

# Establishing liability for climate damages will drive a wave of future litigation

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**MONASH**  
University

**CHANGE MAKERS**

*THOUGHT LEADERSHIP SERIES*

**Can Litigation Stop the  
Climate Emergency?**

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Firefighters at Nowra, NSW, January  
2020. Saeed Khan / AFP / Al Jazeera

# Change Makers: Can Litigation Stop the Climate Emergency? [280 registrations]



## Description

The intercontinental effects of Climate Change have never been more evident, as the world comes to understand what is at stake in a Global Pandemic.

The deteriorating global climate represents an existential challenge to the ideals of justice and fairness, to the Rule of Law, to other species and perhaps even to the whole fabric of human civilisation.

Many countries and some corporations are beginning to embrace drastic reductions in greenhouse emissions. But other governments and high-emitting corporations continue to deny responsibility for their own climate-changing policies and operations.

What legal responsibility do governments and corporations have when it comes to how they manage climate change?

Could strategic litigation in Australia turn the tide in favour of responsible emissions reductions, and ensure support of Australia's legal obligations under the 2015 Paris Agreement?

This panel discussion, moderated by Prof. John Thwaites of ClimateWorks Australia, will update private lawyers, in-house counsel and judiciary on the latest developments in this field.

[I want to focus on likely future developments]

Contributing panellists include Emrys Nekvapil of the Victorian Bar, Ariane Wilkinson of Environmental Justice Australia, Assoc. Prof. Gerry Nagtzaam of Monash Law and Chris McGrath, of the Queensland Bar.

# Context of seminar

1. Climate change causing severe impacts in Australia and globally (e.g. Black Summer Bushfires; GBR bleaching, etc).
2. Global & Australian responses inadequate
3. Groundbreaking litigation already occurring:
  - Urgenda decisions in the Netherlands (2016-2020)
  - Gloucester Resources case 2019
  - McVeigh v REST settlement 2020
  - Cases discussed by Emrys & Ariane

# Outline

1. Professional ethics of climate litigators
2. Establishing liability for climate damages will drive a wave of future litigation:
  - A causal link requires a “material contribution”
  - Liability of individual corporations & corporate groups
  - Class actions with commercial litigation funding

# 1. Professional ethics of climate litigators:

- It is our job (as lawyers) to find remedies for damage suffered by our clients.
- It is unexceptional, perfectly ethical and not some political statement to do that in the context of seeking remedies for damage caused by climate change.

## 2. Establishing liability for climate damages will drive a wave of future litigation.

Reference:

Chris McGrath “Identifying Opportunities for Climate Litigation: A Transnational Claim by Customary Landowners in Papua New Guinea against Australia’s Largest Climate Polluter” (2020) 37(1) *Environmental and Planning Law Journal* 42-66 ([link](#))

## **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;
- 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), which means that liability is largely unrealised.

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 becomes available (e.g. from litigation funders such as Omni Bridgeway).

# Liability exists for any “material contribution”

“If the defendant’s breach has ‘materially contributed’ 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.”

: *Henville v Walker* (2001) 206 CLR 459 at 493 [106] (McHugh J).

# What is a “material contribution” to climate change?



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

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

**Australia's largest single emitter =  
AGL Loy Yang Pty Ltd (LYPL) the  
company that operates the Loy  
Yang A Power Station in Victoria**



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

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

LYPL has emitted  $\sim 19$  Mt CO<sub>2-e</sub> each year since 1997 and plans to operate it until 2048, emitting around 950 Mt CO<sub>2-e</sub> in total.



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

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

In comparison to LYPL (~19 Mt CO<sub>2-e</sub>/yr & 950 Mt CO<sub>2-e</sub>, in total over 50 years) Preston CJ found in *Gloucester Resources* that emissions over the 12-year life of the mine of at least 37 Mt CO<sub>2-e</sub> 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”.

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

## Conclusion:

LYPL makes a “material contribution” to climate change and is, therefore, liable for the damage caused by climate change, at least proportional to its contribution.

The insurance industry's loss footprint for the Australian bushfires of 2019/2020 is estimated at A\$1.9 billion (US\$1.3 billion).

Source: <https://www.insurancejournal.com/news/international/2020/07/07/574617.htm>

LYPL's contribution (0.2%) for a \$1.9 billion loss = \$3.8 million

**What about class actions against  
a corporate group, such as  
BHP Billiton?**

## Note for parent company liability:

*Vedanta Resources PLC v Lungowe* [\[2019\] UKSC 20](#), which involved litigation in the UK relating to pollution in Zambia by a subsidiary company of a parent company.

A parent company that exercised a sufficiently high level of supervision and control of the activities by its subsidiary, with sufficient knowledge of the propensity of those activities to cause harm, may be liable for the harm due to breaching a duty of care.

# The 20 firms behind a third of all global carbon emissions

Tonnes of carbon dioxide and methane contributed between 1965-2017, and the total %

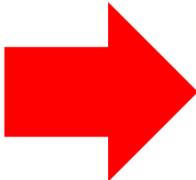
	mtCO2e		% of total
Saudi Aramco, Saudi Arabia	59,262	●	4.38%
Chevron, USA	43,345	●	3.20%
Gazprom, Russia	43,230	●	3.19%
ExxonMobil, USA	41,904	●	3.09%
National Iranian Oil Company, Iran	35,658	●	2.63%
BP, UK	34,015	●	2.51%
Royal Dutch Shell, The Netherlands	31,948	●	2.36%
Coal India, India	23,124	●	1.71%
Permex, Mexico	22,645	●	1.67%
Petróleos de Venezuela, Venezuela	15,745	●	1.16%
PetroChina / China National Petroleum, China	15,632	●	1.15%
Peabody Energy, USA	15,385	●	1.14%
ConocoPhillips, USA	15,229	●	1.12%
Abu Dhabi, United Arab Emirates	13,840	●	1.01%
Kuwait Petroleum Corp, Kuwait	13,479	●	1%
Iraq National Oil Company, Iraq	12,596	●	0.93%
Total SA, France	12,352	●	0.91%
Sonatrach, Algeria	12,302	●	0.91%
BHP Billiton, Australia	9,802	●	0.72%
Petrobras, Brazil	8,676	●	0.64%

Total  
1,354,388

Top 20  
480,168



Australia's BHP Billiton is the 19<sup>th</sup> largest emitter in history. It has emitted ~0.72% of global historic greenhouse emissions.



SOURCE: CLIMATE ACCOUNTABILITY INSTITUTE

BHP Billiton has emitted  $\sim 0.72\%$  of global historic greenhouse emissions.

$0.72\%$  of a \$1.9 billion loss = \$14 million.

## **Conclusions & (3) key messages:**

**Can Litigation Stop the Climate Emergency  
[getting worse]?**

- 1. Litigation can make a massive difference to the future by recognising liability of large corporate polluters and compensating for damage.**

## **Conclusions & (3) key messages:**

2. Damages for the harm caused by companies making a material contribution to climate change is very likely to be established under domestic laws and will be a major growth area for future climate litigation.
3. As soon as damages become available and litigation funders see a commercial return on funding litigation in this area, we can expect a wave of litigation against large polluters and large bankruptcies. Those are real risks that need to be priced into investments now.

**Many important areas of ongoing research:**

Thanks to the Monash University Climate Justice Clinic for research assistance into quantifying climate damages.

See: <https://www.monash.edu/law/home/cle/clinics/The-Climate-Justice-Clinic>