

Climate Change Litigation: Trends and Recent Developments

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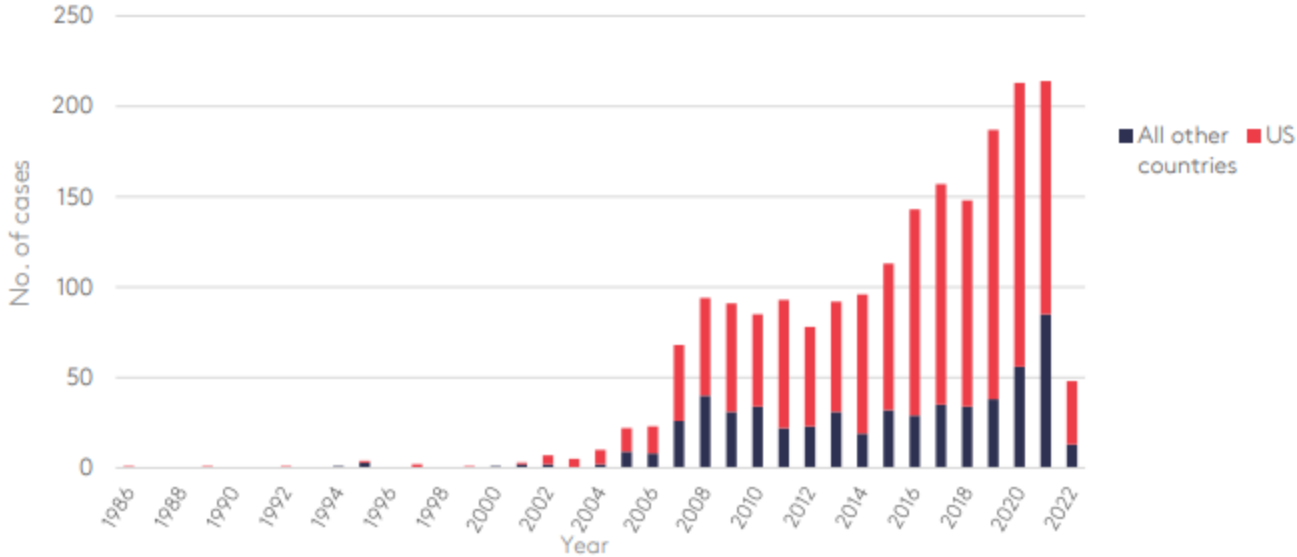
29 August 2022



Overview of Climate Change Litigation Trends

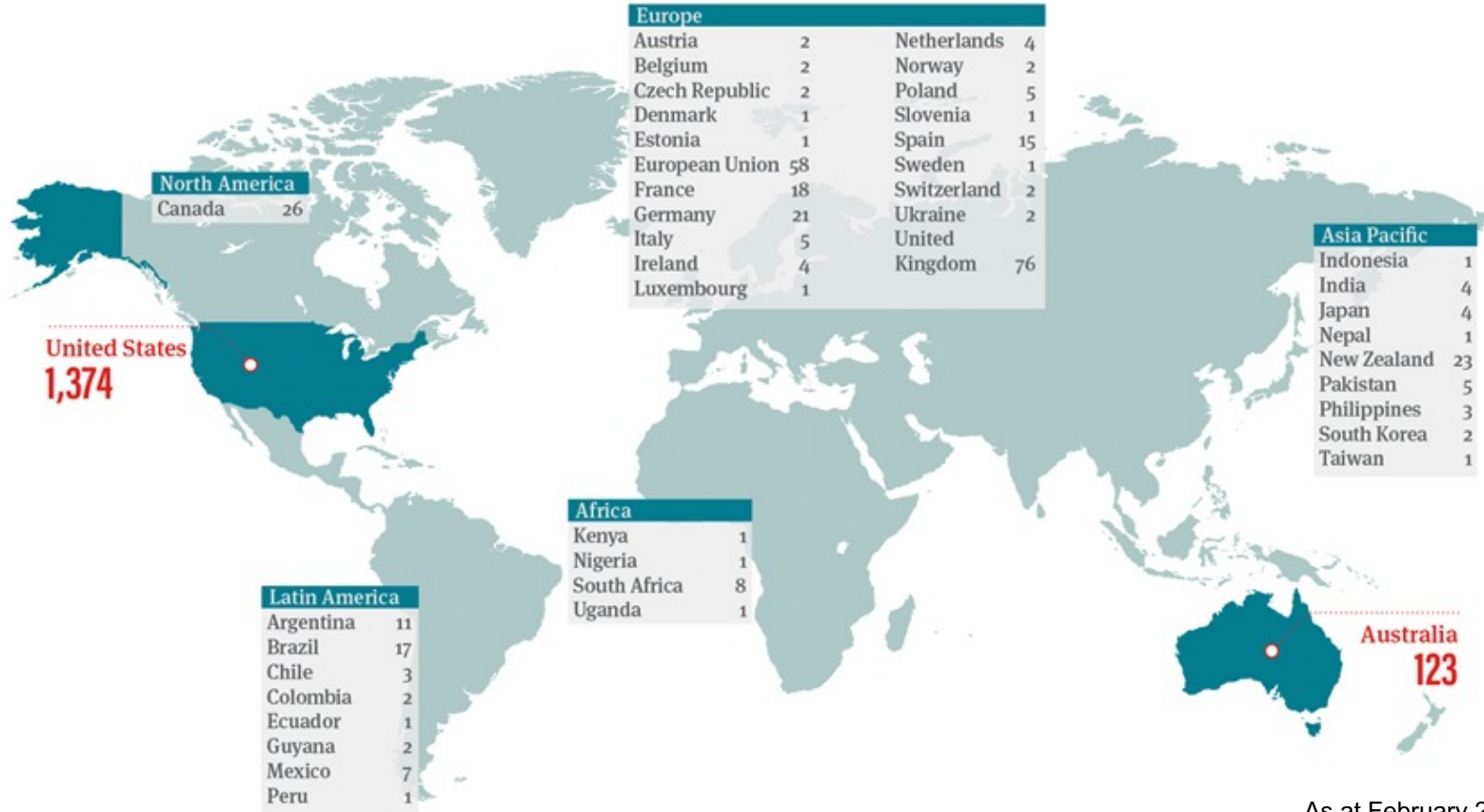
Litigation trends

Figure 1.1. Total climate change cases over time, US and non-US (up to 31 May 2022)



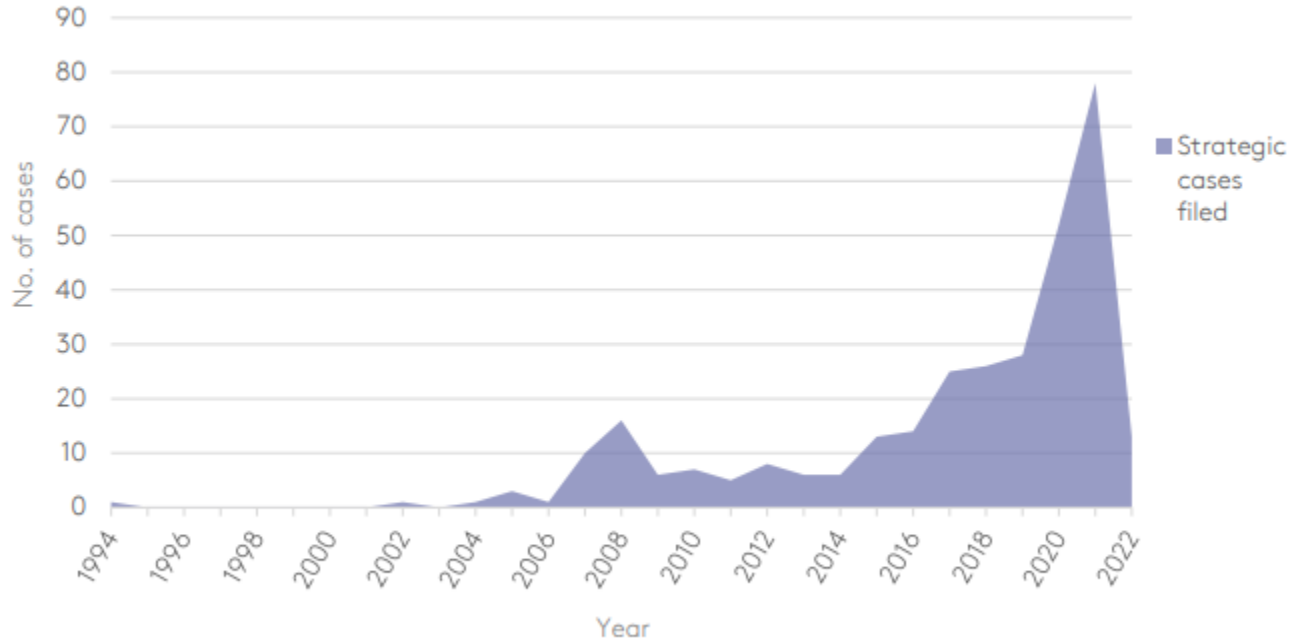
Source: Authors based on CCLW and Sabin Center data

Litigation hotspots



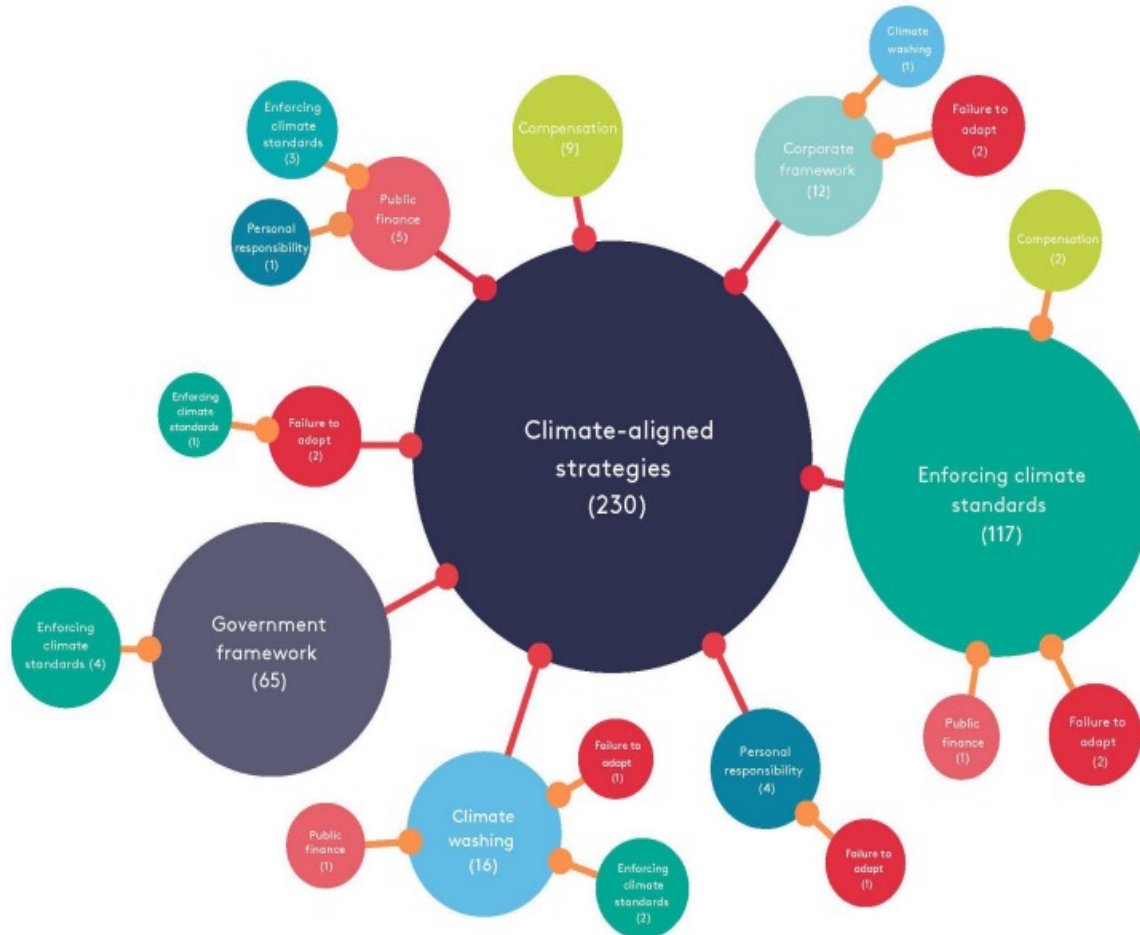
Strategic litigation

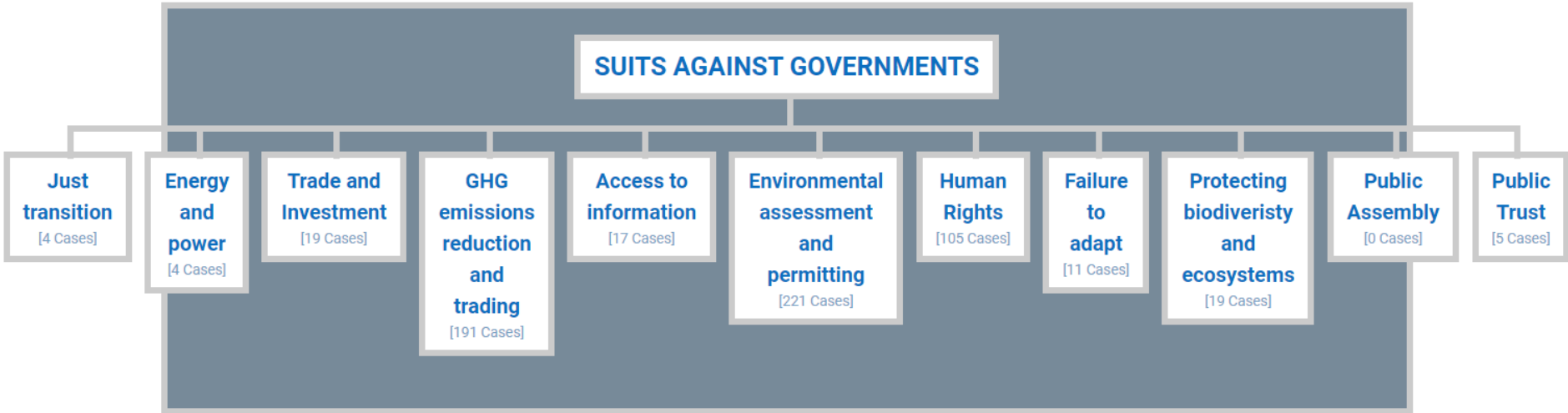
Figure 1.6. Number of strategic climate case numbers over time, outside the US (up to 31 May 2022)



Source: Authors based on CCLW data

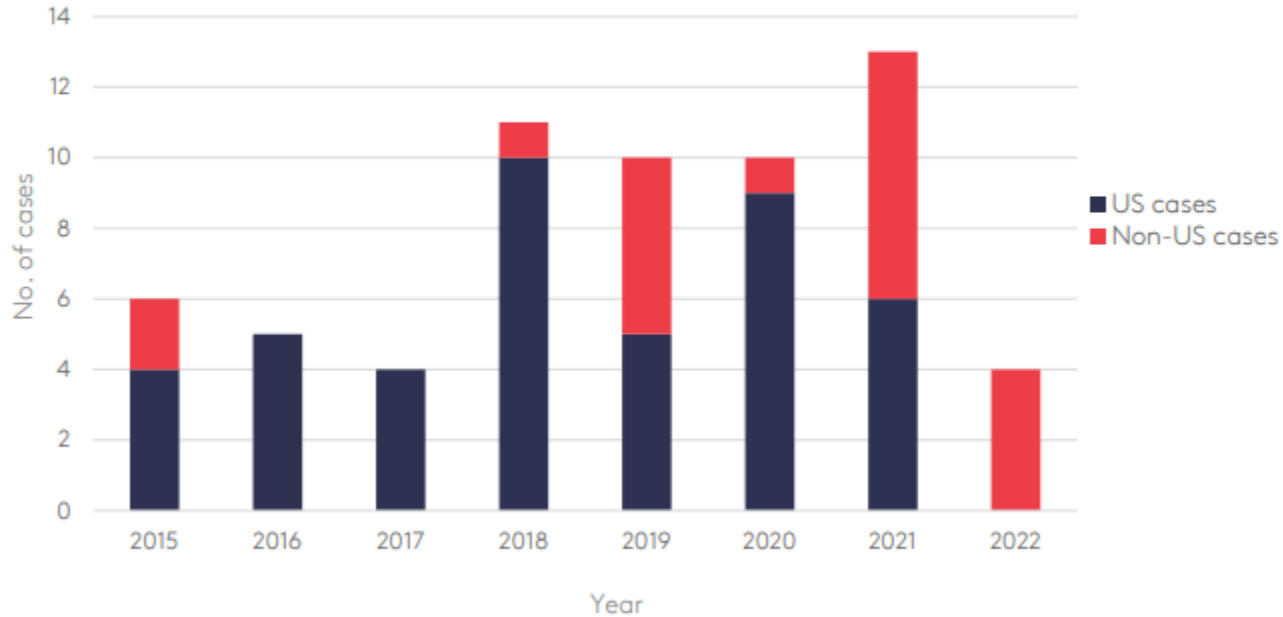
Figure 1.7. Combinations of strategies identified in strategic cases filed outside the US since 2015 (up to 31 May 2022)





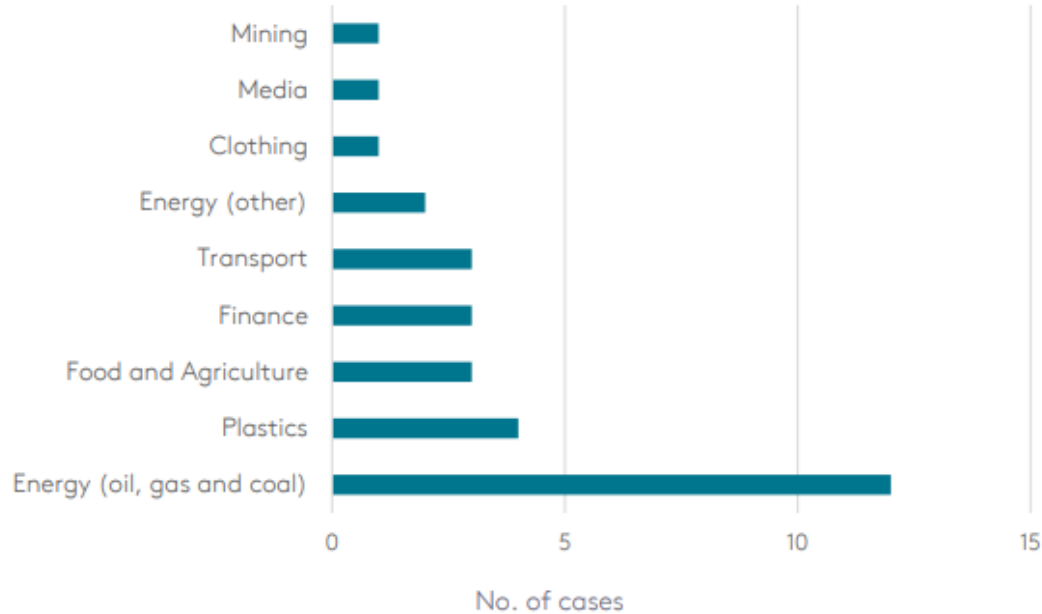
Carbon majors

Figure 1.4. Number of cases filed against the Carbon Majors in the US and elsewhere since 2015 (up to 31 May 2022)



Corporate defendants

Figure 1.5. Number of climate cases involving corporate defendants by sector (31 May 2021 – 31 May 2022)



Source: Authors based on CCLW and Sabin Center data

Key trends



Increasing numbers of cases relying on fundamental and human rights enshrined in international law and national constitutions to compel climate action



Advocating for greater climate disclosures and an end to corporate greenwashing on the subject of climate change and the energy transition



Claiming corporate liability and responsibility for climate harms



Seeking to keep fossil fuels in the ground



Addressing failures to adapt and the impacts of adaption



Challenging domestic enforcement (and non-enforcement) of climate-related laws and policies

Overview of cases

- 1. Human rights*
- 2. Torts*
- 3. Damages claims*
- 4. Fraud, consumer protection and greenwashing*
- 5. Failure to disclose*
- 6. Directors' duties*
- 7. Project approvals*

Human Rights Cases: Europe

Urgenda v Netherlands (2019)

Neubauer, et al. v Germany (2021)

Commune de Grande-Synthe v
Republique Francaise (2021)

VZW Klimaatzaak v Kingdom of Belgium
& Others (2021)



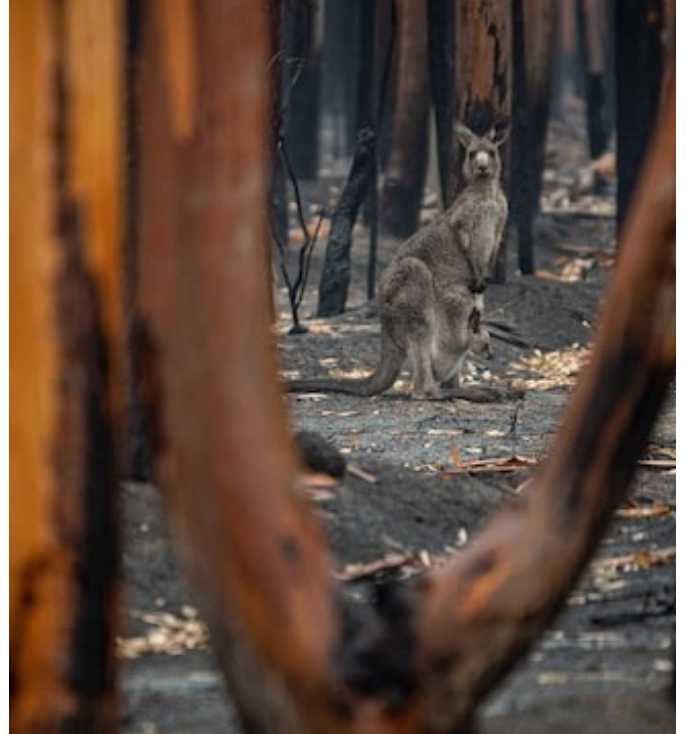
Milieudefensie et al v Royal Dutch Shell plc (2021)

- Action bought by Milieudefensie/Friends of the Earth Netherlands against Shell
- Court ordered Shell to reduce CO2 emissions (including Scope 2) by 45% by 2030, based on 2019 levels
- Court found Shell had obligation from “unwritten standard of care” in Dutch Civil Code to contribute to prevention of climate change
- “*Compelling common interest*” outweighed negative consequences to Shell
- “*Widespread international consensus that human rights offer protection against the impacts of dangerous climate change and that companies must respect human rights*”
- “*Companies have the responsibility to respect human rights*”
- In July 2022, Shell lodged an appeal against the decision



Environmental Justice Australia v Australia (2021)

- In October 2021, EJA submitted a complaint to the OHCHR on behalf of five young people living in Australia relating to human rights harms of the Australian government's Nationally Determined Contribution (NDC) and inaction on climate change.
- EJA alleges contraventions of the Paris Agreement and various UN human rights instruments and has requested the OHCHR to intervene to:
 - a) seek explanation from Australia regarding how its NDC is consistent with its human rights obligations; how its current conduct is compatible with a 1.5 degree pathway; and how its current NDC decision-making has involved young people;
 - b) urge Australia to set a 2030 target that is consistent with its human rights obligations to young people in Australia and to the complainants.



Torts Cases in Australia

Sharma v Minister for Environment (2022)

- Finding of duty of care overturned by Full Federal Court.
- Key elements of duty of care could not be established ('reasonable foreseeability', 'control', 'vulnerability', the 'directness' or 'proximity' of the relationship)

Pabai Pabi and Guy Paul Kabai v Commonwealth of Australia (2021)

- Applicants claim the Commonwealth owes a duty of care relying on factors including special vulnerability, an “extremely significant” degree of harm, control, assumption of responsibility, knowledge and reasonable foreseeability.
- Proceedings are presently pending before the Federal Court.



Damages claims

- Numerous US cases (20 +)
- Sub-national governments (cities, counties and states) pursuing Carbon Majors
 - Nuisance
 - Negligence
 - Public trust
 - Product liability
 - Breach of legislation (ie consumer protection laws)
- Issues about jurisdiction for determination of claims (State vs Federal)

San Francisco Chronicle

Lawsuits rise against Big Oil

According to the lawsuits, those 37 defendants — including Chevron, ExxonMobil, Shell and others — accounted for 20.3 percent of greenhouse emissions between 1965 and 2015.



Lliuya v RWE AG (filed 2015)

- Saul Luciano Lliuya, a Peruvian farmer, filed claims for declaratory judgment and damages against RWE, Germany's largest electricity producer.
- Lliuya argued that RWE contributed to climate change knowingly through the emission of substantial volumes of greenhouse gases. He alleged that these emissions contributed to the mountain glaciers melting near his home, causing flood risk
- Lliuya acknowledged that RWE was not the sole contributor to climate change and asked the Court to order RWE pay him 0.47% of the costs of establishing flood protection (0.47% is RWE's approximate contribution to global greenhouse gas emissions)
- Initially, the Court rejected his claims stating that no linear causal connection could be established
- However, an appeal Court has allowed an appeal against this decision, deciding that the arguments for damages were admissible



Climate attribution science

- Aims to establish the relationship between anthropogenic emissions and specific extreme weather events
- Disputes are increasingly revolving around proving causation, allocating responsibility and jurisdictional arguments as to the role of courts in 'regulating' climate change
- Climate attribution science can be relied on by plaintiffs to show that not only is climate change preventable, but that the associated extreme weather events are reasonably foreseeable

"...event attribution science opens the door to establishing, for the first time, evidence of specific and quantifiable loss and damage arising out of atmospheric levels of anthropogenic GHGs that can be linked to specific regions or individuals and is therefore likely to be relevant to damages claims against large emitters."

Sophie Marjanac & Lindene Patton, "Extreme weather event attribution science and climate change litigation: an essential step in the causal chain", *Journal of Energy & Natural Resources Law*, 2018

- Just 100 companies are responsible for 71% of global greenhouse gas emissions
- Just 20 companies are responsible for more than one-third of all global greenhouse gas emissions, eight of which are investor owned
- The 90 biggest industrial carbon producers are responsible for almost half the rise in global temperature and close to one third of the sea level rise between 1880-2010

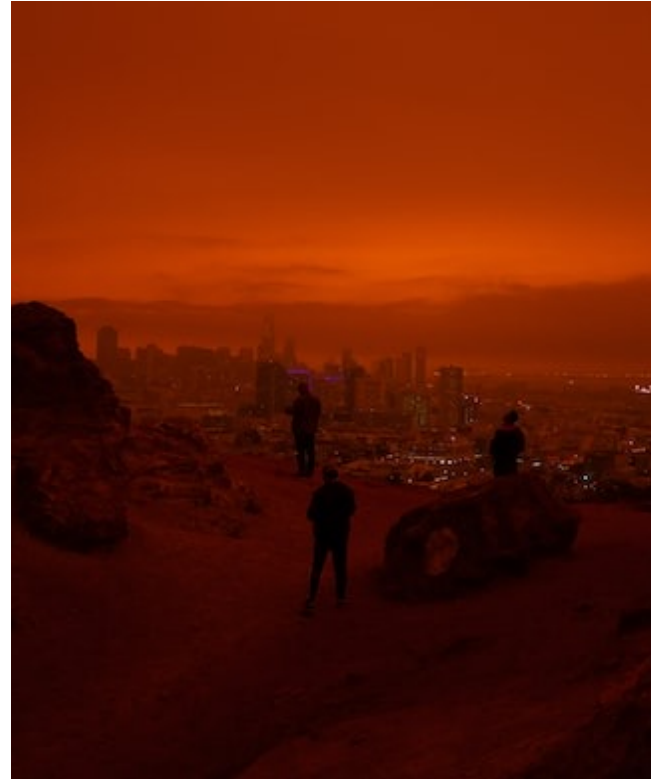
Fraud / Consumer Protection / Greenwashing

Commonwealth of Mass. v Exxon (2019)

The People of the State of NY v Exxon
Mobil Corporation (2020)

“Nothing in this opinion is intended to absolve ExxonMobil from responsibility for contributing to climate change through the emission of greenhouse gases in the production of its fossil fuel products...this is a securities fraud case, not a climate change case...”

Jochims v Oatly Group AB (2021)



Australian Centre for Corporate Responsibility v Santos Limited

- On 25 August 2021, the ACCR, a shareholder advocacy group, filed an originating application in the FCA against Santos.
- ACCR have claimed that Santos contravened s 18 of the ACL and s 796C of the *Corporations Act* by engaging in “greenwashing” via statements made in their 2020 Annual Report.
- The statements alleged to have amounted to greenwashing were:
 - a) natural gas is “clean energy” and “clean fuel”, in spite of scientific evidence to the contrary; and
 - b) Santos had a plan to achieve “net zero” Scope 1 and 2 GHG emissions by 2040 – without disclosing a range of qualifications and/or assumptions made to reach this target, and without disclosing that Santos intends to increase its GHG emissions in the short term.
- ACCR is seeking several injunctions and declarations that Santos has engaged in misleading and deceptive conduct or conduct likely to mislead or deceive.



Failure to Disclose Cases in Australia

Mark McVeigh v Retail Employees
Superannuation Pty Ltd (REST) (2018)

Kathleen O'Donnell v Commonwealth of
Australia & Ors (2020)

Abrahams v CBA (2021)



"I think the Government needs to stop keeping us in the dark so we can be aware of the risks that we're all faced with." – Kathleen O'Donnell

Directors duties:

ClientEarth v Board of Directors of Shell

- In March 2022, ClientEarth announced they were suing the Board of Directors of Shell for breaches of their duties under the UK Companies Act.
- ClientEarth claim that the Board has breached sections 172 and 174 of the UK Companies Act, which legally require it to “act in a way that promote the company’s success, and to exercise reasonable care, skill and diligence”.
- ClientEarth’s action is the first shareholder litigation case in the UK involving a company’s board being challenged for its failure to properly prepare for the net zero transition.
- Case aimed at compelling Shell to strengthen its climate transition plans.
- The case is yet to proceed to Court.



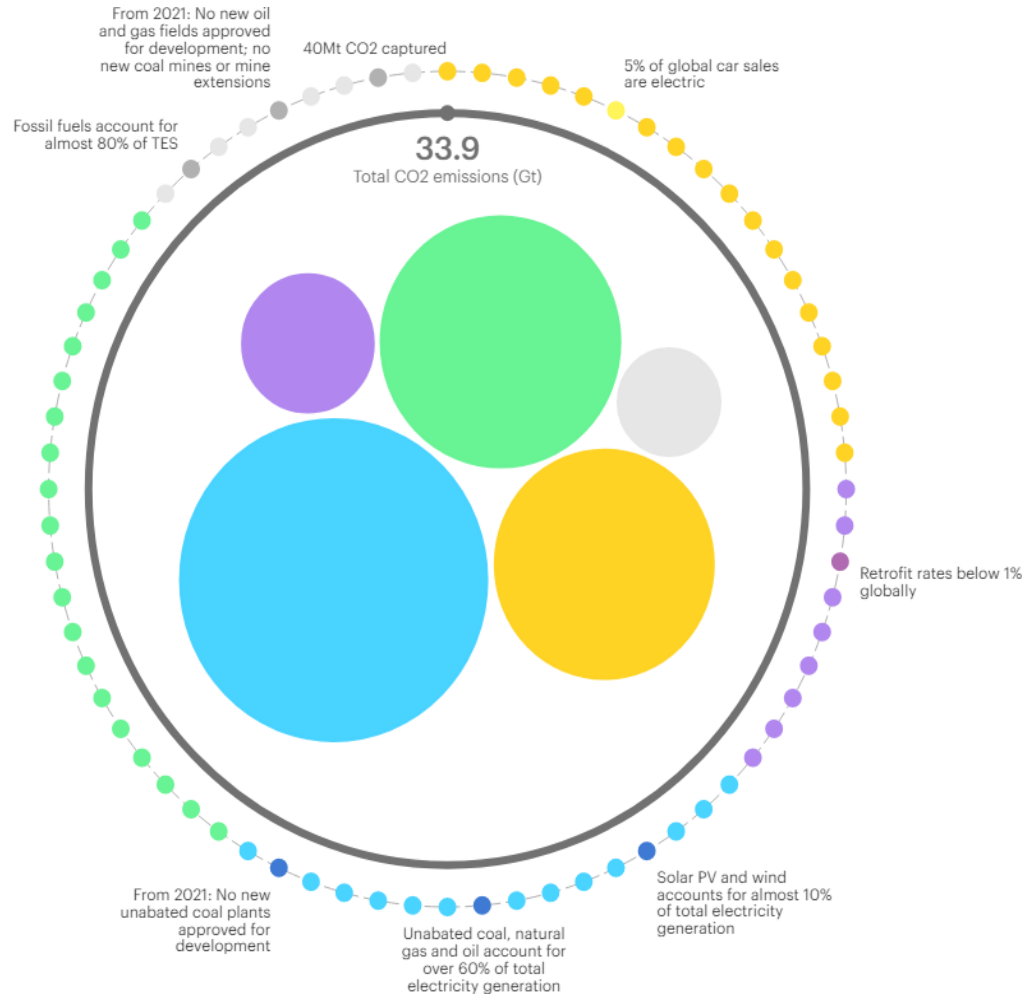
Development approvals – future context



36. *Calls upon* Parties to accelerate the development, deployment and dissemination of technologies, and the adoption of policies, to transition towards low-emission energy systems, including by rapidly scaling up the deployment of clean power generation and energy efficiency measures, including accelerating efforts towards the phasedown of unabated coal power and phase-out of inefficient fossil fuel subsidies, while providing targeted support to the poorest and most vulnerable in line with national circumstances and recognizing the need for support towards a just transition;

IEA report

2020



5 top predictions

**More HR
styled
litigation
against
corporates**

**Successful
damages
claim just
matter of
time**

**Will be
increase in
“greenwash
-ing” claims**

**Focus on
disclosure by
Governments,
corporates
and investors**

**Harder to
obtain
approvals for
high emitting
developments;
offsets will be
required**

Resources

<https://climate.law.columbia.edu/content/climate-change-litigation-updates-archive>

