



Identifying opportunities for climate litigation in or involving Australia

Dr Chris McGrath

UMelb Climate Litigation Workshop – 22 July 2019

Photo: Loy Yang A Power Station, Victoria (Source: The Australian)

Seminar outline

1. Two propositions about climate litigation
2. Identifying future climate litigation opportunities:
 - o 10 key issues for identifying future climate litigation opportunities.
 - o A case study of potential litigation by PNG customary landholders against Australia's largest climate polluter for climate damages.

Two propositions about climate litigation

Proposition 1:

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

Because, as Gageler J said in *Clubb v Edwards* [2019] HCA 11 at [137] in the context of why courts should not consider hypotheticals:

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

Proposition 2:

Liability for climate change is widespread but largely unrealised.

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

Billions of people and trillions of dollars of property will be impacted by climate change. Where someone suffers loss, judges strive to find remedies, however imperfect.

10 *Auckland University Law Review* Vol 24 (2018)

Climate Change: Is the Common Law Up to the Task?

SAUL HOLT* AND CHRIS MCGRATH† @ page 11

The reality of climate change, and the resulting damage to people and property, will demand legal remedies. Much of the harm — such as the inundation of entire islands in the Pacific to the point of extinction⁷ — 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.

Remedies such as damages go some way to redress the harm caused by climate change, and people who suffer losses due to climate change will be entitled to pursue governments, companies and individuals who are responsible for those losses. Many cases will not succeed for a wide variety of reasons, but that is normal in any area of litigation. The scale of loss due to climate change, and the corresponding likely large number of litigants seeking redress in the future, means that many cases will also succeed. Decisions such as *Buller Coal* and *Adani Mining* are not an impenetrable wall that will stop future inundation of climate litigation.

Identifying future climate litigation opportunities:

- 10 key issues
- A case study of potential litigation by PNG customary landholders against Australia's largest climate polluter for climate damages.

Issues for identifying future climate litigation opportunities:*

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

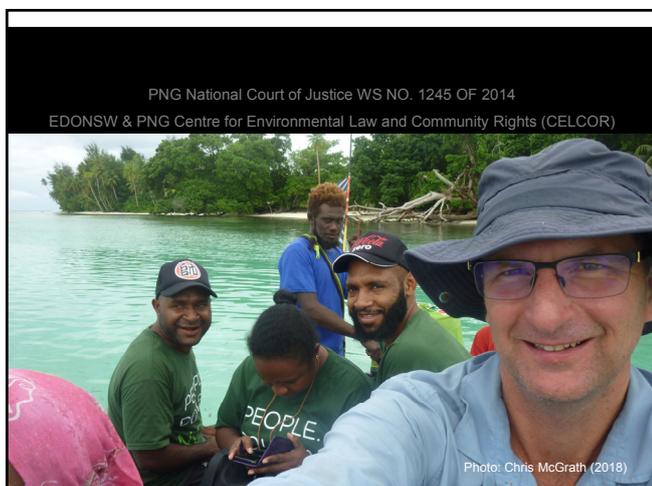
* These issues overlap & are built on McGrath C: "Flying foxes, dams & whales: Using federal environmental laws in the public interest" (2008) 25 EPLJ 324 at 328.

Issue 1:

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



Photo: indopacificimages



PNG National Court of Justice WS NO. 1245 OF 2014
EDONSW & PNG Centre for Environmental Law and Community Rights (CELCOR)

Photo: Chris McGrath (2018)



Source: Climate Change Science Program partners 2011. <https://www.pacificclimatechangeobservatory.org/>



New Hanover litigation for illegal logging (PNG National Court of Justice WS NO. 1245 OF 2014).
Abandoned logs on New Hanover, December 2019. Photo: EDONSW



Photo: Chris McGrath (2018)

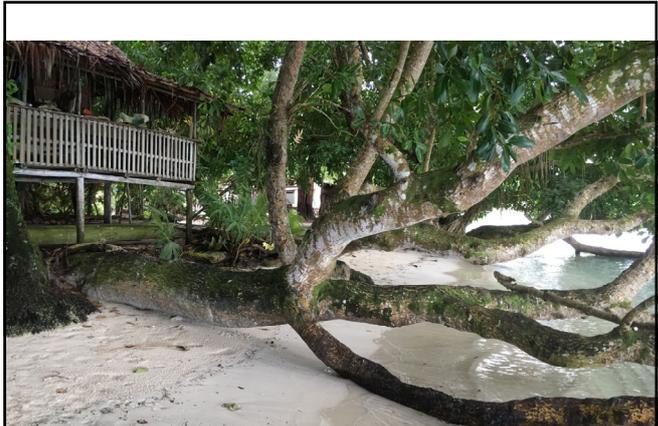


Photo: Chris McGrath (2018)

Evening meals on the island comprised seafood caught that day on the adjacent coral reef



Photographer: unknown



Damage to coral reefs is damage to customary ownership rights, which gives standing to sue

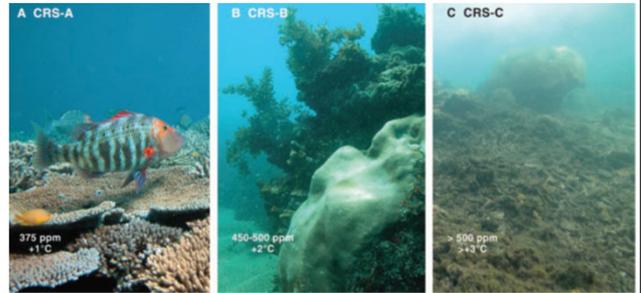
See, e.g. *Medaing v Ramu Nico Management (MCC) Ltd* [2011] PGNC 95.
Photo: Tsoi Island near New Hanover by Chris McGrath (2018)

Article 2 of Paris Agreement sets (hard) 2°C and (aspirational) 1.5°C targets

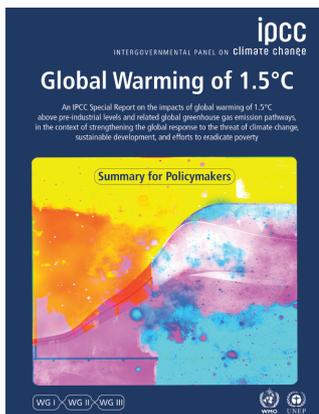
Article 2

1. This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:
 - (a) Holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;
 - (b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production;
 - (c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.
2. This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

Expected loss of coral reefs at 1.5°C or 2°C



Expected condition of coral reefs under three different climate scenarios: A. Approximately current levels. B. 450-500 ppm CO₂ and 2°C warming. C. Greater than 500 ppm CO₂ and >3°C warming. Source: Hoegh-Guldberg O, et al. *Coral Reefs under Rapid Climate Change and Ocean Acidification*. Science 318: 1737–1742 (2007).



Released 8 October 2018

“Coral reefs ... are projected to decline by a further 70–90% at 1.5°C (*high confidence*) with larger losses (>99%) at 2°C (*very high confidence*). ...

Tropical coral reefs will reach a *very high risk* of impact at 2°C with most available evidence suggesting that coral dominated ecosystems will be non-existent at this temperature or higher (e.g., coral abundance near zero in most locations, intensifying storms ‘flattening’ reefs’ 3-dimensional structure) (*high agreement, robust evidence*). Impacts at this point (coupled with ocean acidification) are likely to undermine the ability of tropical coral reefs to provide habitat for the current high levels of biodiversity as well as a range of ecosystem services important for millions of people (e.g., food, livelihoods, coastal protection, cultural services). ...”

Intergovernmental Panel on Climate Change (IPCC), *Global Warming of 1.5°C: an IPCC special report* (IPCC, Geneva, 8 October 2018)

“Tropical coral reefs face very high risks of becoming unsustainable as coral dominated ecosystems if warming exceeds 1.5°C. A 1.5°C world is better for coral reefs than a 2°C world, in which coral reefs mostly disappear. Even with warming up until today (0.87°C), a substantial proportion of coral reefs have experienced large scale mortalities that are causing them to rapidly contract. In the last 3 years alone, large coral reef systems such as the Great Barrier Reef (Australia) have lost as much as 50% of their shallow water corals. These changes are part of a series of heat stress impacts that began in the early 1980s events. ...

Even achieving emission reduction goals consistent with the ambitious goal of 1.5°C under the Paris Agreement will result in the further loss of 90% of reef-building corals compared to today, with 99% of corals being lost under warming of 2°C or more above the pre-industrial period.”

Intergovernmental Panel on Climate Change (IPCC), *Global Warming of 1.5°C: an IPCC special report* (IPCC, Geneva, 8 October 2018)

Can a customary landholder sue for climate damages such as loss of coral reefs?

If customary landholders on New Hanover will suffer large damages due to climate change, why can't they obtain a remedy from the law?

If our (environmental) laws don't deal with the biggest threat to the environment, there is something seriously wrong with them.

Issue 2:

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

If possible, limit any litigation to one corporation and one activity.

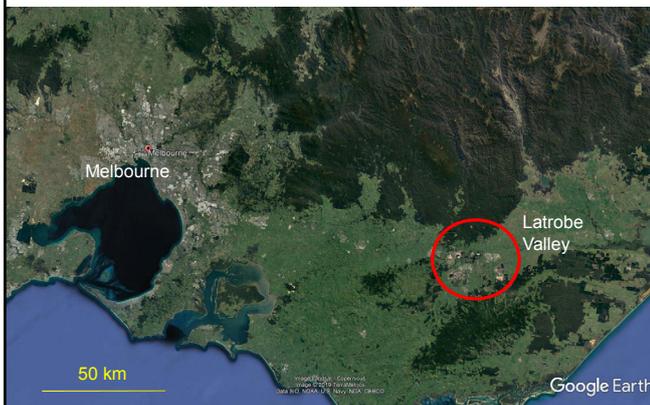
Trying to sue multiple, large corporations for multiple activities simultaneously multiplies the complexity exponentially.

You can simply be overwhelmed.

Choose the largest, single polluter in Australia:

The operator of Loy Yang A Power Station in the Latrobe Valley.

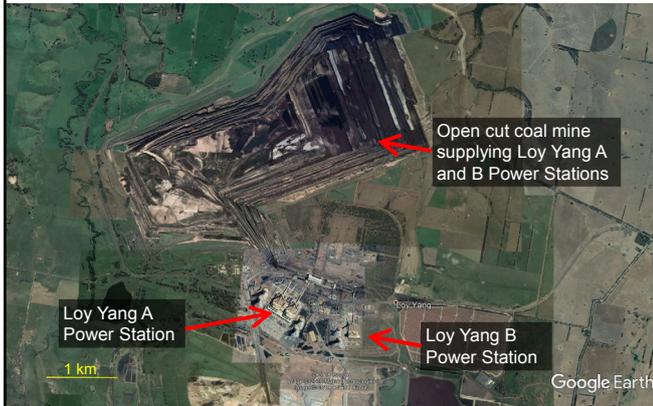
Loy Yang A Power Station is located in the Latrobe Valley, 160km east of Melbourne



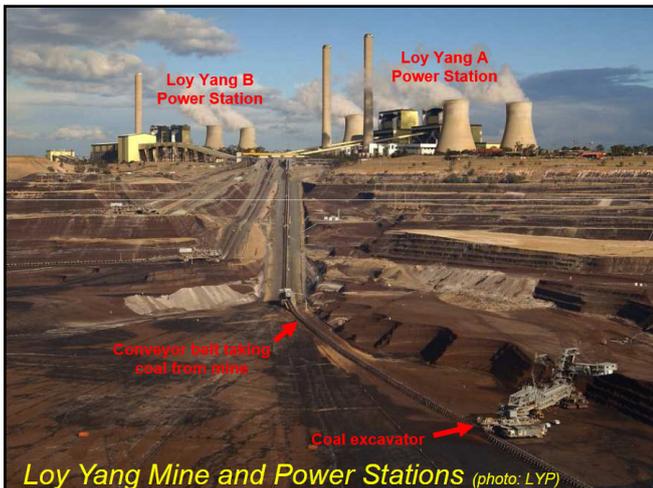
Power stations in the Latrobe Valley



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



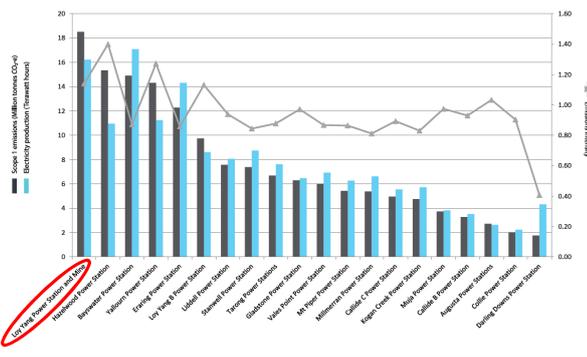
Loy Yang A Power Stations adjacent to the open-cut mine supplying brown coal.



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>

Loy Yang A Power Station is Australia's largest single source of GHG emissions (~18.625 Mt-CO₂-e/yr)

Emissions and emissions intensity of electricity generators



Power companies top list of nation's biggest emitters
The Sydney Morning Herald

By Cole Latimer February 28, 2019 - 1.00pm Coal-fired power companies have been named as Australia's largest polluters by the Clean Energy Regulator, dominating the list of the top 10 biggest carbon emitters.

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

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

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

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

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

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

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

Origin owns the country's largest coal-fired power station, Eraring, on NSW's Lake Macquarie. Origin said its plans to close Eraring in 2052 would slash its emissions levels in half. The group

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

Identifying the corporate entity to sue can be complex:

Loy Yang A Power Station is operated by AGL Loy Yang Pty Ltd (ACN 077 985 758) 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.

AGL Loy Yang Pty Ltd is owned by the Great Energy Alliance Corporation Pty Ltd (ACN 105 266 028), a wholly-owned subsidiary of the AGL Group.

Issue 3:

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

Constitutional cause of action in PNG

A claim for compensation under ss 57 & 58 of the PNG Constitution for contravening guaranteed rights and freedoms under sections:

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

INDEPENDENT STATE OF PAPUA NEW GUINEA.



Constitution of the Independent State of Papua New Guinea.

1975

National Goals and Directive Principles.

1. Integral human development.

We declare our first goal to be for every person to be dynamically involved in the process of freeing himself or herself from every form of domination or oppression so that each man or woman will have the opportunity to develop as a whole person in relationship with others.

2. Equality and participation

We declare our second goal to be for all citizens to have an equal opportunity to participate in, and benefit from, the development of our country.

3. National sovereignty and self-reliance

We declare our third goal to be for Papua New Guinea to be politically and economically independent, and our economy basically self-reliant.

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.

5. Papua New Guinean ways

We declare our fifth goal to be to achieve development primarily through the use of Papua New Guinean forms of social, political and economic organization.

PNG Constitution 1975

4. Natural resources and environment

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

WE ACCORDINGLY CALL FOR—

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

PNG Constitution 1975, s 35

Subdivision B. – Fundamental Rights.

35. RIGHT TO LIFE.

- (1) No person shall be deprived of his life intentionally except–
- (a) in execution of a sentence of a court following his conviction of an offence for which the penalty of death is prescribed by law; or
 - (b) as the result of the use of force to such an extent as is reasonable in the circumstances of the case and is permitted by any other law–
 - (i) for the defence of any person from violence; or
 - (ii) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or
 - (iii) for the purpose of suppressing a riot, an insurrection or a mutiny; or
 - (iv) in order to prevent him from committing an offence; or
 - (v) for the purpose of suppressing piracy or terrorism or similar acts; or
 - (c) as the result of a lawful act of war.
- (2) Nothing in Subsection (1)(b) relieves any person from any liability at law in respect of the killing of another.

Urgenda Foundation v State of Netherlands

The Hague Court of Appeal, 9 October 2018 (currently subject to appeal), based on Art 2 & 8 of the *European Convention for the Protection of Human Rights 1950* (ECHR).



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

Art 2 of the ECHR

SECTION I RIGHTS AND FREEDOMS

ARTICLE 2

Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Art 8 of the ECHR

ARTICLE 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Urgenda Foundation v State of Netherlands at [40] & [43] The Hague Court of Appeal, 9 October 2018.

Articles 2 and 8 ECHR

40. The interest protected by Article 2 ECHR is the right to life, which includes environment-related situations that affect or threaten to affect the right to life. Article 8 ECHR protects the right to private life, family life, home and correspondence. Article 8 ECHR may also apply in environment-related situations. The latter is relevant if (1) an act or omission has an adverse effect on the home and/or private life of a citizen and (2) if that adverse effect has reached a certain minimum level of severity.

...

43. In short, the State has a positive obligation to protect the lives of citizens within its jurisdiction under Article 2 ECHR, while Article 8 ECHR creates the obligation to protect the right to home and private life. This obligation applies to all activities, public and non-public, which could endanger the rights protected in these articles, and certainly in the face of industrial activities which by their very nature are dangerous. If the government knows that there is a real and imminent threat, the State must take precautionary measures to prevent infringement as far as possible. In light of this, the Court shall assess the asserted (imminent) climate dangers.

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

PNG Constitution 1975, s 35

Subdivision B. – Fundamental Rights.

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 - (b) as the result of the use of force to such an extent as is reasonable in the circumstances of the case and is permitted by any other law–
 - (i) for the defence of any person from violence; or
 - (ii) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or
 - (iii) for the purpose of suppressing a riot, an insurrection or a mutiny; or
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 - (v) for the purpose of suppressing piracy or terrorism or similar acts; or
 - (c) as the result of a lawful act of war.
- (2) Nothing in Subsection (1)(b) relieves any person from any liability at law in respect of the killing of another.

PNG Constitution 1975, s 37

37. PROTECTION OF THE LAW.

(1) Every person has the right to the full protection of the law, and the succeeding provisions of this section are intended to ensure that that right is fully available, especially to persons in custody or charged with offences.

Protection of the law – Environment Act 2000 (PNG) (copied from *Environmental Protection Act 1994* (Qld))

INDEPENDENT STATE OF PAPUA NEW GUINEA.



AN ACT
entitled

Environment Act 2000.

Being an Act to provide for and give effect to the National Goals and Directive Principles and in particular—

- (a) to provide for protection of the environment in accordance with the Fourth National Goal and Directive Principle (National Resources and Environment) of the Constitution; and
- (b) to regulate the environment impacts of development activities in order to promote sustainable development of the environment and the economic, social and physical well-being of people by safeguarding the life-supporting capacity of air, water, soil and ecosystems for present and future generations and avoiding, remedying and mitigating any adverse effects of activities on the environment; and
- (c) to provide for the protection of the environment from environmental harm;
- (d) to provide for the management of national water resources and the responsibility for their management; and
- (e) to repeal various Acts,

and for other related purposes.

11. CAUSING SERIOUS ENVIRONMENTAL HARM.

(1) A person who unlawfully causes a serious environmental harm is guilty of an offence.

Penalty: Where the person convicted of an offence is –

- (a) a Corporation - a fine not exceeding K250,000.00; and
- (b) other than a Corporation - a fine not exceeding K125,000.00 or imprisonment for a term not exceeding five years, or both.

Default penalty: A fine not exceeding K15,000.00.

(2) In proceedings for an offence against Subsection (1), there is no requirement to prove that the person intended to cause the serious environmental harm.

Section 2 (Interpretation) “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;

Protection of the law – Environment Act 2000 (PNG)

See also:

- Section 4 (Objects)
- Section 7 (General environmental duty)
- Section 9 (Responsibility for environmental harm)
- Section 10 (Unlawful environmental harm)
- Defence of statutory authority (at common law) does not apply as licence for power station granted under the *Environment Protection Act 1970* (Vic) does not authorise harm in PNG.

Note: *Ramu Nico Management (MCC) Ltd v Tarsie* [2010] PGSC 22

Protection of the law –

Environment Act 2000 (PNG)

4. OBJECTS.

The objects of this Act are –

- (a) to promote the wise management of Papua New Guinea's natural resources for the collective benefit of the whole nation and ensure renewable resources are replenished for future generations; and
 - (b) to protect the environment while allowing for development in a way that improves the quality of life and maintains the ecological processes on which life depends; and
 - (c) to sustain the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations.
- and safeguard the life-supporting capacity of air, water, land and eco-systems; and
- (d) to ensure that proper weight is given to both long-term and short-term social, economic, environmental and equity considerations in deciding all matters relating to environmental management, protection, restoration and enhancement; and
 - (e) to avoid, remedy or mitigate any adverse effects of activities on the environment by regulating in an integrated, cost-effective and systematic manner, activities, products, substances and services that cause environmental harm; and
 - (f) to require persons engaged in activities which have a harmful effect on the environment progressively to reduce or mitigate the impact of those effects as such reductions and mitigation become practicable through technology and economic developments; and
 - (g) to allocate the costs of environmental protection and restoration equitably and in a manner that encourages responsible use of, and reduced harm to, the environment; and
 - (h) to apply a precautionary approach to the assessment of risk of environmental harm and ensure that all aspects of environmental quality affected by environmental harm are considered in decisions relating to the environment; and
 - (i) to regulate activities which may have a harmful effect on the environment in an open and transparent manner and ensure that consultation occurs in relation to decisions under this Act with persons and bodies who are likely to be affected by them; and
 - (j) to provide a means for carrying into effect obligations under any international treaty or convention relating to the environment to which Papua New Guinea is a party.

Protection of the law –

Environment Act 2000 (PNG)

7. GENERAL ENVIRONMENT DUTY.

(1) A person shall not carry out an activity that causes or is likely to cause environmental harm unless the person takes all reasonable and practicable measures to prevent or minimise the harm.

(2) In determining what measures are required under Subsection (1) regard shall be given to the following matters:

- (a) the nature of the harm or potential harm; and
- (b) the sensitivity of the receiving environment; and
- (c) the current state of technical knowledge for the activity; and
- (d) the likelihood of successful application of the different measures that might be taken; and
- (e) the financial implications of the different measures as they would relate to the type of activity.

(3) Failure to comply with the general environmental duty does not constitute an offence or give rise of itself to a right to civil remedy, but compliance with the duty may be enforced by –

- (a) an Environment Protection Order; or
- (b) a Clean-up Order; or
- (c) an Emergency Direction.

(4) Where in a proceeding it is alleged that a person failed to comply with the general environmental duty by causing environmental harm, it will be a defence if the harm is caused in the course of complying with an Environmental Code of Practice or authorized to be caused under –

- (a) an Environment Policy, a Regulation or a Technical Standard; or
- (b) a condition of an environment permit; or
- (c) an approved environmental improvement plan; or
- (d) an Environment Protection Order or Clean-up Order; or
- (e) an Emergency Authorization.

Protection of the law – Environment Act 2000 (PNG)

9. RESPONSIBILITY FOR ENVIRONMENTAL HARM.

(1) Subject to Subsection (2), a person who causes environmental harm is responsible for the environmental harm

(2) Where environmental harm is caused or threatened at any place used in connection with an industrial or commercial activity, the occupier or person who is in effective control of activities carried out at that place shall be responsible for the environmental harm or threatened environmental harm except where –

- (a) the environmental harm or threatened environmental harm occurs as a result of force majeure or accident; and
- (b) the occupier or person in effective control of activities at the place took all reasonable and practicable measures to prevent or minimise the harm.

Protection of the law – Environment Act 2000 (PNG)

10. UNLAWFUL ENVIRONMENTAL HARM.

(1) An act or omission that causes, or is reasonably likely to cause, environmental harm is unlawful unless it is caused in the course of complying with an Environmental Code of Practice or permitted to be done under –

- (a) a condition of an environment permit; or
- (b) an Environment Policy, a Regulation or a Technical Standard; or
- (c) an Environment Protection Order; or
- (d) a Clean-up Order; or
- (e) an Emergency Direction; or
- (f) an Emergency Authorization.

(2) Subject to Section 111, it is a defence to a charge under Section 11, 12 or 13 where the person charged establishes that –

- (a) the act or omission was lawful; and
- (b) the person complied with the general environmental duty either by complying with the relevant Environmental Code of Practice or Technical Standard or in some other way.

Protection of the law – Environment Act 2000 (PNG)

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- (a) a condition of an environment permit; or
- (b) an Environment Policy, a Regulation or a Technical Standard; or
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- (f) an Emergency Authorization.

(2) Subject to Section 111, it is a defence to a charge under Section 11, 12 or 13 where the person charged establishes that –

- (a) the act or omission was lawful; and
- (b) the person complied with the general environmental duty either by complying with the relevant Environmental Code of Practice or Technical Standard or in some other way.

Nb. There is no equivalent in the *Environment Act 2000 (PNG)* of s25 of the *Environmental Protection Act 1994 (Qld)*:

25 Extra-territorial application of Act

A person commits an offence against this Act if—

- (a) the person causes environmental harm within the State by conduct engaged in outside the State; and
- (b) the conduct would constitute the offence against this Act if it were engaged in by the person within the State.

Interpretation Act 1975 (PNG), s2A

2A. LAWS TO OPERATE WITHIN BOUNDARIES, AIRSPACE, SHIPS AND AIRCRAFT.

(1) Subject to Subsection (2), it shall be presumed, unless the contrary intention appears, that a provision is intended to operate—

- (a) throughout the land territory under the sovereignty of the State; and
- (b) within the area of the internal waters and territorial sea; and
- (c) throughout the superjacent airspace of the land territory, the internal waters and territorial sea; and

[Section 2A is about the general operation of laws in PNG throughout the land, sea and airspace. It does not imply PNG laws cannot apply outside these areas.]

Section 109 of the PNG Constitution states that in interpreting a PNG statute, there is no presumption against extra-territoriality

109. GENERAL POWER OF LAW-MAKING.

(1) Subject to this Constitution, the Parliament may make laws, having effect within and outside the country, for the peace, order and good government of Papua New Guinea and the welfare of the People.

(2) In particular, Acts of the Parliament, not inconsistent with the Constitutional Laws, may provide for all matters that are necessary or convenient to be prescribed for carrying out and giving effect to this Constitution.

(3) No law made by the Parliament is open to challenge in any court on the ground that—

- (a) it is not for the peace, order or good government of Papua New Guinea or the welfare of the People; or
- (b) it purports to have extra-territorial effect.

(4) 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.

“Result offences” give inter-jurisdictional liability for pollution and other acts at common law and under statute:

The position at common law 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.

These so called, “result offences”, were recognised in the important decision of *Brownlie v State Pollution Control Commission* (1992) 76 LGRA 419 (NSWCCA; Gleeson CJ with whom Curruthers J and Lee AJ agreed).

In that case a Queensland farmer who polluted a river flowing into NSW resulting in a fish kill was held liable for an offence against the *Clean Waters Act* 1970 (NSW).

Brownlie v State Pollution Control Commission (1992) 76 LGRA 419 at 84 (NSWCCA; Gleeson CJ with whom Curruthers J and Lee AJ agreed):

common considerations that apply. 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:

“... 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.”

Section 11 of the Environment Act 2000 (PNG) is a “result offence”

11. CAUSING SERIOUS ENVIRONMENTAL HARM.

(1) A person who unlawfully causes a serious environmental harm is guilty of an offence.

Penalty: Where the person convicted of an offence is –

- (a) a Corporation - a fine not exceeding K250,000.00; and
- (b) other than a Corporation - a fine not exceeding K125,000.00 or imprisonment for a term not exceeding five years, or both.

Default penalty: A fine not exceeding K15,000.00.

(2) In proceedings for an offence against Subsection (1), there is no requirement to prove that the person intended to cause the serious environmental harm.

Section 2 (Interpretation) “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;

PNG Constitution 1975, s 53 (?)

53. PROTECTION FROM UNJUST DEPRIVATION OF PROPERTY.

(1) Subject to Section 54 (*special provision in relation to certain lands*) and except as permitted by this section, 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 Organic Law or 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.

that is so declared and so described, for the purposes of this section, in an Organic Law or an Act of the Parliament; 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.

(2) Subject to this section, just compensation must be made on just terms by the expropriating authority, giving full weight to the National Goals and Directive Principles and having due regard to the national interest and to the expression of that interest by the Parliament, as well as to the person affected.

...

Question: Is destruction of property (such as a coral reef) taking “possession” or “acquiring” property?

- Many PNG cases suggest s 53, in conjunction with other constitutional rights and common law, also protects against destruction of property: e.g. 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.
- Human rights protections should be construed in a liberal way: *Coburn v Human Rights Commission* [1994] 3 NZLR 323 at 333.

Causes of action in private & public nuisance

The elements of private nuisance are that:

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

The elements of public nuisance are that:

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

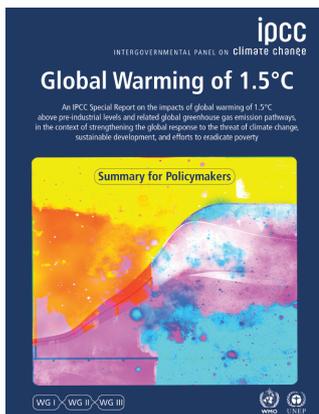
See *Medaing v Ramu Nico Management (MCC) Ltd* [2011] PGNC 95 (Cannings J) for interaction of common law nuisance, *Environment Act* 2000 (PNG), defence of statutory authority & PNG Constitution.

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

Yes

Issues 4 & 5:

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



Released 8 October 2018

"Coral reefs ... are projected to decline by a further 70–90% at 1.5°C (*high confidence*) with larger losses (>99%) at 2°C (*very high confidence*). ...

Tropical coral reefs will reach a *very high risk* of impact at 2°C with most available evidence suggesting that coral dominated ecosystems will be non-existent at this temperature or higher (e.g., coral abundance near zero in most locations, intensifying storms 'flattening' reefs' 3-dimensional structure) (*high agreement, robust evidence*). Impacts at this point (coupled with ocean acidification) are likely to undermine the ability of tropical coral reefs to provide habitat for the current high levels of biodiversity as well as a range of ecosystem services important for millions of people (e.g., food, livelihoods, coastal protection, cultural services). ..."

Intergovernmental Panel on Climate Change (IPCC), *Global Warming of 1.5°C: an IPCC special report* (IPCC, Geneva, 8 October 2018)

Climate science:

While annual emissions of CO₂ are more commonly referred to in political and public discussions of climate change, cumulative emissions of CO₂ over time are the critical issue because the **emissions of CO₂ from fossil fuels will continue to affect the atmosphere through the active carbon cycle for centuries to millennia**

See: Archer D (2005), "Fate of Fossil Fuel in Geologic Time" 110 Journal of Geophysical Research C09S05; Archer D and Brovkin V (2008), "The millennial atmospheric lifetime of anthropogenic CO₂" Climatic Change 90:283-297; Solomon et al (2009), "Irreversible climate change due to carbon dioxide emissions" PNAS 116 (6) 1704-1709

Climate science: the Carbon Budget

The concept of the Carbon Budget to stabilise mean global temperature rises at less than 1.5°C or 2°C above pre-industrial levels is an important concept in climate science that can be used to put boundaries around the total emissions that can be released by humanity and, thereby, **creates a defined quantity within which the contribution of emissions from Loy Yang A Power Station can be assessed**

Deriving a global 2013-2050 emission budget to stay below 1.5°C based on the IPCC Special Report on 1.5°C

A/Prof. Malte Meinshausen, The University of Melbourne, Draft, 12 February 2019, updated 19 March 2019

Summary

This paper provides advice to the Victorian interim targets Independent Expert Panel on developing a 1.5°C greenhouse gas emissions budget for Victoria for the period 2017-2050. It builds on decisions taken by the Independent Expert Panel based on advice provided to the Panel by Meinshausen, Robiou du Pont and Talberg in May 2018 on developing a 2°C emissions budget for Victoria for the period to 2050.

...

Those adjustments to the IPCC SR1.5 carbon budget can be shown in equation form as follows:

580 GtCO ₂	+200 GtCO ₂	-100 GtCO ₂	- 180 GtCO ₂	= 500 GtCO ₂
The remaining carbon budget from Jan 2018 onwards listed in IPCC SR1.5 for a 50% warming to stay below 1.5°C warming relative to 1850-1900.	Enlarging the budget to account for global emissions from 2013 to 2018, so that the remaining budget's starting year is 2013	Reducing the remaining budget to account for permafrost-related feedbacks that are not represented in the 580 GtCO ₂ number.	Reducing the remaining budget to account for a 1.5°C warming target relative to pre-industrial levels, not relative to early-industrial levels.	The remaining carbon budget from Jan 2013 onwards for a 50% warming to stay below 1.5°C warming relative to pre-industrial levels.

IPCC 1.5°C Special Report (2018) & Meinshausen (2019)

Table 2.2 | The assessed remaining carbon budget and its uncertainties.

Approximate Warming since 1850-1900 [°C] ⁽¹⁾	Remaining Carbon Budget (Excluding Additional Earth System Feedbacks ⁽⁵⁾) [GtCO ₂ from 1.1.2018] ⁽²⁾			-100 GtCO ₂
	33rd	50th	67th	Reducing the remaining budget to account for permafrost-related feedbacks that are not represented in the 580 GtCO ₂ number.
	Percentiles of TCRE ⁽³⁾			-180 GtCO ₂
				Reducing the remaining budget to account for a 1.5°C warming target relative to pre-industrial levels, not relative to early-industrial levels.
-1.5°C	840	580	420	300
-2°C	2030	1500	1170	1220

* (3) TCRE: transient climate response to cumulative emissions of carbon,

Calculating contribution to the Carbon Budget

Start date: 1997 (to include past) or Start date: 2018 (from ~present & IPCC 1.5°C report)

Loy Yang A Power Station is operated by AGL Loy Yang Pty Ltd (ACN 077 985 758) under an environmental 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.

End date: 2048

(based on public admissions)

OCTOBER 25 2018 - 8:12AM

Express News

Loy Yang to remain until 2048: AGL

Jarrod Whittaker

Local News

Loy Yang A owner AGL has moved to reassure the community that it has no plans to close following comments to investors which suggested the plant could close early if power markets did not warrant major expenditure to keep it going until 2048.

Source: <https://www.latrobevalleyexpress.com.au/story/5721387/loy-yang-to-remain-until-2048-agl/>

Frame the cause of action around the company's emissions from 2018-2048 as a percentage of the remaining Carbon Budget for 1.5°C or 2°C

18.625 MtCO₂-e/yr x 30 years = 559 MtCO₂-e

These emissions equal:

- 0.2% (a 1 / 537th part) of the 1.5°C Carbon Budget
- 0.05% (a 1 / 2,182nd part) of the 2°C Carbon Budget from 2018 for a 50% probability of exceeding 1.5°C (300 Gt) or 2°C (1220 Gt)

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).

https://coaltransitions.files.wordpress.com/2018/09/coal_australia_fm1.pdf

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



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

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

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

Potential witnesses:

Topic for expert evidence	Possible experts
1. Impacts on coral reefs	Professor Ove Hoegh-Guldberg Professor Terry Hughes
2. Contribution to Carbon Budget	Professor Malte Meinshausen; Professor David Karoly; or Professor Will Steffen
3. Economics and energy sources (relevant in the context of the general environmental duty & unreasonableness)	Professor Frank Jotzo

Issue 6:

What remedies are available that a court will realistically grant?

PNG Constitution 1975, s 22

22. ENFORCEMENT OF THE CONSTITUTION.

The provisions of this Constitution that recognize rights of individuals (including corporations and associations) as well as those that confer powers or impose duties on public authorities, shall not be left without effect because of the lack of supporting, machinery or procedural laws, but the lack shall, as far as practicable, be supplied by the National Court in the light of the National Goals and Directive Principles, and by way of analogy from other laws, general principles of justice and generally-accepted doctrine.

PNG Constitution 1975, s 57

57. ENFORCEMENT OF GUARANTEED RIGHTS AND FREEDOMS.

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

(2) For the purposes of this section—

- (a) the Law Officers of Papua New Guinea; and
- (b) any other persons prescribed for the purpose by an Act of the Parliament; and
- (c) any other persons with an interest (whether personal or not) in the maintenance of the principles commonly known as the Rule of Law such that, in the opinion of the court concerned, they ought to be allowed to appear and be heard on the matter in question.

have an interest in the protection and enforcement of the rights and freedoms referred to in this Division, but this subsection does not limit the persons or classes of persons who have such an interest.

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

PNG Constitution 1975, s 58

58. COMPENSATION.

(1) This section is in addition to, and not in derogation of, Section 57 (*enforcement of guaranteed rights and freedoms*).

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

(3) Subject to Subsections (4) and (5), damages may be awarded against any person who committed, or was responsible for, the infringement.

...

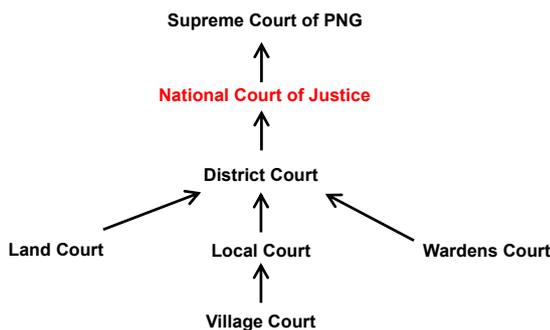
A benefit of seeking only compensation / damages for the harm caused (rather than an injunction to stop the harm by shutting down the power station) is that:

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

Issue 7:

What court should the litigation be commenced in?

PNG court hierarchy



§ 1.4(B) (3). The National Court.

By virtue of the Constitution, the National Court of Justice has an unlimited original jurisdiction. This includes enforcing the Constitution and the rights and freedoms guaranteed thereby and reviewing any exercise of judicial authority. It also has a specialized jurisdiction in land cases (excluding customary land), bankruptcy, defamation, probate, and the granting of prerogative writs by operation of statute. Appeals from the local and district courts may be taken to the National Court.

The expense of bringing an action in the National Court has the practical effect of limiting its civil jurisdiction to cases where a substantial sum is involved, generally over K 2000. Analogously, while theoretically the Court in its criminal jurisdiction could entertain summary offenses, in practice it hears only criminal cases on indictment from the district courts.

Both original and appellate jurisdiction are exercised by a single judge. Appeals lie as of right to the Supreme Court on questions of law or mixed fact and law, and with leave of the Supreme Court on a question of fact. Cases may also be reserved for the consideration of the Supreme Court.

Extracted from Peter Stewart, 'The Legal System of Papua New Guinea' in *Modern Legal Systems Cyclopaedia Pacific Basin - Part I: Country Studies - Chapter Ten* - Page 2.190.1

Issue 8:

What are the procedural obstacles & can they be overcome?

Procedural issues: service in Australia

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

Order 6, rule 19 of the *National Court Rules* 1983 (PNG) provides that originating process may be served outside PNG where:

- (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; ...

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

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

Procedural issues: enforcement in Australia

An order for damages for climate change impacts (and costs) against the operator of Loy Yang A Power Station from the PNG National Court of Justice appears to be enforceable in Australia:

- as the PNG National Court of Justice is a superior court listed in the *Foreign Judgments Regulations* 1992 (Cth), an order for damages and costs from it could be registered under the *Foreign Judgments Act* 1991 (Cth), and then enforced in the Victorian Supreme Court; and
- such an order from the PNG National Court of Justice 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).

Given the highly political nature of climate change liability, 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.

Issues 9 & 10:

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

How do you avoid being overwhelmed by a big opponent?

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

Former New York City Mayor Michael Bloomberg has said he will contribute \$500 million (\$715 million) toward closing coal-fired power plants across the United States, in a clash with White House efforts to revive a fossil fuel blamed for climate change.

ABC NEWS

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

Source: ABC News 9 June 2019 <https://www.abc.net.au/news/2019-06-09/michael-bloomberg-donates-500-million-to-close-coal-plants/1119212>

Three lessons for public interest lawyers

There are three over-arching lessons that I have learnt from the public interest litigation presented as case studies on this website:

...

3. **Courage and tenacity** – environmental litigation, particularly against large and well resourced opponents, can be a very difficult war of attrition even for government regulators. You will 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

See <http://envlaw.com.au/contact/>

We should fight for the future we want, not passively accept terrible outcomes for our kids futures.

As lawyers, litigation is one tool we can use in this fight for our clients.