

## Advancing Climate Litigation Worldwide

Panel for Climate Law and Governance Day 2022

Friday 11 November 2022



### Summary:

It is perhaps surprising, amidst surging enthusiasm for climate litigation, that the IPCC's recent assessment of its contribution to climate governance was so banal. The IPCC found, with medium confidence, that climate litigation is "growing" and "in some cases, has influenced the outcome and ambition of climate governance". It defined "climate governance" as: "The structures, processes and actions through which private and public actors seek to mitigate and adapt to climate change." This 75 minute expert panel will explore the interaction of climate litigation and governance, pose key questions, identify existing knowledge gaps, and build the grounds for future research endeavours.

### Focus questions:

- \* What types of impacts are we seeing come from climate change litigation?
- \* What are the benefits of climate litigation? The limitations?
- \* Is climate litigation contributing to effective climate governance?

### Speakers:

- Prof Jackie Peel, Melbourne Climate Futures, University of Melbourne
- A/Prof Jolene Lin, Asia Pacific Centre for Environmental Law, National University of Singapore
- A/Prof Joana Setzer, Grantham Research Institute on Climate Change and the Environment, London School of Economics
- Mr David Barnden, Equity Generation Lawyers
- Prof Louis Kotzé, Faculty of Law, North-West University

The following is a summary of the discussion that took place.

*Jacqueline Peel* provided an Acknowledgment of Country. In terms of the background to this session, the IPCC Working Group III report made findings for the first time on the contribution of climate litigation to overall governance. However, despite the fact that the IPCC talked about climate litigation, the report had little to say about the impact of litigation and how much of contribution it is making to governance now and in the future. The purpose of this panel was to bring together a diverse range of speakers who could offer insights into the potential impact of litigation and the potential governance role for litigation to play. This is particularly important during COP27, given the focus of conversation on compensation, loss and damage, and liability. A general question overarching this session is: What is climate litigation's contribution to governance?

*Jacqueline Peel* asked Joana for her perspective on the global trends, and what sorts of contributions litigation is making to climate law and governance?

*Joana Setzer* replied that the high level trends come not only from the Global Trends report that was published in July 2022 but also from a newer report published a month ago that focuses on framework litigation. In addition, a new partnership has just been launched between LSE, the Sabin Institute and Climate Policy Radar to use AI to search all the laws and policies and litigation in the database. This means that from now on, people will be able to search not only the summaries of cases and laws, but also to search any document and in any language.

Turning to the Global Trends in climate litigation, the first point to make is the significant increase in climate litigation in the last few years. The first case was filed in 1986 but there were very few cases until 2015 and from there cases picked up significantly. The sharp increase in cases in 2015 was not only in the West but also many other countries around the world. 2021 saw the highest annual number of cases filed outside of the West.

A second interesting trend to emerge relates to strategic climate litigation. These are the cases that receive the most media attention and the most attention from the literature. These are cases that are brought with ambitions that extend beyond the individual case and aim to shape behaviour. These cases started to emerge around 2007 and they really peaked in number after 2019, especially in 2021. However, what is important to remember is that these strategic cases are only one part of the overall number of climate cases. It is also important to note that strategic cases can also be anti-climate (these are cases that weaken or hinder climate protection).

Turning then to look at outcomes and impact, this question is complex because it depends on what you mean by outcomes, impact, effects, or effectiveness. In addition, there are the direct and indirect effects of litigation. The Global Trends report looks at the direct impacts of litigation. This is only to do with the grounds of the case and the decision, only for the cases that have been decided, and only for cases outside of the US. In terms then of the direct outcomes of litigation, last year over 50% of the outcomes in climate cases were favourable for climate litigation. It is also relevant to note that this has dropped from the previous year (due to a number of sub-national cases that had outcomes that were unfavourable to climate action). There is also interest in the indirect outcomes of cases.

The IPCC's recognition that climate litigation shapes climate governance is a really important moment in wider recognition of the role of climate litigation. There is a paragraph on climate litigation in the Summary for Policymakers, which is significant for all countries to accept this one paragraph. This paragraph remarks on the role that litigation plays in affecting the outcome and ambition of governance. In addition, there are 130 times that litigation is mentioned throughout the IPCC report and throughout various chapters.

Finally, it is worth emphasising trends in litigation against both governments and corporates. First on the corporate cases, in the last Global Trends report, they looked at cases filed against corporates around the world and the sectors involved. They found that more than 50% cases of the cases were in other sectors than carbon majors. These span across mining, energy, transport, finance, food and agriculture. The diversity of sectors involved in climate litigation is something to note and explore further.

Second, regarding litigation against governments, these are termed 'government framework litigation' (they have also been called 'systemic litigation'), the report identified 80 framework cases. This is a significant number. These cases have been filed against governments all around the world, in 24 countries, plus regional courts. Half of these cases alone were filed in 2021. The report identified these cases as doing two things. First, there are ambition cases that deal with adequacy of government's policy. Second, there are implementation cases that deal with the enforcement of

existing climate protections, to ensure governments meet their targets and existing plans. In terms of the outcomes of these cases, 47 of these cases have already been decided. However, only looking at cases that have reached apex courts, 7 out of 9 cases have had favourable outcomes.

*Jacqueline Peel* turned to David and asked why litigation is being used as a tool and invited David to talk about the types of cases they have been involved in bringing?

*David Barnden* also provided an Acknowledgement of Country. In terms of why litigation as a tool, Equity Generation Lawyers represent a range of clients. One of their more notable cases was brought on behalf of 8 children who sued the Australian Federal Environment Minister who was considering approval for a coal mine. The children wanted to instruct the lawyers because they wanted to do something. They were part of the Fridays for Futures movement, striking against Australia's non-existent climate policies. There is a general frustration by young people, by investors, by people who are accidental investors etc. This is where climate litigation starts.

In terms of the practical impact of climate litigation, it enables evidence of climate change harms to be put to the courts. This enables scientists and health professionals to ventilate their concerns, which reflect the findings of the IPCC. A hearing in court gives what they are saying legitimacy. This is particularly important in jurisdictions where there has been a history of media pushback against climate action, which has been notable in Australia. These cases expose what governments are not doing. The *Sharma* case, for example, was about a duty of care to avoid harming children when considering approving a coal mine. To the lawyers and the children, it seemed to be a basic duty to find. However, the Court ultimately found that the duty did not exist. Nevertheless, while there was not a favourable direct outcome in *Sharma*, the case certainly raised the profile of climate issues and brought home to the Australian people what they needed to do to influence the Australian government.

A lot of Equity Generation Lawyer's work is focused on corporate actors and the finance sector. They are seeing retail shareholders and bigger institutions very concerned about climate change. The firm's journey on this started with two retail investors in CBA in 2017. They were concerned that the bank did not recognise climate change as a material risk. Once CBA did so, this would create obligations to investors to deal with climate risks and to act on how to protect investors. That case was successful in that it settled in 2017. The bank disclosed to investors their climate risks and came out with a climate policy in 2019. That policy said that the bank would not finance new oil and gas projects unless they were in line with goals of the Paris Agreement. The same investors as in the first case subsequently discovered seven new oil and gas projects that CBA had financed. This was despite that commitment in CBA's climate policy and despite the investors going to the AGM and asking the chair to explain these investments. These investors are now suing CBA to access documents around the decision. The indirect governance impact of that case has been that shareholders can access Board minutes, documents around systems. This case will change the face of corporate governance in Australia.

Another case that the team have run was a pension fund member who sued his pension fund, REST, for not managing climate risks. This was hard fought litigation that settled on the steps of court. The case revolutionised the way the fund dealt with climate risks. They have come out with a new commitment to net zero, and committed to scenario analysis to ensure they make investments for a well below 2 degrees scenario. This single court case has had a major impact on what the board thought about climate change and how this permeated through climate procedures.

Therefore, we have seen good results from climate litigation, particularly against private actors, and for investors. This changes the litigation landscape and corporate landscape in Australia. These cases

were particularly brought at a time when there was no leadership from the Australian government. As such, investors stepped in. It is important to also acknowledge the breadth of the litigation around the world, and the brave clients and lawyers out there.

Finally, David mentioned a case that has overlap with investors and the behaviour of state actors. A 23 law student has sued the Australian government for not acting on climate risks to sovereign bonds. There is an interesting dynamic in this case where most of Australia's sovereign bonds are held by foreign investors. When they create their own ESG policies, they take control from Australia and increase cost of capital. This increases the cost for Australians to borrow money. The indirect impacts of that case may have already been felt. For example, when the government announced their commitment to net zero goal last year, when it was lagging behind global action, they acknowledged in the same announcement the increase in costs for sovereign bonds.

*Jacqueline Peel* asked Jolene, climate litigation has now spread to the Global South and there are an accelerating number of cases being brought, what are we seeing on climate litigation in the Global South and is this a different kind of contribution to climate law and governance?

*Jolene Lin*: Her remarks comes from the book she and Jackie are working on. The genesis of the project was that there was a lot of the discussion and focus on developed countries. However, climate litigation is occurring in Global South jurisdictions in Asia, Latin America and Africa. For the book, they are looking into the 'front runner' jurisdictions i.e. the countries with the greatest number of cases filed. In Asia, the country with the highest number of cases is India, especially because a lot of their public interest litigation is happening in a specialist environmental tribunal. In Africa, the country is South Africa and in Latin America, the country is Brazil. But cases have been filed in many other countries.

In terms of the characteristics of these cases? First, there is a prevalence of rights-based claims. Many of the countries have constitutions with environmental rights. Second, there is a preference for the enforcement of laws and policies that already exist rather than pushing for new or better laws. One of the reasons for this is that a lot of the environmental laws on the books already provide familiar laws that allow environmental lawyers to use case law and precedents to address the court. There is a gamble in putting forward a novel argument. For example, the *Lehari* case in Pakistan, this landmark case was actually a petitioner approaching the court seeking a judicial pronouncement that the government had failed to implement climate change policies that had already developed. Third, plaintiffs are trying to address more fundamental drivers of climate change e.g. deforestation. In the book, Jolene and Jackie use the term 'stealthy' climate litigation. Litigants are advancing cautiously and quietly by packaging climate change cases with less controversial claims, to dilute the potential potency of climate issues. This is also in recognition of the fact that climate change litigation is not without its risk in many jurisdictions e.g. litigants face personal risk.

When we talk about impact, a couple of examples can be made where we use process tracing to show that there is that impact. However, what is more difficult to document is that often enforcing outcomes is a challenge. It is one thing to get a victory in the courtroom, it is another thing to get victories put into practice. For example, a recent judgment by the Indonesian Supreme Court found that the government was negligent and this has led to terrible air pollution in Jakarta. But this judgment has not been enforced. However, there are still benefits for bringing litigation in developing countries and improving accountability and governance in the Global South.

*Jacqueline Peel* asked Louis, your work is focused on the big picture of governance and especially earth systems governance, where do you see litigation fitting and what kinds of changes in governance are needed to deal with sorts of crises we are seeing with issues like climate change?

*Louis Kotze*: In terms of the very political nature of climate conflicts and cases before courts, a general statement to start with is that many specific functions that courts are fulfilling their generic functions of providing justice, judicial interpretation, adjudication of disputes, determining rights and freedoms, upholding the rule of law, protecting the integrity of legal system etc. Courts are performing these generic functions in the context of climate change by providing access to justice, determining claims, enforcing law etc.

But it is important to recognise that the courts are unique in that they are not political actors. They are gatekeepers of justice, performing their oversight role in a neutral way and in turn shaping overall governance. In the climate context specifically, courts provide the adjudicatory tools of the state, serve as legal platforms, conduits. The courts offer a very important arena for actors to confront how climate change ought to be governed. There is growing influence of the courts, specifically in global governance in five domains. The following will elaborate on the influence of courts in global governance across these five domains.

First, in terms of accountability, courts impose accountability on public and private sector actors failing to take adequate action. Courts are in a unique position. We can point to the case example of *Shell* here. They are also providing accountability in relation to governments. There are an increasing number of successful cases that can be identified e.g. *Urgenda*.

Second, in terms of redefinition of power relations, courts could affect power relations at local, state and international level. For example, for Small Island States, courts are empowering various stakeholders in the making of climate policies simply by allowing litigants standing. Courts have the potential to decentralise and democratise powers. Courts are providing new political roles. A case example here is *Neubauer*.

Third, in terms of remedying vulnerabilities and injustices, especially in the Global South context, courts can remedy vulnerabilities and injustices or at least contribute to greater recognition of these. Future generations can often only bring cases through very narrow claims e.g. Youth claimants are a sub-group of the people who are most vulnerable.

Fourth, in terms of using and interpreting international climate law, these cases could lead to better compliance and stronger action. We see most of the action here at the national level. The case of *Neubauer* is relevant here again.

Fifth, in terms of how courts use climate science, there is a need to align climate governance with earth system science. This is increasingly being recognised. There is increased confluence in multi-disciplinary interactions between earth system scientists and political scientists. This need also plays out more specifically for climate science to improve, legitimise, and support climate governance. Science plays central role in climate change cases.

As a final note, courts are increasingly asserting themselves as influential actors in climate governance. This is an appealing idea. But we need to recognise the limitations of this new phenomenon. There are some cases with positive outcomes and some with negative outcomes. And there is insufficient empirical evidence of how courts contribute to climate governance. We would love more studies to be done with empirical evidence of how courts are influencing governance. While courts are not the

solution to the climate problem and they are not the same as governments, many courts are not shying away from being actors who can influence governance.

*Jacqueline Peel* asked the panel, there have been a lot of cases that have a strategic framing, where are the best outcomes being achieved, what evidence there is of this, and also if there are limitations of using litigation? So, where are the most outcomes, where are the limits, and where is the evidence or the gaps most needed to be addressed?

*Joana Setzer*: There is a need for more empirical research that understands the impacts and outcomes of litigation, both qualitative and quantitative ways of understanding impacts. For example, there is research with economists on the impact of litigation against corporates on share price. Quantifying this contribution may spur more litigation. Political scientists have a lot to contribute here as well as lawyers. For example, an anthropologist has looked at how the community in the case of *Lluyia* dealt with suddenly being in the spotlight and media, and how litigation created issues for the community in that case. These examples show not only a need to understand impacts but also from many different disciplines and perspectives. She would love to see this more and more. These are understanding impacts before the case, while the cases are ongoing, and after the case finished.

*Jacqueline Peel*: asking a question from the floor relating to adaptation litigation, what are the trends that we are seeing in the adaptation space and what more can we do to take forward climate adaptation litigation, particularly to address the impact of climate change on land and food security issues?

*Jolene Lin*: A lot of the cases in the Global South focus on mitigation. For Jolene and Jackie writing their book, this was a little surprising as we were expecting to see more on adaptation. Part of the reason for this is how cases are selected for bringing forward. There are so many possible cases that could be brought and funded, so lawyers and others ask which cases focus on with limited resources? In terms of adaptation and loss and damage, we will see more funding and support for litigation moving forward. This is especially because adaptation has been the neglected sibling in UNFCCC. The Paris Agreement was supposed to spur forward adaptation. There have been powerful events in recent years e.g. Pakistan floods, the impacts of which were worsened by at least 50% by climate change. These are powerful impacts that raise awareness of the need for litigation to push for better adaptation, especially because the poor, marginalised, are the most affected.

*Jacqueline Peel*: In the Australian context, where government behaviour is changing, the government was previously recalcitrant and is now engaging, how does that affect climate litigation strategy in terms of maintaining strategic focus?

*David Barden*: Governments in Australia are improving, but there are things that they are not doing. For example, Australia's new Climate Change Act addresses domestic emissions but as Australia largest exporter of emissions, the government is not doing anything about it. There is plenty to do. As another example, there is a desire to have policy on electric vehicles. It is encouraging but plenty of strategic opportunity there.

*Jacqueline Peel*: Who it is easier to oblige to do things, whether climate litigation as a tool is more effective for private sector actors accountability or whether it is more effective against government actors? Are there different kinds of accountability depending on sort of actor looking at?

*Louis Kotze*: It is increasingly collectively seen as tool for keeping perpetrators accountable. There are important examples being set. Governments, private sector are increasingly being more careful because they see what is happening. They see that courts are not hesitating to enforce accountability.

This is where the power of litigation lies. The symbolic impact it has. Carbon majors will not be allowed anymore to continue with their practices. However, one of the biggest challenges here is the David v Goliath question. How do we ensure that those who are fighting are sufficiently empowered and able to bring successful claims? Because we know that the resources of carbon majors are endless. In courts, vulnerable people are empowered to speak up.

*Jacqueline Peel:* What the biggest challenge? What is the biggest opportunity?

*Joana Setzer:* In strategic litigation, there is always risk and fear of having negative precedent. Human rights litigation faced the same issue for many years, as with environmental and health litigation. All of these types of litigation have dealt with challenge of bad precedent for decades. Cases are carefully thought out therefore. They bring the best available science, and precedents around the world. Litigants are crafting and thinking and designing cases. In addition, we know that even lost cases have some impact and this can be positive, particularly looking at the corporate sector, regulators, etc who previously did not care. They are now very much aware and paying attention. Even the risk of litigation is having an interesting impact, particularly on corporate and regulator behaviour.

### Questions from the Audience

- Climate litigation leans heavily towards mitigation specific litigation. But what trend do you see in adaptation specific litigation around the world? How promising do you see this trend potentially emerging?
- For Australian lawyers in particular, how do you see the Albanese government's increased NDC and announcement of Ambassador for Climate Change affecting trends in the next few years for climate litigation in Australia?
- What is harder, to oblige the private sector or governments? And how can legislators find a binding solution for this?
- How do you see the prospect for cooperation between the Global South and North to tackle climate change and protect human rights?
- Can the panel say more about climate litigation in the food and agriculture sectors e.g. the areas covered, arguments used, etc. Can the principles or human rights based litigation work for agriculture, food value chain operations and climate change? Can they be used to argue for higher adaptation in agriculture ambitions?
- What is the biggest challenge that face climate litigation right now?
- Climate litigation is vital in tackling the climate crisis. It is true that the benefit of climate litigation, especially strategic litigation, is not necessarily in securing the legal outcome sought i.e. the legal point may fail but the broader awareness-raising or pressure on government may be successful. But we still need to take care, because creating a bad precedent could be harmful in the long term. How do litigators and clients address this and are the panellists aware of any cases which were lost having a damaging impact?
- What is the role of women in strategizing climate litigation in enhancing climate justice beyond the Global North-South divide, which can ultimately translate to legislation in nations?
- Do you think the dispute settlement mechanism under art 14 of UNFCCC can be triggered where the parties fail in terms of implementation at COP 27?
- How do you see climate litigation building established principles in customary international law, for example *Billy et. al v Australia*? At what point will we have reached customary international law? (e.g. findings on 23 Sept 2022 that Australia violated Art. 17 and 27 of ICCPR in failing to take mitigation and adaptation measures in relation to Torres Strait Islands.