial litigation funding (eg, from litigation funders such as IMF Bentham[26]) becomes available.

Another factor that limits climate litigation at present (and makes governments and large polluters in countries like Australia complacent about climate damages) is a failure to realise that difficulties for establishing a causal link to attribute liability for damage due to carbon pollution has been substantially overcome through the carbon budget. The carbon budget quantifies the total (cumulative) amount of carbon dioxide ($CO_2$) that can be emitted into the atmosphere by human activities to hold the rise in mean global temperatures to a particular level, normally the major international targets of holding mean global temperature rises to less than 2°C or 1.5°C above pre-industrial levels.[27] While there is ongoing debate and refinement of the carbon budget,[28] it is now widely adopted and provides a convenient tool for framing climate litigation to establish a causal link and counter arguments that an individual project's emissions are "de minimus" or "vanishingly small".[29] Carbon polluters have previously used this "drop in the ocean" argument extensively to avoid liability.[30]

Preston CJ adopted the carbon budget extensively in his reasoning in the recent landmark decision in *Gloucester Resources Ltd v Minister for Planning* (*Gloucester Resources*).[31] In rejecting approval for the mine based, in part, on its contribution to climate change within the context of the carbon budget, Preston CJ found:

> In aggregate, the Scope 1, 2 and 3 emissions over the life of the Project will be at least 37.8Mt $CO_2$-e, a sizeable individual source of GHG emissions.[32]
>
> There is a causal link between the Project's cumulative GHG emissions and climate change and its consequences. The Project's cumulative GHG emissions will contribute to the global total of GHG concentrations in the atmosphere. The global total of GHG concentrations will affect the climate system and cause climate change impacts. The Project's cumulative GHG emissions are therefore likely to contribute to the future changes to the climate system and the impacts of climate change. In this way, the Project is likely to have indirect impacts on the environment, including the climate system, the oceanic and terrestrial environment, and people.[33]
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> [I]n order to remain within the carbon budget and achieve the long-term temperature goal of holding the increase in global average temperatures to between 1.5°C and 2°C above pre-industrial levels, most fossil fuel reserves will need to remain in the ground unburned.[34]

Preston CJ's explanation and application of the carbon budget in *Gloucester Resources* provide very useful guides for future courts attributing liability for climate change impacts from a single activity. Within this context, there are 10 key questions for identifying future climate litigation opportunities.

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[26] IMF Bentham <https://www.imf.com.au>.

[27] Based, particularly, on the seminal work of Malte Meinshausen et al, "Greenhouse-gas Emission Targets for Limiting Global Warming to 2°C" (2009) 458 *Nature* 1158. For recent literature and the Carbon Budget for 1.5°C, see IPCC, n 2, 104–108; Joeri Rogelj et al, "Estimating and Tracking the Remaining Carbon Budget for Stringent Climate Targets" (2019) 571 *Nature* 335.

[28] See, eg, Chelsea Harvey, "How the Carbon Budget Is Causing Problems" (22 May 2018) *Scientific American* <https://www.scientificamerican.com/article/how-the-carbon-budget-is-causing-problems/>.

[29] Holt and McGrath, n 7, 14.

[30] See Jacqueline Peel, "Issues in Climate Change Litigation" (2011) 1 *Carbon and Climate Law Review* 15.

[31] *Gloucester Resources Ltd v Minister for Planning* (2019) 234 LGERA 257, [441]–[450], [527], [529], [550], [559]; [2019] NSWLEC 7.

[32] *Gloucester Resources Ltd v Minister for Planning* (2019) 234 LGERA 257, [515]; [2019] NSWLEC 7. Noting that: "Mt $CO_2$-e" refers to millions of tonnes of carbon dioxide equivalents, a unit used to measure carbon pollution; and standard GHG accounting separates direct emissions from an activity (scope 1), indirect emissions from electricity generated offsite (scope 2), and other indirect upstream or downstream emissions (scope 3).

[33] *Gloucester Resources Ltd v Minister for Planning* (2019) 234 LGERA 257, [525]; [2019] NSWLEC 7.

[34] *Gloucester Resources Ltd v Minister for Planning* (2019) 234 LGERA 257, [550]; [2019] NSWLEC 7.

## III. 10 Key Questions for Identifying Future Climate Litigation Opportunities

Previous writers have examined the issues for climate litigation, including procedural issues (such as standing) and evidentiary issues.[35] The list I propose builds on this past work but also draws upon my experience as a barrister in framing litigation and dealing with the practical realities of litigation against large opponents. Litigators make many decisions that frame how a case is presented and these decisions are often critical both for which cases are brought and which succeed. Litigation decisions are influenced by many factors, including the likely attitude of the judges who may be hearing the case and what your opponent is likely to do. Environmental litigation, particularly against large and well-resourced opponents, can be a very difficult war of attrition even for government regulators. I have learnt that, as a litigator working on public interest cases such as climate litigation, you need courage and tenacity to succeed and to survive the hard losses in your career. Narrowing and avoiding disputes through negotiation and compromise are important and you should always pursue them where possible but sometimes you need to fight, and you will need courage and tenacity to do this.

In this context, in my view there are 10 key overlapping questions to answer for identifying future climate change litigation opportunities. These are:

1. Who are the potential plaintiffs (ie, who can sue)?
    - Who has legal standing?
    - Who is willing and suitable (rational and reasonable)?
2. Who are the potential defendants and who is the best to choose?
3. What causes of action are available (such as 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 and 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, and can they be overcome?
9. What resources are needed and available for the litigation (ie, money, experts and lawyers)?
10. How do you avoid being overwhelmed by a big opponent and complexity?

These questions are examined in the next section through a case study of potential transnational litigation by PNG customary landowners against Australia's largest, single carbon polluter, the operator of the Loy Yang A Power Station in Victoria.

## IV. A Case Study of Transnational Litigation by PNG Customary Landowners against Australia's Largest Carbon Polluter

### A. Overview of the PNG Legal System and Its Links to Australia

Before turning to the 10 key questions for identifying climate litigation opportunities for the case study of PNG customary landowners suing Australia's largest single climate polluter, it is useful to provide a brief overview of the PNG legal system and its links to Australia.

PNG is a diverse country that shares many links to Australia, having been a former dependent territory of Australia until becoming self-governing in 1973 and gaining independence in 1975. While PNG's 7.6 million people speak nearly 850 languages, its three official languages are English, Tok Pisin and Hiri Motu.[36]

[35] See, eg, Jacqueline Peel, Hari Osofsky and Anita Foerster, "Shaping the 'Next Generation' of Climate Change Litigation in Australia" (2017) 41(2) *Melbourne University Law Review* 793, 831–836; Rubinson Vollmer, n 9, 360–361.

[36] See, "Papua New Guinea's Incredible Linguistic Diversity", *The Economist*, 20 July 2017 <https://www.economist.com/the-economist-explains/2017/07/20/papua-new-guineas-incredible-linguistic-diversity>.

The PNG legal system is based on the English common law system overlaid with extensive national legislation.[37] It incorporates PNG's customary laws to create a unique layer of the "underlying law" recognised in the *Constitution of the Independent State of PNG 1975* (PNG) (*PNG Constitution*).[38] PNG laws are written in English and the court system operates primarily in English. Many PNG laws are substantially copied from Australian laws, such as the *Environment Act 2000* (PNG), which reflects an early version of the *Environmental Protection Act 1994* (Qld). The rules of civil procedure and evidence are very similar to those in Australia.[39]

Statutory interpretation in PNG is materially the same as in Australia and many other common law countries.[40] Section 109(4) of the *PNG Constitution* provides:

> Each law made by the Parliament shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the law according to its true intent, meaning and spirit, and there is no presumption against extra-territoriality.

In *Gari Baki v Allan Kopi*, the Deputy Chief Justice Sir Salamo Injia, as he then was, said:[41]

> The principles of statutory interpretation are settled. The Court must give effect to the legislative intention and purpose expressed in the language used in the statute. If the words used in the statute are clear and unambiguous, the Court must adopt the plain and ordinary meaning of those words. There is no need for the Court to engage in any statutory interpretation exercise. If the words are not so clear or ambiguous, the Court must construe the words in a fair and liberal manner in ascertaining their meaning and give an interpretation which gives meaning and effect to the legislative intention in the provision. The purpose of words or phrases used in question should be read and construed in the context of the provision as a whole. The Court should avoid a technical or legalistic construction of words and phrases used in a statutory provision without regard to other provisions which give context and meaning to the particular word (s) and phrases in question.

While there are many similarities between PNG and Australia's legal and court systems, there are, of course, important differences. Three differences are particularly relevant in the present context.

The first major difference relevant in the present context is that, whereas Australia's constitution provides only limited protections for citizen's rights, the *PNG Constitution*[42] provides extensive protection for fundamental rights and freedoms, including a right to life,[43] a right to protection of the law,[44] and protection from unjust deprivation of property.[45] The *PNG Constitution* also empowers PNG's superior courts, the Supreme Court and National Court of Justice, to enforce these rights and provides a right to claim compensation when they are infringed.[46] These provisions will be considered further below in the context of causes of action for PNG customary landowners.

The second major difference relevant in the present context relates to land law. Australia's land tenure system is primarily based on the Torrens System with a central land registry and, outside of the

[37] A useful introductory text is Rudolph James and John Luluaki, *Introduction to the Legal System of Papua New Guinea* (Melanesia Law Publishers, 2011). The best source for PNG legislation and case law is the Pacific Islands Legal Information Institute (Paclii) <http://www.paclii.org/countries/pg.html>.

[38] See David Gonol, *The Underlying Law of Papua New Guinea* (UPNG Press, 2016).

[39] See Dominic Katter, Robert Gordon and Erik Anderson, *Civil Procedure in Papua New Guinea* (LexisNexis, 2016); Salamo Injia, *Injia on Evidence in Papua New Guinea and the Pacific* (UPNG Press, 2013).

[40] See generally, Salamo Injia, *Injia on Statutory Interpretation in PNG and the Pacific* (UPNG Press, 2013).

[41] *Gari Baki v Allan Kopi* [2008] PGNC 251; N4023, [16]. The PNG Supreme Court unanimously endorsed the correctness of this approach to statutory interpretation in *Salamo Elema v Pacific MMI Insurance Ltd* [2011] PGSC 9; SC1114, [23]–[24] (Salika DCJ, Cannings and Gabi JJ).

[42] See generally Eric Kwa, *Constitutional Law of Papua New Guinea* (UPNG Press, 2001). PNG's "homegrown" Constitution was heavily influenced by the Constitutional Planning Committee, *Final Report of the Constitutional Planning Committee* (PNG Government Printer, 1974) <http://www.paclii.org/pg/CPCReport/main.htm>.

[43] *Constitution of the Independent State of PNG 1975* (PNG) s 35.

[44] *Constitution of the Independent State of PNG 1975* (PNG) s 37.

[45] *Constitution of the Independent State of PNG 1975* (PNG) s 53.

[46] *Constitution of the Independent State of PNG 1975* (PNG) ss 22, 57, 58.

Northern Territory, only recognises the vestiges of traditional land tenure laws left over after extensive extinguishment of native title.[47] In stark contrast, 97% of land in PNG is still under communal customary land tenure, where only relative fragments are recorded in a central registry, for instance by Incorporated Land Groups.[48]

A third major difference relates to climate change. Both PNG and Australia are parties to the *United Nations Framework Convention on Climate Change 1992* (*UNFCCC*) and the *Paris Agreement 2015,* but Australia is an Annex I country and PNG is a non-Annex I country under the *UNFCCC*. While Australia repealed its carbon price legislation and has only fragmented national laws on climate change, PNG has directly incorporated the *Paris Agreement* into its national laws through the *United Nations Paris Agreement (Implementation) Act 2016* (PNG), which is implemented primarily through other laws, particularly the *Climate Change (Management) Act 2015* (PNG) and other environmental, resource and planning laws.

To give some idea of the factual context of each country's climate change laws and policies, Table 1 provides a comparison of Australia and PNG's annual direct (scope 1) GHG emissions and economic size. These figures may be summarised as: Australia is a rich country with large total and per capita emissions while PNG is a poor country with very low total and per capita emissions.

**TABLE 1. Comparison of Australian and PNG Greenhouse Emissions and Economies[49]**

| | **Australia** | **PNG** |
|---|---|---|
| Annual direct (scope 1) greenhouse emissions (Mt $CO_2$-e) | 534.7 | 10 |
| Annual direct per capita greenhouse emissions (t $CO_2$-e) | 21.5 | 1.4 |
| Gross domestic product (AUD billions) | 1,815 | 34 |

This brief overview provides a basis to now turn to examine the potential for PNG customary landowners to sue Australian companies for climate pollution.

## B. 10 Key Questions for Identifying Climate Litigation Opportunities

### *1. Who Are the Potential Plaintiffs (ie, Who Can Sue)?*

In PNG "[b]etween 50,000 and 70,000 coastal inhabitants rely on coral reefs for their food, livelihoods and shelter".[50] Given the extent of customary land ownership in PNG,[51] the vast majority of these people will be customary landowners. While customary law varies within PNG and must be proven as a question of law and fact,[52] generally, customary landowners adjacent to coral reefs have rights to fish and exploit their reefs. For instance, in *Medaing v Ramu Nico Management (MCC) Ltd*,[53] the plaintiffs were customary landowners adjacent to seawaters affected by a large nickel project, the Ramu Nickel Project. They commenced proceedings seeking a permanent injunction to stop a deep-sea tailings placement

[47] See generally Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th ed, 2017); James Weiner and Katie Glaskin (eds), *Customary Land Tenure and Registration in Australia and Papua New Guinea: Anthropological Perspectives* (ANU Press, 2007).

[48] See Weiner and Glaskin, n 47; HA Amankwah, JT Mugambwa and G Muroa, *Land Law in Papua New Guinea* (LBC, 2001); Rudolph W James, *Law of Land Administration and Policies of Papua New Guinea* (Melanesia Law Publishers, 2011).

[49] These figures are drawn from the Australian Government, *National Inventory Report 2017 Submitted under the UNFCCC and Kyoto Protocol* (Australian Government, 2019) 2, 35 <https://unfccc.int/documents/195779>; Government of PNG (GoPNG), *PNG Intended Nationally Determined Contribution (INDC) under the UNFCCC* (24 March 2016) 3 <https://www4.unfccc.int/sites/NDCStaging/pages/Party.aspx?party=PNG>; Trading Economics, "PNG GDP Growth Rate" (converting USD to AUD based on an exchange rate of 1.47) <https://tradingeconomics.com/papua-new-guinea/gdp-growth-annual>.

[50] Office of Climate Change and Development, n 3, 38.

[51] See Weiner and Glaskin, n 47; Amankwah, Mugambwa and Muroa, n 48; James, n 48.

[52] Under the *Customs Recognition Act 1963* (PNG).

[53] *Medaing v Ramu Nico Management (MCC) Ltd* [2011] PGNC 95; N4340.

(DSTP) system at Basamuk, Madang Province, due to concerns over its environmental impacts. The defendant disputed their standing to bring the proceedings but Cannings J held:

> The plaintiffs have established to my satisfaction that they are owners of, or have a genuine interest in customary land, on the coastline of Madang Province. Ownership of that land gives them ownership of the areas of the sea adjoining their land. I am satisfied, having regard to the findings of fact as to the likely adverse environmental effect of the DSTP, that operation of the DSTP will interfere with their use and enjoyment of customary land, including the sea. The first element of private nuisance is proven.[54]

On this basis, there are tens of thousands of potential customary landholders who can sue for damage to their coral reefs, along with millions of PNG customary landholders who can sue for other climate damages to their land and waters.

### *2. Who Are the Potential Defendant/s and Who Is the Best to Choose?*

#### *(a) General Considerations*

While it might be, at first blush, attractive to attempt to sue the PNG Government or a foreign government, such as the Australian Government, for its country's entire GHG emissions, that would raise considerations such as Crown immunity, the Act of State doctrine, and foreign State immunity, which would be difficult to overcome.[55] These difficult issues can be avoided by suing a company or a number of companies that are directly responsible for large GHG emissions.

For practical reasons, if possible, any litigation should be limited to one corporation and one activity. Trying to sue multiple, large corporations or a group of companies[56] for multiple activities simultaneously multiplies the complexity exponentially. You can simply be overwhelmed. You should expect legal teams comprising a large solicitors' firm and top silk and junior barristers will be engaged by each defendant corporation. You should expect that each of those legal teams will shower you with correspondence and throw procedural obstacles in your way, such as requests for further and better particulars, to drain your resources. At trial and on appeal, having multiple opponents can swamp your case and distract the court from the substance of your arguments and evidence. Litigation against multiple large opponents simultaneously just becomes really, really hard. You should avoid it if possible.

In choosing a single corporation to sue, any person (including a company) whose GHG emissions make a "material contribution" to the harm caused by climate change and, therefore, are above levels that are considered "de minimus" or "vanishingly small" are potential defendants.[57] Liability under the common law, including the principles of causation, varies across jurisdictions and are heavily affected by statute. However, across the differences in jurisdictions and statutes, including in PNG,[58] a common principle is that where two or more causes combine to bring about harm, an act is legally causative if it "materially contributes" to the harm.[59] As McHugh J said in *Henville v Walker*:[60]

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[54] *Medaing v Ramu Nico Management (MCC) Ltd* [2011] PGNC 95; N4340, [69], [129]–[130]. This decision was overturned on appeal (*Mediang v Ramu Nico Management (MCC) Ltd* [2011] PGSC 40; SC1144) but Cannings J's findings on standing were not questioned.

[55] In an Australian context, see, eg, *Dagi v Broken Hill Pty Co Ltd (No 2)* [1997] 1 VR 428, 453 (Byrne J); *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240; [2012] HCA 33; *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31; [2015] HCA 43.

[56] Either directly, by naming each company as a defendant, or indirectly, by suing only the ultimate holding company for a group.

[57] See Holt and McGrath, n 7, 14; Nicola Durrant, *Legal Responses to Climate Change* (The Federation Press, 2010) Ch 19.

[58] See, eg, *State v Sharp* [2017] PGNC 230; N6813, [127] (Higgins J).

[59] See also the argument that any positive contribution to the mechanism by which an injury occurred should be recognised as a "causal" contribution made by Jane Stapleton, "Unnecessary Causes" (2013) 129 *The Law Quarterly Review* 39.

[60] *Henville v Walker* (2001) 206 CLR 459, 493 [106]; [2001] HCA 52. Similarly, see *Amaca Pty Ltd v Booth* (2011) 246 CLR 36, 56 [47] (French CJ); 62–63 [70]–[71] (Gummow, Hayne and Crennan JJ); [2011] HCA 53; *Strong v Woolworths Ltd* (2012) 246 CLR 182, 190 [18], 192 [21]–195 [29] (French CJ, Gummow, Crennan and Bell JJ); [2012] HCA 5; *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, 635 [45] (French CJ, Hayne and Kiefel JJ); [2013] HCA 10; MH Tse, "Tests for Factual Causation: Unravelling the Mystery of Material Contribution, Contribution to Risk, the Robust and Pragmatic Approach and the Inference of Causation" (2008) 16 *Torts Law Journal* 249, 252–255.

> If the defendant's breach has "materially contributed"[61] 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.

French CJ, Gummow, Crennan and Bell JJ recognised the origins of the concept of a "material contribution" in causation for tort in *Strong v Woolworths Ltd* (references in original):[62]

> The expression can be traced to developments in the law of nuisance in Scotland in the nineteenth century.[63] In a case in which several factories had contributed to the pollution of a river, 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.[64]

Building on these solid foundations in the common law, modern environmental laws, such as the *Environmental Protection Act 1994* (Qld) and the *Environment Act 2000* (PNG), also provide statutory tests that allow liability to be attributed where pollution is caused by multiple, direct and indirect sources. For instance, s 2 of the *Environment Act 2000* (PNG) defines "environmental harm" and "material environmental harm" as, relevantly:

> "**environmental harm**" means any change to the environment, or any part of the environment, which—
>
> (a) has a detrimental effect on any beneficial value relating to the environment; and
> (b) may be caused by an act or omission whether the harm –
>
> (i) is a direct or indirect result of the act or omission; or
> (ii) results from the act or omission alone or from the combined effects of the act or omission and any other act or omission …
>
> "**material environmental harm**" means environmental harm— –
>
> (a) that causes, or could reasonably be expected to cause, harm that is not trivial or negligible in nature, extent or context.

There are several potentially useful reference points for what constitutes a "material contribution" to climate change, either under common law principles or a statute such as the *Environment Act 2000* (PNG). At a statutory level in Australia, any operator of a project with direct (scope 1) emissions over 25,000 t $CO_2$-e per annum is required to report their emissions under the *National Greenhouse and Energy Reporting Act 2007* (Cth). This might be thought of as a statutory recognition of levels that make a "material contribution" and are not "de minimus", though, of course this is of limited relevance under PNG law (where there are not yet any reporting thresholds formally established).

In terms of case law, as noted earlier, Preston CJ found in *Gloucester Resources* that emissions over the life of the mine of at least 37 Mt $CO_2$-e were "a sizeable individual source of GHG emissions" and, as such, there "is a causal link between the Project's cumulative GHG emissions and climate change and its consequences".[65]

Another reference point that is likely to be particularly meaningful for litigation in PNG is to compare a defendant company's emissions with the total annual direct (scope 1) GHG emissions from PNG, which are currently around 10 Mt $CO_2$-e.[66] A company with comparable or far greater annual GHG emissions to the entire nation of PNG is likely to be regarded as a "material contributor" to climate change by a PNG court. This seems obvious at a common-sense level – otherwise a court would be, in effect, finding

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

[62] *Strong v Woolworths Ltd* (2012) 246 CLR 182, 192–193 [22]; [2012] HCA 5.

[63] The history is traced in Sandy Steel and David Ibbetson, "More Grief on Uncertain Causation in Tort" (2011) 70 *Cambridge Law Journal* 451, 453.

[64] *Duke of Buccleuch v Cowan* (1866) 5 M 214.

[65] *Gloucester Resources Ltd v Minister for Planning* (2019) 234 LGERA 257, [515], [525], [550]; [2019] NSWLEC 7.

[66] GoPNG, n 49, 3.

that PNG's total national emissions were not material. It is hard to see how that can be accepted as a question of law or fact given PNG's ratification of the *Paris Agreement* and enactment of it into domestic law in the *United Nations Paris Agreement (Implementation) Act 2016* (PNG) supported by the *Climate Change (Management) Act 2015* (PNG). These actions are sovereign and legislative recognition that PNG's emissions are a material contribution to climate change.

### *(b) Choice of Defendant in This Case*

With the general considerations set out in the previous section in mind, if a single corporation and a single activity are to be chosen, provided it can be sued in a PNG court (which is discussed in later sections), a logical choice is Australia's largest single, direct emitter of GHGs: the operator of the Loy Yang A Power Station. This power station is in the Latrobe Valley, 165 km east of Melbourne, in Victoria.[67] Recent figures for its GHG emissions are no longer accessible in reports made publicly available by the company but in 2010 it emitted 19.7 Mt $CO_2$-e and its emissions varied between approximately 18.4 and 20.2 Mt $CO_2$-e per annum from 2004 to 2010.[68] These emissions are greater than any other Australian power station by around 4 Mt $CO_2$-e.[69] They are nearly double PNG's entire direct GHG emissions, of around 10 Mt $CO_2$–e per annum.[70] In comparison, the largest single emitter in PNG, ExxonMobil's PNG LNG Project, generates around 2–3 Mt $CO_2$-e direct (scope 1) emissions per annum.[71]

Loy Yang A Power Station is not only the largest, single GHG emitter in Australia, it is also one of the oldest and most inefficient power stations in Australia. It was commissioned in the 1980s and burns lignite or brown coal from an adjacent open-cut mine, which is very high in water content (around 60%) and low in carbon content compared to black coal.[72] This makes brown coal a very inefficient source of electricity and a high source of GHG emissions per unit of energy produced. There have been small, pilot studies of pre-drying coal to improve combustion efficiency[73] and carbon capture[74] at Loy Yang A Power Station, however, these pilots have not progressed to large-scale operation primarily due to technological difficulties and the additional costs involved. Capturing 90% of $CO_2$ emissions from Loy Yang A Power Station is estimated to cost AUD 935 million in capital expenditure with AUD 24 to 60 million per year operating costs.[75] This does not include the cost of storing the captured emissions. In summary, while there was a small, pilot study of carbon capture at Loy Yang A Power Station, all of its GHG emissions have been and are currently released to the atmosphere.

Identifying the correct corporate entity to sue can be challenging in complex corporate structures, such as the AGL Group of companies, but Loy Yang A Power Station is operated by AGL Loy Yang Pty Ltd[76] under a licence granted under the *Environment Protection Act 1970* (Vic). AGL Loy Yang Pty Ltd has changed its name several times since its registration in 1997 and is a wholly owned subsidiary of the AGL Group.[77] AGL has stated publicly it intends to operate Loy Yang A Power Station until 2048,[78] so

[67] See AGL, "AGL Loy Yang Power Station" <https://www.agl.com.au/about-agl/how-we-source-energy/loy-yang-power-station>.

[68] Loy Yang Power, *Sustainability Report 2010* (Loy Yang Power, 2010) 41–42.

[69] The Climate Group, *Australian Electricity Generation Report 2008* (The Climate Group, 2009) <https://apo.org.au/node/18441>.

[70] GoPNG, n 49, 3.

[71] ExxonMobil, *Environmental Impact Statement for the PNG LNG Project* (ExxonMobil, 2008) Ch 26 <https://pnglng.com/>.

[72] See Bob Everett et al (eds), *Energy Systems and Sustainability: Power for a Sustainable Future* (Oxford, 2nd ed, 2012) 146–150.

[73] See, eg, G Domazetis et al, "Treatments of Low Rank Coals for Improved Power Generation and Reduction in Greenhouse Gas Emissions" (2008) 89 *Fuel Processing Technology* 68.

[74] Y Artanto et al, "Performance of MEA and Amine-blends in the CSIRO PCC Pilot Plant at Loy Yang Power in Australia" (2012) 101 *Fuel* 264, 265.

[75] Bechtel Infrastructure and Power Corporation, *Retrofitting an Australian Brown Coal Power Station with Post-combustion Capture* ($CO_2$CRC, October 2018) 1–1 <http://www.co2crc.com.au/publication-category/reports/>.

[76] Australian Company Number (ACN): 077 985 758.

[77] See AGL Group <https://www.agl.com.au/>.

[78] Jarrod Whittaker, "Loy Yang to Remain until 2048: AGL", *Latrobe Valley Express*, 25 October 2018 <https://www.latrobevalleyexpress.com.au/story/5721387/loy-yang-to-remain-until-2048-agl/>.

AGL Loy Yang Pty Ltd is responsible for 50 years of GHG emissions, totalling around 950 Mt $CO_2$e. It is significant for establishing liability that the company is responsible for substantial past and future emissions. Remarkably, at current rates the emissions from this single company equate to a century of PNG's entire direct national emissions.

While the AGL Group, operating through AGL Energy Ltd, emits around 43 Mt $CO_2$e per annum,[79] that includes emissions from multiple coal- and gas-fired power stations, which would be a multi-headed hydra to sue. A holding company, such as AGL Energy Ltd, may be liable for the activities of its subsidiaries but lifting or piercing the corporate veil to make shareholders liable for the torts or debts of a company remains difficult and contentious.[80] For the reasons explained earlier, if possible, it is better to focus on a single company and single activity, provided its emissions exceed what can be regarded as a "material contribution" to climate change. Here, that is the subsidiary company that operates Loy Yang A Power Station. With emissions from Loy Yang A Power Station alone being nearly double PNG's entire national emissions each year and cumulatively equating to a century of PNG's emissions, it is difficult to see how a PNG court would not regard this as a material contribution to climate change.

### *3. What Causes of Action Are Available (eg, Judicial Review, Tort, etc.)?*

Two main causes of action are available: the first under the *PNG Constitution*; the second under common law torts of public nuisance and private nuisance.

#### *(a) PNG Constitution*

The *PNG Constitution* is a truly remarkable document that begins by stating five national goals and directive principles intended to provide the "philosophy" for PNG society.[81] These are non-justiciable but PNG statutes must be interpreted to give effect to them or, at least, not to derogate from them.[82] The fourth national goal and directive principle states:

> **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.

Within the context of the five national goals and directive principles, the *PNG Constitution* provides a cause of action to claim compensation under ss 57 and 58 of the *PNG Constitution* for contravening guaranteed rights and freedoms.[83] The guaranteed rights relevant here are ss 35 (Right to Life) and 37 (Protection of the Law) and, possibly, s 53 (Protection from unjust deprivation of property). These sections provide, relevantly:

> **35. RIGHT TO LIFE.**
>
> (1) No person shall be deprived of his life intentionally …

[79] See the Australian Clean Energy Regulator, "Corporate Emissions and Energy Data 2017–18" (ACER, 2019) <http://www.cleanenergyregulator.gov.au>.

[80] See, eg, the previous Chief Justice of Victoria, writing extra-curially, Marilyn Warren, "Corporate Structures, the Veil and the Role of the Courts" (2017) 40 *Melbourne University Law Review* 657.

[81] Constitutional Planning Committee, n 42, [12].

[82] *Constitution of the Independent State of PNG 1975* (PNG) s 25(1) and (3).

[83] Note, also, the obligation imposed by *Constitution of the Independent State of PNG 1975* (PNG) s 22 on the National Court of Justice to give effect to guaranteed rights.

**37. PROTECTION OF THE LAW.**

(1) Every person has the right to the full protection of the law …

**53. PROTECTION FROM UNJUST DEPRIVATION OF PROPERTY.**

(1) … possession may not be compulsorily taken of any property, and no interest in or right over property may be compulsorily acquired, except in accordance with … an Act of the Parliament, and unless–

(a) the property is required for–
(i) a public purpose; or
(ii) a reason that is reasonably justified in a democratic society that has a proper regard for the rights and dignity of mankind …; and

(b) the necessity for the taking of possession or acquisition for the attainment of that purpose or for that reason is such as to afford reasonable justification for the causing of any resultant hardship to any person affected. …

**57. ENFORCEMENT OF GUARANTEED RIGHTS AND FREEDOMS.**

(1) A right or freedom … shall be protected by, and is enforceable in, the Supreme Court or the National Court … either on its own initiative or on application by any person who has an interest in its protection and enforcement …

(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 …

**58. COMPENSATION.**

…

(3) … damages may be awarded against any person who committed, or was responsible for, the infringement.

The PNG National Court of Justice and Supreme Court have applied these sections in a wide variety of contexts, including ordering compensation be paid by the State of PNG for actions of police destroying villages[84] and illegal logging on customary land.[85] It is fair to say that these courts have consistently striven to uphold the letter and spirit of these and other fundamental rights protected under the *PNG Constitution*.[86]

A recent decision of the PNG National Court of Justice linked the right to life protected in s 35 of the PNG Constitution to environmental harm. In Bernard v Duban, Kandakasi J refused to lift an interim injunction granted to customary landowners restraining a large gas development in the Western Province from proceeding due to failure to meet the requirements under the Oil and Gas Act 1998 (PNG) for a full-scale social mapping and landowner identification study (SMLIS).[87] Kandakasi J said, in rejecting the developer's argument that irreparable harm had not been established, that (footnote in original):[88]

> The Developer's argument with respect, fails to acknowledge the fact that a petroleum development has the potential unless proper measures are taken of upsetting and damaging for good the traditional landowners' way of life, environment, culture and tradition and matters of traditional value and importance to them. These can be beyond any value and repair. …
>
> Given the possible irreparable harm and damage highlighted above, it is critically important that there be careful and detailed SMLIS. Then based on such studies, the people who stand to be affected be informed of all implications. … It is not fair and certainly not right that the people should be ill prepared, kept in the dark and be expected or forced to accept any so called development imposed upon them, their

[84] See, eg, *Wemin v Kalasim* [2001] PGNC 58; N2134; *Salamon v Independent State of PNG* [1994] PNGLR 265; *Kirino v Independent State of Papua New Guinea* [1998] PGNC 149; [1998] PNGLR 351.

[85] See *Galeva v Paiso Co Ltd* (unreported, PNG National Court of Justice at Waigani, WS No 1200 of 2002, Davani J, 21 June 2011) [68]–[84].

[86] See, eg, *Namah v Pato* [2016] PGSC 13; SC1497, in which the Supreme Court unanimously struck down purported amendments to s 42 (Liberty of the person) of the *Constitution of the Independent State of PNG 1975* (PNG) pursuant to an agreement between the government PNG and Australia over holding asylum seekers on PNG's Manus Island.

[87] Bernard v Duban [2016] PGNC 121; N6299. I thank Cecilia Fonseca for drawing this case to my attention.

[88] Bernard v Duban [2016] PGNC 121; N6299, [105]–[106].

> environment, culture and tradition and as peoples. They have a universal and constitutionally guaranteed right to life[89] and not something short of that in the name of development.

The right to life protected in s 35 of the *PNG Constitution* has not yet been applied to environment-related damage involving climate change but this appears open based on Kandakasi J's reasoning in *Bernard v Duban* and the fourth national goal and directive principle stated in the *PNG Constitution.* This approach to s 35 is also consistent with the groundbreaking *Urgenda* case in which the Hague Court of Appeal held that the right to life protected by 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"[90] and this had been infringed by the State's lack of action in relation to climate change. It is well accepted that human rights legislation should be given a fair, large and liberal interpretation, rather than a literal or technical one.[91]

In addition, the environment-related aspects of the right to life or other aspects of the *PNG Constitution* may create a "nature's trust" doctrine[92] or something like the doctrine of intergenerational responsibility for the environment implied into the Philippines Constitution in *Oposa v Factoran*.[93] The fourth National Goal and Directive Principle is certainly consistent with a nature's trust doctrine being implied.[94]

The right to the full protection of the law in s 37 includes protection from unlawful environmental harm, material environmental harm or serious environmental harm under ss 10–13 of the *Environment Act 2000* (PNG). On their face and read in the proper context,[95] these sections are clearly "result offences" in which a certain result is an essential part of conduct constituting a given offence; therefore, that conduct may be relevantly regarded as local to PNG if the result occurs in PNG.[96]

The licence granted under the *Environment Protection Act 1970* (Vic) to AGL Loy Yang Pty Ltd to operate the Loy Yang A Power Station is not a permit or other authority prescribed in s 10 of the *Environment Act 2000* (PNG) as authorising environmental harm in PNG. The common law defence of statutory authority does not arise for offences under the *Environment Act 2000* (PNG) as this defence only applies to common law causes of action.[97] The only statutory defence available is compliance with the general environmental duty, stated in s 7 of the *Environment Act 2000* (PNG), of taking "all reasonable and practicable measures to prevent or minimise the harm". In the context of the severe, long-term harm that will be caused to PNG customary landowners by climate change, the availability of renewable energy to generate electricity, and the need to close existing coal-fired power stations earlier than their technically feasible lifetimes discussed further below, there is a strong argument that the operation of Loy Yang A Power Station does not comply with the general environmental duty and is unreasonable.

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[89] Section 35 of the Constitution *of the Independent State of PNG 1975* (PNG).

[90] *State of the Netherlands v Urgenda Foundation* (The Hague Court of Appeal, Case No 200.178.245/01, 9 October 2018) [40]. The Supreme Court of the Netherlands upheld this decision on 20 December 2019. See C McGrath, "Case Note: Urgenda Appeal Is Groundbreaking for Ambitious Climate Litigation Globally" (2019) 36 EPLJ 90.

[91] See, eg, *Coburn v Human Rights Commission* [1994] 3 NZLR 323, 333–334 (Thorp J), cited with approval in the context of interpreting beneficial and remedial legislation in *IW v Perth* (1997) 191 CLR 1, 12 (Brennan CJ and McHugh J), 39 (Gummow J) and 58 (Kirby J); [1997] HCA 30.

[92] See Mary Christina Wood, *Nature's Trust: Environmental Law for a New Ecological Age* (CUP, 2013).

[93] *Oposa v Factoran* (1993) 224 SCRA 792.

[94] I thank Kent Blore for raising this point with me.

[95] Including the objects stated in ss 4–5 and responsibility for environmental harm stated in ss 9–10. Note that: the *Constitution of the Independent State of PNG 1975* (PNG) s 109 states that in interpreting a PNG statute, there is no presumption against extra-territoriality; and *Interpretation Act 1975* (PNG) s 2A provides for the general operation of laws in PNG throughout the land, sea and airspace of PNG but does not imply PNG laws cannot apply to activities outside these areas that result in harm in PNG.

[96] *Brownlie v State Pollution Control Commission* (1992) 27 NSWLR 78, 84 (Gleeson CJ); 76 LGRA 419.

[97] See generally the discussion in *Ramu Nico Management (MCC) Ltd v Mineral Resources Authority* [2010] PGSC 22; SC1075 (Davani and Sawong JJ, Hartshorn J dissenting); *Medaing v Ramu Nico Management (MCC) Ltd* [2011] PGNC 95; N4340 (Cannings J); *Mediang v Ramu Nico Management (MCC) Ltd* [2011] PGSC 40; SC1144 (Hartshorn and Sawong JJ, Davani J dissenting).

The protection from unjust deprivation of property in s 53 of the *PNG Constitution* provides another possible basis for a constitutional claim. Many PNG cases suggest that s 53 is not limited to taking "possession" or "acquiring" property but also protects against destruction of property.[98] A liberal interpretation of s 53 such as this, rather than a literal or technical one,[99] may allow this section to extend to protecting customary landowners from destruction of their property (coral reefs) in this case.

In summary, it appears that transnational liability exists under the *PNG Constitution* and *Environment Act 2000* (PNG) for GHG emissions generated outside PNG that impact through climate change within PNG.

### *(b) Common Law*

Common law causes of action for private and public nuisance are also available for PNG customary landholders impacted by climate change. The elements of private nuisance are that:[100]

- 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:[101]

- the conduct of the defendant causes inconvenience, damage or harm to the general public;
- 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.

A key issue is whether the harm caused to PNG customary landowners by the generation of GHGs from Loy Yang A Power Station contributing to climate change is unreasonable. There is evidence it is and this evidence is growing, as discussed in the following section.

## *4. What Evidence Is Available to Establish the Cause/s of Action?*

The evidence available to establish the cause/s of action is a crucial consideration for any litigation. There are several key factual issues that need to be supported by evidence for the proposed litigation by PNG customary landowners against the operator of Loy Yang A Power Station. These include: the factual context of climate change, including impacts such as the expected loss of the coral reefs at 1.5°C and 2°C mean global temperature rises; the GHG emissions by the company; whether these emissions are reasonable and comply with the general environmental duty; the causal link to damages suffered by the PNG customary landowners; and quantification of those damages.

The factual context of climate change, including the expected loss of coral reefs, is unlikely to be disputed as the science of climate change and the impacts on parts of the ecosystem like coral reefs are so well established. These matters still need to be addressed in the evidence, but they are unlikely to be the main focus of the dispute. The main focus is likely to be the *causal link* between the company's emissions and the harm to customary landowners. This will be addressed in the next section by reference to framing the case around the carbon budget.

A secondary evidentiary issue is likely to be whether the company is acting unreasonably and contrary to the general environmental duty under the *Environment Act 2000* (PNG). In relation to this issue, there is evidence that burning brown coal at Loy Yang A Power Station to generate electricity is unreasonable and contrary to the general environmental duty (if not now, well before 2048 when AGL plans to close the power station). The evidence of this is growing and this changes the nature of what is "reasonable"

[98] See, eg, involving destruction of property by police in raids on villages: *Wemin v Kalasim* [2001] PGNC 58; N2134; *Salamon v Independent State of PNG* [1994] PNGLR 265; *Kirino v Independent State of Papua New Guinea* [1998] PGNC 149; [1998] PNGLR 351.

[99] See *Coburn v Human Rights Commission* [1994] 3 NZLR 323, 333–334 (Thorp J), cited with approval in the context of interpreting beneficial and remedial legislation in *IW v Perth* (1997) 191 CLR 1, 12 (Brennan CJ and McHugh J), 39 (Gummow J) and 58 (Kirby J); [1997] HCA 30.

[100] *Medaing v Ramu Nico Management (MCC) Ltd* [2011] PGNC 95; N4340, [65] (Cannings J); *Mediang v Ramu Nico Management (MCC) Ltd* [2011] PGSC 40; SC1144 (Hartshorn and Sawong JJ; Davani J dissenting).

[101] See the cases cited at n 100.

and what is needed to comply with the general environmental duty. For instance, in late 2018 Professor Frank Jotzo, an economist and energy expert from the Australian National University, stated 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 and:

> 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.[102]

There is also now evidence that committed emissions from existing and proposed global energy infrastructure (about 846 Gt $CO_2$), which includes the Loy Yang A Power Station, represent more than the entire remaining carbon budget if mean warming is to be limited to 1.5°C with a probability of 50–66% and perhaps two-thirds of the remaining carbon budget if mean warming is to be limited to below 2°C.[103] The take-away message from this is that the evidence is growing stronger of the contribution large polluters such as Loy Yang A Power Station make to the harm expected from climate change.

A further evidentiary issue is how to quantify the damage suffered by PNG customary landowners due to the company's emissions. Expert evidence will be required to quantify the extent that coral reefs and associated fisheries of the plaintiffs have already been impacted and how they will be impacted in the future by emissions from Loy Yang A Power Station contributing to climate change.

In summary, there are a range of evidentiary issues that need to be addressed. Some, such as the basic reality of climate change and the severe impacts expected to customary landowners, are likely to be conceded or at least not hotly contested. Even though some issues, such as proving a causal link, are likely to be fiercely contested, all of the evidentiary issues to establish the proposed constitutional and common law causes of action are surmountable at this point and growing stronger.

### *5. How Should the Evidence Be Presented/Framed to Best Explain the Facts and Avoid Defence Strategies to Avoid Liability?*

In addition to considering what evidence is available, a further crucial question is how the evidence should be presented/framed to best explain the facts and avoid defence strategies to avoid liability. These are key questions for any complex litigation. As lawyers representing the plaintiff customary landowners, you need to expect a dirty fight, where the defendant's lawyers will attempt to confuse the issues and throw dust in the eyes of the judge.[104] You should expect that the defendant will attempt to throw obstacles in the way of the trial occurring by raising any procedural and legal challenge it can, such as seeking further and better particulars of the claim. Procedural issues are considered further below. In terms of framing and presenting the evidence proving the claim, your question as a lawyer for the plaintiff is: how do I present the evidence clearly, so that the judge can understand it and not be misled by the defence strategies to confuse them?

The main contested evidentiary issue in this case is likely to be establishing the *causal link* and how to frame this issue needs careful consideration. In terms of proving the power station makes a material contribution to the harm caused by climate change to PNG customary landowners, the litigation can be framed around both the annual emissions compared to PNG's national emissions (the power station is double PNG's entire national annual emissions) as well as the carbon budget, discussed earlier. Comparison of the annual emissions from the power station and PNG's national emissions is simple conceptually and the scale of the company's emissions are obviously significant given that they are

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[102] Quoted in Giles Parkinson, "No Future: Even Existing Coal to Be Beaten by Renewables and Storage on Costs", *RenewEconomy*, 6 September 2018 <https://reneweconomy.com.au/no-future-even-existing-coal-to-be-beaten-by-renewables-and-storage-on-costs-51136>. See also Frank Jotzo et al, *Coal Transition in Australia: Preparing for the Looming Domestic Coal Phase-out and Falling Export Demand* (IDDRI and Climate Strategies, 2018) <https://coaltransitions.files.wordpress.com/2018/09/coal_australia_final.pdf>.

[103] Dan Tong et al, "Committed Emissions from Existing Energy Infrastructure Jeopardize 1.5°C Climate Target" (2019) 572 *Nature* 373.

[104] Figuratively speaking.

nearly double PNG's entire national emissions. The carbon budget is simple conceptually and is well supported by climate science.

The cause of action can be framed around the remaining carbon budget for the *Paris Agreement* goals of stabilising mean global temperature rises beneath 1.5°C or 2°C above pre-industrial levels, since these are goals agreed internationally and by both Australia and PNG. The remaining carbon budget (from 2018) for a 50% probability of exceeding 1.5°C is 300 gigatonnes (Gt) $CO_2$e and for 2°C is 1220 Gt $CO_2$-e.[105] As noted earlier, Loy Yang A Power station emits around 19 Mt $CO_2$-e per annum and plans to operate until 2048. Its cumulative emissions from 2018 to 2048 are, therefore, around 570 Mt $CO_2$-e. These emissions equal 0.2% of the remaining 1.5°C carbon budget and 0.05% of the remaining 2°C carbon budget. The budget is smaller and, hence, the power station's contribution is greater, if a greater safety margin is desired than simply a 50/50 chance but this level has conceptual attraction in the context of civil litigation where facts are decided on the balance of probabilities.

Framing the causal link around the carbon budget gives a simple and strong basis for arguing that the GHG emissions from Loy Yang A Power Station make a material contribution to the impacts of climate change globally and with respect to PNG customary landowners, including loss of their coral reefs.

### *6. What Remedies Are Available That a Court Will Realistically Grant?*

It is important to limit the remedies sought to what a court will realistically grant. In this context, limiting the relief sought by PNG customary landowners against the Australian company operating Loy Yang A Power Station to damages has two major advantages. The first is that, if the Australian company is found to be making a material contribution to the damage suffered by PNG customary landowners due to climate change, there is little or no discretion not to award damages. The second is that an award of damages is a money order that can be enforced in Australia under the *Foreign Judgments Act 1991* (Cth). The second issue will be considered further below in relation to procedural issues.

In relation to the first issue, it is well recognised that, even if a cause of action is established, a power to grant an injunction is at the court's discretion in all of the relevant facts and circumstances of the case.[106] This means that, if the PNG customary landowners sought an injunction ordering the Australian company to stop emitting GHGs, the court would need to consider issues such as the impact of the power station being closed down (even assuming the Australian company would comply with the injunction). It is simply not realistic to think any court would order a major power station to be closed down, potentially leading to power shortages in a large city such as Melbourne. A claim for damages, however, is very different.

By limiting any claim to seek only damages (and, possibly, a declaration), and not seeking an injunction that would shut Loy Yang A Power Station down, PNG customary landowners avoid the discretionary factors against relief being granted. The landowners thereby accept that the harm has and will occur. They simply say the Australian company should pay them for the damage the emissions cause to them. In the circumstances, this is a remedy that a PNG court would realistically award.

Damages can be assessed taking into account not only losses to food supply but also loss of spiritual and cultural connections.[107] The loss of food supply should be assessed based on market value of the goods and ecosystem services lost and the cost of replacing them[108] but there are complications to assessing these.

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[105] Based on: IPCC, n 2, Table 2.2; Malte Meinshausen, "Deriving a Global 2013–2050 Emission Budget to Stay below 1.5°C Based on the IPCC Special Report on 1.5°C" <https://www.climatechange.vic.gov.au/__data/assets/pdf_file/0018/421704/ Deriving-a-1.5C-emissions-budget-for-Victoria.pdf>.

[106] See (in Australia): *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335, 339–341 (Kirby P); 63 LGRA 361; (in PNG): *Medaing & Ors v Ramu Nico Management (MCC) Ltd* [2011] PGNC 95; N4340 (Cannings J); *Mediang & Ors v Ramu Nico Management (MCC) Ltd & Ors* [2011] PGSC 40; SC1144 per Hartshorn and Sawong JJ, Davani J dissenting.

[107] See, eg, Tim Anderson "Framework for Assessing Compensation for the Wrongful Loss of Customary Land in Papua New Guinea" (ActNOW! PNG, 2017) <http://actnowpng.org/publications/publication-framework-assessing-compensation-wrongful-loss-customary-land>.

[108] *Griffiths v Kerkemeyer* (1977) 139 CLR 161.

One complication in assessing damages is that the cost of replacing food supply from any particular coral reef can be expected to greatly increase in the future due to widespread impacts from climate change on coral reefs at regional and global scales damaging fisheries and, thereby, substantially increasing the cost of seafood both regionally and globally. A further complication is that these losses will occur in perpetuity and affect future generations, so calculating their value when assessing damages will presumably require some discount factor. However, these complications are relatively small details in the context of this case.

A claim for damages in this case would include components for both past harm and future harm. Coral reefs globally and in PNG have already been impacted by climate change,[109] including the emissions from Loy Yang A Power Station since 1997 when AGL Loy Yang Pty Ltd commenced operating it. Coral reefs are projected to decline by a further 70–90% if mean global temperatures are stabilised at 1.5°C above pre-industrial mean global temperatures with larger losses (>99%) at 2ºC above pre-industrial mean global temperatures.[110] The IPCC recently concluded:

> Warm water (tropical) coral reefs are projected to reach a very high risk of impact at 1.2°C, with most available evidence suggesting that coral-dominated ecosystems will be non-existent at this temperature or higher. At this point, coral abundance will be near zero at many locations and storms will contribute to "flattening" the three-dimensional structure of reefs without recovery, as already observed for some coral reefs. The impacts of warming, coupled with ocean acidification, are expected to undermine the ability of tropical coral reefs to provide habitat for thousand[s] of species, which together provide a range of ecosystem services (e.g., food, livelihoods, coastal protection, cultural services) that are important for millions of people.[111]

While damages are often limited to harm that has already been caused (including on a prospective basis in the future) rather than harm that will be *caused* in the future,[112] damages for the company's past emissions causing harm to PNG customary landowners should be substantial in itself. In addition, provisional damages for future harm has been recognised for injuries such as asbestosis where a claimant's physical or mental condition may deteriorate over time.[113] In such cases an immediate award of damages is granted based on the claimant's present condition and provision is made for the claimant to return within a specified time for a further award of damages if the disease or condition develops. While provisional damages for future impacts of climate change would be a new development for PNG, the PNG National Court of Justice has a broad power to make orders "as the nature of the case requires"[114] and s 22 of the *PNG Constitution* calls on the Court to give effect to rights recognised in the constitution and overcome any lack of procedural laws. In addition, what may qualify as actionable damage is "a question of fact and degree and ultimately of policy".[115]

The question of whether GHG emissions trigger a claim for prospective damage when they are emitted or when their effects are felt – such as the loss of coral reefs – has some similarities to asbestos litigation and whether the cause of action accrues when asbestos fibre is inhaled or when mesothelioma develops.[116] But the similarities with asbestos litigation only go so far because once GHG emissions from fossil fuels are emitted to the atmosphere it is inevitable (at least based on current policy settings)

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[109] IPCC, n 2, 222. Impacts on the Australia's Great Barrier Reef, immediately south of PNG, have received far greater study than PNG: eg, Terry Hughes et al, "Global Warming Transforms Coral Reef Assemblages" (2018) 556 *Nature* 492.

[110] IPCC, n 2, 10, 179.

[111] IPCC, n 2, 226 (cross references, confidence levels and citations omitted).

[112] See, eg, James Edelman, James Varuhas and Simon Colton, *McGregor on Damages* (Sweet & Maxwell, 20th ed, 2018) Ch 11 (Past and prospective damage).

[113] See, eg, *Amaca Pty Ltd v Banton* (2007) 5 DDCR 314; [2007] NSWCA 336.

[114] *National Court Rules 1983* (PNG) O 12 r 1.

[115] *Alcan Gove Pty Ltd v Zabic* (2015) 257 CLR 1, 7 [8] (French CJ, Kiefel, Bell, Keane and Nettle JJ); [2015] HCA 33.

[116] In that context, see the discussion in *Alcan Gove Pty Ltd v Zabic* (2015) 257 CLR 1, 7 [8]–20 [48] (French CJ, Kiefel, Bell, Keane and Nettle JJ).

that they will affect the global climate system immediately and those impacts will continue for centuries to millennia.[117]

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 will 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*:[118]

> 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, for example, have departed from the regime of liability for tort at common law (solidary liability) under which liability may be joint or several but each wrongdoer can be treated as the effective cause and therefore bear the whole loss.[119] Civil liability in Australia, for instance under the *Civil Liability Act 2002* (NSW), provides 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.[120] It is, therefore, necessary that the plaintiff sue all of the wrongdoers in order to recover the total loss. These are clearly important issues for the proposed litigation to resolve but damages should be significant even if the company were only held liable for the proportionate share of its contribution to the damage suffered by the plaintiffs.

### *7. What Court Should the Litigation Be Commenced in?*

The PNG National Court of Justice is the appropriate court to commence the litigation in. It is a superior court of unlimited jurisdiction and recognised in the *PNG Constitution* as the appropriate court to enforce guaranteed rights and to seek damages for their infringement.[121]

### *8. What Are the Procedural Obstacles and Can They Be Overcome?*

Two procedural issues that are important to consider for the proposed litigation in PNG against an Australian company with no registered office in PNG are: how service outside the jurisdiction is effected; and how any judgment can be enforced.

#### *(a) Service Outside the Jurisdiction*

To commence litigation against an Australian company that is not present in PNG, the PNG customary landowners would need to obtain leave from the National Court of Justice to serve the originating process (the Writ of Summons) on the company in Australia. To obtain leave, they need to satisfy the Court that: there is one or more ground under O 6 r 19 of the *National Court Rules 1983* (PNG) (*NCR*) allowing service outside PNG; they have a prima facie case; and the case is a proper one for service outside PNG.[122] As part of deciding that the case is a proper one for service outside PNG, the Court should be positively persuaded that the proceedings would not be stayed as an abuse of process on *forum non conveniens* grounds or for some other reason.[123] As relevant here, O 6 r 19 of the *NCR* provides that originating process may be served outside PNG where:

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[117] See IPCC, n 2.

[118] *Barker v Corus UK Ltd* [2006] 2 AC 572, 598 [60]; [2006] UKHL 20.

[119] The history of these reforms was discussed in *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, 624 [10]–627 [17] (French CJ, Hayne and Kiefel JJ); 644 [79]–648 [86] (Bell and Gageler JJ); [2013] HCA 10.

[120] *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, 624 [10] (French CJ, Hayne and Kiefel JJ); [2013] HCA 10.

[121] See *Constitution of the Independent State of PNG 1975* (PNG) ss 22, 57, 58.

[122] See *National Court Rules 1983* (PNG) O 6 r 20(2) and (4). These rules reflect the approach in Australia under the now repealed *Supreme Court Rules 1970* (NSW) Pt 10 r 1A, discussed in *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491; [2002] HCA 10 and is similar to the updated approach under, eg, the *Uniform Civil Procedure Rules 2005* (NSW) r 11.4 Sch 6.

[123] *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 564 (Mason CJ, Deane, Dawson and Gaudron JJ).

> (a) the proceedings are founded on a cause of action arising in PNG; or …
>
> (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 …
>
> (l) the proceedings concern the construction, effect or enforcement of an Act, or a regulation or other instrument having or purporting to have effect under an Act affecting property in PNG; or …
>
> (r) the proceedings concern the construction, effect or enforcement of an Act or a regulation or other instrument having or purporting to have effect under an Act.

There are, therefore, multiple grounds under which PNG customary landowners can apply to the National Court of Justice to exercise jurisdiction over a company in Australia. In this context, once a court's jurisdiction is properly invoked, it generally does not have a discretion to refuse to exercise that jurisdiction for diplomatic or political considerations. For instance, a majority of the Full Federal Court held in allowing an appeal in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* and granting leave to serve a company in Japan engaging in whaling in the Australian Whale Sanctuary adjacent to Antarctica:

> We take it to be settled law that provided the jurisdiction of the Federal Court is engaged by an action in respect of subject-matter with which the Court can deal, and the action is instituted by an applicant who has standing, and the action is not oppressive, vexatious or otherwise an abuse of process and, finally, the Court can assume jurisdiction over the defendant (by service or submission), the Court cannot refuse to adjudicate the dispute. The reason is explained by Brennan J in *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 239:
>
> > "Generally speaking, it is of the nature of a legal right that the person in whom it is vested is entitled to invoke the State's power to enforce it. For that purpose the courts are at the service of litigants, and the rule of law rests on the courts' duty to exercise their jurisdiction when litigants invoke it".
>
> It follows that, in our opinion, the judge was in error in refusing leave even if the pursuit of the claim was contrary to Australia's foreign relations.
>
> We are also persuaded that the primary judge was in error in attaching weight to what we would characterise as a political consideration. It may be accepted that whilst legal disputes may occur in a political context, the exclusively political dimension of the dispute is non-justiciable. It is appropriately non-justiciable because the court lacks competence to resolve disputes and issues of an exclusively political type, the resolution of which will involve the application of non-judicial norms: compare *Japan Whaling Association v American Cetacean Society* [1986] USSC 161; (1986) 478 US 221 at 230.[124]

In this context, there appears to be no reason why the PNG National Court of Justice would decline to assume jurisdiction. For instance, the Court would not be a *forum non conveniens* in the sense it is so inappropriate a forum that the continuation of the proceedings would be oppressive and vexatious to the defendant.[125] The proceedings would not "be productive of injustice [and] oppressive in the sense of seriously and unfairly burdensome, prejudicial or damaging, or vexatious, in the sense of productive of serious and unjustified trouble and harassment."[126] Ordinarily, establishing a court is a *forum non conveniens* requires some appropriate foreign tribunal to be identified whose jurisdiction the defendant is amenable to and which would entertain the particular proceedings at the suit of the plaintiff.[127]

There is no question that the National Court of Justice is not a *forum non conveniens* where: the harm occurs in PNG; the court is provided with original jurisdiction in the proceedings by ss 57 and 58 of the *PNG Constitution*; and PNG customary landowners cannot obtain relief in any foreign court or forum for the damage. On this final point, the Ok Tedi litigation in the 1990s is notable. It involved a

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[124] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425, 430 [10], [12] (Black CJ and Finkelstein J); [2006] FCAFC 116. Moore J, 434–435 [38] agreed that the effect of the proceedings on foreign relations was irrelevant but dissented on the result due to futility.

[125] *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 247–248 (Deane J); *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 564 (Mason CJ, Deane, Dawson and Gaudron JJ).

[126] *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 521 [78] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); [2002] HCA 10.

[127] *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 248 (Deane J).

claim by PNG customary landowners in the Victorian Supreme Court 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.[128]

The principle of international comity, that, "in general, courts will not adjudicate upon the validity of acts and transactions of a foreign sovereign State within that sovereign's own territory"[129] does not indicate that the PNG National Court of Justice should refuse leave to serve the proceedings in Australia. The proceedings do not seek to adjudicate upon the validity of acts and transactions in Australia. Rather, the proceedings concern liability for harm *in PNG* from emissions from activities in Australia. The harm in question occurs within the territory of PNG, not Australia.

A further issue going to the exercise of discretion when seeking leave from a court to serve initiating process outside the jurisdiction is the ability to enforce the remedy sought.[130] That too, weighs in favour of the grant of leave to serve the originating process in Australia because, as discussed in the next section, an award of damages can be enforced in Australia.

### *(b) Enforcement of a Judgment in Australia*

An order for damages for climate change impacts (and costs) against the operator of Loy Yang A Power Station from the PNG National Court of Justice can be enforced in Australia. The PNG National Court of Justice is a superior court listed in the *Foreign Judgments Regulations 1992* (Cth). As such, an order for damages and costs from it could be registered under the *Foreign Judgements Act 1991* (Cth) (*FJA*) and then enforced in the Victorian Supreme Court.[131] Such an order would not be an order in antitrust proceedings that may be made unenforceable under s 9 of the *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth).

Allsop CJ observed in an extra-curial article that, "There is no coherent Australian regime for the recognition and enforcement of foreign judgments" [and] problems still "lurk in the background" even under the FJA due to reliance on State and Territory court rules.[132] Even so, the FJA provides a simplification of the common law rules particularly in the context of a court recognised under the regulations to the Act.

The FJA "contemplates that an application for registration of a foreign judgment will be made ex parte and that notice of registration will be given to the judgment debtor, who may then apply to set aside the registration under s 7."[133]

Under s 7 of the *FJA* there are a number of grounds for a defendant to apply to set aside a judgment registered under it. A ground that the operator of Loy Yang A Power Station may rely upon is "that the enforcement of the judgment … would be contrary to public policy".[134] There is an established body of

[128] *Dagi v Broken Hill Pty Co Ltd (No 2)* [1997] 1 VR 428, 441–442 (Byrne J). The case ultimately settled for an undisclosed sum: Holly, n 13, 54.

[129] *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd [No 2]* (1988) 165 CLR 30, 40–41 (Mason CJ, Wilson, Deane, Dawson, Toohey, Gaudron JJ) and cases cited therein. The "Act of State" doctrine or principle reflects international comity: *Dagi v Broken Hill Pty Co Ltd (No 2)* [1997] 1 VR 428, 441 (Byrne J).

[130] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425, 430[14]–433 [28] (Black CJ and Finkelstein J); 436 [43]–438 [50] (Moore J).

[131] See generally regarding the FJA: *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1, 13 [20]–17 [34] (French CJ, Kiefel, Bell, Gageler and Gordon JJ) and 23 [62]–[63] (Keane and Nettle JJ); [2015] HCA 36; *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31, 45 [19]–46 [25] (French CJ and Kiefel J), 77 [162]–78 [166] and 93–94 [213] (Nettle and Gordon JJ); [2015] HCA 43.

[132] James Allsop, "Incoherence in Australian Private International Laws" [2013] *Federal Judicial Scholarship* 8.

[133] *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31, 93–94 [213] (Nettle and Gordon JJ); [2015] HCA 43.

[134] *Foreign Judgments Act 1991* (Cth) s 7(2)(xi).

case law on this ground.[135] The starting point is Cardozo J's oft-cited decision in *Loucks v Standard Oil Co of New York*:[136]

> A right of action is property. If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him. We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home … The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep rooted tradition of the common weal.

Tamberlin J stated in *Stern v National Australia Bank*:[137]

> The thread running through the authorities is that the extent to which the enforcement of the foreign judgment is contrary to public policy must be of a high order to establish the defence. A number of the cases involve questions of moral and ethical policy; fairness of procedure, and illegality, of a fundamental nature.

While the courts are generally slow to invoke public policy to refuse to enforce a foreign judgment,[138] one of the rare exceptions is where a court "would be required to act in a way which would jeopardise national interests".[139] A famous Australian example of public policy considerations stopping transnational litigation is found in the *Spycatcher* case (though it did not involve a foreign judgment).[140] In that case the Attorney-General of the United Kingdom sued a publisher and the author of the *Spycatcher* book in the Supreme Court of NSW claiming an injunction to restrain the publication of the book which contained information that had been acquired while the author was an officer of the British security service. The High Court held the claim was not maintainable in an Australian court on public policy grounds. In a separate judgment generally concurring with the majority, Brennan J stated:

> The public policy of the law throughout Australia precludes an Australian court from enforcing a claim which is damaging to Australian security and foreign relations.[141]

The High Court was particularly concerned in the *Spycatcher* case that the plaintiff's action was to protect the intelligence secrets of a foreign State. No such issue would arise in the proposed litigation by PNG customary landowners against the company operating the Loy Yang A Power Station. In addition, such litigation does not involve an action for the enforcement of a penal, revenue or other public law of a foreign State and they do not constitute the assertion of "governmental interests of a foreign State".[142] As such, there "is nothing in this case of the character of a governmental interest in the sense in which that concept is applied in the Australian authorities, that is, as the exercise of a power peculiar to government."[143]

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[135] See the cases cited in *Jenton Overseas Investment Pte Ltd v Townsing* (2008) 21 VR 241; [2008] VSC 470; *LFDB v SM* (2017) 256 FCR 218, [29]–[43] (Besanko, Jagot and Lee JJ); [2017] FCAFC 178. Similar considerations apply to refusing to apply choice of law clauses in contracts: *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418, 445–447 (Toohey, Gaudron and Gummow JJ); Michael Douglas and Nicholas Loadsman, "The Impact of the Hague Principles on Choice of Law in International Commercial Contracts" (2019) 19(1) *Melbourne Journal of International Law* 1, 21–23.

[136] *Loucks v Standard Oil Co of New York* (1918) 224 NY 99, 110–111.

[137] *Stern v National Australia Bank* [1999] FCA 1421, [143]. On appeal the Full Federal Court found no error of principle in Tamberlin J's judgment: *Stern v National Bank Australia Ltd* (2000) 171 ALR 192, [78] (Hill, O'Connor and Moore JJ); [2000] FCA 294.

[138] See *Vervaeke v Smith* [1983] AC 145, 164; *De Santis v Russo* (2001) 27 Fam LR 414, [19] (Atkinson J); [2001] QSC 65.

[139] See *De Santis v Russo* (2001) 27 Fam LR 414, [21] (Atkinson J); [2001] QSC 65; PB Carter, "The Role of Public Policy in English Private International Law" (1993) 42 *International & Comparative Law Quarterly* 1, 4–5.

[140] *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30. See also, in particular, *Evans v European Bank Ltd* (2004) 61 NSWLR 75, 85 [37]–96 [89] (Spigelman CJ with whom Handley and Santow JJA agreed); [2004] NSWCA 82.

[141] *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 50.

[142] See *Evans v European Bank Ltd* (2004) 61 NSWLR 75, 91 [62]–92 [63] (Spigelman CJ with whom Handley and Santow JJA agreed); [2004] NSWCA 82.

[143] *Evans v European Bank Ltd* (2004) 61 NSWLR 75, 96 [89] (Spigelman CJ with whom Handley and Santow JJA agreed); [2004] NSWCA 82.

As noted earlier, what can be called "political considerations" in proceedings involving diplomatic and political issues are generally regarded as non-judiciable and not entertained by the courts.[144]

In the context of PNG customary landowners seeking to enforce an award of damages against an Australian company for its contribution to climate change, the question of public policy considerations would be likely to be decided, ultimately, by the High Court. At the very least, PNG customary landowners seeking to enforce their fundamental human rights, such as the right to life, who have established a causal link between a company polluting their environment situated in Australia and the damage they are suffering would have a strong case *in favour of* their award of damages not being defeated on public policy grounds.

It would be remarkable for Australian courts to effectively shield Australian companies from damages claims arising from harm occurring in foreign countries that involved breaches of human rights such as the right to life. Such fundamental human rights are recognised, not only in the *PNG Constitution*, but by the *Universal Declaration of Human Rights.*[145] Australia was a key proponent and voted in favour of that declaration. The right to life and a right to protection from unlawful interference with a person's family or home are also protected under the *International Covenant on Civil and Political Rights*, of which Australia is a party[146] and has incorporated into domestic law.[147] Other human rights protected under international law include, "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing" under the *International Covenant on Economic, Social and Cultural Rights*, of which Australia is a party.[148] Shielding an Australian company from human rights infringements would be contrary to these international legal obligations[149] and would also be contrary to the United Nation's *Guiding Principles on Business and Human Rights*.[150]

The public policy ground for setting aside a judgment under s 7 of the *FJA* should be construed consistently with Australia's obligations under international treaty and customary law.[151] In addition to international human rights obligations, international treaty and customary law impose numerous obligations on Australia that weigh heavily against public policy being used to set aside a judgment in this case under s 7 of the *FJA*. These obligations include the "no-harm" rule to avoid activities in Australia that cause significant harm to the environment of another state.[152]

In the circumstances and based on past case law,[153] it is unlikely that Australian courts would refuse to enforce an award of damages by the PNG National Court of Justice to PNG customary landowners for

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[144] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425, 430 [10], [12] (Black CJ and Finkelstein J); [2006] FCAFC 116. Moore J, 434–435 [38] agreed that the effect of the proceedings on foreign relations was irrelevant but dissented on the result due to futility.

[145] Adopted by the UN General Assembly as Resolution 217 on 10 December 1948.

[146] *International Covenant on Civil and Political Rights*, done in New York, opened for signature 16 December 1966, 1980 [ATS] 23 (entered into force generally for Australia (except Art 41), 23 March 1976) Arts 6 and 17.

[147] Rights under it are the core of the definition of "human rights" in the *Australian Human Rights Commission Act 1986* (Cth) and it is annexed as Sch 2 to that Act. It is also incorporated at a state and territory level under the *Charter of Human Rights and Responsibilities Act 2006* (Vic), *Human Rights Act 2004* (ACT), and the *Human Rights Act 2019* (Qld).

[148] *International Covenant on Economic, Social and Cultural Rights*, done in New York, opened for signature 16 December 1966, 1976 [ATS] 5, (entered into force for Australia, 10 March 1976) Art 17.

[149] See, in particular, Robert McCorquodale, "Corporate Social Responsibility and International Human Rights Law" (2009) 87 *Journal of Business Ethics* 385; Holly, n 13.

[150] United Nations, *Guiding Principles on Business and Human Rights* (United Nations, 2011) <https://www.unglobalcompact.org/library/2>; discussed in Holly, n 13.

[151] *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31, 70–71 [134] and [137] (Gageler J); [2015] HCA 43 in the context of the *FJA*, citing *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J); [1995] HCA 20.

[152] See Voigt, n 19, 156–159.

[153] See, eg, *Evans v European Bank Ltd* (2004) 61 NSWLR 75, 85 [37]–96 [89] (Spigelman CJ with whom Handley and Santow JJA agreed); [2004] NSWCA 82.

the harm caused by GHG emissions from the Loy Yang A Power Station based on fundamental human rights.

In this context it can be noted that there is some possibility that the Australian Government would change the law to defeat an award of damages and costs in this case being enforceable in Australia, thereby attempting to shield Australian companies from such claims if the courts refused to do so. However, speculation about such future legislative changes should not prevent a legitimate case from proceeding based on existing laws.

### *9. What Resources Are Needed and Available for the Litigation (ie, Money, Experts and Lawyers)?*

It is important to consider what resources are needed for complex litigation even though lawyers and experts may act for no fee (pro bono) or reduced fees in public interest litigation.

Litigation by PNG customary landholders in the PNG National Court of Justice against a large Australian company would involve multiple stages and, most likely, several appeals. The first step is to apply for leave to serve outside the jurisdiction. This is an ex parte application that may take one day. Upon service being effected in accordance with leave being granted, the defendant company may choose to ignore the proceedings entirely (a dangerous course in the circumstances) or file a conditional appearance (limited to challenging the court's jurisdiction) or an unconditional appearance. If the matter proceeds to trial with the company actively defending the substantive issues, the factual issues in dispute would be likely to narrow to causation and the assessment of damages. Depending on what remains in dispute, the trial may take three days or longer. The trial decision would be likely to be appealed to the Supreme Court of PNG, which would also be likely to involve several days of hearing.

If damages are awarded and this survives appeal, the PNG customary landowners can register the judgment under the FJA, as discussed above. The respondent company could apply to have the judgment set aside on, for instance, public policy grounds. Again, any decision by a trial court on this would be likely to appeal and, ultimately, is likely to end in the High Court of Australia.

The resources required to conduct this complex litigation are, therefore, considerable. In this context it is noteworthy that, in the USA, a philanthropist has recently donated USD 500 (AUD 715) million to shut down US coal-fired power stations.[154] Clearly, there are substantial philanthropic funds potentially available to support such litigation.

### *10. How Do You Avoid Being Overwhelmed by a Big Opponent and Complexity?*

When all other things have been considered, it is worth stepping back and asking as a final question: how do we avoid being overwhelmed by a big opponent and complexity? Even government regulators can be overwhelmed by the scale of complex litigation. For instance, Austin J observed in dismissing an application by the Australian Securities and Investments Commission (ASIC) in complex proceedings arising out of the collapse in May 2001 of a large Australian-listed company, One.Tel Ltd, and its local subsidiaries, after a case involving 232 hearing days, 425 exhibits, 37 witnesses, 16,642 pages of transcript, and 4,384 pages of written submissions:

> [T]here is a real question whether ASIC should ever bring civil proceedings seeking to prove so many things over such a period of time as in this case. … Instead [of a more limited case that might have been brought by ASIC], we have had a case which seeks to prove the financial condition of a large multinational corporate group with various businesses, some in start-up mode and some more established, over a period of four months, with a view to establishing not one but many breaches of the statutory duty of care and diligence. I wonder whether that is beyond the bounds of reasonable scope of civil litigation.[155]

Austin J's observations bring into stark relief why it is vital in complex litigation to deliberately limit the scope and the number of defendants to avoid being overwhelmed. In this context, the proposed litigation

[154] ABC Reuters, "Billionaire Michael Bloomberg Pledges $715 Million to Close US Coal Power Plants", *ABC News*, 8 June 2019 <https://www.abc.net.au/news/2019-06-08/michael-bloomberg-donates-$us500-million-to-climate-change/11193712>.

[155] *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1, [65]; [2009] NSWSC 1229.

by PNG customary landowners is undoubtedly complex but, by focusing the case on a single large emitter, it is feasible to avoid being overwhelmed.

## V. Conclusion

An important question for lawyers to answer for their clients is: who can be sued for losses due to climate change? Few past cases have sought damages from polluters directly, but this will undoubtedly change as more people suffer loss due to climate pollution. The 10 key questions examined in this article provide a framework for considering future potential cases. The case study of PNG customary landowners suing Australia's largest single GHG emitter is one such potential future case. Transnational climate litigation such as this is a relatively new frontier for climate litigation, but its potential is immense. Any existing laws in countries where damage occurs that are "result offences" can be used as the basis for a claim against large corporate polluters in other countries. The prospect that damages may be awarded and enforced through national court systems against large climate polluters in overseas countries has immense implications for the global climate regime. A successful claim against Australia's largest carbon polluter will open the way to a vast new field of climate litigation against other large polluters, not only in Australia but in other countries such as the US where foreign judgements comprising money orders such as damages may be enforced.