



Global Climate Change Litigation: Year in Review

Danny Noonan
Climate Law Fellow
Our Children's Trust

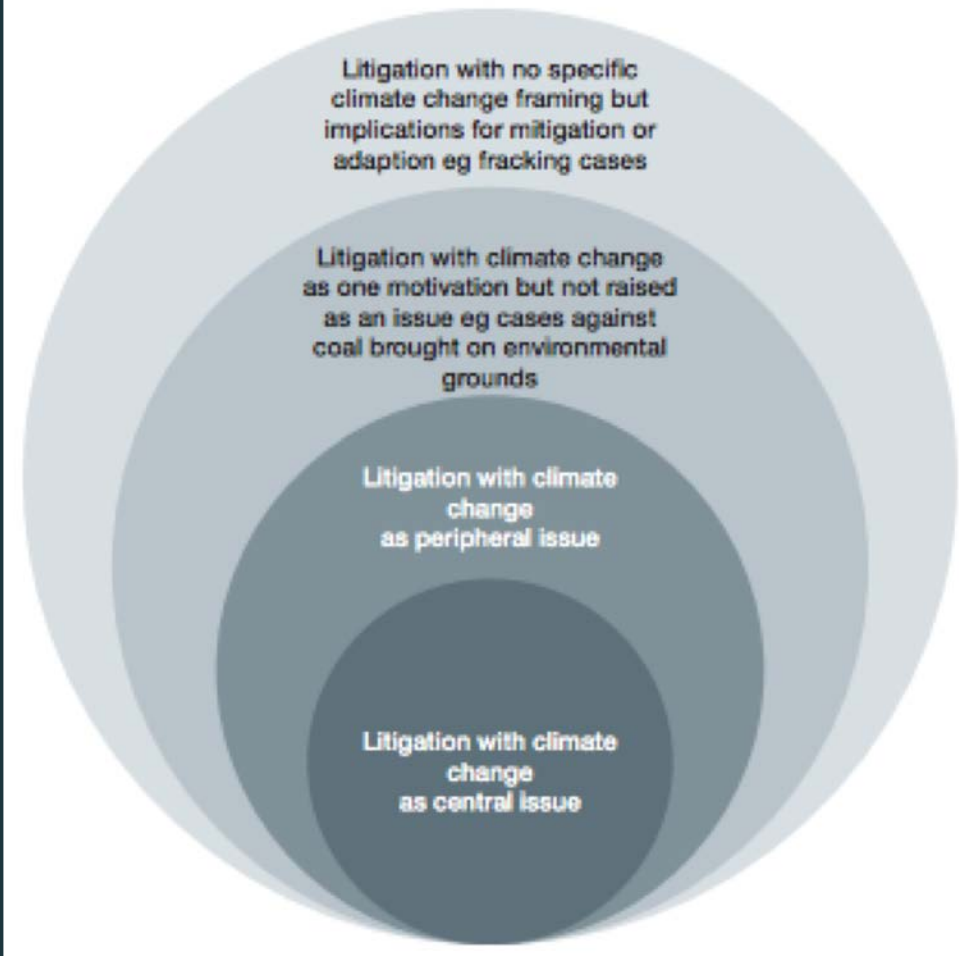
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Introduction

Figure 1: Conceptualising climate change litigation²⁴



- Surge in “next generation” cases in last 12-18 months
 - “... founded on an accountability model whereby legal interventions are designed to hold governments and corporations directly to account for the climate change implications of their activities” (Peel et al 2017, p. 803).
- Some successes, some setbacks
- Focus of today’s presentation:
 1. Admin law cases challenging targets
 2. Non-admin law “state responsibility” cases
 3. Damages cases against “carbon majors”
 4. Lessons & implications for Australia

Admin Law Cases

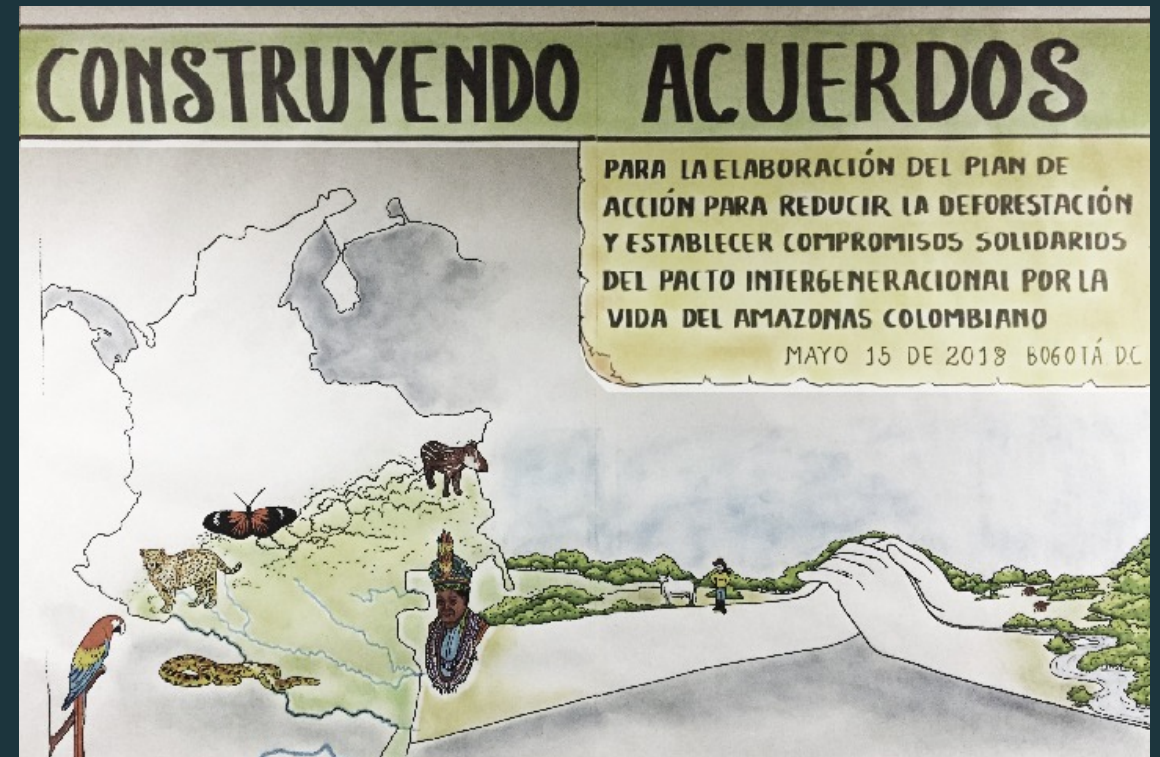
- **New Zealand:** *Thomson v The Minister for Climate Change Issues* [2017] NZHC 733
- **United Kingdom:** *Plan B Earth & Ors v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWHC 1892
- **Ireland:** *Friends of the Irish Environment v The Government Of Ireland, Ireland And The Attorney General* (2017)



Source: Rachel Thomas, 'Former councillor sets up fundraising page for Sarah Thomson who's suing Govt over climate change' *Stuff* (Online) 8 December 2015 <<https://www.stuff.co.nz/environment/climate-news/74882781/former-councillor-sets-up-fundraising-page-for-sarah-thomson-whos-suing-govt-over-climate-change>>

State Responsibility Cases

- Our Children's Trust-Coordinated Cases:
 - *Juliana v. United States*
 - Cases in US states (currently-active: Alaska, Oregon, Washington, Florida)
 - Global cases: Uganda, India, Pakistan
- European "duty of care" cases:
 - *Urgenda* appeal: heard in May 2018, decision expected on 9 October 2018
 - Belgium *Klimaatzaak / L'Affaire Climat*: Belgian *Cour de Cassation* gives go-ahead
- Europe-wide cases:
 - "The People's Climate Case" filed before the European Court of Justice (May 2018)
- *Dejusticia* case in Colombia: filed... and won! (2018)



Source: Carolina Gutiérrez Torres, 'Tutela de cambio climático: pasar del papel a la acción' *Dejusticia* (15 May 2018) <<https://www.dejusticia.org/tutela-de-cambio-climatico-pasar-del-papel-a-la-accion/>>.

Juliana v. United States

- **November 2016:** District Court denies Defendants' Motion to Dismiss
- **June 2017:** District Court sets February 2018 trial date; fossil fuel industry Intervenor withdraws; Defendants petition for "Writ of Mandamus" to Ninth Circuit Court of Appeals
- **July 2017:** Ninth Circuit Court of Appeals stays District Court proceedings pending resolution of Mandamus petition
- **December 2017:** Ninth Circuit hears oral arguments on Mandamus petition



Juliana v. United States



- **March 2018:** Ninth Circuit denies Defendants petition for Writ of Mandamus
- **May 2018:** Defendants file Motion for Protective Order (blanket stay of discovery), Motion for Judgment on the Pleadings and Motion for Summary Judgment
- **May-June 2018:** District Court denies Motion for Protective Order
- **July 2018:** Defendants file 2nd petition for Writ of Mandamus and Emergency Motion for a Stay of Discovery and Trial to the Ninth Circuit Court of Appeals

Juliana v. United States

- **July 2018:** Defendants appeal Ninth Circuit's denial of first Mandamus petition to Supreme Court and request stay of District Court proceedings
- **18 July 2018:** District Court hears oral arguments for Defendants' motions for Judgment on the Pleadings and Summary Judgment
- **20 July 2018:** Ninth Circuit denies Defendants' 2nd Mandamus petition
- **30 July 2018:** Supreme Court denies Defendants' stay petition and declines to hear appeal of Ninth Circuit ruling



Juliana v. United States

(ORDER LIST: 585 U.S.)

MONDAY, JULY 30, 2018

ORDER IN PENDING CASE

18A65 UNITED STATES, ET AL. V. USDC OR

The application for stay presented to Justice Kennedy and by him referred to the Court is denied.

The Government's request for relief is premature and is denied without prejudice. The breadth of respondents' claims is striking, however, and the justiciability of those claims presents substantial grounds for difference of opinion. The District Court should take these concerns into account in assessing the burdens of discovery and trial, as well as the desirability of a prompt ruling on the Government's pending dispositive motions.

Plaintiffs	People of California (Oakland & San Francisco)	Imperial Beach, Marin County, San Mateo County, Santa Cruz City & County, Richmond	New York City	Boulder County, San Miguel County, City of Boulder	King County (Seattle)	Rhode Island	Mayor and City Council of Baltimore
Defendants	Chevron, Exxon, BP, Shell, ConocoPhillips	Chevron, Exxon, BP, Shell, Citgo, ConocoPhillips, Phillips 66, Peabody, Total, Arch Coal, ENI, Rio Tinto, Anadarko, Occidental, Repsol, Marathon, Hess, Devon Energy, Encana, Apache	Chevron, Exxon, BP, Shell, ConocoPhillips	Suncor Energy, Exxon	BP, Chevron, ConocoPhillips, Exxon, Shell, and "Does 1 through 10"	Chevron, Exxon, BP, Shell, Motiva, Citgo, ConocoPhillips, Marathon, Speedway, Hess, Lukoil, Getty Petroleum Market and "Does 1 through 100, inclusive"	BP, Crown Central, Chevron, Exxon, Shell, Citgo, ConocoPhillips, Marathon, Speedway, Hess, CNX Resources, Consol
Jurisdiction	Federal (Northern District of California) (originally filed in state court)	State (California)	Federal (Southern District of New York)	State (Colorado)	State (Washington)	State (Rhode Island)	State (Maryland)
Cause(s) of Action	Public Nuisance	Public Nuisance, Private Nuisance, Failure to Warn , Design Defect, Negligence, Trespass	Public Nuisance, Private Nuisance, Trespass	Public Nuisance, Private Nuisance, Trespass, Unjust Enrichment, Violation of the Colorado Consumer Protection Act	Public Nuisance, Trespass	Public Nuisance, Failure to Warn, Design Defect, Trespass, Impairment of Public Trust Resources, Violation of State Environmental Rights Act	Public Nuisance, Private Nuisance, Failure to Warn, Design Defect, Trespass, Violation of Maryland's Consumer Protection Act
Relief Requested	Abatement fund for adaptation infrastructure	Compensatory damages Equitable relief incl. abatement of nuisances Punitive damages Disgorgement of profits	Damages, equitable relief (not effective unless Ds fail to pay damages)	Damages, equitable relief (remediation / abatement)	Declaratory relief, abatement fund, compensatory damages	Damages, equitable relief incl. abatement of the nuisance, punitive damages and disgorgement of profits	Damages, equitable relief incl. abatement, civil penalties for statutory violations, punitive damages and disgorgement of profits
Status	Dismissed [Order of Alsup J, 27 July 2018]	Defendants appealing order remanding San Mateo, Marin and Imperial Beach cases to State Court [March 2018]	Dismissed [Order of Keenan J, 9 July 2018]. Notice of appeal filed by City of New York. [26 July 2018]	Removed to Federal Court; Motion to Remand back to State Court filed [30 July 2018]	Defendants' motions to dismiss filed (27 July 2018)	Pre-Motions to Remove / Dismiss	Notice of Removal to Federal Court Filed [31 July 2018]

Carbon Majors Cases

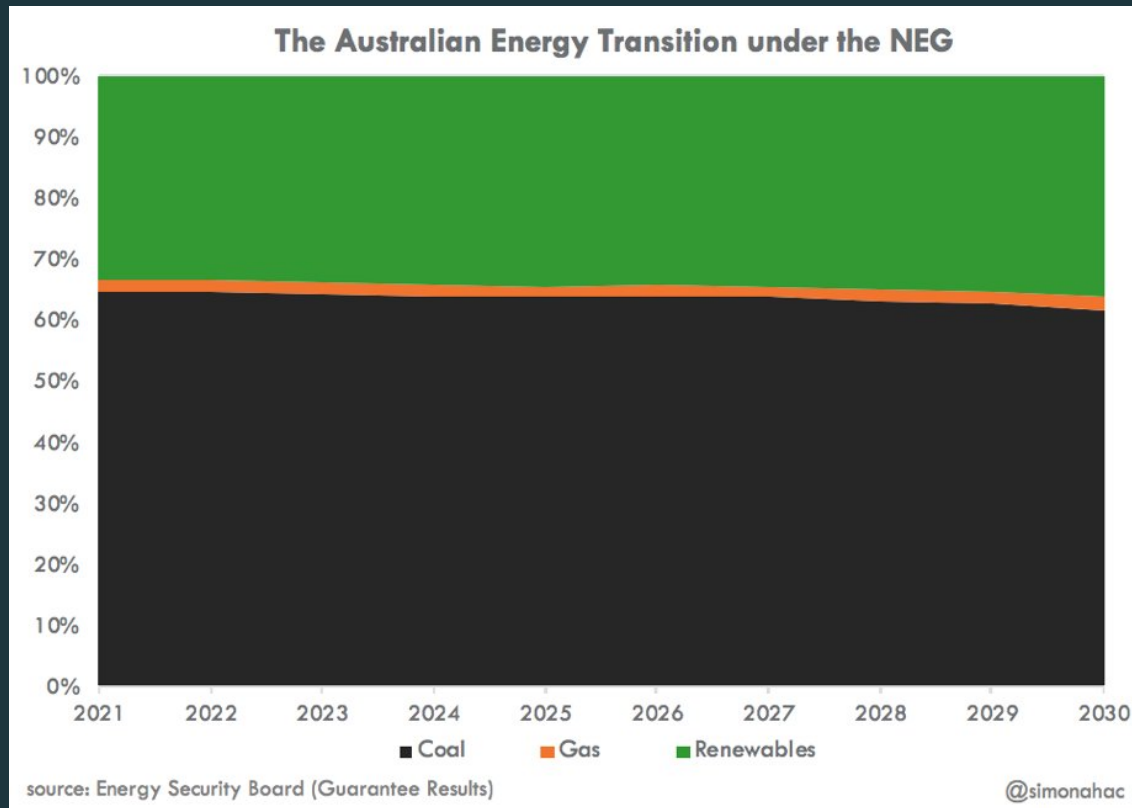
Outside the US:

- *Saul Luciano Lliuya v RWE*
(Germany, 2017)
- *Milieudefensie v Shell*
(Netherlands, 2018?)



Source: 'German court to hear Peruvian farmer's climate case against RWE' *The Guardian* (Online) 1 December 2017
<<https://www.theguardian.com/environment/2017/nov/30/german-court-to-hear-peruvian-farmers-climate-case-against-rwe>>

Lessons and Implications for Australia



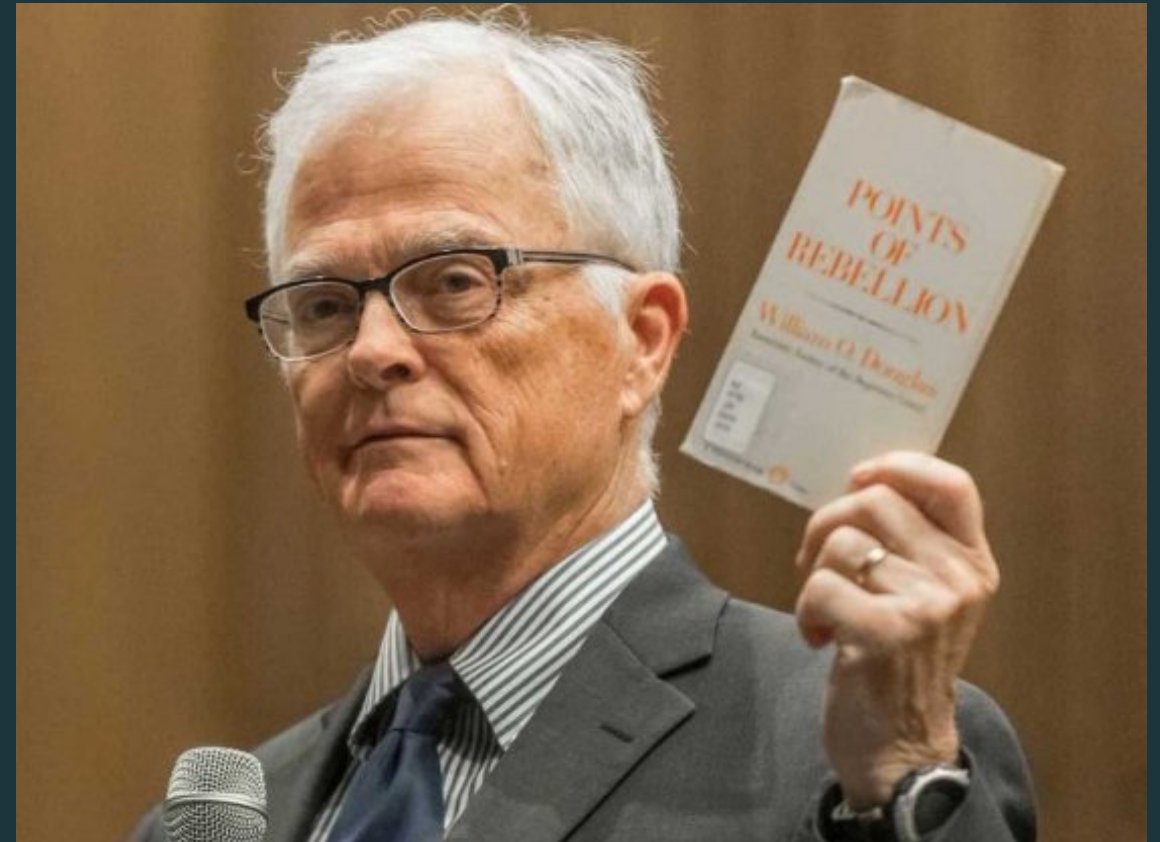
- *What's the point? Why are we seeing more litigation? Why are we seeing more of this type of litigation?*
- Shift in frame and strategy from piecemeal, micro-level approach to systemic macro-level approach
- Interplay between framing, “Political Opportunity,” “Legal Opportunity,” resources, “strategic entrepreneurs” etc.
 - See, e.g., Chris Hilson, ‘The Courts and Social Movements: Two Literatures and Two Methodologies’ *Mobilizing Ideas* (Online) 18 February 2013 <<https://mobilizingideas.wordpress.com/2013/02/18/the-courts-and-social-movements-two-literatures-and-two-methodologies/>>

Lessons and Implications for Australia

Are these cases viable? Are they appropriate? Will courts intervene? Two views of justiciability (Ewing and Kysar 2011):

1. “Duck and weave”

- “The dangers raised in the complaints are very real. But those dangers are worldwide. Their causes are worldwide. The benefits of fossil fuels are worldwide. ... The Court will stay its hand in favor of solutions by the legislative and executive branches. *City of Oakland v. BP P.L.C.*, No. C 17-06011 WHA, 2018 WL 310972 (N.D. Cal.), at *9 (Alsup, J.).
- “Climate change is a fact of life, as is not contested by Defendants. But the serious problems caused thereby are not for the judiciary to ameliorate.” *City of New York v. BP P.L.C.*, No. 18 Civ. 182 (JFK), Slip Op. (S.D.N.Y., 2018), at 20 (Keenan, J.).



Source: Amy Westervelt, 'Climate Tutorial Ordered by Calif. Judge Adds Fascinating Wrinkle to Liability Case' *Climate Liability News* (Online) 15 March 2018 <<https://www.climateliabilitynews.org/2018/03/15/california-climate-liability-judge-william-alsup/>>.

Lessons and Implications for Australia



2. "Prod and Plea"

- "Federal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it." *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or., 2016) at 1262 (Aiken, J.).
- "...it may be appropriate for domestic courts to play a role in Government decision making about climate change policy. ... The courts have not considered the entire subject matter is a 'no go' area... The importance of the matter for all and each of us warrants some scrutiny of the public power in addition to accountability through Parliament and the General Elections." *Thomson v Minister for Climate Change Issues* [2017] NZHC 733, [133]-[134] (Mallon J).

Conclusion



Questions? Feedback?
danny@ourchildrenstrust.org