OPPORTUNITIES FOR NOVEL CLIMATE CHANGE LITIGATION IN WESTERN AUSTRALIA

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An international wave of novel or “next generation” climate litigation is emerging, which embraces innovative legal arguments to respond to climate change through the courts. This article analyses future prospects for novel climate change litigation in Western Australia, focusing on claims in tort law and corporate law. It highlights key issues and opportunities associated with these claims in Western Australia, and how they may be overcome with the assistance of climate attribution science.

I INTRODUCTION

Australia has the second highest rate of climate change litigation in the world,1 with the first case being heard in 1994.2 Climate change litigation is broadly defined as legal action which seeks to address the causes or likely impacts of climate change.3 Climate change litigation in Australia has typically focused on traditional arguments, such as judicial and merits review of administrative decisions, for example to approve projects under environmental and planning law, and compliance with domestic legislation in the context of climate change.4 It is acknowledged that a new wave of novel or “next generation”5 climate litigation is emerging, that builds on earlier litigation trends and embraces innovative legal arguments to respond to climate change through the courts.6 This development is reflected by recent Australian cases that attempt to target the corporate law obligations of Australian companies under the Corporations

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* Solicitor, Environmental Defenders Office.
2 Greenpeace Australia Ltd v Redbank Power Pty Ltd (1994) 86 LGERA 143.
5 Peel and Oosofsky (n 3); Peel, Oosofsky and Foerster (n 4).
6 Peel, Oosofsky and Foerster (n 4) 281.
Act 2001 (Cth) (‘Corporations Act’) in a climate change context, and the first Australian human rights-based case in Queensland pursuant to the Human Rights Act 2019 (Qld). As yet, there have been limited attempts in Australia to apply tort law claims, such as negligence or nuisance, specifically to climate change.

Western Australia (‘WA’) is particularly vulnerable to the impacts of climate change, including rising sea levels, increased temperatures, drought periods and extreme weather events. Despite this vulnerability, WA’s greenhouse gas (‘GHG’) emissions continue to increase and it is one of the only Australian states or territories that does not have a binding emissions reduction target, renewable energy target or climate change legislation. Opportunities for climate change litigation in WA are also significantly limited compared to other countries and Australian states and territories. This means that substantial innovation is required to provide WA citizens with avenues to respond to WA’s increasing GHG emissions and ineffective climate action through the courts.

This article analyses - from a legal practice perspective - potential opportunities for novel corporate and tort climate change litigation in WA. It will discuss opportunities for innovative legal arguments to respond to ineffective climate action in WA, based on arguments employed in other

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7 Guy Abrahams (and others) v Commonwealth Bank of Australia VID89/2017; McVeigh v Retail Employees Superannuation Trust Pty Ltd [2019] FCA 14.
9 Peet, Osofsky and Foerster (n 4) 797.
12 Department of Water and Environmental Regulation, Climate Change in Western Australia – Issues Paper (Report, September 2019) 1.
14 Every Australian state or territory except Western Australia and New South Wales has an emissions reduction target, renewable energy target or both incorporated into climate policy or legislation.
15 See: Climate Change Act 2017 (Vic); Climate Change and Greenhouse Gas Emissions Reduction Act 2007 (SA); Climate Change (State Action) Act 2008 (Tas); and Climate Change and Greenhouse Gas Reduction Act 2010 (ACT).
16 Department of Water and Environmental Regulation (n 12) 1.
domestic and international cases, and potential impediments to the success of these arguments. The article is structured in six parts. Part I is the introduction; Part II discusses the scientific and legal context in WA to frame the analysis; Part III explores advancements in climate attribution science and how they may assist with overcoming evidentiary issues in climate change litigation; Parts IV and V consider potential opportunities and issues associated with corporate and tort climate change litigation in WA respectively. Finally, the conclusion offers insights into how novel climate change litigation may provide WA plaintiffs with a powerful tool to respond to ineffective climate action.

II WESTERN AUSTRALIAN CONTEXT

The WA Government acknowledges that WA has already experienced climate change impacts including higher average temperatures, a steady decline in rainfall, sea level rise that is “almost three times the global average”, and drying conditions that have increased WA’s fire risk. The WA Environmental Protection Authority reveals that WA’s south-west region has already experienced significant drying as a result of climate change, which has put additional pressure on the environment, including water resources, flora and fauna and marine environmental quality. The WA Government also acknowledges the particular vulnerability of WA’s south-west region, stating that it has been “impacted by climate change more than almost any other place on the planet”. Predicted future impacts in Australia include further increases in sea and air temperatures, sea level rise, ocean acidification and time spent in drought in southern Australia. A longer fire season and greater proportion of high-intensity storms are also predicted. Despite these impacts, WA’s GHG emissions have been steadily increasing and are predicted to continue to increase.

Opportunities for climate change litigation in WA are limited compared to other countries and Australian states and territories, which mean that legal arguments successfully employed in climate change cases such as Urgenda

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17 Ibid.  
18 Ibid.  
19 Environmental Protection Authority, (n 13) 3.  
20 Department of Water and Environmental Regulation (n 12) 1.  
22 Ibid 22.  
23 Ibid; Environmental Protection Authority (n 13) 2.
Foundation v Kingdom of the Netherlands\(^4\) (‘Urgenda’) cannot simply be replicated. No constitutional rights or duties relating to climate change or the environment apply to WA. While Australia is a party to numerous international human rights treaties,\(^5\) giving rise to an expectation of good faith compliance,\(^6\) no legislation or bill of rights expressly incorporates the rights in these treaties into Australian law at the federal level.\(^7\) Further, WA has no state human rights legislation.\(^8\) Briana Collins and Justine Bell-James highlight the importance of state human rights legislation, stating that the *Human Rights Act 2019* (Qld) creates a “more fertile ground for a rights-based climate change case on Australian soil”.\(^9\) This legislation led to Australia’s first human rights-based climate change case being brought in May 2020, in which young people and landholders in Queensland allege that the proposed Galilee Coal Project will infringe various human rights enshrined in the *Human Rights Act 2019* (Qld).\(^10\) Without federal or state human rights legislation, however, rights-based arguments are unlikely to succeed in WA courts.

No climate change legislation exists in WA, unlike some other Australian states and territories.\(^31\) WA has no specialist environment court like the New South Wales Land and Environment Court (‘NSW LEC’) that is capable of

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\(^{25}\) For example, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.


\(^{28}\) For example, see: *Human Rights Act 2019* (Qld), *The Charter of Human Rights and Responsibilities Act 2008* (Vic) and the *Human Rights Act 2004* (ACT).


\(^{30}\) Ibid.

\(^{31}\) *Climate Change Act 2017* (Vic); *Climate Change and Greenhouse Gas Reduction Act 2010* (ACT); *Climate Change and Greenhouse Gas Reduction Act 2007* (SA); *Climate Change (State Action) Act 2008* (Tas).
hearing merits review appeals relating to environmental issues. Accordingly, outside of the WA State Administrative Tribunal ("WA SAT") there is no ability for merits review of administrative decision making in WA courts. This means that WA plaintiffs are confined to seeking judicial review of administrative decision-making and conduct in the Supreme Court of WA. Judicial review is limited to assessing whether a legal error exists in decision-making. As Dr Chris McGrath notes, judicial review is typically of little use for environmental litigation\(^{32}\) and does not suit the issues most public interest litigants seek to raise,\(^{33}\) as it does not extend to considering the merits of a decision in light of environmental issues.

The narrow opportunities for climate change litigation in WA are reflected by the fact that, of the 113 Australian climate change litigation cases reported in the Sabin Center for Climate Change Law’s Climate Change Litigation Database as at November 30 2020,\(^{34}\) only one is Western Australian, Able Lott Holdings Pty Ltd v City of Fremantle.\(^{35}\) Another more recent WA climate change case is Two Rocks Investments v WAPC ("Two Rocks").\(^{36}\) While these cases are important, they were both decided in the SAT and concerned challenges to approval decisions under WA planning law on the basis of inadequate consideration of climate change impacts. WA’s restrictive legislative and court framework mean that legal innovation and creativity are crucial to providing avenues to respond to ineffective climate action through the courts. As discussed in more detail below, there may be scope for WA plaintiffs to target the corporate law or tort law obligations of private or public bodies in novel climate change litigation. While corporate law obligations are contained in federal legislation,\(^{37}\) they provide an important opportunity to respond to the conduct of WA companies and their officers in the context of climate change.

For novel climate change litigation to have prospects of success in WA, plaintiffs must establish that they have standing, that is, the ability to commence proceedings. In comparison, establishing standing has been a significant obstacle

\(^{34}\) ‘Australia Climate Case Chart’, Sabin Center for Climate Change Law (Web Page, 2020) <http://climatecasechart.com/non-us-jurisdiction/australia/>.
\(^{35}\) [2010] WASAT 117.
\(^{36}\) [2019] WASAT 59.
\(^{37}\) Corporations Act 2001 (Cth) (‘Corporations Act’).
to the success of climate change litigation in the United States (‘US’). While the
requirements relating to standing will depend on the legal cause of action
employed, the general position is that plaintiffs must establish that they have a
‘special interest in the subject matter’. Tim Baxter contends that effective
climate change litigation will likely target plaintiffs that are affected by the more
direct impacts of climate change, where the underpinning science is the
strongest. As discussed above, WA has already experienced, and is expected to
continue to experience, significant sea level rise, increased temperatures, changes
to rainfall patterns, drying trends and extreme weather events. WA climate
change litigation could therefore target these climate impacts. WA plaintiffs
affected by these impacts could include individual or groups of citizens such as
young people, property owners and residents of coastal areas, farmers, fishing
operators, shareholders and investors, non-governmental organisations (‘NGOs’),
and local government bodies such as cities.

In the context of tort climate change litigation, plaintiffs must also establish
that WA legislation has not displaced or pre-empted common law claims or
authorised conduct that would otherwise be unlawful. Displacement of common
law by legislation has been a major obstacle for climate change litigation in the
US. Here in WA, the key legislation relating to environmental protection is the

41 Department of Water and Environmental Regulation (n 12) 1.
42 For example, Leghari v Pakistan (2015) W.P. No. 25501/2015 (Lahore High Court Green Bench); Juliana v United States (2016) 615-CV-01517-TC (United States District Court).
43 For example, Ralph Lauren 57 Pty Ltd v Byron Shire Council (2014) 199 LGERA 424; Comer v. Murphy Oil USA, 607 F.3d 1049 (5th Cir, 2010); Native Village of Kivalina v ExxonMobil Corp, 663 F Supp 2d 863, 883 (ND Cal, 2009); 696 F 3d 849 (9th Cir. 2012).
44 For example, see: Family Farmers and Greenpeace Germany v. GermanyVG 10 K 412.18; Lluis v RWE AG 2 O 285/15.
45 For example, see: Pacific Coast Federation of Fisherman’s Associations, Inc v Chevron Corp, 3:18-CV-07477 (ND Cal, 2018).
46 For example, see: Guy Abrahams (and others) v Commonwealth Bank of Australia VID879/2017.
47 For example, see: Urgenda Foundation v Kingdom of the Netherlands (2015) C/09/456689 / HA ZA 13-1396 (Hague District Court).
48 For example, see: City of Imperial Beach v Chevron Corp, 3:17 CV 04934 (Cal Super Ct, 2017); City of Oakland v. BP PLC, 325 F Supp 3d 1017 (ND Cal, 2018).
49 Courts have dismissed federal common law claims as not being justiciable on the basis that they
have been displaced by legislation, in particular the Clean Air Act – for example, see: Native Village of
Environmental Protection Act 1986 (WA) (‘Environmental Protection Act’). If the defendant’s activities, for example GHG emissions, are authorised by this legislation or by an instrument granted under the legislation, it may affect their liability under common tort law or provide a defence to liability. However, it is seen as highly undesirable in Australia for statute to abrogate common law rights, with the principle of legality requiring the intention for abrogation to be clearly manifested by unmistakable and unambiguous language.\textsuperscript{50} As the Environmental Protection Act does not refer to GHG emissions or express any clear or unambiguous intention to authorise the commission of a tort, it does not appear that issues of displacement or authorisation by statute would impede tort climate change litigation in WA. Further, licence instruments granted under the Environmental Protection Act do not refer to GHG emissions such as CO₂, due to the WA Department of Water and Environmental Regulation’s view that Part V of the Environmental Protection Act does not extend to regulating these emissions.

III DEVELOPMENTS IN CLIMATE ATTRIBUTION SCIENCE

There have been substantial developments in “climate attribution science” that may help WA plaintiffs to overcome evidentiary issues associated with climate change litigation. Climate attribution science seeks to estimate the effect of human activities such as GHG emissions on the climate and related earth systems.\textsuperscript{51} It enables the risk and likelihood of climate change impacts, such as extreme weather events, to be modelled and linked to specific actors or sources.\textsuperscript{52} In the context of climate change litigation, it may assist with proving foreseeability of climate change impacts and establishing causal links between activities, such as GHG emissions and local harm from climate change impacts.\textsuperscript{53} The Supplementary Memorandum of Opinion on “Climate Change and Directors’ Duties” (‘Supplementary Hutley Opinion’), published by Australian barristers Noel Hutley SC and Sebastian Hartford Davis in March 2019 provides

\textsuperscript{50} Coco v The Queen (1994) 179 CLR 427.
an update to the original Hutley Opinion (‘original Hutley Opinion’) published in October 2016, and states that advances in event attribution science “mean that the probabilistic “fingerprint” of climate change in individual extreme events… can be more readily identified”.

Further, it predicts that these advances will have implications for the development of law. Michael Burger, Jessica Wentz and Radley Horton similarly state that attribution science “is central to the recent climate litigation, as it informs discussions of responsibility for climate change” and that “[a]s the science evolves, so too will its role in the courtroom and in policymaking.”

To be accepted by WA or Australian courts, climate attribution science or expert evidence must be legally admissible in accordance with the rules of evidence. This may be difficult given the variabilities and level of uncertainty associated with climate attribution science and the fact that no single climate attribution framework or method exists. Burger, Wentz and Horton predict that plaintiffs will have the most success where they base their claims on impacts which can be attributed to climate change with high confidence and where they rely on expert reports and peer-reviewed attribution studies. Courts must also be willing to accept this evidence, which may require interrogation of the evidence. The recent case of Gloucester Resources Limited v Minister for Planning (‘Gloucester’) demonstrates the potential willingness of Australian judges and courts to recognise and apply developments in climate attribution science in litigation. In that case, Preston CJ made numerous references to the expert report prepared by earth systems scientist and professor, Will Steffen. While professor Steffen disputed the conception of the carbon budget put forward by the opponent’s expert report prepared by Dr Brian Fisher, Preston CJ relied on his report to conclude that the GHG emissions of the Rocky Hill Coal Project will contribute cumulatively to global GHG

54. Noel Hutley SC and Sebastian Hartford Davis, “Climate Change and Directors’ Duties”: Supplementary Memorandum of Opinion (Memorandum of Opinion, 26 March 2019) [17].
55. Ibid.
56. Burger, Wentz and Horton (n 51) 61-2.
57. Ibid 62.
58. For example, see: Evidence Act 1995 (Cth); Evidence Act 1906 (WA); State Administrative Tribunal Rules 2004 (WA).
59. Marjanac and Patton (n 53) 271.
60. Pfrommer et al (n 52) 77.
61. Ibid 237.
62. Marjanac and Patton (n 53) 279.
64. Ibid [456].
emissions and are likely to contribute to the future changes to the climate system and the impacts of climate change.\textsuperscript{65} Further, the NSW LEC recently made orders allowing the plaintiffs in \textit{Bushfire Survivors for Climate Action Inc v Environmental Protection Authority}\textsuperscript{66} to file and serve expert evidence from a climate scientist for consideration at trial.

The evidential reliability of attribution science will ultimately depend on the circumstances of the case. To this end, Burger, Wentz and Horton note that:

> The cases litigated to date demonstrate that attribution science is sufficiently robust to establish causal connections between increases in GHG concentrations, global warming, and a broad range of on-the-ground impacts and harms. This is not to say all impacts of climate change can be definitively linked to anthropogenic influence on climate—but there is a sufficiently large subset of impacts that can be attributed with enough confidence to support litigation in one form or another. These include, for example, sea level rise, melting snowpack, increases in average temperatures and extreme heat, and ocean acidification.\textsuperscript{67}

If climate attribution science is admissible and accepted by domestic courts, it could provide substantial assistance to WA plaintiffs in overcoming evidentiary issues in climate change litigation, discussed in more detail below. However, given the controversy and uncertainty associated with the climate change, it is likely that there will be disagreements in expert evidence adduced by opposing parties in climate litigation. This means that the weight of such evidence will depend on the court’s decision as to whether it should be accepted and adequately substantiates the relevant argument.\textsuperscript{68} For example, there was a disagreement between experts in \textit{Positive Change for Marine Life Inc v Byron Shire Council}\textsuperscript{69} in relation to the likely environmental impacts of the proposed construction of a rock wall,\textsuperscript{70} and the NSW LEC concluded that, on the evidence on before it, the applicant’s case was not strong\textsuperscript{71} and that an interlocutory injunction should not be granted.\textsuperscript{72} Despite this, Preston CJ’s treatment of

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\textsuperscript{65} \textit{Gloucester Resources Limited v Minister for Planning} [2019] NSWLEC 7 [525].

\textsuperscript{66} [2020] NSWLEC 152

\textsuperscript{67} Burger, Wentz and Horton (n 51) 235

\textsuperscript{68} For example, in \textit{Gloucester Resources Limited v Minister for Planning} [2019] NSWLEC 7 at [536] the NSW LEC found that “GRL has failed to substantiate, in the evidence before the Court, that this risk of carbon leakage will actually occur if approval for the Rocky Hill Coal Project were not to be granted”.

\textsuperscript{69} (No 2) [2015] NSWLEC 157.

\textsuperscript{70} Ibid [46].

\textsuperscript{71} Ibid [75].

\textsuperscript{72} Ibid [81].
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professor Steffen's evidence in *Gloucester* indicates the possible value of climate attribution science in WA and Australian courts.

**IV CORPORATE LAW CLIMATE CHANGE LITIGATION**

As mentioned above, corporate law obligations applying to WA companies are contained in federal legislation, the *Corporations Act*, meaning litigation would be brought in the Federal Court of Australia rather than WA courts. Despite this, corporate law obligations provide an important opportunity for WA beneficiaries to respond to the conduct of WA companies and their officers in the context of climate change, especially given approximately 35% of Australian Stock Exchange (‘ASX’) companies are headquartered in WA.73

**A Global and Local Developments**

In recent times, climate change litigation has increasingly targeted the corporate law obligations of private companies and their officers, with various cases being brought by shareholders and investors against companies in Australia and the US.74 There are three broad types of potential corporate climate change cases: suits grounded in a failure to adequately disclose information relating to climate change risks (in financial or directors’ reports or on request);75 those based on publication of false, misleading or deceptive information relating to climate change;76 and actions grounded in breach of directors’ fiduciary duties in the context of climate change.77

Here in Australia, in 2017 shareholders alleged in *Guy Abrahams (and others) v Commonwealth Bank of Australia*8 that the Commonwealth Bank did not

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74 For example, see: *Guy Abrahams (and others) v Commonwealth Bank of Australia* VID879/2017; *McVeigh v Retail Employees Superannuation Trust Pty Ltd* [2019] FCA 14; *People of the State of New York v Exxon Mobil Corporation, 452044/2018 1 (NY Super Ct, 2018)*.
75 *Guy Abrahams (and others) v Commonwealth Bank of Australia* VID879/2017; *McVeigh v Retail Employees Superannuation Trust Pty Ltd* [2019] FCA 14.
77 Hutley and Davis, “Climate Change and Directors’ Duties”: Supplementary Memorandum of Opinion (n 54) [22]; Noel Hutley SC and Sebastian Hartford Davis, “Climate Change and Directors’ Duties”: Memorandum of Opinion (Memorandum of Opinion, 7 October 2016) [51].
78 VID879/2017.
adequately inform investors of climate change risks in its 2016 annual report as required by the Corporations Act.\textsuperscript{79} While the case was withdrawn as the Bank’s 2017 annual report was deemed to adequately acknowledge climate change, had the case proceeded, it would have been the first Australian case examining the obligations of companies to disclose climate risks.\textsuperscript{80} A case was also brought by an Australian superannuation trust member in McVeigh \textit{v} Retail Employees Superannuation Trust Pty Ltd in 2018. McVeigh alleged that the Trust violated the Corporations Act\textsuperscript{82} by failing to provide, upon his request, adequate information relating to its climate change business risks to enable him to make an informed judgment about the management, financial condition and investment performance of the Trust.\textsuperscript{83} He also alleged that the Trust breached its duties under the Superannuation Industry (Supervision) Act 1993 (Cth)\textsuperscript{84} and in equity. While the parties agreed to settle the case out of court, the Trust publicly acknowledged that "climate change is a material, direct and current financial risk to the superannuation fund".\textsuperscript{85} Further, it confirmed that the Trust and its investment managers should actively identify, consider and manage the financial risks of climate change on behalf of its members, and that this included disclosure of these risks to members.\textsuperscript{86} In a third case, Friends of the Earth Australia and bushfire victims lodged a complaint in January 2020 against the Australia and New Zealand Banking Group Limited (‘ANZ Bank’) alleging that it has violated the Organisation for Economic Cooperation and Development’s (‘OECD’) Guidelines for Multinational Enterprises\textsuperscript{87} by financing fossil fuel projects and inadequately disclosing its indirect GHG emissions arising from its business lending.\textsuperscript{88}

\textsuperscript{79} \textit{Corporations Act} (n 37) ss 292(1)(b), 295, 297, 208(1).
\textsuperscript{81} [2009] FCA 14.
\textsuperscript{82} \textit{Corporations Act} (n 37) s 1017(c).
\textsuperscript{84} \textit{Superannuation Industry (Supervision) Act 1993 (Cth)} s 315.
\textsuperscript{86} Ibid.
\textsuperscript{88} Friends of the Earth Australia, ‘Complaint to the Australian National Contact Point’ (Complaint, 30 January 2020)
In the US, in 2018 the Attorney General of New York alleged in *People of the State of New York v Exxon Mobil Corporation* that Exxon Mobil Corporation committed fraud and made material misrepresentations and omissions regarding its use of proxy costs and climate risks that were capable of misleading investors. This case was dismissed due to a lack of evidence that any investor was in fact misled. More recently in the United Kingdom (‘UK’), Client Earth lodged a complaint in 2019 against British Petroleum (‘BP’) alleging it violated the OECD Guidelines for Multinational Enterprises as a result of their misleading advertising campaign: "Keep Advancing" and "Possibilities Everywhere". This complaint is yet to be decided.

B **Potential for Corporate Law Climate Change Litigation in WA**

The *Corporations Act* outlines legal requirements that apply to Australian companies, including WA companies. In particular, it outlines obligations relating to corporate disclosure, false or misleading conduct in relation to financial products and financial services and false or misleading statements in documents required to be disclosed. It also imposes legal duties on directors of companies, for example to exercise due care and diligence and act in the best interests of the company. The Australian Consumer Law (‘ACL’) is contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) and sets out legal requirements that apply to conduct in trade or commerce, including a prohibition of conduct that is misleading or deceptive, or is likely to mislead or deceive.

WA companies or their officers may expose themselves to climate change litigation for breach of the *Corporations Act* and the ACL if they inadequately...
disclose climate risks, breach their fiduciary duties by inadequately considering climate change and/or publish false and misleading statements or information or engage in misleading or deceptive conduct relating to climate change.

1 Inadequate Disclosure of Climate Risks

If WA companies do not adequately disclose climate risks in corporate documents such as annual financial reports99 and directors’ reports100 they may potentially expose themselves to climate change litigation. While the Corporations Act does not expressly require companies to disclose climate risks, there have been various developments that confirm that companies in WA and Australia are obliged, or at least expected, to disclose climate-related financial risks.101 According to the original Hutley Opinion, the duty of care and diligence is capable of requiring company directors to consider and disclose their exposure to foreseeable physical, transition and tertiary risks associated with climate change.102 The Australian Securities and Investment Commission (‘ASIC’) Regulatory Guide 247 similarly highlights that climate change is a systemic risk that could materially impact an entity’s future financial position, performance and prospects for future years and may need to be disclosed in an operating and financial review (‘OFR’).103 The ASX Corporate Governance Council has also recommended that listed entities should disclose whether they have any material exposure to environmental risks, including climate change risks, and how they manage or intend to manage those risks.104

The Supplementary Hutley Opinion notes that there have been “significant changes in financial reporting frameworks relevant to the disclosure of climate

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99 Corporations Act (n 37) s 297.
100 Ibid s 299A.

102 Described in Hutley and Davis, “Climate Change and Directors’ Duties”: Memorandum of Opinion (n 77) [51].
103 Australian Securities and Investments Commission (n 101) r 247.66.
risk’,

These include a report published in June 2017 by the Taskforce for Climate-related Financial Disclosures (‘TCFD’), an industry-led task force established by the international G20 Financial Stability Board to develop voluntary, consistent climate-related financial disclosures.

TCFD’s report outlines a recommended framework for voluntary disclosure requirements to ensure consistent and useful disclosures. In particular, it contains four widely adoptable recommendations in relation to governance, strategy, risk management, and metrics and targets, and specific recommended disclosures relating to climate risks that organisations should include in their financial filings to provide decision-useful information.

The TCFD report also outlines principles for effective disclosure of climate risks, which include that disclosures should represent relevant information, be specific and complete, and comparable among companies within a sector, industry and portfolio.

The TCFD recommendations have been endorsed by various regulatory bodies in Australia, including the Australian Prudential Regulation Authority (‘APRA’), Reserve Bank and ASIC. For example, ASIC states in its Regulatory Guide 247 that directors may consider whether it would be worthwhile to disclose information that would be relevant under “the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD), where that information is not already required for the OFR.” Thus, while the TCFD recommendations are voluntary and not legally binding on WA or Australian companies, there may still be an expectation that they disclose climate risks in a way that complies with these recommendations.

Andrew Korbel highlights the potential for claims to be made against companies and their officers for failure to properly disclose climate change

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105 Described in Hutley and Davis, “Climate Change and Directors’ Duties”: Supplementary Memorandum of Opinion (n 54) [7].
106 TCFD, Recommendations of the Task Force on Climate-related Financial Disclosures (Final Report, June 2017) iii.
108 Ibid 75.
109 Ibid 18.
111 Guy Debelle, ‘Climate Change and the Economy’ (Speech, Centre for Policy Development, 12 March 2019).
112 John Price, ‘Climate change’ (Speech, Centre for Policy Development, 18 June 2018).
113 Australian Securities and Investments Commission (n 101) 1 247,66.
risks. In relation to the expected standard of disclosure of climate risks, ASIC emphasises that climate risks should be disclosed in a way that is “useful and relevant to the market” and that specific disclosure is more useful than general disclosure. APRA has similarly stated that it “expects that disclosure that is specific, comprehensive and considers climate change risks distinctly will progress in the future”. Further, the Supplementary Hutley Opinion states in sectors where climate risks are most evident, there is an expectation of “comprehensive disclosures and, ultimately, sophisticated corporate responses at the individual firm and system level”. While there is clearly a recognised expectation that Australian companies should report on their climate risks in a useful way, current levels of reporting are low, with a review by ASIC of 60 ASX 300 listed companies in 2018 finding that only 17% had identified climate change risk as a material risk in their OFRs and that most climate risk disclosures were general and of limited use for assessing climate risk exposures. ASIC therefore announced in December 2019 that it was launching an investigation into the disclosure of climate risk by Australian companies.

If WA companies do not disclose climate risks in corporate documents, where those risks could affect their financial performance or outcomes, they could expose themselves to climate change litigation. In particular, it may be possible to argue that inadequate disclosure of climate risks results in financial reports not giving a true and fair view of the financial position and performance of a company or directors’ reports not containing information that members of the company would reasonably require to make an informed assessment of the company’s operations, financial position and/or business strategies and

115 Price (n 112).
117 Australian Prudential Regulation Authority (APRA) (n 110) 17.
118 Described in Hutley and Davis, ”Climate Change and Directors’ Duties”: Supplementary Memorandum of Opinion (n 54) [21].
121 Australian Securities and Investments Commission (n 101) r 247.66.
122 Corporations Act (n 37) s 297.
prospects for future business years, in breach of the Corporations Act. While the recommendations of the TCFD and Australian regulatory bodies that disclosure must be sufficiently relevant, decision-useful, specific and comprehensive are not legally binding, they may increase the standard of care and expectations applying to WA companies regarding adequate disclosure of climate risks.

2 Breach of Directors’ Duties in the Context of Climate Change

If directors of WA companies fail to consider, disclose or take steps in relation to foreseeable climate change risks that can be demonstrated to cause harm to the company, they could be subject to climate change litigation for breaching their fiduciary duties to act with reasonable care and diligence; and to act in good faith and in the best interests of the company, and for a proper purpose. The Original and Supplementary Hutley Opinion state that the duty of directors relating to care and diligence under the Corporations Act and general law mean that Australian company directors can, and in some cases should, consider the impact of climate-related risks on their business. Preston CJ warns that legal opinion is mounting that directors will be liable for breach of their duties if they fail to consider, manage and disclose climate risks. Further, various law firms have highlighted the link between directors’ duties and climate change.

To avoid liability for breach of the duty of care and diligence, WA directors must consider and inform themselves about foreseeable climate risks and the potential impact on the company, the degree to which these risks should be disclosed (discussed in detail above), and whether appropriate steps should be taken in response to these risks. The business judgement rule may provide a

132 Ibid s 299A.
134 Ibid s 180.
135 Ibid s 181.
136 Hutley and Davis, “Climate Change and Directors’ Duties”: Supplementary Memorandum of Opinion (n 54) [2].
139 Hutley and Davis, “Climate Change and Directors’ Duties”: Supplementary Memorandum of Opinion (n 54) [2].
defence to liability for breach of this duty, where the director makes a business judgement or decision in good faith and for a proper purpose, does not have a material personal interest in the subject matter of the judgement, informs themselves about the subject matter to the extent they reasonably believe to be appropriate, and rationally believes that the judgement is in the best interests of the company.\textsuperscript{130} However, where a WA director has not adequately responded to foreseeable climate risks, this failure has caused harm to the company (for example, reputational damage or loss of securities value), and the business judgement rule does not apply, they may be liable for breaching their fiduciary legal duty relating to reasonable care and diligence.\textsuperscript{131} It could also be possible to argue in certain circumstances that failure of WA directors to adequately consider or respond to climate risks mean they are also liable for breaching the duty to act in good faith, in the best interests of the company and for a proper purpose.\textsuperscript{132}

3 False, Misleading or Deceptive Statements, Information or Conduct Relating to Climate Change

International and domestic cases demonstrate the potential for climate change litigation to target WA companies for publishing false and misleading statements or information relating to climate change in corporate documents, such as annual financial or directors’ reports and ASX statements, and/or misleading or deceptive conduct in relation to climate-related advertising campaigns. Various provisions of the \textit{Corporations Act} relate to false or misleading statements and information\textsuperscript{133} and misleading or deceptive conduct in relation to financial products and financial services.\textsuperscript{134} Section 18 of the ACL also relates to misleading or deceptive conduct in trade or commerce. At a general level, statements, information and conduct must be capable of leading a reasonable member of the target audience into error to be considered misleading or deceptive.\textsuperscript{135} However, it is sufficient for statements, information or conduct to be likely to mislead or deceive, meaning that evidence of a person being induced, misled or deceived is not required.

\textsuperscript{130} \textit{Corporations Act}(n 37) s 180 (2).
\textsuperscript{131} Ibid s 180.
\textsuperscript{132} Ibid s 181.
\textsuperscript{133} Ibid ss 1308, 1309.
\textsuperscript{134} Ibid ss 1041H; \textit{Australian Consumer Law}(n 98) s 18.
\textsuperscript{135} \textit{Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd}(1982) 149 CLR 191, 198.
If a WA company publishes a statement or information or engages in conduct relating to climate change that is false and capable of leading a reasonable member of its target audience into error, it may be subject to climate change litigation for breach of the Corporations Act or ACL. This potential is demonstrated by the US case, People of the State of New York v Exxon Mobil Corporation, which targeted misrepresentations made by Exxon Mobil Corporation to investors in relation to its use of proxy costs and climate change risks. Here in Australia, numerous cases have been brought by the Australian Competition and Consumer Commission (‘ACCC’) in relation to the “greenwashing” or false environmental advertising practices of Australian companies, including claims relating to carbon neutrality and offsetting. These cases indicate the potential for WA companies to be subject to similar litigation if they publish false or misleading statements or information or engage in misleading or deceptive practices relating to climate change, climate risks, GHG emissions or the GHG intensity of their activities.

V TORT LAW CLIMATE CHANGE LITIGATION

While various academics have analysed the potential application of tort law to climate change claims in Australia, the potential for tort climate change litigation in WA within the context of recent legal developments and advancements in climate attribution science has not yet been explored. While extending the application of tort law to climate change may raise floodgate concerns, tort law may provide an important avenue to respond to inadequate climate action in WA given opportunities for climate change litigation are significantly limited.

137 Ibid.
140 Preston (n 138) 779.
142 Durrant (n 141) 421.
A Global and Local Developments

Tort law has been widely used in climate change litigation across the world to target the conduct of public and private bodies in relation to GHG emissions and climate change.\footnote{For example, see: Urgenda Foundation v Kingdom of the Netherlands (2015) C/09/456689 / HA ZA 13-1396 (Hague District Court); Llueva v RWE AG 2 O 285/15; AG Comer v. Murphy Oil USA, 607 F 3d 1049 (5th Cir, 2010); Native Village of Kivalina v. ExxonMobil Corp., 663 F Supp 2d 863, 883 (ND Cal, 2009); 696 F 3d 849 (9th Cir. 2012); American Electric Power Company v. Connecticut, 564 U.S. 410 (2011).} Climate change litigation based on tort law claims has generally focused on negligence and nuisance (public and private),\footnote{Claims have also focused on trespass, failure to warn and defective products.} arguing that government bodies or private companies have breached a duty of care or created a nuisance by failing to mitigate climate change.\footnote{Urgenda Foundation v Kingdom of the Netherlands (2015) C/09/456689 / HA ZA 13-1396 (Hague District Court) [76].} A well-known example of tort climate change litigation is Urgenda, in which a Dutch NGO successfully sued the Dutch government in negligence on behalf of hundreds of citizens for its failure to take adequate climate action.\footnote{George Newhouse, 'I've won cases against the government before. Here's why I doubt a climate change class action would succeed', The Conversation (Blog Post, 15 January 2020) <https://theconversation.com/ive-won-cases-against-the-government-before-heres-why-i-doubt-a-climate-change-class-action-would-succeed-129707>; Durrant (n 141); Rieb and Waldron (n 141); Peel, Osofsky and Forster (n 4).} There are numerous difficulties with replicating arguments employed in Urgenda in Australia,\footnote{[2020] NZHC 419.} with much of the Dutch law relied on in that case differing quite significantly from Australian law.

In the recent New Zealand case of Smith v Fonterra Co-operative Group Ltd\footnote{Smith v Fonterra Co-Operative Group Ltd[2020] NZHC 419, [77], [100], [103].} (‘Smith’), the plaintiff argued that the defendants, a group of companies, were liable in public nuisance, negligence, and for breach of an inchoate duty as a result of their GHG emitting activities and production of products that result in the GHG emissions. The New Zealand High Court struck out the claims relating to public nuisance and negligence, but concluded that the claims relating to breach of an inchoate duty should proceed to trial.\footnote{[2020] NZHC 419.} Various cases have also been brought by local governments in the US, including the Cities of Imperial Beach, New York and Oakland against private companies such as BP, Chevron and Exxon Mobil, claiming that they are liable in public nuisance and negligence
for their contribution to climate change. The local governments seek compensation and other relief in relation to the harm and damage that has or will be caused by climate change impacts, including sea level rise. Most of these cases are ongoing and have been riddled with disputes over whether they should be dealt with in state or federal courts, or by legislative and executive branches of government rather than the judiciary.

Here in Australia, Ralph Lauren 57 v Byron Shire Council is an example of tort law arguments being used in the context of climate change adaptation. In this case, a group of property owners sued the Byron Shire Council in negligence and public nuisance in relation to its failure to adapt to, and prepare for, coastal impacts from climate change. While the action was settled outside of court before a judgement could be reached, the Court of Appeal confirmed that the arguments could be heard in court, demonstrating the potential for tort law to be employed in the context of climate change in Australian cases. More recently, the plaintiffs in Sharma and others v Minister for Environment argue that the Commonwealth Minister for Environment owes a statutory duty to exercise its power with reasonable care to not cause harm to them from climate change. Further, they argue that the Minister will breach this duty if it exercises its powers in a manner that materially increases CO2 emissions.

B Potential for Tort Law Climate Change Litigation in WA

In WA, tort law is governed by a combination of common law and statute law, in particular the Civil Liability Act 2002 (WA) (‘Civil Liability Act’). If private and public authorities in WA do not reduce their GHG emissions or take effective climate mitigation or adaptation action they may expose themselves to liability in negligence and/or nuisance.

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150 See for example: City of Imperial Beach v Chevron Corp 3:17 cv 04934 (Cal Super Ct, 2017); City of Oakland v. BP PLC, 325 F Supp 3d 1017 (ND Cal, 2018); County of San Mateo v Chevron Corp (Cal Super Ct, 17CIv03222, Complaint filed 17 July 2017); City of New York v. BP P.L.C., 325 F Supp 3d 466 (SDNY, 2018).
151 See for example: City of Imperial Beach v Chevron Corp 3:17 cv04934 (Cal Super Ct, 2017); City of Oakland v. BP PLC, 325 F Supp 3d 1017 (ND Cal, 2018); County of San Mateo v Chevron Corp (Cal Super Ct, 17CIv03222, Complaint filed 17 July 2017); City of New York v. BP P.L.C., 325 F Supp 3d 466 (SDNY, 2018).
153 Ralph Lauren 57 Pty Ltd v Byron Shire Council(2014) 199 LGERA 424.
1 Negligence

It may be possible for WA plaintiffs to argue that the actions or omissions of public or private bodies in relation to climate change (for example, production of substantial GHG emissions or failure to take adequate climate adaptation and mitigation action) constitute negligence. The Civil Liability Act contains general principles relating to negligence.\(^{154}\) Broadly, the main elements required for a successful negligence action are: a duty of care owed by the plaintiff to the defendant, a breach of that duty, that harm to the plaintiff occurred that was not too remote, and that the breach factually and legally caused this harm.\(^{155}\) Innovation will be required to establish a duty of care, breach, harm and causation in climate change cases.

(a) Novel duty of care

In tort climate change litigation it must be established that the defendant (whether it be a WA company or public body) owes a duty of care to take reasonable care to avoid harm or injury to the plaintiff. Where the relationship between the plaintiff and the defendant does not fall within, and is not analogous to, an existing category of duty of care (for example, employer to employee), a novel duty of care must be established with reference to the circumstances of the case.\(^{156}\) In Caltex Refineries (Qld) Pty Ltd v Stavar\(^{57}\) it was held that where a duty of care is a novel one, the proper approach is to closely analyse the facts bearing on the relationship between the plaintiff and the defendant by reference to a non-exhaustive list of “salient features” or factors affecting the appropriateness of imputing a legal duty.\(^{158}\) Factors that may be relevant to tort climate change litigation include:

(a) the foreseeability of harm;

...  
(c) the degree and nature of control able to be exercised by the defendant to avoid harm;

(d) the degree of vulnerability of the plaintiff to harm from the defendant’s...
conduct, including the capacity and reasonable expectation of a plaintiff to take steps to protect itself;

... (k) knowledge (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff; (l) any potential indeterminacy of liability; (m) the nature and consequences of any action that can be taken to avoid the harm to the plaintiff; ...

Baxter and Rahul Thyagarjan argue that it may be possible in certain circumstances to apply the above factors to argue that the defendant owes a duty of care to the plaintiff in the context of climate change. For example, contemporary climate science, including the findings of the Intergovernmental Panel on Climate Change and developments in climate attribution science, could help WA plaintiffs to prove that harm from climate change impacts is foreseeable. The defendant’s knowledge that its conduct will cause harm to the plaintiff could be established by the fact that contemporary climate science relating to the causes and impacts of climate change is generally accepted and acknowledged by private and public bodies in public facing documents. Further, it would be relatively straightforward to prove that private and public bodies have significant control over the activities giving rise to the harm from climate change impacts (such as GHG emissions, development approval or climate adaptation measures). WA plaintiffs could, therefore, potentially apply the factors in Caltax v Stavar to argue that a novel duty is owed by public bodies to take effective climate mitigation and adaptation action or by private bodies to reduce their GHG emissions. The latter duty is supported by the findings of the New Zealand High Court in Smith that the plaintiff’s arguments that a new tortious duty should be recognised that makes corporates responsible to the public for their GHG emissions are arguable and should be properly explored at trial. The Supplementary Hutley Opinion also refers to the potential for

159 Ibid.
160 Baxter (n 40).
161 Burger, Wentz and Horton (n 51) 192.
162 Thyagarajan (n 141) 215.
163 Ibid 214.
164 Ibid 213.
165 Smith v Fonterra Co-Operative Group Ltd [2020] NZHC 419 [103].
directors of companies to breach a duty of care if they ignore climate risks.\textsuperscript{166} WA plaintiffs will need to be innovative, however, to overcome public policy issues militating against the finding of a novel duty, including indeterminacy of liability.\textsuperscript{167}

In the context of public bodies, Thyagarajan contends that a duty of care could be recognised in specific contexts, such as where public authorities approve developments knowing they are at high risk of climate change impacts such as flooding.\textsuperscript{168} This duty would be analogous to the duty that the Council breached in 	extit{Armidale City Council v Alec Finlayson Pty Ltd}\textsuperscript{169} by selling a parcel of land that it knew was severely contaminated to a builder.\textsuperscript{170} Establishing a similar duty is owed by public bodies in a climate change context would require evidence that the particular area is at high risk from climate change impacts (climate attribution science may assist with this) and that the WA local government body had knowledge of such risk when approving the development.\textsuperscript{171} Further, the plaintiff would need to prove that it did not share this knowledge of the risk.\textsuperscript{172} Thyagarajan also argues that it may be possible to argue that public bodies owe a duty of care relating to construction of mitigating or adaptive protective infrastructure, or approval of GHG emitting projects.\textsuperscript{173}

\textit{(b) Reasonably foreseeable risk of harm}

For WA plaintiffs to establish a novel duty of care or breach of this duty in a climate change context, they must prove that the risk of climate-related harm is reasonably foreseeable, that is, not far-fetched and fanciful.\textsuperscript{174} This means that the plaintiff must show that they belong to a class of people to whom the defendant should have regarded as being ‘at risk’ of harm from its conduct, not that precise harm or injury was foreseeable.\textsuperscript{175} Contemporary climate science and developments in climate attribution science could assist WA plaintiffs to prove

\begin{footnotesize}
\textsuperscript{166} Hutley and Davis, “Climate Change and Directors’ Duties”: Supplementary Memorandum of Opinion (n 54) [2].
\textsuperscript{167} Durrant (n 141) 408; Brian J Preston, 'Climate Change Litigation – A Conspectus' (Conference paper, LAWASIA 23rd Conference, 11-14 November 2010) 7.
\textsuperscript{168} Thyagarajan (n 141) 211.
\textsuperscript{169} Armidale City Council v Alec Finlayson Pty Ltd (1999) 104 LGERA 9.
\textsuperscript{170} Ibid.
\textsuperscript{171} Ibid (n 141) 211.
\textsuperscript{172} Ibid 221.
\textsuperscript{173} Ibid 210.
\textsuperscript{174} Wyong Shire Council v Shirt (1980) 146 CLR 40, 48.
\textsuperscript{175} Donoghue v Stevenson [1932] AC 562, 580; Wyong Shire Council v Shirt (1980) 146 CLR 40.
\end{footnotesize}
that the risk of local harm from climate change impacts in WA is reasonably foreseeable. For example, in the 2008 case of Gippsland Coastal Board v South Gippsland Shire Council the Victorian Civil and Administrative Tribunal (‘VCAT’) held that the risk of flooding to the land and properties from increased severity of storm events and sea level rise was reasonably foreseeable. VCAT has since confirmed that flooding and inundation as a result of climate changes is reasonably foreseeable.

(c) Breach of duty

It must also be established that the defendant breached the duty it owed to the plaintiff by failing to exercise a reasonable standard of care in the context of climate change. For a person to be liable for breach of duty, evidence is required that the risk of harm was foreseeable, not insignificant, and that a reasonable person in the defendant’s position would have taken precautions against the risk of harm. As discussed above, developments in climate attribution science should assist WA plaintiffs to establish that climate change impacts in WA are foreseeable, although experts may disagree on the particular impacts that are foreseeable. Given the predicted climate change impacts in WA include sea level rise, increased temperatures, drought periods, and extreme weather events, it should be relatively straightforward to establish that the risk of harm from these impacts is substantial and not insignificant.

Relevant factors in determining whether a reasonable person would have taken precautions against a risk of harm include the probability that the harm would occur if care were not taken, the likely seriousness of the harm, the burden of taking precautions to avoid the risk of harm, and the social utility of the activity that creates the risk of harm. As discussed above, it should be possible to establish that harm from climate change impacts is foreseeable and likely to occur, and will be sufficiently serious. WA plaintiffs could argue that WA private and public bodies could take precautions to avoid or reduce the risk of harm

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179 Burger, Wentz and Horton (n 51) 192.
177 [2008] VCAT 1545 [45].
180 Thyagarajan (n 151) 217.
181 Civil Liability Act (n 154) s 5B(1); Wyong Shire Council v Shirt (1980) 146 CLR 40, 47-8.
182 Department of Water and Environmental Regulation (n 12) 1.
183 Civil Liability Act (n 154) s 5B(2); Wyong Shire Council v Shirt (1980) 146 CLR 40.
through measures to mitigate GHG emissions (for example, by employing renewable energy or sequestration measures\textsuperscript{184} or introducing laws and policies relating to climate change mitigation and adaptation), and that these precautions are not particularly costly, difficult or inconvenient. Further, they could argue that whatever the social utility of the defendant’s activity is, it does not outweigh the highly probable and serious risk of harm from climate change impacts. However, Thyagarajan contends that breach of duty will likely only be established in climate change cases that relate to high risk areas, where the probability and magnitude of the risk of harm from climate change are sufficiently great to justify the burden of taking precautions to avoid the risk of harm.\textsuperscript{185}

\textit{(d) Harm}

The defendant’s breach must cause actual or future climate-related harm to the plaintiff and this harm must be recognised by law. “Harm” is defined in the \textit{Civil Liability Act} as meaning harm of any kind, including personal injury, damage to property and economic loss.\textsuperscript{186} This requires the identification of a specific and localised harm in the context of climate change, which may be difficult given the all-pervasive\textsuperscript{187} and potentially immeasurable nature of climatic impacts.\textsuperscript{188} The difficulties with proving harm are demonstrated in \textit{Smith}, in which the New Zealand High Court found that the plaintiff had not established that it had suffered special harm or damage, due to it not being considered more serious or substantial in degree than that suffered by the rest of the public or different to the damage that many other members of the public who live in coastal or marine areas may suffer. Developments in climate attribution science may assist with measuring and localising climate-related harm. As the predicted climate change impacts in WA include sea level rise, increased temperatures and drought periods, and extreme weather events,\textsuperscript{189} WA plaintiffs could target personal injury, property damage or economic loss that has been suffered as a result of impacts such as flooding, coastal erosion, droughts and

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{184} Durrant (n 141) 413.
\item \textsuperscript{185} Thyagarajan (n 141) 218.
\item \textsuperscript{186} \textit{Civil Liability Act} (n 154) s 3.
\item \textsuperscript{187} \textit{Smith v Fonterra Co-Operative Group Ltd} [2020] NZHC 419 [62].
\item \textsuperscript{188} Thyagarajan (n 141) 209.
\item \textsuperscript{189} Department of Water and Environmental Regulation (n 12) 1.
\end{enumerate}
\end{footnotesize}
bushfires. Further, Burger, Wentz and Horton conclude that entities representing a large group of people (such as states, cities, trade organisations, environmental groups and other non-governmental entities) may be more successful in proving harm as they “will experience greater harms from climate change as a result of the breadth of their interest”. This is demonstrated by the difficulties of the plaintiff in Smith proving that the damage was direct to him or a direct result of the defendants’ activities, with the New Zealand High Court finding that it was instead a result of numerous consequential and indirect steps. While proving a causal link in climate change contexts will require innovation (discussed in more detail below), advancements in climate attribution science could help to overcome these issues.

Baxter argues that climate litigation claims could also be brought in relation to apprehended or future harm that will be caused by impacts of climate change by plaintiffs seeking “quia timet” injunctions from the court to prevent future harm from occurring. To obtain such an injunction, proof is still required that the harm is imminent, which requires a degree of certainty both that the alleged breach will occur and that legally recognisable harm will occur as a consequence of the breach. Climate attribution science may assist with proving that climate-related harm is imminent. Innovation will be required to apply these arguments to future climate-related harm, however, as courts are generally reluctant to grant quia timet injunctions.

(e) Causation

A significant obstacle for tort climate change litigation is establishing a causal connection between the defendant’s conduct comprising the breach (for

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190 Thyagarajan (n 141) 209.
191 Burger, Wentz and Horton (n 51) 235
192 Durrant (n 141) 416; Preston (n 138) 8.
193 Smith v Fonterra Co-Operative Group Ltd [2020] NZHC 419 [63].
194 Burger, Wentz and Horton (n 51) 149.
195 Baxter (n 40).
196 Ibid 3.
197 Burger, Wentz and Horton (n 51) 148-9.
example, GHG emissions or ineffective climate action) and the harm suffered by
the plaintiff.198 To this end, the Supplementary Hutley Opinion refers to the
potential of the “inexact causality of weather events” limiting the incidence of
climate litigation.199 For causation to be established, WA plaintiffs must prove
that the defendant’s fault was a necessary condition of the occurrence of the harm
(factual causation); and that it is appropriate for the scope of the defendant’s
liability to extend to the harm so caused (scope of liability or legal causation).200

(i) Factual causation

To establish factual causation it must be established, on the balance of
probabilities, that the defendant’s negligence “caused or materially contributed
to the damage”.201 It is widely acknowledged that satisfying the traditional “but
for” causation test202 is extremely difficult in tort climate change cases, given the
sources of GHG emissions responsible for climate change are “geographically
and historically diffuse”.203 Various academics contend that these difficulties
could be avoided by instead applying the “material contribution” test.204 This test
is applicable in exceptional cases where harm is caused by multiple acts or
events205 and has been used widely in toxic tort cases and in some medical
negligence cases. The High Court emphasised in Amaca Pty Ltd v Booth206 that
the question is whether the defendant’s breach was a cause of the harm, not the
most probable source of the harm.207 However, as Thyagarajan notes, it is not
sufficient to prove that the breach increases the risk, a clear causal connection
must still be established between the breach and the harm.208

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198 Cecilia Riebl and Blake Dawson Waldron, ‘Time to hold someone accountable: A tort-based
199 Hutley and Davis, “Climate Change and Directors’ Duties”: Supplementary Memorandum of
Opinion (n 54) [17].
200 Civil Liability Act (n 154) s 5C(1).
201 March v Stramare (E & M H) Pty Ltd (1991) 171 CLR 506, 514 per Mason CJ; Athey v Leonati
202 That “but for” the defendant’s negligence or breach the harm would not have occurred.
203 Thyagarajan (n 141) 218.
204 Ibid 201; Durrant (n 141) 417; Riebl and Waldron (n 141) 25.
205 Amaca Pty Ltd v Booth (2011) 246 CLR 36 [70].
206 Ibid.
207 Ibid.
208 Thyagarajan (n 141) 220.
Toxic tort cases in Australia, the UK and the US have employed a probabilistic approach to causation,209 accepting expert evidence showing the relative contribution to the harm or risk from different parties.210 Courts have been willing to impose liability on the defendant in these cases where the probability of a defendant’s substance causing harm reaches a certain threshold.211 It is widely argued that a similar probabilistic approach could be used to establish causation in climate change litigation, using climate event attribution science.212

For example, Burger, Wentz and Horton state:

From a technical standpoint, given that GHG emissions disperse throughout the atmosphere and have a relatively uniform effect, it would be more accurate to say that all emissions can be traced to impacts. And as discussed below, the emissions contribution of a party can be used as a proxy for its contribution to an impact.213

This approach would require some form of quantification of GHG emissions contributions in order to establish that a defendant has material contributed to global concentrations.214 To show that a defendant’s emissions materially contributed to an impact, Sophie Marjanac, Lindene Patton and James Thornton have suggested focusing on the relative size of their contribution, as compared with others.215 Sophie Marjanac and Lindene Patton also contend that the concept of fungibility (which assumes that all GHG emissions contribute equally to climate change over time) could be useful in climate change litigation to allocate liability and determine whether a defendant’s GHG emissions meet the requisite threshold for causation.216 In Smith, the New Zealand High Court refused to apply the material contribution test on the basis that it was impossible to determine each defendants’ contribution to global GHG emissions or climate change impacts or the extent to which their GHG emissions caused damage to the coastal properties.217 However, developments in climate source attribution science could enable the quantification of a defendant’s contribution to global GHG emissions and climate change.218 In particular, Korbel predicts that the

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210 Burger, Wentz and Horton (n 51) 200.

211 Ibid.

212 Pfrommer et al (n 52) 69; Marjanac, Patton and Thornton (n 223) 616.

213 Burger, Wentz and Horton (n51) 236.

214 Ibid 229.

215 Ibid.

216 Marjanac and Patton (n 53) 285.

217 Smith v Fonterra Co-Operative Group Ltd [2020] NZHC 419 [88](b).

218 Burger, Wentz and Horton (n 51) 230.
recent identification of “Carbon Major” companies\footnote{For example, see: ‘Carbon Majors’, Climate Accountability Institute (Web Page, 8 October 2019) <https://climateaccountability.org/carbonmajors.html>.} and developments in climate change attribution science could enable courts to conclude that particular emitters have contributed to harm as a result of climate change impacts.\footnote{Korbel (n 114) 12.} It may therefore be possible for WA plaintiffs to argue that WA companies responsible for substantial GHG emissions have materially contributed to, and increased, the harm caused by climate change impacts, and therefore should be liable for their proportion of GHG emissions. Climate attribution science may also mean that it possible to establish that climate change impacts could have been avoided or reduced through adoption of certain mitigation or adaptation measures. This may enable WA plaintiffs to argue that ineffective climate mitigation or adaptation action by public bodies has materially contributed to, and increased, the harm from climate change impacts in WA.

Given the general reluctance of courts to depart from the traditional “but for” test beyond toxic tort cases\footnote{Maryanac and Patton (n 53) 281.} and the difficulty that remains with establishing causal links between individual GHG emissions and climate change impacts,\footnote{Setzer and Byrnes (n 1) 9.} substantial innovation will be required.\footnote{Thyagarajan (n 141) 220.} Nevertheless, this argument is worth exploring and may be assisted by advancements in climate event attribution and source attribution science which may establish a causal link between GHG emissions and local harm from climate change impacts in tort law climate change litigation.\footnote{Burger, Wentz and Horton (n 51).}

\section*{(ii) Scope of liability / legal causation}

Scope of liability or legal causation requires proof that it is appropriate for the defendant’s liability to extend to the plaintiff’s harm, with the court considering factors such as whether and why responsibility should be imposed on the defendant, or whether the harm should be left to lie where it fell.\footnote{Civil Liability Act (n 154) s 5C(2).} Policy issues such as indeterminate and disproportionate liability will be relevant to addressing legal causation in climate change contexts. For example, the New
Zealand High Court concluded in Smith that it would be unfair, unjust or unreasonable to impose liability on the defendants, partially due to issues associated with disproportionate liability and indeterminate liability. Baxter highlights that seeking equitable relief (such as injunctions or declarations) instead of common law damages (which will be extremely difficult to calculate in climate change cases) may avoid issues with indeterminate liability. Issues with disproportionate liability could also be overcome by seeking injunctive or declarative relief or, if damages are sought, applying principles relating to proportionate liability contained in the Civil Liability Act to ensure that the amount sought reflects the defendant’s contribution to the harm. WA plaintiffs could, therefore, address issues with establishing legal causation by seeking equitable relief such as a declaration that the defendant has acted unlawfully or an injunction to stop the harmful conduct, rather than compensatory damages.

2 Nuisance

Various climate change cases internationally, particularly in the US, have sought to hold public and private bodies liable in private and public nuisance. Nuisance refers to interferences with private rights or public rights (to use or enjoy property and associated rights to life, health, or comfort). Evidence is required that the defendant caused or participated in causing an actionable interference with private or public rights and that the interference was substantial and unreasonable. Public nuisance cases can only be initiated by the Attorney-General on behalf of the public or by a person who has special interest or will suffer special loss or damage. Private nuisance cases can only be brought by a person with rights over the land affected by the nuisance, such as the owner or occupier of the land.

226 Smith v Fonterra Co-Operative Group Ltd [2020] NZHC 419 [97].
227 Baxter (n 40).
228 Ibid.
229 Civil Liability Act (n 154) pt 1F.
230 Burger, Wentz and Horton (n 51) 238.
231 Kent v Johnson (1973) 21 FLR 177, 203-4; Attorney-General v PYA Quarries Ltd [1957] 2 QB 169, 190-1.
233 Walsh v Ervin (1952) VLR 361.
234 Daniel Herridge & Ors v Electricity Networks Corporation T/As Western Power [No 4] [2019] WASC 94, [389].
(a) Interference with private or public rights

It must be established that the defendant has created or participated in creating a nuisance that causes a substantial and unreasonable interference with private or public rights in the context of climate change. For example, in the US case, American Electric Power Company v. Connecticut, it was argued that the CO₂ emissions of the companies were contributing to the public nuisance of global warming and resulting environmental, economic and medical harm, and that they should be liable for their portion of this contribution. More recently, various local government bodies in the US - including the City of Imperial Beach and Oakland - allege that fossil fuel companies have caused or contributed to the public nuisance of climate change-induced sea level rise and resulting damage through their actions in producing substantial GHG emissions, production and promotion of fossil fuel products, knowledge of climate change impacts and deliberate concealment of climate change impacts.

Here in Australia, the NSW LEC highlighted in Macquarie Generation v Hodgson that it may be difficult to prove that GHG emissions such as CO₂ cause an actionable nuisance or interference because “CO₂ is colourless, odourless and inert”. However, the more recent US cases brought by local governments discussed above demonstrate how this issue could potentially be avoided by plaintiffs characterising the nuisance as climate change impacts, rather than GHG emissions. If this approach was adopted by WA plaintiffs, it is clear that climate change impacts in WA including sea level rise, increased temperatures and extreme weather events will interfere with private and public property and also public rights to life, health and comfort. It may, therefore, be possible for WA plaintiffs to argue that the defendant’s actions (in producing substantial GHG emissions or failing to take adequate climate action) have

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236 Although these cases were both dismissed on the basis of the overriding operation of existing legislation in the area and lack of standing, they were not directly dismissed on the merits, meaning some of the arguments may be applicable to an Australian claim.
237 City of Imperial Beach v. Chevron Corp. 3:17 cv 04934 (Cal Super Ct, 2017); City of Oakland v. BP PLC, 325 F Supp 3d 1017 (ND Cal, 2018).
240 For example, see: City of Oakland v. BP PLC, 325 F Supp 3d 1017 (ND Cal, 2018); City of Imperial Beach v Chevron Corp. 3:17 cv 04934 (Cal Super Ct, 2017).
241 Department of Water and Environmental Regulation (n 12) 1.
created or contributed to the interference with private or public rights caused by climate change impacts, and that they should be liable for their contribution. Innovation will be required, given these legal arguments have not been attempted in WA as yet. In particular, WA courts must be willing to develop the common law to remedy emerging legal issues concerning climate change and to accept advances in climate attribution science. The statement of the WA SAT in *Two Rocks* that developments in climate science must be considered[242] provides hope that the WA courts may do the same in court proceedings.

Further, it must be established that the defendant has created or participated in the creation of the nuisance of climate change impacts. In *Daniel Herridge & Ors v Electricity Networks Corporation T/As Western Power*, the WA Supreme Court found that two defendants had participated in the creation of the nuisance of a bushfire caused by an unplanned discharge of electricity,[243] and that they were liable for 70% and 30% of the plaintiff’s damages.[244] In coming to this conclusion, the court referred to various cases including *Fennell v Robson Excavations Pty Ltd*,[245] in which the NSW Court of Appeal concluded that the defendant excavator was liable notwithstanding that its conduct was only one of, and not the sole, cause of the plaintiff’s damage. This was due to the damage being a reasonably foreseeable consequence of the dangerous state of affairs created by the defendant’s excavation.[246] In a climate change context, in the US the City of Oakland argued in *City of Oakland v BP PLC*[247] that BP, through its production and promotion of massive amounts of fossil fuels, caused or at least contributed to the public nuisance of climate change-induced sea level rise, resulting in severe harm to the City. WA plaintiffs could potentially adopt a similar approach, and argue that WA companies have participated in the creation of the nuisance of climate change impacts such as sea level rise, on the basis that their GHG emissions have substantially contributed to global emissions and climate change, and have therefore created a dangerous state of affairs. Advancements in climate attribution science could assist WA plaintiffs to prove that the defendant substantially contributed to global GHG emissions[248]

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[242] *Two Rocks Investments v WAPC* [2019] WASAT 59, [180]
[243] [No 4] [2019] WASC 94, [488].
[244] Ibid [489].
[245] [1977] 2 NSWLR 486.
[246] Ibid.
[248] Burger, Wentz and Horton (n 51) 150.
and, therefore, participated in the creation of the nuisance of certain climate change impacts.

(b) *Interference was substantial and unreasonable*

The interference caused by the defendant’s conduct must also be substantial and unreasonable to constitute nuisance.²⁴⁹ Relevant factors in determining whether the interference was substantial and unreasonable include the nature, extent and duration of the interference, the normal land use in the locality and whether the defendant has taken reasonable precautions to avoid the nuisance.²⁵⁰ If the interference is characterised as climate change impacts, such as sea level rise and associated flooding, it should be relatively straightforward to establish that such interference with public or private rights is ongoing, frequent and severe. Further, it should also be possible for WA plaintiffs to establish that WA private and public bodies could have taken precautions to prevent, or at least reduce, the nuisance of climate change impacts, by employing measures to mitigate GHG emissions and address climate change. Accordingly, WA plaintiffs should be able to clearly prove that the interference caused by the nuisance of climate change impacts is substantial and unreasonable.

(c) *Loss or damage*

Finally, it must be established that the plaintiff suffered actual loss or damage as a result of the interference with private or public rights caused by the defendant’s conduct - for example, loss of amenity or damage to property.²⁵¹ This loss or damage must be substantial and direct, not consequential.²⁵² Where climate change impacts have resulted in damage to private property, it should be relatively straightforward to establish substantial and direct loss or damage in private nuisance cases. However, as discussed above, public nuisance cases can only be brought by plaintiffs other than the Attorney General where they suffer special loss or damage that is greater in degree than any suffered by the general public.²⁵³ This means that if WA plaintiffs target the liability of private or public

²⁵⁰ *Munro v Southern Dairies* [1955] VLR 332.
²⁵¹ *Daniel Herridge & Ors v Electricity Networks Corporation T/As Western Power [No 4]* [2019] WASC 94.
²⁵² *Walsh v Ervin* (1952) VLR 361.
²⁵³ Ibid
bodies in public nuisance, they will need to prove that they suffered loss or
damage that exceeded the loss or damage suffered by the rest of the WA public.254

VI CONCLUSION

Despite WA’s legislative and court framework restricting opportunities for
novel climate change litigation, this article demonstrates that there is,
nevertheless, potential for litigation to target the corporate or tort law obligations
of private and public bodies in WA. Such litigation could address the compliance
of WA companies with the Corporations Act in relation to disclosure of climate
risks, false, misleading or deceptive statements, information or conduct, and/or
breach of directors’ duties in the context of climate change. WA climate change
cases could also target the liability of WA private and public bodies in negligence
and/or nuisance for their contribution to GHG emissions or ineffective climate
action. While substantial legal innovation is required for these novel claims to
have prospects of success in WA, global and local developments and
advancements in climate attribution science provide hope that they may be
accepted by WA courts. Novel climate change litigation could, therefore, provide
WA plaintiffs such as members of the public, shareholders, investors and local
government bodies with a powerful tool to respond to inadequate climate action.
This is particularly important given WA’s GHG emissions continue to increase
at a time when rapid, far-reaching and unprecedented changes are required to
limit global warming to 1.5°C.255

254 Ibid.
255 Valérie Masson-Delmotte et al (eds), Global Warming of 1.5°C: An IPCC Special Report on the
Impacts of Global Warming of 1.5°C above Pre-Industrial Levels and Related Global Greenhouse Gas
Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate
Change, Sustainable Development, and Efforts to Eradicate Poverty (Final Report, October 2018).