A JUST TRANSITION

Who Holds the Hose?

Exploring a Government Duty of Care to Avert Climate Change

Isabella Boone, Lauren Sandeman, Kelsey Gray, Oscar Pearce, Thomas Webb and Himali Wijesinghe

GREEN LAW

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Acknowledgement of Country

We recognise that Aboriginal and Torres Strait Islander Nations are the first sovereigns of the lands and waters of this continent. This sovereignty was never ceded and continues to this day, informing Indigenous connection to land, waters and community.

Indigenous respect and guardianship over Country is an integral part of environmental justice and must be acknowledged and respected for the realisation of environmental justice. Indigenous leadership, autonomy and justice are also critical to broader climate justice in Australia.

GreenLaw and its members acknowledge we meet on Indigenous land and, in working towards environmental justice, we stand beside the traditional guardians of these lands. We recognise that during the writing of this submission we met on Ngunnawal and Ngambri Country, as well as the lands of the Dharug and Gadigal Peoples. We pay our respects to Elders past and present.

Acknowledgements

We acknowledge the editorial and strategic assistance of Annika Reynolds, the research assistance of Joel Bourke and the contributions of Matt Floro, Sean Ryan, Nicole Summer, Elaine Johnshon, Kenneth Pennington and Oscar Luke from the Environmental Defenders Office for commissioning this research, working with us on development and for their comments on drafts of this report.

Executive Summary

GreenLaw has been commissioned by the Environmental Defenders Office to produce a report on the feasibility of a climate duty of care being recognised in Australia. In this report, we provide an overview of the basic elements needed to find a duty of care, owed by a statutory authority to the public, concerning climate-related harms under Australian negligence law.

Climate change is "legally disruptive" and has catalysed the advancement and resolution of novel legal disputes.[1] The absence of effective government responses to mitigate the risks of climate-related harms has led to a greater focus on litigation as a vehicle to challenge the decision-making of statutory authorities that contribute to the climate crisis.[2] This is reflected in the increase in climate litigation around the world.[3]

An emerging legal pathway to ensure Australian governments fulfil their responsibilities to avert the climate crisis is to establish a climate duty of care to prevent that harm. The purpose of such a duty is to impose obligations, under negligence law, on Australian governments to prevent actions or policies that contribute to worsening climate change, namely, the approval of coal and gas projects in their jurisdictions (labelled a climate duty of care in this report). If a government entity is found to hold such a duty and to have breached that duty, they may be liable for damages or prevented, through injunctive relief, from continuing to take actions that worsen climate change through injunctive relief. A climate duty of care is, therefore, a powerful mechanism for shifting government policy and decision-making.

However, whether a climate duty of care exists between Australian governments and the public, or defined classes of plaintiffs, is contentious and legally complex. In 2021, a single judge of the Federal Court found that the federal Environment Minister owed the children of Australia a duty of care to avert climate harms that could cause them physical injury.[4] This case, cited as *Sharma* in this report, was globally a ground-breaking step forward for the law of negligence and for legal pathways to climate accountability. Unfortunately, the decision that recognised the climate duty of care in *Sharma* was overturned on appeal before the Full Federal Court in 2022,[5] in a case called *Sharma (No*

[1] See Elizabeth Fisher, Eloise Scotford and Emily Barritt, 'The Legally Disruptive Nature of Climate Change' (2017) 80(2) *Modern Law Review* 173.
[2] Rahul Thyagarajan, 'Constructing a Negligence Case under Australian Law against Statutory Authorities in Relation to Climate Change Damages' (2014) 8(3) *Carbon & Climate Law Review* 208, 208.
[3] See generally Rachel Pepper, 'Environmental Law: Quartet of Recent Landmark Climate Change Cases' (2021) 95 *Australian Law Journal* 861.
[4] *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560 ('*Sharma*').
[5] *Minister for the Environment v Sharma* [2022] FCAFC 35 ('*Sharma (No 2)*').

2) in this report. Nonetheless, these cases have shined a spotlight on the potential for negligence law to contribute to climate accountability against government entities.

This report builds upon this novel case law and explores the legal issues that a plaintiff will need to address to ground a case for a climate duty of care to be recognised against an Australian government or decision-maker. The report is split into seven sections.

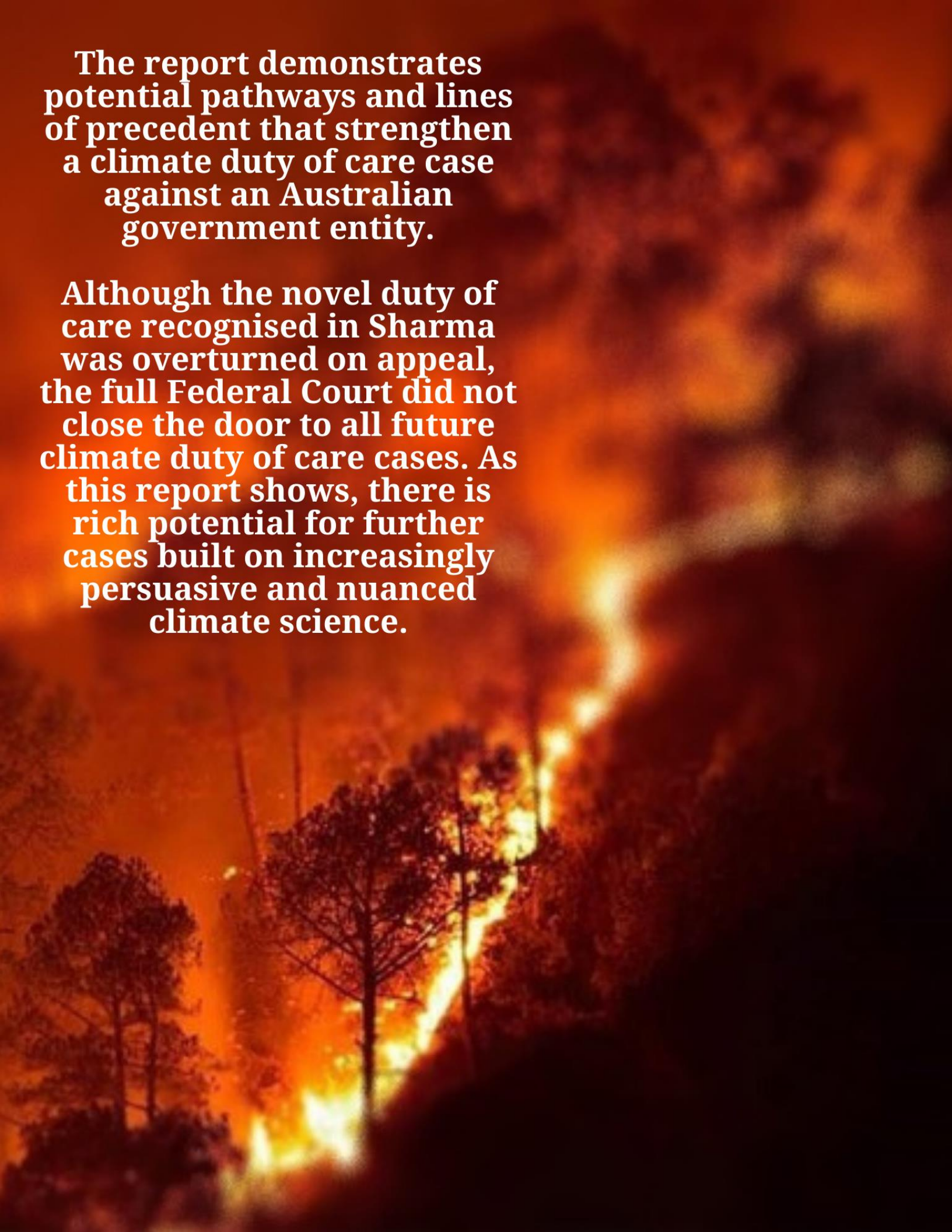
The first section outlines how the common law of negligence develops and the role (or mythology) of judicial activism in this process to provide a contextual background for the rest of the report. The second section then examines the climate science that provides the evidentiary basis for any climate duty of care claim. In section three, the report addresses the second foundational aspect of a climate duty of care claim, the statutory scheme that the decision-maker operates within and how that legislation informs a negligence case. The fourth section provides the final foundational limb of a climate duty of care claim, exploring how the selection of the class of plaintiffs impacts upon any potential case.

In section five, the report delves into the salient features, that a Court is likely to explore in determining whether a duty of care to avert climate harms exists between a government entity and a class of plaintiffs. Section six provides a more detailed analysis of coherence considerations, which are likely to be a significant legal hurdle in the recognition of a climate duty of care. Finally, the seventh section provides a brief overview of potential remedies. As the choice of remedy fundamentally influences the construction of the duty of care in any negligence case, and therefore, is a relevant consideration for any plaintiff assessing how to formulate a climate duty of care claim.

Overall, the report demonstrates potential pathways and lines of precedent that strengthen a climate duty of care case against an Australian government entity. Although the novel duty of care recognised in *Sharma* was overturned on appeal, the full Federal Court did not close the door to all future climate duty of care cases. As this report shows, there is rich potential for further cases built on increasingly persuasive and nuanced climate science.

Establishing a climate duty of care is closely linked with the other elements of negligence, notably, breach and causation. This is particularly prevalent in a climate duty of care case, where climate science forms the basis of both the duty of care and causation. This report will not explore breach or causation elements but notes these as potential issues which future cases and the common law will need to address.[6]

[6] For example, in *Sharma (No 2)* Allsop CJ discussed the need for the common law to evolve to grapple with climate harms, including the adoption of new principles for causation: Ibid [440].



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Novel Cases

The common law develops incrementally. In negligence, novel cases can serve as catalysts for this development and expansion, such as when a new negligence duty of care is established. In *Sullivan v Moody* the High Court emphasised that "the law of tort develops by reference to principles which must be capable of general application, not discretionary decision making in individual cases".[7] This is particularly important in the formulation of a new duty, because the scope of the duty must be general enough that questions of law and fact do not become intertwined.[8] This is done through the application of salient features to determine whether the relationship between the plaintiff and defendant gives rise to a duty of care.[9]

Climate duty of care cases are also novel because of the temporal relationship between a claim that a duty of care exists and the assertion that the plaintiffs should be protected from *future* climate harms. Such claims for future harms may be recognised by the common law, and have been, especially in the context of personal harm to refugees in government-controlled detention facilities.[10] However, a climate duty of care grounded in "concrete facts that arise by reference to a claim of actual damage"[11] may resolve some of the legal hurdles currently associated with climate duty of care cases, including indeterminacy of the class of plaintiffs.

Despite these challenges, tortious claims to recognise a climate change duty of care against statutory authorities have gathered pace since the ground-breaking decision in *Urgenda* where the Dutch Supreme Court determined that the Dutch Government has a duty towards its citizens to mitigate the risk of personal injury from climate change.[12]

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[7] *Sullivan v Moody* (2001) 207 CLR 562 [49] (per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).
[8] *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 [106] (per McHugh J) ('*GBO*').
[9] *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649 [103] ('*Stavar*').
[10] See generally Tim Baxter, 'The Slow Death of Past Damage as an Essential Element of Negligence' (2019) 26(3) *The Tort Law Review* 123.
[11] *Sharma (No 2)* (n 5) [777] (per Beach J).
[12] *Urgenda Foundation v Netherlands (Ministry of Infrastructure and the Environment)*, Rechtbank Den Haag [Hague District Court], C09/456689/HA ZA 13-1396 (24 June 2015) [4.15] and [4.38] ('*Urgenda*').

The Role of Judicial Activism

The alleged politicisation of the Courts through public interest environmental litigation is an ongoing critique by some conservative commentators. This includes the evocation of "green lawfare",[13] the argument that environmental groups are abusing court processes, and "judicial activism", the myth that the judiciary is deciding climate cases according to politics and not the law.[14] However, climate litigation - including climate duty of care cases - is neither green lawfare nor judicial activism. In *Sharma*, in line with other legal decisions regarding climate change, the Court applied orthodox legal principles to new factual matrixes. This report will take a similar approach in its construction of a climate duty of care. The common law, and indeed the entire Australian legal system, is predicated on the values of liberty and personal safety. Climate change fundamentally threatens the achievement of these values and necessitates the application of existing laws to new circumstances.

Climate Science

> *"The attribution science studies have been able to link the growing frequency and intensity of extreme weather events to climate change…[This] data could become important evidence in holding governments and corporations legally accountable for the current climate crisis."*[15]

The foundation of any negligence inquiry is whether the harm occasioned by the defendant was reasonably foreseeable. In the context of climate change, the question becomes: could a government reasonably foresee the harms of global warming? Climate science is critical to this question and the growth of climate literature significantly strengthens any negligence case. Plaintiffs must be able to demonstrate a causal link between a defendant's behaviour and a plaintiff's injury or foreseeable injury. It is therefore important to discuss climate science, how it underpins a climate duty of care and how it may be utilised in litigation.

This report provides an overview of two major forms of climate science evidence that could be adduced before a Court: event attribution science and estimating Australia's remaining carbon budget (that is compatible with limiting global warming to 1.5˚C or 2˚C).

Climate Science and the Foreseeability of Harm

Event attribution science is the main source of scientific research relevant to establishing a duty of care. It analyses the relationship between anthropogenic greenhouse gas emissions and specific

[13] Annika Reynolds et al, 'Submission to the EPBC Act Independent Review' (Report, 2020) *GreenLaw*.
[14] M Sakr, Johnny and Augusto Zimmermann, 'Judicial Activism and Constitutional (Mis)Interpretation: A Critical Appraisal' (2021) 40 *University of Queensland Law Journal* 119, 120-121.
[15] Rolline Shekan and Becker Buttner Held, 'The science behind climate litigation' (2020) 9(4) *Renewable Energy Law and Policy Review* 5-8, 6.s

extreme weather events.[16] By modelling the influence of human impacts, we can understand the causes of extreme weather, and quantify the extent to which climate change alters expected weather patterns. While there are variations in methodology, drawing comparisons between the "real" and "counterfactual" worlds is an accepted method of determining probabilistic causation.[17] Numerous projections can be calculated and modelled across different geographical and temporal scales for different climatic impacts and harms.[18]

Such modelling could also address existing evidentiary shortfalls, either by attributing climate change impacts to individual emitters of greenhouse gases or establishing the foreseeability of climate change impacts. Attribution science can be utilised to determine liability for past harms through retrospective application and for likely future harms through prospective application. Articulating climate harms through the lens of attribution science is a way for plaintiffs to demonstrate foreseeability and knowledge of harm.

A second form of scientific evidence is the use of carbon budget calculations. A carbon budget is a tool for determining the set amount of cumulative carbon that may be emitted into the atmosphere before inducing further global warming.[19] Carbon budgets can be used to estimate whether a defendant's current or future actions are compatible with limiting global warming to 1.5˚C or 2˚C.[20] Put another way, carbon budget calculations enable a plaintiff to argue that the defendant's actions will contribute to future climate harms, resulting in those harms being reasonably foreseeable.

Indeed, the International Energy Agency has published a global energy roadmap outlining the essential conditions for the global energy sector to meet net zero greenhouse gas emissions by 2050. A core recommendation of that roadmap was that "no new oil and gas fields or coal mines or mine extensions" could be approved, beyond those in 2021, in order to remain within the remaining carbon budget that is compatible with net zero emissions by 2050.[21] The United Kingdom, among

[16] Sophie Marjanac and Lindene Patton, 'Extreme Weather Event Attribution Science and Climate Change Litigation: An Essential Step in the Causal Chain?' (2018) 36(3) *Journal of Energy & Natural Resources Law* 265.
[17] National Academies of Sciences, Engineering, and Medicine, *Attribution of Extreme Weather Events in the Context of Climate Change* (National Academies Press Report, 2016) 1.
[18] IPCC, *2021: Summary for Policymakers. In: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press) ('*IPCC Summary*').
[19] Unurjargal Nyambuu and Willi Semmler 'Climate change and the transition to a low carbon economy – Carbon targets and the carbon budget' (2020) 84 *Economic Modelling* 367, 367.
[20] See generally Luke Sussams, 'Carbon Budgets Explained', *Carbon Tracker Initiative* (Explainer Article, 6 February 2018) < https://carbontracker.org/carbon-budgets-explained/>.
[21] International Energy Agency, *Net Zero by 2050: A Roadmap for the Global Energy Sector* (IEA, Flagship Report, 2021) 20.

other countries, has relied upon this research and its own carbon budget calculations in developing policy to achieve net zero by 2050.[22]

However, the interaction between climate science and policy in Australia remains controversial, as carbon budget calculations are not utilised by most Australian governments to measure greenhouse gas emissions.[23] The exception being the ACT, which relies upon carbon budgets in its Climate Strategy 2019-2025 and as a mechanism for assessing whether that jurisdiction has met its emission reduction targets.[24] The judiciary has, in turn, rejected the use of carbon budgets in climate negligence cases to date.[25] However, testimony that a government will exceed its national climate commitments through the use of carbon budget calculations has been used successfully as evidence to further climate litigation in foreign jurisdictions.[26] There may yet be scope for the use of carbon budget evidence in climate litigation in Australian jurisdictions, especially if carbon budgeting is used by governments in the future to inform project approval decisions or policy.

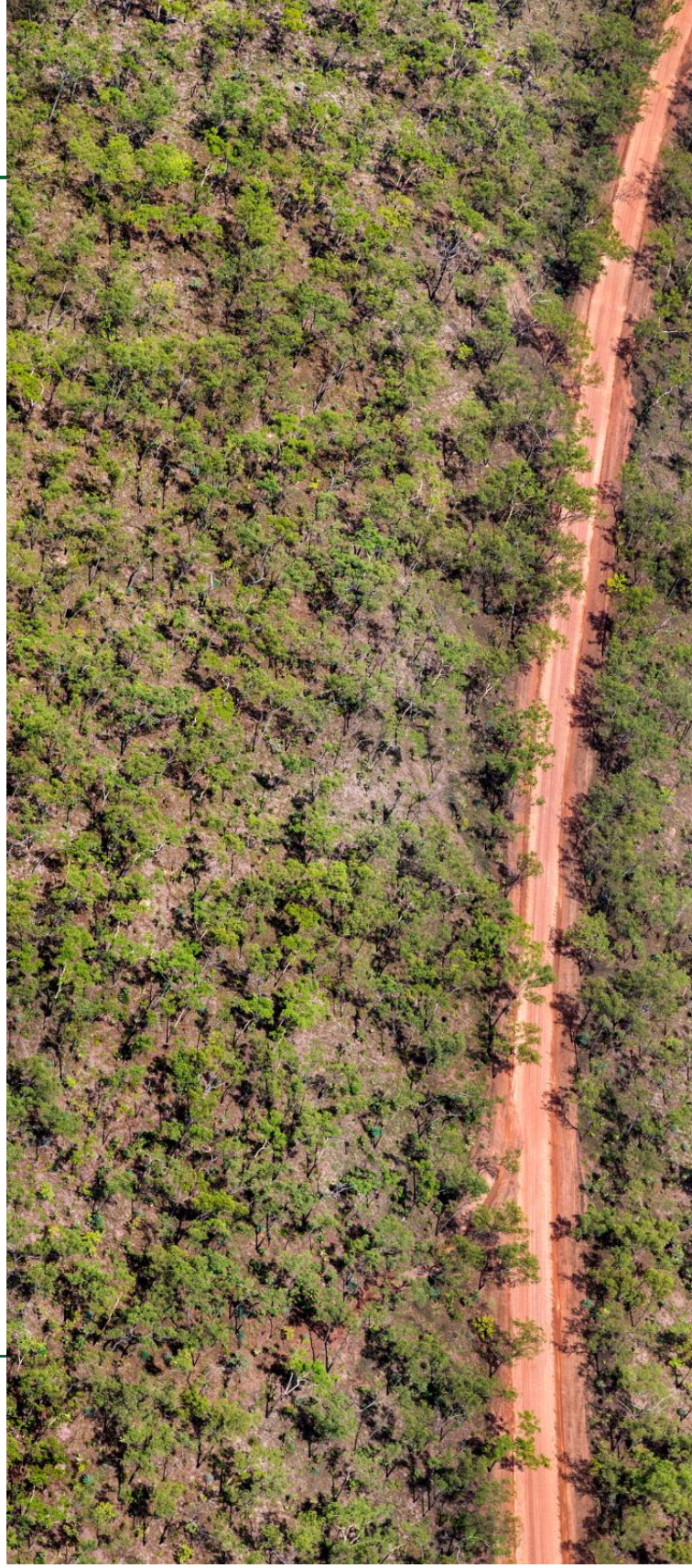
Climate science is the primary evidence for establishing causal links between the emission of greenhouse gases, anthropogenic climate change and potential (or actual) harms experienced by the class of plaintiffs. This evidence is necessary to articulate the type of harm a litigant is exposed to, and to demonstrate the reasonable foreseeability of this harm. Climate science is, therefore, the central pillar for a climate duty of care.

[22] See, eg, *Climate Change Act 2008* (UK) and HM Treasury, *Net Zero Review: Analysis exploring the key issues* (Review Report, October 2021) 81.
[23] *Sharma (No 2)* (n 5) [111] (per Allsop CJ).
[24] Environment, Planning and Sustainable Development Directorate, *ACT Climate Change Strategy 2019-25* (ACT Government, 2019) 22-23.
[25] *Sharma (No 2)* (n 5) [111] (per Allsop CJ).
[26] See Eloise Culic, 'Carving the Path for the Future of Climate Change Litigation Using Tort Law: A Comparative Case Study of the Australian Sharma Decision and the Dutch Decision of Urgenda' (2021) 38 *Environmental and Planning Law Journal* 279.

Climate Science in Bushfire Survivors for Climate Action[27]

Bushfire Survivors for Climate Action, a climate action group, sought an order from the Court to compel the Environment Protection Authority to perform its statutory duty to ensure the protection of the environment in NSW from climate change through the development of environmental quality policies and objectives, pursuant to s 9 (1)(1) of the *Protection of the Environment Administration Act 1991* (NSW) Act. The Court found that this duty, given "the current circumstances",[28] included a duty to develop instruments to ensure such protection from climate change. However, the Environment Protection Authority retained discretion as to the specific content of such instruments. The Environment Protection Authority was found to have failed to fulfil this duty and a mandamus order was made to compel the authority to perform its duty.

In this case, the latest Intergovernmental Panel on Climate Change (IPCC) Report was tendered as evidence before the Court.[29] The Court accepted the IPCC Report as decisive evidence of the threats posed by climate change, indicating that the Report is likely to be an influential piece of expert evidence in climate litigation going forward.[30]



[27] *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* [2021] NSWLEC 92.
[28] Ibid [16].
[29] Ibid.
[30] Ibid.

Climate Science in the Courtroom

The availability of climate science allows plaintiffs to provide specific information that demonstrates to a Court the loss, damage and future harm caused by individual emitters, decision-makers or policymakers.[31]

The role of expert evidence is to provide the Court with impartial information on complex factual subject matters.[32] There are rules of evidence and codes specific to each jurisdiction which dictate the manner in which expert evidence can be produced and presented.[33]

The most authoritative body for the assessment and publication of climate science is the IPCC.[34] The IPCC's 2021 climate report, using stronger language than its previous iterations, concluded that human influence has warmed the planet.[35] With respect to Australia, the Report referred to increased risks of droughts, sea level rise, intensified storms, tropical cyclones, heatwaves and more intense bushfires.[36] This report was affirmed as the most authoritative source on climate science in *Sharma (No 2)*.[37]

In Australia, the Australian Bureau of Meteorology and the Commonwealth Scientific and Industrial Research Organisation publish a biennial *State of the Climate* report. This report draws upon the latest climate science and projections to describe the year-to-year and long-term variability of Australia's climate.[38] In climate duty of care cases, expert evidence on the risks and likelihood of specific climate harms is fundamental. These authoritative international and national sources strengthen a plaintiff's submissions regarding likely climate harms and their foreseeability.

In *Sharma*, Dr Mallon referred to time constraints with the preparation of his expert report on risk assessment of specific climatic harms.[39] This may pose a challenge for future cases postulating a climate duty of care. Under temporal constraints, experts may make conservative estimates or generalisations.[40] This may prevent the full impact of the expert evidence from being realised by the Court. Alternatively, sufficient time for the preparation of expert witness reports and their testimony in Court may enable a stronger articulation of the scientific evidence that underpins finding a climate duty of care.

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[31] Marjanac and Patton (n 16) 265-299.
[32] Chief Justice L B Allsop, 'Expert Evidence Practice Note (GPN-EXPT)' (Practice Note, 25 October 2016) *Federal Court of Australia* [4.1].
[33] Ibid.
[34] *Sharma* (n 4) [35]; *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 [431]-[434].
[35] *IPCC Summary* (n 18) 4.
[36] Ibid 8.
[37] *Sharma* (n 4) [35].
[38] CSIRO, *State of the Climate* (Report, 2020).
[39] *Sharma* (n 4) [209].
[40] UNEP, *Global Climate Litigation Report: 2020 Status* Review (Report, 2020) 22.

Climate science in *Sharma*[41]

Expert evidence was provided by Professor Steffen, an eminent climate and Earth systems research specialist with over 30 years of experience. His unchallenged evidence was based upon his research and made substantial reference to IPCC Assessment Reports and the *State of the Climate: 2020 Report*.[42]

This evidence outlined:

- Global implications of the effects of greenhouse gas emissions on global surface temperatures;
- Planetary carbon feedback loops;
- Three possible 'future world' scenarios of 2, 3 and 4°C global warming respectively;
- Effects of a 4°C future on Australia specifically; and
- A probability assessment of maintaining a 2°C future scenario.

Expert evidence was also provided by Dr Mallon and Dr Meyricke, whose specialties reside in climate change physical impact risk analysis and climate change mitigation respectively. This evidence assessed the risk of personal injury or death from specific types of harm (e.g. heatwaves) to the class of plaintiffs.[43] It is important to note that these risk assessments were calculated from the evidence provided by Professor Steffen and narrowed to harms applicable to the class of plaintiffs (children under the age of 18 ordinarily residing in Australia) and demonstrates the utility of pairing climate science with risk analysis before a Court to support a potential climate duty of care.

The factual findings that arose from this expert evidence were affirmed by the Court on appeal in *Sharma (No 2)*.[44]

[41] *Sharma* (n 4).
[42] Ibid [34]-[36].
[43] Ibid [205].
[44] *Sharma (No 2)* (n 5) [290] (per Allsop CJ).

The Statutory Scheme

Due to the principle of parliamentary supremacy,[45] the creation of any duty at common law must be consistent with, and not infringe upon, the operation of the statutory scheme.[46]

Therefore, an understanding of the relevant statutory scheme is crucial to determining the scope of a public authority's duty of care. The statutory scheme will inform the:

- Scope of the authority's powers;
- Process of approval for coal and gas projects, and the level of discretion the authority has to reject the project or impose conditions upon any approval;
- Mandatory considerations the decision-maker must take into account when making their decision whether to approve a coal or gas project; and
- Statutory capacity of the decision-maker to consider and address climate harms.

The content of a duty of care owed by a public authority would be equal to that of a private citizen.[47] However, there are additional considerations for the imposition of such a duty where the defendant is a public authority. It is important to note that where a statute confers upon an authority the power to act, this does not necessarily give rise to a duty of care.[48]

The statutory scheme may also define key terms, notably, environmental concepts that can serve as statutory 'hooks' for the imposition of a climate duty of care. An example of this is the construction of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*'EPBC Act')* in *Sharma*. Bromberg J examined the definition of "environment"[49] and Ecologically Sustainable Development (ESD) principles, which were mandatory considerations for the Minister when exercising her approval power.[50] As a result, the Court found that the "avoidance of death and personal injury" was an implied consideration under the *EPBC Act* and consistent with the Act's legislative structure and purpose of "protecting … people … as a defined part of the environment".[51] This reasoning was overturned on appeal but, nonetheless, it is a demonstration of how the statutory scheme can be construed to be consistent with, and even support, the imposition of a climate duty of care.

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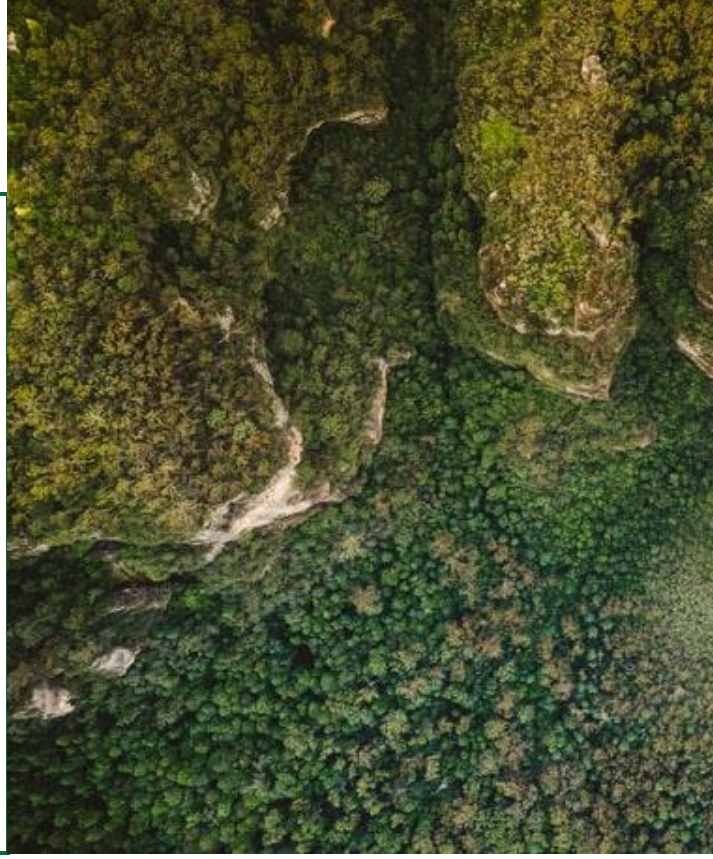
[45] *GBO* (n 8) 616–17.
[46] *Sullivan v Moody* (n 7) 579-582.
[47] *Graham Barclay Oysters* (n 8) 556 (per Kirby J).
[48] *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 (*'Stuart'*).
[49] *Sharma* (n 4) [158].
[50] Ibid [150]-[166].
[51] Ibid [405].



Ecologically Sustainable Development (ESD)

ESD is a fundamental tenet of environmental and planning law in Australia (at both a State and federal level). It involves the consideration of four key principles:

- the precautionary principle;
- intergenerational equity;
- biodiversity conservation; and
- improved valuation mechanisms.[52]

Any activity containing an economic, social or environmental objective requires consideration of ESD principles during the decision-making process.[53]

The statutory scheme, and other relevant legislation that governs either the decision-maker or negligence law more generally, will also inform the formation of the duty. In each State, there is a *Civil Liability Act,* which codifies aspects of common law negligence. Notably, these Acts codify that a duty of care is a necessary element of a successful negligence claim but are silent on how to determine whether a duty of care exists.[54] That process of determining whether a duty exists is still informed by the common law.

[52] Guy Dwyer and Mark Taylor, 'Moving From Consideration to Application: The Uptake of Principles of Ecologically Sustainable Development in Environmental Decision Making in New South Wales' (2013) 30 *Environment and Planning Law Journal* 185; See for instance, *Protection of the Environment Administration Act 1991* (NSW) s 6(2).

[53] Department of Agriculture, Water and the Environment, 'Criteria for determining ESD relevance' (Policy 2003) *Environment Australia* <https://www.awe.gov.au/environment/epbc/publications/criteria-determining-esd-relevance>, Ch 2.

[54] David Rolph et al, *Law of Torts* (Lexis Nexus, 6th ed., 2021), 250-251.

Class of Plaintiffs

Negligence law imposes legal duties based on relationships between different groups of people. Therefore, the choice of plaintiff is critical because it is their relationship with the defendant that will determine if a duty of care exists. As stated in *Bottomley v Bannister*, a duty of care is not recognised in the abstract.[55] The choice of plaintiff impacts how a court will assess a range of salient features, the reasonable foreseeability of harm and the award of remedies.

The Legal Dimensions of the Class of Plaintiffs

A class of plaintiffs must not be indefinite.[56] Climate change harms impact everyone, and therefore, the class of plaintiffs that are owed a duty of care could be indefinite.

One way to limit the class of plaintiffs is to limit the harms claimed to those that have already occurred during a specific time and/or in a specific place, [57] such as a particular bushfire affected region after a major fire season. As the effects of climate change are becoming more marked, litigating harms that have already occurred becomes a more viable option. However, this does not limit the capacity of future harms to be litigated, so long as the members of the class are ascertainable.[58] For example, in other jurisdictions, Courts have recognised that national governments owe a duty to avert the climate crisis to their own populations.[59]

In *Sharma*, the class of plaintiffs was limited to children who reside in Australia.[60] The duty was also restricted to only the physical harms or death the children may face in coming decades from climate change.[61] On appeal this class of plaintiffs was found to be indeterminate.[62] In reaching this decision, Allsop CJ emphasised the need for an existing legal relationship to be present between the defendant and the class of plaintiffs.[63] An existing legal relationship can be determined through an analysis of the salient features between the defendant and plaintiffs, see below for further discussion of some of the relevant salient features for a climate duty of care case. Geographical and temporal closeness between the parties may also be indicative of an existing legal relationship.[64] This is further discussed below.

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[55] *Bottomley v Bannister* [1932] 1 KB 458, 476 (per Greer LJ).
[56] *Agar v Hyde* (2000) 201 CLR 552 [127] (per Callinan J).
[57] *Sharma (No 2)* (n 5) [711] (per Allsop CJ).
[58] Ibid [741] (per Beach J).
[59] *Urgenda* (n 12).
[60] *Sharma* (n 4) [91].
[61] Ibid.
[62] *Sharma (No 2)* (n 5) [742]-[747] (per Beach J).
[63] *Sharma (No 2)* (n 5) [211] (per Allsop CJ).
[64] Ibid [678] and [697] (per Beach J).

A Class of Plaintiffs with a Narrative

Although not a strict legal requirement, the selection of the class of plaintiffs should also be informed by the overall strategic aim of the litigation; to tell a compelling narrative both within the courtroom and outside. A well-chosen class of plaintiffs communicates to the broader public the importance of climate action by tapping into social values (such as the importance of young people's futures). The class of plaintiffs can also reveal particular areas where the government is most egregiously failing to secure climate justice for the future (such as the lack of disaster responses that specifically protect disabled people).

A class of plaintiffs with a compelling narrative increases the strategic utility of the litigation because their narrative, and the values that narrative is predicated upon, can be utilised in other campaigns adjacent to the courtroom, such as media advocacy, non-violent protests or law reform submissions.

For example, the plaintiffs' case in *Sharma* was more compelling because it represented the intergenerational inequity of the climate crisis. In recent years there has been a groundswell of youth-led climate litigation, highlighting the symbolic power of this class of plaintiffs outside of the courtroom. Equally, there have been calls for climate litigation to include plaintiffs from the Global South - the communities who are least responsible for climate change and most vulnerable to its impacts.[65] A key example of Global South applicants joining strategic climate litigation is *Neubauer v Germany*, which included plaintiffs from Bangladesh and Nepal.[66] In Australia, First Nations Peoples are another compelling class of plaintiff because of the disproportionate impact of climate change upon their human rights, such as rights to practice their culture on country. First Nations Peoples also have a custodial relationship with their lands and have been at the forefront of the environmental movement in Australia since colonisation.

[65] Jacqueline Peel and Rebekkah Markey-Towler, 'A Duty to Care: The Case of Sharma v Minister for the Environment [2021] FCA 560' (2021) 33(3) *Journal of Environmental Law* 727-736, 733.

[66] *Neubauer et al. v Germany* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Mar. 24, 2021, Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20.

The class of plaintiffs communicates to the broader public the importance of climate action by tapping into social values. The class of plaintiffs can also reveal particular areas where the government is most egregiously failing to secure climate justice for the future.

In *O'Donnell v Commonwealth*, Murphy J dismissed the Commonwealth's application to have strategic litigation struck out as "pseudo climate change class action" brought to generate media attention.[67] Rather, Murphy J recognised:

> "*These days, it is commonplace for the parties to large litigation to consider, and attempt to influence, the way the litigation is seen in the eyes of the public… to the extent that she may have [attempted to garner media attention], it carries little weight in deciding whether to order that the proceeding not continue as a representative proceeding.*"[68]

The strategic selection of a class of plaintiffs will not necessarily undermine the integrity of the climate duty of care claim. Ultimately, litigants need to be careful to match the articulation of harm to the class of plaintiffs. The bigger the class, the wider the harm must be experienced by *all* within that class.

[67] *O'Donnell v Commonwealth of Australia* [2021] FCA 1223 [33].
[68] Ibid [58].

Salient Features

Salient features are factors which indicate whether it is appropriate to impose a legal duty of care upon an entity vis-à-vis a class of plaintiffs.[69] The features are to be analysed with reference to different facets of the relationship between the class of plaintiffs and the defendant. Thus, this report will explain the salient features in terms of their general application to climate harms and the relationship between the class of plaintiffs and a public authority. For a general climate duty, the following relevant salient features are discussed.[70]

Reasonable Foreseeability of the Class of Plaintiffs

In order for a duty of care to be owed to a class of plaintiffs, the plaintiffs must be so closely and directly affected by the actions of the defendant, that the defendant ought to have foreseen that their actions would have the potential to harm those plaintiffs.[71] This assessment is made from the perspective of a reasonable person in the position of the defendant.[72]

The reasonable foreseeability of a class of plaintiffs also involves temporal considerations. Significant time between the action causing harm and the alleged harm eventuating can limit the reasonable foreseeability of that class of plaintiffs being closely and directly affected by the defendant's actions.[73] However, climate science modelling, and its communication to government officials, means Courts may consider that climate harms based on future world scenarios are reasonably foreseeable.[74] The core challenge with this salient feature is ensuring that the climate harms articulated in a claim (for example threats to personal safety from bushfires) are reasonably foreseeable harms to the class of plaintiffs bringing the case.[75]

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[69] *Stavar* (n 9).
[70] Note: this is not an exhaustive list of salient features. See *Stavar* (n 8) for further enumerated salient features.
[71] *Donoghue v Stevenson* [1932] AC 562, 580; See also *Chapman v Hearse* (1961) 1056 CLR 112.
[72] *Panagiotopoulos v Rajendram* [2007] NSWCA 265.
[73] *Sydney Water Corp v Turano* (2009) 239 CLR 51.
[74] See, eg, *Sharma* (n 4) [55]-[66].
[75] See generally Tim Baxter, 'The Slow Death of Past Damage as an Essential Element of Negligence' (2019) 26(3) *The Tort Law Review* 123.

Vulnerability

Vulnerability is essential to the creation of a new duty.[76] It has been explained in the following way:

> *"[N]ot to be understood as meaning only that the plaintiff was likely to suffer damage if reasonable care was not taken. Rather, "vulnerability" is to be understood as a reference to the plaintiff's inability to protect itself from the consequences of a defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant."*[77]

Courts assess the degree of vulnerability of the class of plaintiffs by reference to the capacity a plaintiff has to take steps to protect themselves and the reasonableness of an expectation of them to do so.[78] There are two considerations that emerge as a result:

- Courts are not concerned with the plaintiff's overall vulnerability to harm, just the plaintiff's vulnerability to harms relating to the defendant;[79] and
- A plaintiff is less vulnerable if they can reasonably be expected to take steps to avoid the harm.[80]

In general, the class of plaintiffs in a climate duty of care case will be recognised as vulnerable. The average person, or community, is largely powerless to avoid large-scale environmental harms. For example, in *Sharma,* Bromberg J determined that there were no reasonable measures that could be taken by the class of plaintiffs to avoid harm.[81] There may also be circumstances of "special vulnerability" of the plaintiffs that encompass other considerations in support of this factor, for example the application of the *Parens Patraie* doctrine for plaintiffs with "legal incompetence".[82]

The class of plaintiffs must be more vulnerable than those that fall outside of the class. The children in *Sharma (No 2)* were found to be no more vulnerable to the risk of harm from climate change than any other person in society.[83] This indicates that an assessment of vulnerability that includes a geographical dimension may be more successful in future climate duty of care cases, such as communities in bushfire or flood prone areas.

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[76] *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 ('*Woolcock*').
[77] Ibid [23] (per Gleeson CJ, Gummow, Hayne and Heydon JJ).
[78] *Stavar* (n 9) [102] (per Allsop P).
[79] *Stuart* (n 48) 134 (per Crennan and Kiefel JJ).
[80] *Stavar* (n 9) [102] (per Allsop P).
[81] *Sharma* (n 4) [296].
[82] Ibid [311].
[83] *Sharma (No 2)* (n 5) [338] (per Allsop CJ).

Reliance

Reliance often intertwines with other salient features such as control and reasonable foreseeability. It may also be seen as an indicator of vulnerability.[84] A class of plaintiffs are reliant if they are shown to have reasonably relied upon to the defendant to prevent the stipulated harm.[85] In climate litigation, this may be satisfied if the government, or relevant Minister, has power over the approval or regulation of emissions-intensive projects. In *Sharma*, this was satisfied for two reasons:

- The Minister had control over their own actions and thus had capacity to prevent the risk of harm, and
- The Minister was responsible for the overall health of the environment.[86]

Reliance will support litigants seeking a climate duty if the case relates to an actual government decision or future decision that is required by the statute. The concept of "general reliance" was rejected by the High Court as a sufficient test to establish a duty of care by public authorities.[87] An individual cannot rely on a public authority to perform an act, on the basis that it is within the scope of their function.[88] This limits reliance to be considered where there is a specific known reliance as a source of information or advice, or a vulnerability to the defendant.[89]

Indeterminacy

Courts avoid creating "an indeterminate class" of potential plaintiffs.[90] Litigants seeking a climate duty of care will need to demonstrate that the authority in question "knew or ought to have known of the number of claimants and the nature of their likely claims".[91]

However, establishing this does not require precision. Arbitrary boundaries have been deemed an acceptable by-product of "limiting mechanism[s]".[92] With the help of widely available life expectancy data and increasing scientific evidence on climate related harms, a governmental authority can be reasonably expected to understand how many living citizens will be alive to experience the ramifications of their climate decisions. Thus, litigants seeking to reliably avoid the issue of indeterminacy could justify their categorisation of plaintiff class with data to clarify the scope

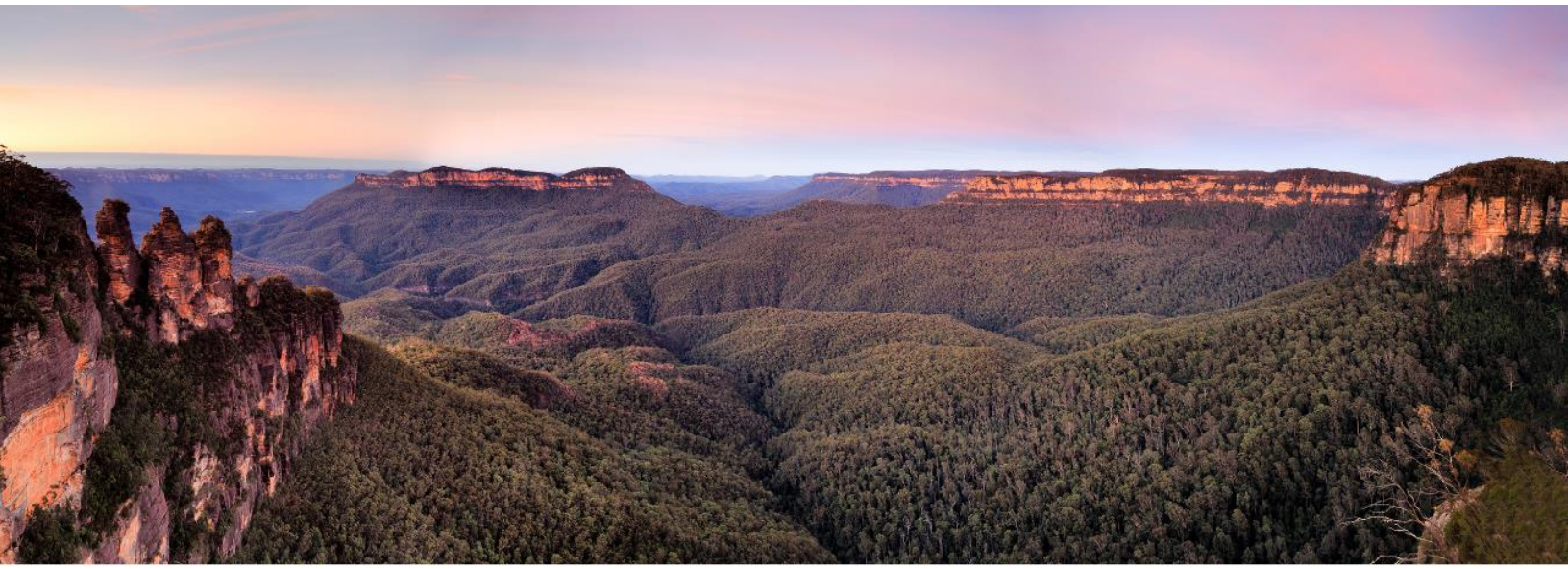
[84] *Perre v Apand Pty Ltd* (1999) 198 CLR 180 [126] ('*Perre*').
[85] *Stavar* (n 9) [215] (per Basten JA).
[86] *Sharma* (n 4) [299].
[87] *Pyrnees Shire Council v Day* (1998) 192 CLR 330, 331-332 (per Allsop P); *GBO* (n 8) 623-625 (per Kirby J).
[88] *GBO* (n 8) 623-625 (per Kirby J).
[89] *Central Highlands Regional Council v Geju Pty Ltd* [2018] 3 Qd R 550, 554.
[90] *Perre* (n 84) [15] (per Gleeson CJ).
[91] Ibid [108] (per McHugh J).
[92] Ibid [343] (per Hayne J).

of plaintiffs.[93] Indeterminacy is also less of an issue for a more limited class of plaintiffs, for example a particular First Peoples Nation or people with disabilities residing in a particular location.

There is no inherent issue at law with a large potential plaintiff class, so long as it legitimately reflects the negligent party's liability. For example, a case against a State Government would need to be limited to individuals residing within that State to reflect that government's responsibilities.

Indeterminacy extends beyond the class of plaintiffs to include an indeterminate quantum of liability for an indeterminate time.[94] These factors are most relevant where the harm is pure economic loss and are not often considered in cases of physical harm.[95] Where physical harm is alleged, the damage involved is usually sufficiently limiting in defining the duty of care.[96]

In future climate harm cases, like the type alleged in *Sharma*, indeterminacy of liability may still be an issue because of the scale (both geographically and temporally) of climate harms.[97] This may limit the viability of a Court recognising a climate duty of care or awarding substantive remedies (see later in this report). It is therefore recommended that the type of harm that is the subject of the climate duty of care case be considered carefully. Harms that have already occurred to a limited group of people and are likely to reoccur, such as bushfires and flooding, are more likely to be considered determinate.



[93] For further discussion on the role of indeterminacy in claims of personal injury, see *Sydney Water* (n 73) [55].
[94] *Ultramares Corp v Touche* 255 NY 170 at 179 (1931); 174 NE 441 at 444; cited in *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529, 551-552.
[95] Jonathan Beach, 'Indeterminacy: The uncertainty principle of negligence' (2005) 13 *Torts Law Journal* 129-159.
[96] See *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241, 302 (per Gummow J), citing *Al Saudi Banque v Clark Pixley* [1990] Ch 313, 330 (per Millet J).
[97] *Sharma (No 2)* (n 5) [231] (per Allsop CJ).

Reasonable Foreseeability of the Harm

Extensive consideration of the reasonable foreseeability of the harm normally occurs at the breach stage of a negligence enquiry, not in determining whether a duty exists. However, in determinations of a duty of care prior to the harm alleged occurring, as will be common for any climate duty of care claim, it is relevant to assess the reasonable foreseeability of harm at the duty of care stage.[98]

Neither the "precise sequence of events" leading to the harm nor the precise damage caused needs to be reasonably foreseeable at the duty of care stage - the inquiry is more generalised.[99] However, a climate duty of care case should also consider how reasonable foreseeability would be assessed at the breach and causation stages of the inquiry. This is for two reasons. Firstly, a Court may consider, especially in future harm cases, whether it would be reasonably foreseeable that the defendant's actions would cause the future harm at the duty of care stage as part of its assessment of whether a climate duty of care is coherent with negligence law.[100] Secondly, this would inform the plaintiffs' articulation of the remedy it seeks, which is discussed in more detail later in this report.

Given the well-established scientific certainty around climate change and the potential for public authorities to contribute to climate change through their decisions,[101] the reasonable foreseeability of the types of harm related to climate change is not particularly contentious. What a reasonable person would foresee in a defendant's position is considered with reference to the "contemporary social conditions and community standards of what is reasonable".[102] The global recognition of anthropogenic climate change[103] is a community standard which lends itself to support the foreseeability of climatic harms generally from a reasonable person's position. In *Sharma (No 2)*, the Court affirmed that emissions from the combustion of coal is a reasonably foreseeable harm.[104]

However, whether the specific harms alleged by a class of plaintiffs are reasonably foreseeable will be heavily dependent upon the evidence at trial demonstrating there is a real risk of that harm to each member of the alleged class of plaintiffs, not just some people in that class.

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[98] *Sharma* (n 4) [184].
[99] *Chapman v Hearse* (n 71) [120].
[100] See, eg, *Sharma (No 2)* (n 5) [882]-[886] (per Wheelahan J).
[101] *IPCC Report* (n 18) 4.
[102] *King v Philcox* (2015) 255 CLR 304 [97] (per Nettle J).
[103] See generally IPCC, 2022: *Climate Change 2022: Impacts, Adaptation, and Vulnerability.* Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.), Cambridge University Press).
[104] *Sharma (No 2)* (n 5) [332]-[333] (per Allsop CJ).

Types of Harm

The risk of harm in a climate duty of care case will stem from the harms induced by climate change, or more specifically, climatic hazards resulting from increased global average surface temperatures. The content of a duty of care is purposely broad so as not to create overlapping issues of law and fact.[105] However, harms relating to climate change are vast, creating potential issues for indeterminate liability (see above). It is therefore important for a climate duty of care claim to particularise the types of harm that will adversely impact the class of plaintiffs.

The risk of harm, as articulated at the duty stage, does not need to be assessed in terms of the defendant's actual contribution to that harm.[106] Nonetheless, a plaintiff should consider, when articulating the types of harm alleged, whether they are submitting that the defendant should be liable for materially increasing the risk of harm as opposed to materially causing that harm. The former is not an accepted limb of causation in Australia,[107] despite being upheld in UK cases.[108]

In assessing the types of harm which flow from the posited duty, there must be some causal relationship between the acts of the defendant and the harm alleged.[109] The question posed by the Court in *Sharma (No 2)* was "whether the increase in risk of the harm from this act can be seen to be so small that it is not reasonably foreseeable, that is, it is not real but is fanciful, that the act will or may have any causal relationship to harm".[110]

[105] *GBO* (n 8) [106] (per McHugh J).
[106] *Sharma (No 2)* (n 5) [329] (per Allsop CJ).
[107] Ibid [326] (per Allsop CJ).
[108] See *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32.
[109] *Sharma (No 2)* (n 5) [329] (per Allsop CJ).
[110] Ibid.

Exploring The Potential Categories of Climate Harms

The following were accepted types of harm applicable to all of the Australian children in *Sharma* were ill health and personal injury arising from heatwaves and heat stress,[111] bushfires and bushfire smoke.[112]

The following harms in *Sharma* were pitched at too general a level of applicability to be attributed to *all* plaintiffs, but may be worthy of further particularisation and greater analysis of their impact to the entirety of a class of plaintiffs in subsequent claims:

- Inland and coastal flooding;[113]
- Cyclones;[114]
- Indirect health impacts such as: amplification of air pollution by changed weather patterns, changed abundance and distribution of vector-borne diseases and altered biodiversity leading to 'spill-over' pathogens to humans; and
- Flow-on health impacts due to social, economic, and demographic disruption such as adverse agricultural impacts due to prolonged drought, effects on wellbeing and mental health of farmers and rural communities, especially depression and Health and wellbeing implications from forced displacement of at-risk communities. [115]

Additionally, other types of psychological-based harms from fossil fuel developments have been analysed within State planning law and may be worth further exploration under tort law.[116]

[111] *Sharma* (n 4) [205]-[225].
[112] Ibid [226]-[235].
[113] Ibid [236].
[114] Ibid.
[115] Ibid [239].
[116] See Jasper Brown et al, 'Solastalgia: Recognition by the Land and Environment Court of the Social Impacts of Fossil Fuel Developments' (2021) 38 *Environmental Planning Law Journal* 295.

Control and Knowledge

Control refers to the extent that the defendant's positive exercise of their power creates or contributes to a real risk of harm being experienced by the plaintiffs.[117] The extent of a defendant's control can be enhanced or diminished by the degree of knowledge attributed to the defendant, which informs how aware the defendant is or was of the extent that their conduct contributes to or averts harms. However, knowledge may also be articulated as a standalone salient feature.[118]

Control, in this case, stems from the statutory powers to approve or regulate developments that contribute to climate change, notably gas and coal extraction projects. Greater levels of control over, and knowledge of, the risk of harm are features positively indicating a duty relationship between the plaintiff and defendant and are of "fundamental importance in discerning a common law duty" when the defendant is a public authority.[119]

Government defendants may argue that they have limited control over climate harms or, alternatively, that they merely control a small portion of climate harms. This may be a difficult argument to overcome but attribution science is increasingly sophisticated and may provide an evidentiary basis to rebut this.

[117] *Agar v Hyde* (2000) 201 CLR 552; *Voli v Inglewood Shire Council* (1963) 110 CLR 74.
[118] *Stavar* (n 9) [103].
[119] *GBO* (n 8) [150] (per Gummow and Hayne JJ).

Coherence

General Outline of Coherence

Coherence-based reasoning is utilised by the Court to assess whether the intervention of the common law in a particular field by establishing a novel duty of care would "undermine, contradict or substantially interfere with the purpose, policy and operation of the statutory law already in place".[120] Coherence is particularly relevant when assessing whether a duty of care should be imposed on a decision-maker with statutory powers.[121] The imposition of liability on a statutory authority must be consistent with the purpose, scope and powers of the statute that empower or constitute the authority.[122] A statutory authority can be subject to a number of duties, provided that these duties do not impose upon the authority conflicting obligations.[123] The coherence inquiry therefore serves to preclude the recognition of a duty of care where it would be inconsistent with legislated powers and obligations.[124]

Application to Australian Climate Law

The High Court has stated that there is "no reason" to deny the imposition of a duty of care on an authority exercising statutory powers if the appropriate circumstances arise.[125] The very nature of development assessment and approval of major projects by statutory decision-makers involves the balancing of often competing environmental, social and economic considerations through the prism of ESD. It is at this nexus that coherence-based reasoning is vital to the formulation of a climate duty of care because of the importance placed on the coherence between the objects and purpose of a statute and the imposition of liability in negligence.[126]

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[120] *Sharma* (n 4) [322].
[121] *Plaintiff S99/2016 v Minister for Immigration and Border Protection* (2016) 243 FCR 17 [229] ('*Plaintiff S99*').
[122] *Sharma* (n 4) [395].
[123] *Sullivan v Moody* (n 7) [60].
[124] Ross Grantham and Darryn Jensen, 'Coherence in the Age of Statutes' (2016) 42(2) *Monash University Law Review* 360.
[125] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 457-458 (per Mason J); Janina Boughey et al, *Government Liability: Principles and Remedies* (LexisNexis Butterworths, 2019) 415 [14.3.1.2].
[126] *Sharma* (n 4) [395].

A climate duty in Australia is likely to face at least three primary obstacles relating to coherence, depending upon the relevant statutory scheme and authority in question: coherence between the common law duty and statute, coherence with the authorities' discretionary decision-making powers and coherence with the separation of powers. These issues were all ventilated in *Sharma (No 2)*. In that case, the Court articulated coherence-related considerations as follows:

- The context in which coherence is assessed is not limited to the statutory scheme of the decision-maker but is inclusive of the broader context of that area of law;[127]
- Whether an issue of incoherence arises because the subject matter of the duty is not the subject matter of the statute which the decision made under;[128] and
- A duty of care that skews or distorts the exercise of a discretionary power does not automatically give rise to incoherence, but rather is dependent on how severely the decision-maker's discretion is fettered by that duty.[129]

Coherence between the common law duty and statute

Whether there is a coherence issue between the power conveyed by the relevant statutory scheme and the alleged climate duty of care will be dependent upon the subject-matter, scope and purpose of the relevant legislation. See earlier in this report.

Coherence with the public authority's discretionary decision-making powers

A more complex coherence issue arises when the statutory power is a discretionary one. Courts must assess whether the imposition of a duty of care will lead to "outcome-based impairment", where the climate duty of care impermissibly interferes with the decision-maker's discretionary power under the statute.[130] It is important to ensure that the alleged duty of care does not place significant functional limitations on the statutory authority's discretionary power.[131] Incoherence with discretionary powers is not limited to the duty stage, but may re-arise as a concern at the breach and causation stages.[132]

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[127] *Sharma (No 2)* (n 5) [232] (per Allsop CJ).
[128] Ibid [544] (per Beach J)
[129] Ibid [546] (per Beach J).
[130] Ibid [410]-[411] (per Beach J); See also Ellen Rock, 'Superimposing Private Duties on the Exercise of Public Powers: *Sharma v Minister for the Environment*', *Australian Public Law* (Blog Post, 11 August 2021) <https://auspublaw.org/2021/08/superimposing-private-duties-on-the-exercise-of-public-powers-sharma-v-minister-for-the-environment/>.
[131] *Sharma (No 2)* (n 5) [546] (per Beach J).
[132] Ibid [538] (per Beach J).

Coherence with the separation of powers

In jurisdictions where Courts are restricted to reviewing and ensuring the legality of administrative decisions through judicial review, it would be incoherent with the doctrine of the separation of powers for a duty of care to be imposed which requires a decision-maker (typically a Minister) to exercise reasonable care not to make "a flawed decision".[133] The Courts have previously refrained from imposing climate-related duties upon public authorities because those authorities are making polycentric, policy-related decisions when assessing large-scale, emissions-intensive developments.[134] This presents potential issues of coherence with the principles of the separation of powers and may be a limiting factor on the establishment of a duty of care owed by public authorities.[135]

[133] Ibid [160] citing *Precision Products (NSW) Pty Ltd v Hawkesbury City Council* [2008] NSWCA 278 [119].
[134] Thyagarajan (n 2) 216; *Gloucester Resources Limited v Minister for Planning* (n 34); *Wollar Progress Association Incorporated v Wilpinjong Coal Pty Ltd* [2018] NSWLEC 92.
[135] Thyagarajan (n 2) 216; *Precision Products (NSW) Pty Ltd v Hawkesbury City Council* [2008] NSWCA 278, [119].

Remedies

Climate litigation, like all strategic litigation, is successful by reference to social change as much as legal change. Indeed, Staton DJ in *Juliana v United States* observed "no case can singlehandedly prevent the catastrophic effects of climate change predicated by the government and scientists".[136] Yet decades of policy failure in Australia have driven communities to the courtroom to accelerate climate action. The choice of remedy is therefore critical and will significantly inform the success of a climate duty of care case.

Historically, damages have been the primary means of remedy in tortious actions.[137] This has held true even in the development of other novel tort cases, such as pharmaceutical and tobacco strategic litigation.[138] In those cases, the challenge was overcoming the evidentiary hurdle of linking the defendant's actions to the harm, and the legal issue of addressing multiple, accumulative causes of harm.[139] However, in the case of climate litigation, the scale of harm - and therefore damages - is a unique hurdle for the Courts.

Calculating damages in the case of climate harms is a costly exercise that a Court is unlikely to find appropriate to do, even if there are multiple defendants liable for their contribution to the harm.[140] Furthermore, damages do not address the ongoing harm communities face from climate change. Climate litigants are seeking systemic policy change and emissions reduction, not compensation. Therefore, when seeking a remedy, damages are not the best approach. Rather, *prima facie*, injunctive relief and declaratory relief provide greater benefits to plaintiffs bringing a climate duty of care case.

Quia Timet Injunctive Relief

Quia timet injunctions are distinguished from other types of injunctions in that they are "granted against apprehended wrongs rather than against the continuance of those which have already occurred".[141] This is done by directing a defendant not to breach their legal obligations or to take steps to mitigate against an apprehended and imminent harm.[142] As such, this form of remedy is

[136] *Juliana v United States* 947 F.3d 1159 (9th Cir. 2020).
[137] ALRC, 'Damages' (Report, 15 July 2014) *Serious Invasions of Privacy in the Digital Era (ALRC Report 123)*, [12.10].
[138] Rupert Stuart-Smith et al, 'Filling the evidentiary gap in climate litigation' (2021) 11(8) *Nature Climate Change* 651, 652.
[139] Christine Shearer, 'On Corporate Accountability: Lead, Asbestos, and Fossil Fuel Lawsuits' (2015) 25(2) *NEW SOLUTIONS: A Journal of Environmental and Occupational Health Policy* 172, 178.
[140] *Caltex Oil (Australia) v The Dredge 'Willemstad'* (1976) 136 CLR 529, 586 (per Stephen J). See also Jacqueline Peel, Hari Osofsky and Anita Foerster, 'Shaping the 'Next Generation' of Climate Change Litigation in Australia' (2017) 41 *Melbourne University Law Review* 793, 822.
[141] Heydon JD and Leeming MJ, *Cases and Materials on Equity and Trusts* (Lexis Nexis, 9th ed, 2018) 1175.
[142] Tim Baxter, "The Slow Death of Past Damage as an Essential Element in Negligence" (2019) 26 *Tort Law Review* 123, 128; *Hurst v Queensland (No 2)* [2006] FCAFC 151, [21].

desirable when pursuing negligence claims regarding future harms like those arising from climate change,[143] especially where a single action or decision is the alleged cause of harm.

Quia timet injunctions have long been granted to prevent or restrain apprehended wrongs resulting in substantial damage,[144] but, in the area of torts law, have mostly been used for public nuisance cases.[145] A *quia timet* injunction was first granted in Australia to prevent a negligence duty of care being breached in *Plaintiff S99*.[146]

To issue a *quia timet* injunction, a Court must be satisfied that there is a reasonable apprehension of a breach of the duty of care and the general principles of granting a *quia timet* injunction are met.[147]

[143] Jacqueline Peel, Hari Osofsky and Anita Foerster, 'Shaping the 'Next Generation' of Climate Change Litigation in Australia' (2017) 41 *Melbourne University Law Review* 793-844, 822; Tim Baxter, "Urgenda-Style Climate Litigation Has Promise in Australia" (2017) 32(3) *Australian Environmental Review* 70.
[144] *Hurst v Queensland (No 2)* (n 143) [20].
[145] Arthur Emmett QC, 'Equitable Relief - An Outline' (2007) *Bar Practice Course*, NSW Bar Association, 5.
[146] *Plaintiff S99* (n 122).
[147] *Sharma* (n 4) [497].

Quia Timet Injunction Principles

The general principles that apply to the grant of a *quia timet injunction* are that the plaintiff must show:[148]

- that the defendant's actions will infringe upon their rights; and
- that the threatened infringement of their rights will cause imminent and substantial damage to them.[149]

However, imminence is not a fixed standard. The Court will determine what an imminent harm is by reference to all the relevant circumstances of a case.[150] A Court will have particular regard to: how probable the harm is, the seriousness of the threatened injury and the requirements of justice between the parties.[151] The injunction will not be granted unless imminence is clearly established so as to justify the Court's intervention.

[148] *Apotex Pty Ltd v Les Laboratoires Servier* (No 2) (2012) 293 ALR 272, [46].
[149] *Royal Insurance Co Ltd v Midland Insurance Co Ltd* (1908) 26 RPC 95, 97.
[150] *Hooper v Rogers* [1975] Ch 43 at 50; [1974] 3 All ER 417, 421.
[151] *Hurst v Queensland* (n 143) [21].

These principles apply equally in the application of the injunction against a public authority as they do to any other citizen.[152] In issuing an injunction, the terms must clearly identify what is expected of the individual subject to it.[153] This includes the "formulation of an effective and clearly worded restraint".[154] In *Sharma*, the applicants sought a *quia timet* injunction to restrain the Minister from exercising their power under the EPBC Act to permit the expansion of a coal mine.[155] Injunctive relief was ultimately rejected after considerations of:

- Coherence with the Minister's competing responsibilities and duties;[156]
- Reasonable apprehension of breach;[157] and
- Imminence of the threatened breach.[158]

However, this refusal does not eliminate the possibility of a *quia timet* injunction being awarded in a climate duty of care case in the future. The reasoning behind the granting or refusal of a *quia timet* injunction is inherently complex. In particular, for a climate duty of care case, the interaction between notions of imminence and the temporal spectrum of climate related harms will likely inform the question of awarding injunctive relief.

In *Sharma*, the request for injunctive relief was blunt; the phrasing of this request ensured that the only lawful decision available to the Minister would be to not approve the extension of a coal mine should the injunction be granted.[159] This would have been a significant incursion into Ministerial discretion.

It is imperative that a request for injunctive relief does not create incoherence. The failure of the parties in *Sharma* to explore potential options outside of seeking relief that would prevent the Minister issuing an approval limited the viability of that relief.[160] A more nuanced request for injunctive relief may be more successful in the future. For example, requiring the public authority to ensure that the impact of any reenhouse gas emissions from a project are alleviated. This would allow the public authority to retain their discretion to decide whether to not approve the coal or gas project, or to impose additional conditions on an approval. This approach would maintain Ministerial discretion and may overcome some of the challenges experienced in *Sharma* with respect to obtaining a *quia timet* injunction.

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[152] *Plaintiff S99* (n 122) [489].
[153] Ibid [499].
[154] Ibid.
[155] *Sharma* (n 4) [493].
[156] Ibid [502].
[157] Ibid [504]-[506]
[158] Ibid [508].
[159] Ibid [494].
[160] Ibid [501]- [502].

Strategic climate litigation is designed to inform broader debates about climate action in Australia.

In this way, climate litigation can contribute to the systemic policy change for which climate advocates are calling.

Declaratory Relief

Declaratory relief is a binding statement issued by the Court, answering a specific legal question.[161] Like most remedies, declaratory relief is discretionary and "is neither possible nor desirable to fetter … by laying down rules as to the manner of its exercise".[162] It is also limited by the boundaries of judicial power, as follows:

- The Hypotheticality Test: the declaration must be directed "to the determination of legal controversies and not to answering abstract or hypothetical questions";
- The Standing Test: there must be "a real interest" in the declaration being sought; and
- The Consequences Test: the declaration must procure foreseeable consequences for the parties involved.[163]

Declaratory relief may be appropriate in some jurisdictions, where the government is likely to act in a manner that upholds the spirit of a declared climate duty of care. However, historically in Australia, climate litigation that has resulted in declaratory relief has failed to lead to more ambitious government action. For example, despite the declaration of a duty of care in *Sharma*, the Environment Minister approved the disputed coal project just months later and without any conditions to mitigate greenhouse gas emissions.[164]

Strategic climate litigation is designed to inform broader debates about climate action in Australia. Declaratory relief can strengthen campaigns outside the courtroom by confirming the legal duties held by a government entity to avert the climate crisis.[165] In this way, climate litigation can contribute to the systemic policy change for which climate advocates are calling.

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[161] Jeremy Drew, 'Declaratory Relief: Don't Be Afraid to Ask' (2006) 1(3) *Journal of Intellectual Property Law & Practice* 188-195, 188.

[162] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 581–582 (per Mason CJ, Dawson, Toohey and Gaudron JJ), quoting *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, 437 (per Gibbs J).

[163] Ibid. For further discussion on these tests and the limits of declaratory relief, see generally: Leigh Howard, "Declaratory Relief and Public Law Litigation in the 21st Century' (2018) 25 *Australian Journal of Administrative Law* 181, 181-189.

[164] Department of Agriculture, Water and the Environment, *Vickery Extension Project, Gunnedah, NSW*, Referral EPBC 2016/7649 (Statement of Reasons, 15 September 2021).

[165] See Eloise Culic, 'Carving the Path for the Future of Climate Change Litigation Using Tort Law: A Comparative Case Study of the Australian Sharma Decision and the Dutch Decision of Urgenda' (2021) 38(4) *Environmental and Planning Law Journal* 279.

Email: Green_Law@outlook.cm
Website: greenlawnetwork.org/