CLIMATE CHANGE LITIGATION IN PRIVATE NUISANCE: CAN IT ADDRESS HARMS SUSTAINED BY TRADITIONAL OWNERS IN THE TORRES STRAIT?

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Torres Strait Islanders are highly vulnerable to climate change hazards and in turn, climate-related harms. Through a detailed analysis of Australian and foreign case law and commentary, this article examines whether tort law, specifically, private nuisance, may offer Traditional Owners in the Torres Strait an avenue for holding accountable major carbon polluters for their contribution to these climate-related harms. Barriers to success are analysed and further discussed in relation to policy questions. Ultimately, the article finds that significant barriers to success currently exist, making a climate-related harm claim in private nuisance unlikely to succeed, for now. However, advances in international and Australian jurisprudence are creating the potential for actions to be successful in the future.

I INTRODUCTION

Climate change-related harms are increasingly becoming evident, both on the Australian continent and globally. For islanders living in the Torres Strait, some of these harms manifest as land inundation and erosion associated with sea level rise and loss of livelihoods through ocean acidification. These harms threaten the

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ability of islanders to continue living on their ancestral lands without significant adaptations.[1]

The Intergovernmental Panel on Climate Change ('IPCC') makes clear the need for urgent action to mitigate greenhouse gas ('GHG') emissions to limit global warming to 1.5°C above pre-industrial levels, with a 45% reduction from 2010 in global emission levels required by 2030.[2] Put simply, emissions from the extraction and combustion of fossil fuels contribute to a build-up of 'greenhouse gases' (eg carbon dioxide and methane) in the Earth's atmosphere. In turn, global temperatures rise, oceans warm and expand, arctic and glacial ice melt, sea levels rise, oceans acidify, and extreme weather events increase and intensify.[3]

Drastic mitigation of global GHG emissions cannot come soon enough to prevent, nor slow down, climate change impacts that will continue to generate climate change-related harms for islanders in the Torres Strait. In May 2019, the Gur A Baradharaw Kod, an organisation representing Traditional Owners in the Torres Strait, submitted a complaint to the United Nations Human Rights Committee against the Australian government, for failing to take sufficient action to address human-induced climate change, which in turn, is impacting rights protected under the *International Covenant on Civil and Political Rights* ('*ICCPR*').[4] This complaint and the subsequent view issued by the United Nations Human Rights Committee in September 2022[5] draw international attention to policy failures by

1 Land and Sea Management Unit, Torres Strait Regional Authority, *Torres Strait Climate Change Strategy 2014–2018* (Report, July 2014) i, iii ('*Torres Strait Climate Change Strategy 2014–18*').

2 Intergovernmental Panel on Climate Change, *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* (Report, 2018) vi, 95 <https://www.ipcc.ch/sr15/#fn:1>.

3 See Intergovernmental Panel on Climate Change, *Climate Change 2007: The Physical Science Basis* (Cambridge University Press, 2007) 749–52.

4 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'). See Ebony Back and Rebecca Lucas, 'Climate Change and Human Rights to Collide before the United Nations Human Rights Committee', *Australian Public Law* (Blog Post, 17 July 2019) <https://auspublaw.org/2019/07/climate-change-and-human-rights-to-collide-before-the-united-nations-human-rights-committee>. For a broader legal analysis of this context from a human rights perspective, see Owen Cordes-Holland, 'The Sinking of the Strait: The Implications of Climate Change for Torres Strait Islanders' Human Rights Protected by the *ICCPR*' (2008) 9(2) *Melbourne Journal of International Law* 405.

5 See Human Rights Committee, *Views Adopted by the Committee under Article 5(4) of the Optional Protocol, concerning Communication No 3624/2019*, UN Doc CCPR/C/135/D/3624/2019 (22 September 2022) (Advance). The Committee found that the Australian government violated arts 17 and 27 of the *ICCPR*, which respectively, protect the right to private and family life and the home, and the right to enjoy one's culture, religion and language as a member of a traditional community.

the Australian government[6] to adequately mitigate GHG emissions and adopt timely and adequate adaptation measures. The views expressed by the United Nations Human Rights Committee are encouraging. Australia is now obliged to provide the authors of the complaint with an effective remedy.[7] However, even this positive development does not guarantee action that will substantively address the harms suffered by Torres Strait Islanders.[8]

Climate litigation has become a prominent pathway to address climate change impacts and a means to fund adaptation strategies.[9] Vulnerable communities internationally are not only pursuing damages for climate change-related harms from governments, but also from corporate actors who are responsible for extracting and marketing fossil fuels, which when combusted, contribute

6 It should be noted that there was a change of government at the federal level in Australia in May 2022. The new Labor government has signalled more stringent climate action commitments: see, eg, Smriti Mallapaty, 'Australians Vote for Stronger Climate Action', *Nature* (Web Page, 23 May 2022) <https://www.nature.com/articles/d41586-022-01445-0>, archived at <https://perma.cc/GY9Q-KY5Y>.

7 Pursuant to art 2(3)(a) of the *ICCPR* (n 4).

8 *Torres Strait Climate Change Strategy 2014–18* (n 1) iii. See also Kirstin Dow et al, 'Limits to Adaptation' (2013) 3(4) *Nature Climate Change* 305; Patrick Toussaint, 'Loss and Damage and Climate Litigation: The Case for Greater Interlinkage' (2021) 30(1) *Review of European, Comparative and International Environmental Law* 16. Unlike litigation, individual communications (complaints) made to the United Nations Human Rights Committee can only lead to views being expressed by the Committee, which are, ultimately, non-binding on a state that is signatory to the *ICCPR* Optional Protocol 1. Notably, Australia has a mixed track record on actually addressing views expressed by the Committee: see, eg Devika Hovell, 'The Sovereign Stratagem: Australia's Response to UN Human Rights Treaty Bodies' (2003) 28(6) *Alternative Law Journal* 297.

9 For an overview, see Jacqueline Peel and Hari M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015). While the common law, and in particular torts-based climate litigation literature is drawn upon in further detail below, there are also a number of other avenues for climate litigation, each with a substantive body of literature. Initially, climate litigation in Australia focussed on using the tools of environmental law (and administrative law more generally) to challenge governmental decision making on coal mining and power plants. For an overview on pivotal Australian case law, see Jacqueline Peel, Hari Osofsky and Anita Foerster, 'Shaping the "Next Generation" of Climate Change Litigation in Australia' (2017) 41(2) *Melbourne University Law Review* 793. Newer directions include human rights-based litigation, for instance: see Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) *Transnational Environmental Law* 37; Annalisa Savaresi and Juan Auz, 'Climate Change Litigation and Human Rights: Pushing the Boundaries' (2019) 9(3) *Climate Law* 244. For litigation targeting corporate behaviour, often by shareholders, see Benjamin Franta, 'Litigation in the Fossil Fuel Divestment Movement' (2017) 39(4) *Law and Policy* 393; Lisa Benjamin, 'The Road to Paris Runs through Delaware: Climate Litigation and Directors' Duties' [2020] (2) *Utah Law Review* 313.

significantly to human-induced climate change.[10] One prominent group of corporations being targeted internationally through climate change litigation is the carbon majors. This group of 90 state, private and publicly owned global corporations is responsible for 63% of global carbon dioxide emissions from between 1751 and 2010, resulting from fossil fuels that are extracted, produced and marketed by these companies.[11]

Tort law is one legal avenue through which climate change litigants, predominantly in the United States ('US'), are seeking to hold these corporate actors accountable for climate change-related harms,[12] with a substantive body of literature in this area.[13] As an 'environmental tort', nuisance lends itself to circumstances where there is unreasonable and sustained conduct that interferes with enjoyment of property (private nuisance), or a right common to the public (public nuisance). Nuisance is now being employed as a leading cause of action by climate litigators in the US, with commentators asserting that it offers the most appropriate cause of action to respond to climate change-related harms.[14] Yet, to date, nuisance has not been applied widely by Australian litigators — including Traditional Owners — to address climate change-related interference and harms, despite Traditional Owners in places like the Torres Strait being amongst the most vulnerable in the world to climate impacts. This article seeks to explore whether a cause of action in private

10 Prominent examples include the Native Village of Kivalina in Alaska, United States: see *Native Village of Kivalina v ExxonMobil Corporation*, 663 F Supp 2d 863 (ND Cal, 2009) ('*Kivalina*'); a Peruvian farmer supported by a German non-governmental organisation in a case still ongoing before the German courts: *Lliuya v RWE AG*, Oberlandesgericht Hamm [Essen Regional Court], I-5 U 15/17 (2017); an appeal to the New Zealand Court of Appeal by a First Nations New Zealander which was based on causes of action in public nuisance, negligence and a breach of a new duty of care: *Smith v Fonterra Co-Operative Group Ltd* [2021] 2 NZLR 284; and, more generally, an inquiry of the Human Rights Commission of the Philippines with regard to the legal and moral responsibility of carbon majors. Notably, we are also seeing legal challenges brought by young people around the world, such as the Australian case of *Waratah Coal Pty Ltd and Youth Verdict Ltd* [2020] QLC 33; a petition filed by an international group of young people before the UN Committee on the Rights of the Child, 'Communication to the Committee on the Rights of the Child', Communication to the Committee on the Rights of the Child in *Sacchi v Argentina*, 23 September 2019; and the US case of *Juliana v United States*, 947 F 3d 1159 (9th Cir, 2020). Further, in 2021 a judicial review claim was brought against the UK government for alleged failure to meet climate change commitments: *R (Plan B Earth) v Prime Minister* [2021] EWHC 3469 (Admin).

11 Richard Heede, 'Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010' (2014) 122(1–2) *Climatic Change* 229, 234.

12 Detailed examples of case law can be found below in Part III.

13 For instance, see Saul Holt and Chris McGrath, 'Climate Change: Is the Common Law Up to the Task?' (2018) 24 *Auckland University Law Review* 10; Gabrielle Holly, 'Transnational Tort and Access to Remedy under the UN *Guiding Principles on Business and Human Rights*: *Kamasaee v Commonwealth*' (2018) 19(1) *Melbourne Journal of International Law* 52; Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38(4) *Oxford Journal of Legal Studies* 841; Douglas A Kysar, 'What Climate Change Can Do about Tort Law' (2011) 41(1) *Environmental Law* 1; Brian J Preston, 'Climate Change Litigation: Part 1' (2011) 5(1) *Carbon and Climate Law Review* 3, 4; David Bullock, 'Public Nuisance and Climate Change: The Common Law's Solutions to the Plaintiff, Defendant and Causation Problems' (2022) 85(5) *Modern Law Review* 1136.

14 Daniel G Hare, 'Blue Jeans, Chewing Gum and Climate Change Litigation: American Exports to Europe' (2013) 29(76) *Merkourios* 65, 69.

nuisance may offer Traditional Owners in the Torres Strait an avenue for holding carbon majors legally accountable for the climate change-related harms they are experiencing. The amenability of nuisance to environmental harms warrants its exploration in this novel context.

This article applies doctrinal legal analysis,[15] drawing on comparative examples, to assess the potential of private nuisance claims in Australia to contribute to strategic climate change litigation — a present gap in the literature. Part II of this article examines climate change impacts experienced by Torres Strait Islanders, with private litigation being identified as a potential source of funding for adaptation strategies and compensation for climate change-related harms. This paper refers to private litigation as a civil avenue for individuals (or groups of individuals) to pursue civil claims for damages, as opposed to a public claim utilising administrative law or human rights law principles. Part III builds on this potential by discussing key trends in climate change litigation and identifying a current wave of cases that focus on private litigation claims against state and corporate actors. In consideration of climate-related claims made in private nuisance internationally, Part IV addresses the prospects of such actions in Australia by considering a hypothetical claim by Traditional Owners in the Torres Strait against an Australian-based carbon major. This analysis focuses on contentious issues to be overcome by the proposed plaintiffs. Finally, Part V identifies important policy implications that may support — or hinder — strategic climate change litigation in the future.

II TORRES STRAIT ISLANDERS AT THE FRONTLINE OF CLIMATE CHANGE IMPACTS: ADDRESSING HARM

The Torres Strait lies between the Cape York Peninsula in Far North Queensland and Papua New Guinea. It is the ancestral home of over 47,000 First Nations peoples who live in 20 communities across 18 islands and on the Australian mainland.[16] *Ailan Kastom* (Island Culture) is distinct and made up of two language groups: Kala Lagaw Ya and Miriam Mir.[17] Significantly, the Meriam people of the Torres Strait were the first in Australia to have their native title recognised in *Mabo v Queensland [No 2]* ('*Mabo*').[18] Native title was determined on all islands in the

15 See generally Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge, 2nd ed, 2017) 8; Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83.

16 Land and Sea Management Unit, Torres Strait Regional Authority, *Torres Strait Regional Adaptation and Resilience Plan: 2016–2021* (Report, June 2016) 15. Approximately 7,000 islanders live in these Torres Strait Island communities.

17 *Torres Strait Climate Change Strategy 2014–18* (n 1) 4.

18 (1992) 175 CLR 1 ('*Mabo*').

Torres Strait. With claims settled on all but Hammond Island,[19] Traditional Owners in the Torres Strait have a legally recognised interest in land under settler-colonial law.[20]

Torres Strait Islanders are traditionally seafaring peoples inhabiting small, and in many cases, low-lying islands.[21] As such, they are and will continue to be disproportionately impacted by climate change hazards.[22] These include both slow-onset hazards (eg sea level rise,[23] ocean acidification,[24] changes to rainfall,[25] evaporation, wind and ocean currents)[26] and rapid-onset events (eg extreme weather events).[27] Combined, these hazards and events can create disasters that lead to displacement.[28] The high vulnerability and exposure of Torres Strait Islanders to climate change hazards means that the resulting impacts affecting these communities are amongst the most serious globally.[29] Already, sea level rise causes yearly spring tides to inundate large areas of Saibai Island, flooding houses, community facilities, roads, sewage systems, traditional gardens and eroding ancestral burial sites and coastal ecosystems.[30]

19 Under the *Native Title Act 1993* (Cth). For a list of native title determinations, see 'Native Title', *Torres Strait Island Regional Council* (Web Page) <http://www.tsirc.qld.gov.au/our-work/native-title>.

20 The question of proprietary rights under native title and standing is discussed below in Part IV.

21 *Torres Strait Climate Change Strategy 2014–18* (n 1) 3.

22 Working Group II to the IPCC's Fifth Assessment Report explains that '[r]isk of climate-related impacts results from the interaction of climate-related hazards … with the vulnerability and exposure of human and natural systems': Intergovernmental Panel on Climate Change, *Climate Change 2014: Impacts, Adaptation, and Vulnerability* (Cambridge University Press, 2014) 37 fig TS.1 <https://digitallibrary.un.org/record/3893750?ln=en>. See also Randall S Abate and Elizabeth Ann Kronk, 'Commonality among Unique Indigenous Communities: An Introduction to Climate Change and Its Impacts on Indigenous Peoples' in Randall S Abate and Elizabeth Ann Kronk (eds), *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (Edward Elgar, 2013) 3, 3.

23 Donna Green, 'How Might Climate Change Affect Island Culture in the Torres Strait?' (CSIRO Marine and Atmospheric Research Paper No 011, Marine and Atmospheric Research, Commonwealth Scientific and Industrial Research Organisation, November 2006) 1.

24 Australian Bureau of Meteorology and Commonwealth Scientific and Industrial Research Organisation, *Climate Change in the Pacific: Scientific Assessment and New Research* (Report, 2011) vol 1, 9.

25 Ramasamy Suppiah et al, *Observed and Future Climates of the Torres Strait Region* (Report, 2010) 46.

26 *Torres Strait Climate Change Strategy 2014–18* (n 1) 8.

27 Thomas R Knutson et al, 'Tropical Cyclones and Climate Change' (2010) 3(3) *Nature Geoscience* 157, 162; Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2008* (Report No 2, 2009) 233 ('*Native Title Report 2008*').

28 'No Matter of Choice: Displacement in a Changing Climate' (Thematic Series, Internal Displacement Monitoring Centre, December 2018) 2.

29 *Torres Strait Climate Change Strategy 2014–18* (n 1) iii.

30 Ibid i, 1.

Murray Island elder, Ron Day, describes the changes he has witnessed over his lifetime and their impact on *Ailan Kastom*:

> We see the big trees near the beach, like the wongai trees, falling down. The seagrass that the dugongs eat, you used to find long patches of it, but not any more. The corals are dying, and the sand is getting swept away and exposing the rock. We were taught by our grandfathers and fathers to read the sky and forecast the weather. … But nowadays the weather is unpredictable.[31]

A growing body of research seeks to evaluate the relationship between the concepts of place and the legal concept of property.[32] While this article focuses on interference with a proprietary interest in land, it is critical to acknowledge that the scope of harm described by Day goes beyond such interests. Communities in the Torres Strait face the loss of homelands and their sovereign, political, economic, social and cultural base through climate displacement and relocation.[33] For this reason, Traditional Owners in the Torres Strait are acting to protect their human rights under international human rights law.[34] While these measures draw international attention to the policy failings of the previous Australian government in mitigating GHG emissions, they do not promise remedies that can substantively address the harms suffered by Torres Strait Islanders.

Civil litigation for pecuniary damages against major carbon polluters may offer Torres Strait Islanders compensation for climate change-related harms and a source of funding for adaptation.

III TRENDS IN CLIMATE CHANGE LITIGATION AND THE POTENTIAL OF PRIVATE NUISANCE

While the first climate change litigation was initiated in the US in 1986,[35] a rush of cases since 2016 — in Australia, Europe, Asia and the Americas[36] — reflects intensifying global concern over the need for state and corporate actors to mitigate

31 'Sinking without Trace: Australia's Climate Change Victims', *The Independent* (online, 22 October 2011) <http://www.independent.co.uk/environment/climate-change/sinking-without-trace-australias-climate-change-victims-821136.html>.

32 For instance, see Tayanah O'Donnell, 'Don't Get Too Attached: Property-Place Relations on Contested Coastlines' (2020) 45(3) *Transactions of the Institute of British Geographers* 559.

33 Megan Davis, 'Climate Change Impacts to Aboriginal and Torres Strait Islander Communities in Australia' in Randall S Abate and Elizabeth Ann Kronk (eds), *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (Edward Elgar, 2013) 493, 497.

34 See Back and Lucas (n 4); Cordes-Holland (n 4) 405.

35 *City of Los Angeles v National Highway Traffic Safety Administration*, 912 F 2d 478 (DC Cir, 1990).

36 Joana Setzer and Rebecca Byrnes, *Global Trends in Climate Change Litigation: 2019 Snapshot* (Policy Report, July 2019) 1, 8.

GHG emissions. *State of the Netherlands v Urgenda Foundation* ('*Urgenda*')[37] is the most prominent case to date, as the first case where the highest court in a domestic legal system, the Dutch Supreme Court,[38] determined that the Dutch government had a duty to reduce GHG emissions.[39]

Inspired by the judicial trend in *Urgenda*, recent cases in Australia have and continue to attempt to have the courts recognise a novel duty of care in litigation brought by Australian children against the federal government for adverse effects of climate change. In *Sharma v Minister for the Environment (Cth)* ('*Sharma*'),[40] the Federal Court of Australia found that the first respondent (the Federal Minister for the Environment) owed Sharma and other Australian children a duty of care. It was reasonably foreseeable that the risk of harm would arise from the GHG emissions of a proposed expansion and extension of an approved coal mine;[41] that the Minister had control over the risk through the decision to approve the relevant project,[42] and Australian children were a vulnerable category.[43] This decision was unanimously overturned by the Full Federal Court of Australia on the basis of three separate reasonings.[44] Firstly, Allsop CJ reasoned that the imposition of a duty of care was a question of policy 'unsuitable for the Judicial Branch to resolve'.[45] Secondly, Beach J established that there was insufficient 'closeness' between 'the Minister and her exercise of statutory power to approve … and any reasonably foreseeable effects on the respondents'.[46] Finally, Wheelahan J found that a duty of care between the Minister and litigants could not be established under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act*'),[47] recognising such duty would be incoherent with the Minister's functions under the *EPBC Act*,[48] and reasonable foreseeability of the approval of the coal

37 *Netherlands v Urgenda Foundation* (Supreme Court of the Netherlands, No 19/00135, 20 December 2019) [tr 'Landmark Decision by Dutch Supreme Court', *Urgenda* (Web Document) <https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf>] ('*Urgenda*').

38 This would be equivalent to a High Court decision in Australia.

39 Here, the plaintiffs successfully argued on human rights grounds — under the European Union's *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) arts 2 (the right to life), 8 (respect for private and family life) — that the Netherlands government should adopt stricter emissions reduction targets: *Urgenda* (n 37) [8.3.4].

40 (2021) 391 ALR 1.

41 Ibid 64 [247] (Bromberg J).

42 Ibid 71 [288] (Bromberg J).

43 Ibid 73 [295] (Bromberg J).

44 *Minister for the Environment (Cth) v Sharma* (2022) 400 ALR 203 (Allsop CJ, Beach and Wheelahan JJ).

45 Ibid 210 [15].

46 Ibid 301 [362]–[363].

47 Ibid 401 [843], supporting 283 [267] (Allsop J).

48 Ibid.

mine extension causing personal injury to the litigants could not be established.[49] Despite the finding that a duty of care does not exist between the Minister and the litigants, the Full Federal Court of Australia upheld Bromberg J's findings of fact in relation to the risk of harm to Australian children posed by climate change.

In October 2021, two leaders from the Gudamalulgal First Nation of the Torres Strait Islands filed a claim in the Federal Court of Australia against the Commonwealth of Australia for failing to reduce GHG emissions. The litigants assert that breach of a duty of care owed by the Commonwealth is impacting their native title rights, *Ailan Kastom* and will cause physical and psychological injury to the applicants and other persons of Torres Strait Islander descent.[50] Given that the finding of a duty of care owed by the Australian government was overturned in *Minister for the Environment (Cth) v Sharma*, it is unclear how this case might return a positive finding.

Similar to *Urgenda* and *Sharma*, the majority of climate change cases globally have been 'brought by citizens, corporations and non-government organisations against governments'.[51] Corporate actors are increasingly also being named as defendants. In the Royal Dutch Shell class action, the Hague District Court in the Netherlands concluded that the company has a duty of care to take responsibility for and reduce scope three emissions.[52] This case may signal an increasing willingness of the courts to hold company actors — not simply states — to account for emissions in accordance with the *Paris Agreement*.[53] In their comprehensive analysis of climate change litigation cases internationally, Setzer and Byrnes identify two key motivations for climate change litigants initiating actions against state and corporate actors: as a strategic mechanism to affect policy and corporate accountability, and an avenue for seeking compensation for loss and damage from major GHG emitters.[54] While approximately 80% of all cases seek to stimulate more effective mitigation of GHG emissions, almost half of citizen enacted cases focus on adaptation to climate change impacts.[55]

A *The Promise of Tort Law*

Tort law is increasingly being used to frame climate change impacts as climate-related 'harms'.[56] Ganguly, Setzer and Heyvaert distinguish two waves of strategic

49 Ibid 410–15 [869]–[886].

50 See Pabai Pabai and Guy Paul Kabai, 'Statement of Claim', Submission in *Pabai v Commonwealth*, VID622/2021, 26 October 2021.

51 Setzer and Byrnes (n 36) 4.

52 *Vereniging Milieudefensie v Royal Dutch Shell plc* (Hague District Court, No C/09/571932, 26 May 2021).

53 *Paris Agreement*, opened for signature 22 April 2016, [2016] ATS 24 (entered into force 4 November 2016).

54 Setzer and Byrnes (n 36) 1.

55 Ibid 5.

56 Ganguly, Setzer and Heyvaert (n 13).

private climate change litigation in tort law,[57] with the first wave starting in the early 2000s.[58] Claims in negligence, public nuisance, private nuisance and conspiracy were initiated by local governments and private individuals against companies facilitating fossil fuel extraction, utility companies, car manufactures and the Environmental Protection Authority.[59] These claims were largely unsuccessful due to unmet procedural and substantive thresholds.[60] The second wave began in 2015 and is ongoing.[61] It largely involves plaintiffs seeking compensation from carbon majors for alleged climate change-related damage.[62] Plaintiffs are relying on advances in science in their attempts to apportion liability for climate change harms to large GHG emitters.[63] Ganguly, Setzer and Heyvaert are cautious about the success of this 'second wave of private climate litigation', but conclude that overall, slow progress on such claims is being made.[64]

After the US, Australia has the highest instance of climate change litigation cases globally.[65] Peel, Osofsky and Foerster identify the 'first generation' of cases as consisting mostly of judicial review of coal mine and coal-fired power station proposals.[66] However, in Australian case law, there is significant uncertainty among courts on whether downstream end user emissions from the combustion of these fossil fuels should be attributed to the total GHG emissions of coal mines,

57 Ibid 844.

58 Setzer and Byrnes (n 36) 8, citing Ganguly, Setzer and Heyvaert (n 13).

59 For notable US tort law cases, see *Comer v Murphy Oil USA*, 585 F 3d 855 (5th Cir, 2009); *Kivalina* (n 10); *Massachusetts v Environmental Protection Agency*, 549 US 497 (2007); *Connecticut v American Electric Power Co Inc*, 406 F Supp 2d 265 (SD NY, 2005); *California v General Motors Corporation* (ND Cal, No C06–05755 MJJ, 17 September 2007).

60 Ganguly, Setzer and Heyvaert (n 13) 844.

61 Setzer and Byrnes (n 36) 8, citing Ganguly, Setzer and Heyvaert (n 13).

62 Ganguly, Setzer and Heyvaert (n 13) 844.

63 Setzer and Byrnes (n 36) 8–9. The authors define attribution science as 'the study of the relationship between climate change and weather events and impacts': at 9.

64 Ganguly, Setzer and Heyvaert (n 13) 868.

65 Setzer and Byrnes (n 36) 7.

66 Peel, Osofsky and Foerster (n 9) 793. For notable examples of cases relating to new coal mines, see *Coast and Country Association of Queensland Inc v Smith* [2016] QCA 242 ('*Coast and Country*'); *Gloucester Resources Ltd v Minister for Planning* (2019) 234 LGERA 257 ('*Gloucester Resources*'); *Australian Conservation Foundation Inc v Minister for the Environment and Energy [No 2]* [2017] FCAFC 216; *New Acland Coal Pty Ltd v Ashman [No 4]* [2017] QLC 24; *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* (2006) 93 ALD 84. For a comprehensive list, see 'Project Approval: Mitigation', *The University of Melbourne* (Web Page) <https://law.app.unimelb.edu.au/climate-change/case.php?litigation=Project%20Approval%20-%20Mitigation&id=5>.

including carbon majors.[67] As will be seen, this issue of establishing causality is also central to the potential success of future private nuisance case law.

Peel, Osofsky and Foerster also characterise a 'next generation' of private climate change litigation aimed at holding accountable state and corporate actors for conduct that exacerbates anthropocentric climate change.[68] While likely barriers to torts-based actions are identified more generally in the literature,[69] little attention is given to claims in private nuisance.[70]

B *Assessing the Potential of Private Nuisance*

To date, no in-depth analysis examines the prospects of actions in private nuisance in the Australian context. This article seeks to address this gap by exploring the potential of actions in private nuisance to hold corporations accountable for climate change-related harms.

Despite potential impediments, Hsu identifies the benefits of such actions against corporate actors:

> By targeting deep-pocketed private entities that actually emit [GHGs] … a civil litigation strategy, if successful, skips over the potentially cumbersome, time-consuming, and politically perilous route of pursuing legislation and regulation. … [C]ivil litigation … is potentially a means of regulation itself, as a finding of liability could have an enormous ripple effect and send [GHG] emitters scrambling to avoid the unwelcome spotlight.[71]

Many citizen litigants are seeking to attribute climate change-related harms to the carbon majors, a group of 90 fuel producing corporations responsible for 63% of global emissions from between 1751 and 2010.[72] The core business of these corporations is fossil fuel extraction (eg mining of coal, oil, gas) and marketing. In their report on *Australia's Carbon Majors*, Moss and Fraser argue that 'the impact of carbon majors is now so large and their influence so great that the case for

67 Compare, for example, *Australian Conservation Foundation Inc v Minister for the Environment and Energy* (2017) 251 FCR 359 (which, found that the link between the combustion of coal from a proposed coal mine and an impact on a relevant matter of national environmental significance was too difficult to identify: at 377–8 [60]) with *Gloucester Resources* (n 66) (where the Court stated that scope 3 emissions are included in the GHG emissions of a development: at 365 [487]).

68 Peel, Osofsky and Foerster (n 9) 793.

69 Ibid 831–43; Nicola Durrant, 'Tortious Liability for Greenhouse Gas Emissions? Climate Change, Causation and Public Policy Considerations' (2007) 7(2) *Queensland University of Technology Law and Justice Journal* 403.

70 Ross Abbs, Peter Cashman and Tim Stephens, 'Australia' in Richard Lord et al (eds), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press, 2012) 67, 98–9.

71 Shi-Ling Hsu, 'A Realistic Evaluation of Climate Change Litigation through the Lens of a Hypothetical Lawsuit' (2008) 79(3) *University of Colorado Law Review* 701, 717.

72 Heede (n 11).

holding them responsible for the consequences of their emissions must now be made'.[73]

Recent advances in climate change and attribution science mean that the proportionate impact of a company's GHG emissions on the atmosphere can be quantified with increasing accuracy.[74] Notably, Richard Heede's work in attribution science reconceptualises responsibility for creating and addressing human-induced climate change by tracing the emissions of carbon majors. For example, Moss and Fraser identify BHP as Australia's top carbon major.[75] Heede calculates that between 1751 and 2010, BHP was responsible for 0.52% of global carbon dioxide and methane emissions,[76] through its production of oil, gas and coal and associated downstream emissions.[77]

These developments go some way towards supporting plaintiffs in establishing a causal link between the activities of carbon majors and climate-related harms, opening up the possibility for damages claims.[78]

IV BARRIERS TO CLIMATE CHANGE LITIGATION IN PRIVATE NUISANCE

This part introduces the legal claim of private nuisance, drawing on relevant case law to illustrate the key elements of this tort. It then moves on to consider its potential application to addressing climate-related harms by considering a hypothetical claim against an Australian-based carbon major and focusing on contentious issues to be overcome.

In the High Court's decision in *Hargrave v Goldman*, Windeyer J defined private nuisance as, an 'unlawful interference with [the occupier's] use or enjoyment of land, or of some right over, or in connexion with it'.[79] Private nuisance is a proprietary cause of action that developed as a way of governing the mutual obligations of neighbouring landowners, where regulations were absent.[80] While

73 Jeremy Moss and Persephone Fraser, *Australia's Carbon Majors* (Report, 2019) 4.

74 Setzer and Byrnes (n 36) 8.

75 Moss and Fraser (n 73) 7. The next top nine carbon majors are Glencore, Yancoal, Peabody, Anglo American, Chevron, Whitehaven, Woodside, ExxonMobil and Santos.

76 Heede (n 11) 237.

77 These downstream emissions that result from the combustion of these fossil fuels by the end user are referred to as 'scope 3 emissions': see 'FAQ', *Greenhouse Gas Protocol* (Web Document) <https://ghgprotocol.org/sites/default/files/standards_supporting/FAQ.pdf>.

78 Setzer and Byrnes (n 36) 8–9. See also in more detail below at Part IV(A)(4).

79 (1963) 110 CLR 40, 59 ('*Hargrave*'), quoting T Ellis Lewis, *Winfield on Tort: A Textbook on the Law of Tort* (Sweet & Maxwell, 6th ed, 1954) 536.

80 Francis Trindade, Peter Cane and Mark Lunney, *The Law of Torts in Australia* (Oxford University Press, 4th ed, 2007) 167. See Danuta Mendelson, *The New Law of Torts* (Oxford University Press, 3rd ed, 2014) 721 regarding the historical development of this tort.

cases on nuisance typically refer to interference with 'neighbouring land', case law has not strictly defined geographical boundaries, suggesting this is not a strict legal element of the cause of action.[81] For instance, esteemed scholars define the tort of private nuisance in the following terms, with the notable absence of a strict requirement for neighbouring land:

> In order to establish an action in private nuisance, the plaintiff must establish that he or she has title to sue, and that (depending on whether the defendant was the creator, authoriser or continuer of the nuisance) the defendant had the requisite knowledge of the nuisance and that the nuisance was a substantial or unreasonable interference with the plaintiff's right to enjoyment of their land.[82]

The use of private nuisance as a cause of action in climate change litigation presents a novel application of traditional tort principles in an emerging and contemporary societal issue. For instance, legal commentators such as McGrath have considered transnational litigation by landowners in Papua New Guinea against an Australian source of GHG emissions.[83] McGrath explores public and private nuisance as possible causes of action, identifying that the main focus of litigation would likely be on establishing a 'causal link between the [Australian-based] company's emissions and the harm to customary landowners'.[84] As such, evidentiary issues such as causation, rather than the lack of neighbouring land, are identified as more problematic in making out a private nuisance claim.

The tort of private nuisance is narrower in scope than public nuisance, which derives from the criminal law and is chiefly concerned with acts that cause annoyance to the general public.[85] Nuisance is often described as an 'environmental tort' and is codified in environmental, zoning, public health and safety statutes.[86] In Australia, claims in private nuisance rely on the common law.

81 Previous 'physically removed' non-neighbour cases have largely been subsumed under the tort of negligence. For instance, the *Rylands v Fletcher* (1868) LR 3 HL 330 ('*Rylands*') rule has since been absorbed into principles of negligence: *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 ('*Burnie Port*'). In the United Kingdom, the rule has been subsumed under the tort of nuisance: Carolyn Sappideen, Prue Vines and Penelope Watson, *Torts: Commentary and Materials* (Lawbook, 12th ed, 2016) 782 [16.105], citing *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 ('*Cambridge Water*').

82 Sappideen, Vines and Watson (n 81) 770 [16.45].

83 Chris McGrath, 'Identifying Opportunities for Climate Litigation: A Transnational Claim by Customary Landowners in Papua New Guinea against Australia's Largest Climate Polluter' (2020) 37(1) *Environment and Planning Law Journal* 42, 44–5.

84 Ibid 56 (emphasis omitted).

85 For instance, highway obstruction and pollution of public water supplies: see Bernadette Richards and Melissa de Zwart, *Tort Law Principles* (Lawbook, 2nd ed, 2017) 530.

86 Mendelson (n 80) 721–2. Mendelson identifies four types of nuisance actions and they include: (i) statutory nuisance; (ii) public nuisance; (iii) crime of public nuisance; and (iv) private nuisance: at 722. In the environmental context specifically, see the following statutes that would be relevant to litigants in the State of Queensland: *Public Health Act 2005* (Qld) s 469; *Summary Offences Act 2005* (Qld) s 6; *Environmental Protection Act 1994* (Qld) ch 1 pt 3 div 2 sub-div 3, ss 440 and 443A, sch 1. See Sappideen, Vines and Watson (n 81) 764 [16.05], who state '[b]ecause nuisance concerns interference in people's ability to enjoy land … it seems an obvious tort to be used for environmental protection'.

To have standing in private nuisance, a person must establish a proprietary interest in land.[87] This interest can be possessory, through lawful occupation, or consist of riparian rights or a right over easements and reversions.[88] Interference with these rights or the use and enjoyment of private land is the chief element comprising private nuisance. Unlike trespass, the interference (harm) in private nuisance is indirect.[89] The nuisance itself can be tangible (eg fire, flood, dust) or intangible (eg noise, odours, electricity, offensive sights).[90]

To be actionable, the interference must be substantial[91] ('not trivial') and unreasonable.[92] These tests pertaining to substantial interference have been applied in subsequent state judgments.[93] Liability is derived from 'the extent of the harm actually caused by the defendant's unreasonable use of land'.[94] Four factors are considered when balancing the unreasonableness of the interference and a defendant's right to lawfully use their property: location,[95] frequency and extent,[96]

87 *Hunter v Canary Wharf Ltd* [1997] AC 655 ('*Canary Wharf*').

88 *Gartner v Kidman* (1962) 108 CLR 12, 18 (McTiernan J), 22 (Windeyer J, Dixon CJ agreeing at 15) ('*Gartner*').

89 Sappideen, Vines and Watson (n 81) 770 [16.45]: 'Because it is an action on the case, a nuisance may be caused by an indirect interference whereas a trespass to land can only result from a direct interference'.

90 See, eg, *Spicer v Smee* [1946] 1 All ER 489; *Radstock Co-Operative & Industrial Society Ltd v Norton-Radstock Urban District Council* [1968] 1 Ch 605; *Corbett v Pallas* (1995) 86 LGERA 312 ('*Corbett*'); *Andreae v Selfridge & Co Ltd* [1938] 1 Ch 1 ('*Andreae*'); *Matania v National Provincial Bank Ltd* [1936] 2 All ER 633; *Bridlington Relay Ltd v Yorkshire Electricity Board* [1965] 1 Ch 436; *Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683 ('*Halsey*'); *Thompson-Schwab v Costaki* [1956] 1 WLR 335.

91 *Walter v Selfe* (1851) 4 De G & Sm 315; 64 ER 849, 852 (Knight Bruce V-C).

92 *Hargrave* (n 79) 62 (Windeyer J). Determination of reasonableness will be a balancing exercise between the plaintiff and defendants' interests: *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642; 11 ER 1483, 1485.

93 *Munro v Southern Dairies Ltd* [1955] VLR 332, 334 (Sholl J):

> I have already said something as to what is necessary to constitute a nuisance in law. It is defined in one of the text books as "An unlawful interference with a person's use or enjoyment of land, or of some right over, or in connection with it," but that definition of itself is so wide that it is necessary to add to it and qualify it in order to set out clearly what it is that will constitute an actionable private nuisance of the kind here complained of. In the first place, there must be a substantial degree of interference with the comfort and convenience of the occupier who complains of a private nuisance, or with some other aspect of the use or enjoyment of his land. The interference must be so substantial as to cause damage to him.

In *Oldham v Lawson [No 1]* [1976] VR 654 ('*Oldham*') Harris J held: 'To establish a nuisance, the plaintiffs must show that there has been a substantial degree of interference with their enjoyment of their use of [their land]': at 655. See also *Dynamic Flooring Pty Ltd v Carter* [2001] NSWCA 396, [44] (Priestley JA, Beazley JA agreeing at [47], Stein JA agreeing at [48]).

94 Mendelson (n 80) 737.

95 *Halsey* (n 90) 700–2 (Veale J).

96 *Andreae* (n 90).

the plaintiff's sensitivity[97] and malice.[98] Finally, the interference must be unlawful.[99]

The principle of reciprocity is used by courts to determine the reasonableness of an interference.[100] In traditional negligence claims, this requires looking beyond the interests of one landowner and considering the character of the locality, and to some extent, the interests of their neighbour. In assessing the reasonableness of an interference, courts have regard to the 'locality doctrine' (or the 'character of the neighbourhood'), noting that this factor relates to the *place-context* of the nuisance, rather than the *relationship* between neighbours. This can be illustrated using the landmark case of *Sturges v Bridgman* (1879) 11 Ch D 852 where the Court had regard to the character of the local neighbourhood. Reasonable use of the land does also invoke, to some extent, the relationship between neighbours, which involves the principle of reciprocity, as acknowledged in *Southwark London Borough Council v Tanner*.[101] Additionally, Pontin contends that

> [p]rivate nuisance is a tort to land that rests on what moral philosophers sometimes call the 'golden rule' of reciprocity. This is to say, it is about so using your land as not to injure another's, having regard to the essential 'give and take' of neighbourly relations. The central challenge for the courts is to articulate specific legal remedies that give practical application to that ethic.[102]

Ultimately, these principles demonstrate the relevance of reciprocity, locality and balancing interests of neighbours as relevant factors in doctrines espousing the tort of nuisance. However, in the context of claims against large corporations, the scope becomes much wider than a traditional nuisance case between Neighbour A and Neighbour B. In circumstances involving emissions created by large corporations, the defendant's use of land, operations and resources ought to be a significant factor.

Fault in nuisance is found in a defendant's failure to reasonably foresee damage to the plaintiff's right/interest in their land.[103] As per *Gales Holdings Pty Ltd v Tweed*

97 *McKinnon Industries Ltd v Walker* [1951] 3 DLR 577.

98 *Canary Wharf* (n 87) 721 (Lord Cooke).

99 *Gartner* (n 88) 22 (Windeyer J, Dixon CJ agreeing at 15).

100 See *Broder v Saillard* (1876) 2 Ch D 692, 701–2 (Jessel MR); *Bamford v Turnley* [1861–73] All ER Rep 706, 712 (Bramwell B) ('*Bamford*').

101 [2001] 1 AC 1 ('*Southwark*'). The principle was acknowledged by Lord Millett: 'The governing principle is good neighbourliness, and this involves reciprocity. A landowner must show the same consideration for his neighbour as he would expect his neighbour to show for him.': at 20.

102 Benjamin J Pontin, 'Private Nuisance in the Balance: *Coventry v Lawrence (No 1)* and *(No 2)*' (2015) 27(1) *Journal of Environmental Law* 119, 119 (citations omitted). The 'live and let live principle' was established in *Bamford* (n 100) 712 (Bramwell B). See also *Bonnici v Ku-ring-gai Municipal Council* (2001) 121 LGERA 1 ('*Bonnici*').

103 *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty* [1967] 1 AC 617, 640 (Lord Reid) ('*The Wagon Mound [No 2]*'); *Cambridge Water* (n 81) 300–1 (Lord Goff); *Gales Holdings Pty Ltd v Tweed Shire Council* (2013) 85 NSWLR 514, 546 [142], 547 [144] (Emmett JA) ('*Gales Holdings*'); *Montana Hotels Pty Ltd v Fasson Pty Ltd* (1986) 69 ALR 258, 262 (Lord Ackner).

Shire Council ('*Gales Holdings*'), a plaintiff must demonstrate that the 'interference with their actual use of the property, or an adverse effect on their comfort and pleasure derived from occupancy of the land was reasonably foreseeable'.[104]

A contentious issue that one can foresee would arise relates to the reasonable use of land.[105] At the outset, it must be noted that the plaintiff has the onus of proof to establish that interference is unreasonable in all of the circumstances.[106] This must be balanced with the 'live and let live' principle[107] and the four factors pertaining to unreasonable and sustained interference already identified.[108] As part of initial liability questions, defendants may argue that their use of the land, for instance, in the extraction of coal, has a social utility and that it is an 'ordinary' and 'natural' use of the land.[109] While the notion of 'ordinary' and 'natural' use of land resembles a *Rylands v Fletcher* claim,[110] it should be noted that in 1994 the High Court of Australia subsumed this doctrine within the sphere of the tort of negligence.[111] Despite this, the terminology of 'ordinary' use of land is evident in nuisance case law.[112] Regarding questions of social utility as a possible defence, in the United Kingdom case law has held that social utility is not a defence to

104 Mendelson (n 80) 738, citing *Gales Holdings* (n 103).

105 See *Corbett* (n 90).

106 The interference must be 'unreasonable': *Hargrave* (n 79) 60 (Windeyer J). To determine unreasonableness, a court must undertake a balancing exercise between the plaintiff and the defendant's interests: *St Helen's Smelting Co v Tipping* (n 92) 1485.

107 *Bamford* (n 100) 712 (Bramwell B).

108 Courts balance factors such as locality (*Domachuk v Feiner* [1996] NSWCA 157; *Sturges v Bridgman* (1879) 11 Ch D 852); duration/time/frequency/extent (*Wherry v KB Hutcherson Pty Ltd* (1987) Aust Torts Reports 80-107); malice (*Christie v Davey* [1893] 1 Ch 316); and undue sensitivity of the plaintiff (*Robinson v Kilvert* (1889) 41 Ch D 88).

109 *Corbett* (n 90). If courts are willing to attach end-user emissions to carbon majors, then plaintiffs must also consider countering an argument that it is a reasonable use of land to combust coal in coal-fired power stations. Domestic and global closures of coal-fired power stations suggest that acceptance of this land use is changing. For a global analysis of when countries need to phase out coal-fired power to meet their *Paris Agreement* commitments, see 'Coal Phase-Out', *Climate Analytics* (Web Page) <https://climateanalytics.org/briefings/coal-phase-out>; Damian Carrington, 'Global "Collapse" in Number of New Coal-Fired Power Plants', *The Guardian* (online, 28 March 2019) <https://www.theguardian.com/environment/2019/mar/28/global-collapse-in-number-of-new-coal-fired-power-plants>.

110 In *Rylands* (n 81) the House of Lords held that the defendant had a duty to prevent water from his property escaping and flooding the plaintiffs' property. This meant that if a person was conducting any activity on premises that was 'dangerous' or 'non-natural' and allowed a substance to escape (or allowed another person to conduct a dangerous activity), they would have been liable under this rule.

111 *Burnie Port* (n 81) 547 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

112 *Bamford* (n 100) 712 (Bramwell B). See also *Southwark* (n 101) 20 (Lord Millett), quoting *Bamford* (n 100) 712 (Bramwell B), where reference is made to the 'common and ordinary use and occupation of land and houses' and the activity being 'conveniently done'.

nuisance.[113] Nevertheless, Australian courts have held that 'the social or public interest value in the defendant's activity' is a factor in determining whether an interference is unreasonable,[114] or that 'the interference [may be] justified by its social utility'.[115]

Despite the social utility of coal mining becoming an increasingly contentious and politicised matter, current federal government policy supporting existing and future coal mines indicates that a court would likely find that coal mining is, presently, a reasonable use of land.[116] However, there is limited case law that suggests the opposite.[117] Also, independent assessments of the financial viability of new coal mines point to the limited marketability of coal, particularly given the increased economic viability of renewable energy and the global imperative to drastically cut GHG emissions.[118] The reluctance of the insurance industry to insure new coal projects and the closure of coal-fired power stations might also be considered by the courts.[119] In summary, this element relating to 'reasonable use' is highly contextual and may become less effective over time as society, and the courts, redefine what constitutes 'reasonable use'. If plaintiffs are able to overcome these initial elements of the tort of nuisance, they may be entitled to three types of remedies. If a plaintiff can make out the reasonable foreseeability of property damage, they can be eligible for compensatory damages to restore them to their

113 *Dennis v Ministry of Defence* [2003] EWHC 793 (QB), [47] (Buckley J). In this case even though there was public benefit in the defendants continuing to train pilots, the plaintiff ought not have borne the burden of the public benefit (ie being subjected to the noise created by jets).

114 *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management* (2012) 42 WAR 287, 310 [118] (McLure P):

> To constitute a nuisance, the interference must be unreasonable. In making that judgment, regard is had to a variety of factors including: the nature and extent of the harm or interference; the social or public interest value in the defendant's activity; the hypersensitivity (if any) of the user or use of the claimant's land; the nature of established uses in the locality (eg residential, industrial, rural); whether all reasonable precautions were taken to minimise any interference; and the type of damage suffered.

115 *Bald Hills Wind Farm Pty Ltd v South Gippsland Shire Council* [2020] VSC 512, [81] (Richards J):

> [T]he common law position is that a substantial interference with a person's enjoyment of their land is prima facie a nuisance, unless the person creating the interference can show it to be reasonable. This may be done by, for example, demonstrating that the person took reasonable precautions to avoid the interference, that the interference is justified by its social utility, or that the interference arises from an activity that is an established use in the locality.

116 For example, approval of the Carmichael coal mine in Queensland. See also Matthew Doran, 'Federal Labor Critical of Coalition's Coal Study, while Not Ruling Out Blocking Mines and Power Plants', *ABC News* (online, 9 February 2020) <https://www.abc.net.au/news/2020-02-09/labor-critical-of-government-coal-record-while-sitting-on-fence/11947812>.

117 As per the judgment of Preston CJ in *Gloucester Resources* (n 66).

118 See John Quiggin, 'The Economic (Non)viability of the Adani Galilee Basin Project' (Research Paper, School of Economics, University of Queensland, July 2017); Frank Jotzo and Salim Mazouz, 'Coal Does Not Have an Economic Future in Australia', *The Conversation* (online, 6 September 2018) <https://theconversation.com/coal-does-not-have-an-economic-future-in-australia-102718>.

119 See Michael Mazengarb, 'Australian Insurance Companies Abandon Thermal Coal Industry', *Renew Economy* (online, 26 July 2019) <https://reneweconomy.com.au/australian-insurance-companies-abandon-thermal-coal-industry-69801>.

original position.[120] Consequential financial losses are also compensable.[121] As nuisance is a continuing tort, a separate cause of action arises each time there is substantial interference with a plaintiff's enjoyment of and rights to land.[122] The equitable remedy of injunction is also available, either as a separate remedy or in addition to damages.[123]

Once the plaintiff has established standing to sue and a prima facie interference with the use and enjoyment of the land or related rights, it is for the defendant to demonstrate the existence of a valid defence.[124] Defences include: consent,[125] statutory authority,[126] conformation of land[127] and a prescriptive right to commit private nuisance.[128]

To support the legal analysis below, it is important to identify the nuisance that might be claimed by Traditional Owners in the Torres Strait. Based on the above case study and previous claims made in US nuisance cases,[129] the complaint against an Australian-based carbon major may include:

> *Through their extraction, marketing of fossil fuels and associated scope three emissions, the company created a substantial and unreasonable interference with Torres Strait Traditional Owners' use and enjoyment of their land and with their rights associated with that land. This interference includes flooding of houses, sewage systems and traditional gardens, as well as coastal erosion and erosion of ancestral burial sites due to storm surges associated with sea level rise.*

A *Contentious Issues*

This section tests the possibility of bringing a claim in private nuisance against an Australian-based carbon major by considering key barriers to be overcome. Abbs, Cashman and Stephens identify several theoretical challenges to successful climate litigation actions in private nuisance.[130] These include remoteness of damage and

120 Mendelson (n 80) 753.

121 Ibid 754.

122 *Stockwell v Victoria* [2001] VSC 497, [492]–[493] (Gillard J) ('*Stockwell*').

123 See *Chancery Amendment Act 1858* (UK) s 2.

124 Mendelson (n 80) 738.

125 *Clarey v Principal and Council of the Women's College* (1953) 90 CLR 170, 175 (Williams ACJ, Webb, Kitto and Taylor JJ); *Burnie Port* (n 81) 545 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ), 590 (McHugh J).

126 *Benning v Wong* (1969) 122 CLR 249.

127 *Kraemers v A-G (Tas)* [1966] Tas SR 113, 118 (Burbury CJ).

128 *Lawrence v Fen Tigers Ltd* [2014] AC 822.

129 See, eg, *American Electric Power Co Inc v Connecticut*, 564 US 410 (2011) ('*American Electric Power*'); *Kivalina* (n 10).

130 Abbs, Cashman and Stephens (n 70) 99 [5.78].

making out the unreasonableness of the nuisance.[131] US common law nuisance cases also provide direction on possible impediments. To date, justiciability, standing, causation, and statutory displacement of claims, have proven to be major obstacles for litigants.[132]

The analysis below centres on key issues that are likely to impact the success of an action in private nuisance by Traditional Owners in the Torres Strait against a prominent Australian carbon major. These issues include justiciability, standing, identifying a defendant, causation and fault, likely defences, and resourcing litigation.[133]

1 *Justiciability*

Justiciability is a formal procedural threshold that must be met in order for a matter to be heard by a court. While the term 'non-justiciability' is used in multiple contexts, in this analysis, it represents an issue that is not appropriate for judicial determination.[134] In jurisdictions such as the US, this is a threshold that would have to be satisfied to bring forth a claim in the tort of nuisance for adverse climate change effects.

In Australia the element of justiciability is not a formal element of the tort of nuisance. In jurisdictions such as Australia and the United Kingdom, emphasis is placed on *standing to sue*, which encompasses a plaintiff's interest in the land,[135] and other elements of the tort such as a 'sustained and unreasonable interference', principles already addressed in Part IV(A)(2) of this paper. While Australian courts are likely to be conscious of political issues, and international developments, it is more likely that Australian courts will adopt reasoning in line with existing doctrine pertaining to nuisance. For completeness, this section briefly outlines the relevance of justiciability in Australia, the developments of these principles in US case law, and scholarly commentary on the role this principle may have, should such questions be brought before Australian courts.

131 Ibid.

132 Ganguly, Setzer and Heyvaert (n 13).

133 The role of time limitations in civil ligation should also be acknowledged. Statute of limitations outline when actions can be commenced — usually within six years from when the cause of action accrues for torts where no death or personal injury is claimed. The statutory time limitation is the point in time when time starts running, namely when all of the elements of a cause of action have been established. Generally, in torts where damage/harm is an element, that is the point when the damage is accrued: *Limitation Act 1985* (ACT) s 11(1); *Limitation Act 1969* (NSW) s 14(1)(b); *Limitation Act 1981* (NT) s 12(1)(b); *Limitation of Actions Act 1974* (Qld) s 10(1)(a); *Limitation of Actions Act 1936* (SA) s 35(c); *Limitation Act 1974* (Tas) s 4(1)(a); *Limitation of Actions Act 1958* (Vic) s 5(1)(a); *Limitation Act 2005* (WA) s 16.

134 Sir Anthony Mason, 'The High Court as Gatekeeper' (2000) 24(3) *Melbourne University Law Review* 784, 788.

135 A recent case on this legal principle is *Brown v Tasmania* (2017) 261 CLR 328. Gordon J stated, '[t]he plaintiff must have a right over or an interest in the land that has been affected by the nuisance of which complaint is made. The plaintiff must be more than a mere licensee or a person merely present on the land': at 452 [385] (citations omitted).

The High Court of Australia dealt with questions of justiciability, as they relate to the separation of powers doctrine, in *Victoria v Commonwealth*[136] and *Gerhardy v Brown*.[137] In *Victoria v Commonwealth*, the High Court drew on US jurisprudence, as per Frankfurter J's comment in *Baker v Carr*, that the

> courts are not fit instruments of decision where what is essentially at stake is the composition of those large contests of policy traditionally fought out in non-judicial forums, by which governments and the actions of governments are made and unmade.[138]

The political question doctrine, which is enshrined in the *United States Constitution*,[139] has caused, at least in part, many US climate change litigation cases to fail.[140]

Peel, Osofsky and Foerster draw on the reasoning of Gleeson CJ in *Graham Barclay Oysters Pty Ltd v Ryan* ('*Graham Barclay Oysters*'),[141] to assert that Australian courts have demonstrated a 'very restrictive view of their role with regards to "political questions" or justiciability'.[142] In *Graham Barclay Oysters*, a negligence case, justiciability was denied based on a question of reasonableness in relation to the conduct of a public authority.[143] In assessing the justiciability of a private nuisance claim against a corporate actor, a court would also likely raise the question of reasonableness, however, in relation to the interference. For instance, in the US case of *Native Village of Kivalina v ExxonMobil Corporation* ('*Kivalina*'),[144] the District Court applied an objective test to assess if a reasonable person would consider the defendant's GHG emissions unreasonable. This test gave rise to two questions: (1) What is an acceptable level of GHG emissions? (2)

136 (1975) 134 CLR 81, 135 (McTiernan J) ('*Victoria*').

137 (1985) 159 CLR 70, 138–9 (Brennan J).

138 369 US 186, 287 (1962), quoted in *Victoria* (n 136) 135 (McTiernan J). This case established criteria to determine whether a question is political in nature. See also *Marbury v Madison*, 5 US (1 Cranch) 137 (1803) which established the political question doctrine.

139 *United States Constitution* art III.

140 For example, in *American Electric Power* (n 129), a public nuisance claim was found to be non-justiciable under federal nuisance law by the US Supreme Court. Note that the Court of Appeals held that the claim was not barred by the political question doctrine. For commentary, see Phillip Divisek, 'Climate Change Torts: *American Electric Power v Connecticut*' (2011) 7(1) *Macquarie Journal of International and Comparative Environmental Law* 108; Amelia Thorpe, 'Tort-Based Climate Change Litigation and the Political Question Doctrine' (2008) 24(1) *Journal of Land Use and Environmental Law* 79.

141 (2002) 211 CLR 540, 553–5 [5]–[7] ('*Graham Barclay Oysters*').

142 Peel, Osofsky and Foerster (n 9) 824.

143 *Graham Barclay Oysters* (n 141) 553–5 [5]–[7] (Gleeson CJ).

144 *Kivalina* (n 10).

Who should bear the cost of global warming?[145] The District Court determined that these questions were essentially political in nature.[146]

If Traditional Owners from the Torres Strait were to bring an action under private nuisance against a carbon major, they would need to convince the court that their matter was not essentially a policy question, more appropriately addressed by the legislature. The paradox here is that many climate change litigation actions aim to strategically shift government policy on climate change.[147] In relation to the reasonableness of the interference and the two contextual questions raised in *Kivalina*,[148] the plaintiffs could argue that the defendant company's own self-imposed emissions reductions targets,[149] as well as Australia's emissions reductions targets under the *Paris Agreement*,[150] could be used by the court to determine an acceptable level of GHG emissions and hence, interference. For future research, it would be interesting to explore further the defendants' self-imposed targets and the impact this would have on apportionment of liability; however, this is beyond the scope of the present paper. Also, climate attribution science might offer the court guidance on how responsibility (the cost of climate change) might be apportioned.

2 *Standing to Sue*

As private nuisance is a proprietary cause of action, a plaintiff must have a right to exclusively possess or occupy the land in order to have legal standing.[151] In relation to this case study, native title exists on all Torres Strait Islands, with claims settled

145 Ibid 876–7 (Armstrong J).

146 Ibid. Also, two further justiciability issues have hampered US climate change litigation: the displacement of federal common law private nuisance claims by legislation and lack of subject matter jurisdiction. *American Electric Power* (n 129) affirmed that climate change litigation through federal common law nuisance claims is displaced by the *Clean Air Act*, 42 USC § 7401 (1970): at 424 (Ginsburg J for the Court). There is no equivalent legislation in Queensland or Australia which would displace a common law claim in private nuisance. Hence, displacement is not presently an issue in Queensland or Australia, as there is no federal or state statute that regulates GHG emissions.

147 Setzer and Byrnes (n 36) 6.

148 (1) What is an acceptable level of GHG emissions? And (2) Who should bear the cost of global warming?: *Kivalina* (n 10) 876–7 (Armstrong J).

149 See, eg, Neil Hume, 'BHP to Set Targets for Reducing Customers' Carbon Emissions', *Financial Times* (online, 23 July 2019) <https://www.ft.com/content/90b8fdd0-ac87-11e9-8030-530adfa879c2>.

150 Under the *Paris Agreement* (n 53), Australia has committed to reducing its GHG emissions by 43% below 2005 levels by 2030: Anthony Albanese and Chris Bowen, Letter to the United Nations Framework Convention on Climate Change (Nationally Determined Contribution, 16 June 2022) <https://unfccc.int/sites/default/files/NDC/2022-06/NDC%202022%20Update%20Letter%20to%20UNFCCC.pdf>.

151 *Sutherland Shire Council v Becker* (2006) 150 LGERA 184, 230 [137] (Bryson JA).

on all but Hammond Island.[152] However, there is a lack of case law affirming that native title qualifies as a possessory right over land for a private nuisance claim.[153]

In *Mabo*, Toohey J was the only judge to consider possessory title.[154] Brennan J did, however, refer to Meriam people as 'a community … [with] proprietary interest in the Islands',[155] offering some indication that native title rights could give rise to standing in private nuisance.[156] More recently, in *Western Australia v Ward*, Kirby J pointed out that in most instances, the rights claimed in relation to native title are connected to land and water, with some semblance to common law property concepts.[157] Yet, as Gordon J opined in *Love v Commonwealth*, '[n]ative title is both more than, and different from, what common lawyers identify as property rights'.[158] The common law's silence on whether native title — either through exclusive or non-exclusive possession — gives rise to standing in private nuisance, is perhaps positive, in that it may encourage the courts to resolve this important legal question.[159] Supportive commentary offers a pathway for the general law's recognition of native title as a form of proprietary interest on two key grounds: firstly, native title 'exhibits a sufficient number of indicia that its characterisation as property is persuasive' and secondly, 'the High Court has loosened the hold that the conventional indicia play in characterising property at general law'.[160]

There are two strands of legal authority in relation to grounds for standing in private nuisance. In *Ammon v Colonial Leisure Group Pty Ltd*, the Court acknowledged that the 'older strand of authority requires the claimant to be an owner of the land subject to the interference in order to have a valid … claim'.[161] More recent case authorities suggest that lesser proprietary interests, such as a

152 Also, further analysis is required on how deeds of grant in trust may impact this question of standing for peoples in the Torres Strait.

153 See Nick Duff, 'Fluid Mechanics: The Practical Use of Native Title for Freshwater Outcomes' (Research Report, Australian Institute of Aboriginal and Torres Strait Islander Studies, June 2017) 44.

154 *Mabo* (n 18) 214.

155 Ibid 61.

156 See also Janice Gray, 'Is Native Title a Proprietary Right?' (2002) 9(3) *eLaw Journal: Murdoch University Electronic Journal of Law* 1.

157 (2002) 213 CLR 1, 246 [578].

158 (2020) 270 CLR 152, 273 [339].

159 For an in-depth analysis of the characterisation of native title rights and whether they are proprietary in nature, see William Isdale, *Compensation for Native Title* (Federation Press, 2022) 144–54.

160 Ibid 149.

161 [2018] WASC 280, [20] (Master Sanderson), quoting *Marsh v Baxter* (2014) 46 WAR 377, 429 [351] (Kenneth Martin J). See, eg, *Oldham* (n 93) 657 (Harris J).

licence, are sufficient to satisfied standing requirements in private nuisance.[162] For instance, in *Deasy Investments Pty Ltd v Monrest Pty Ltd*,[163] the Queensland Court of Appeal adopted a broader view of standing than that applied in *Malone v Laskey*,[164] and *Oldham v Lawson [No 1]*,[165] deciding that licensees can sue in nuisance. Also, there are instances where fishing rights have qualified plaintiffs for standing.[166]

If native title is found to qualify Traditional Owners in the Torres Strait for standing in private nuisance, the inherent tragedy, as aptly put by former Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma, is that over time, '[s]ea level rises will extinguish certain rights and interests over land because they will disappear'.[167]

3 *Identifying the Defendant*

A vexed question plaintiffs and courts must contemplate in climate change nuisance suits against carbon majors is, who is the nuisance neighbour? This is because the climate change-related nuisance that interferes with a plaintiff's rights to and enjoyment of land cannot directly be attributed to one single corporate entity.[168]

The materialisation of climate change hazards as impacts and interference for Torres Strait Islanders cannot easily be traced back to the specific emissions of one corporation. This traceability issue raises significant challenges in making out causation,[169] and attributing legal liability when complex corporate structures are involved. In relation to the latter, questions arising from corporations law require careful consideration when identifying the defendant.

Firstly, many of the carbon majors targeted in climate change litigation suits are corporate groups. While in some instances these groups are the sole owners of the subsidiaries that actually extract and market fossil fuels and potentially cause the nuisance, in many instances they are not. This creates difficulties in attributing legal liability, as courts are reluctant to impute liability from a subsidiary to a parent company — pierce the corporate veil — and will only do so under narrow

162 See *Vaughan v Shire of Benalla* (1891) 17 VLR 129, cited in *Toll Transport Pty Ltd v National Union of Workers* [2012] VSC 316, [28] (Ferguson J). See also *Deasy Investments Pty Ltd v Monrest Pty Ltd* [1996] QCA 466 ('*Deasy*').

163 *Deasy* (n 162) 5–6 (Pincus JA).

164 [1907] 2 KB 141, 151 (Barnes P).

165 *Oldham* (n 93) 657 (Harris J).

166 See *Wickham v Hawker* (1840) 7 M & W 63; 151 ER 679; *Fitzgerald v Firbank* [1897] 2 Ch 96; *Nicholls v Ely Beet Sugar Factory* [1931] 2 Ch 84.

167 *Native Title Report 2008* (n 27) 258.

168 *Salomon v A Salomon and Co Ltd* [1897] AC 22 established the legal doctrine of separate legal personality for corporate entities.

169 Causation matters are addressed in Part IV(A)(4) below.

circumstances.[170] For instance, piercing of the corporate veil only tends to occur when a subsidiary goes into insolvency and creditors are pursuing the assets of the parent company, or plaintiffs are seeking damages.[171] To date, no court has imputed liability from a subsidiary to a parent company in a climate change litigation case. However, there is analogous case law to support future actions.

In the key mesothelioma negligence case *Briggs v James Hardie & Co Pty Ltd*, Rogers AJA considered factors that may enable the lifting of the corporate veil in torts actions:

> Generally speaking, a person suffering injury as a result of the tortious act of a corporation has no choice in the selection of the tortfeasor. The victim of the negligent act has no choice as to the corporation which will do him harm.[172]

In this case, the Court allowed the plaintiff to bring an action against the joint shareholder companies of the subsidiary, which had negligently caused the plaintiff's mesothelioma.

To put these issues into context, consider BHP, Australia's largest carbon major. It operates as a dually listed company, with two parent companies, BHP Group Limited and BHP Group Plc. In practical terms, BHP operates as a single economic entity, governed by a single board and management.[173] It is listed on the ASX200 and registered at an Australian address.[174] BHP wholly owns hundreds of subsidiaries and shares in hundreds of other companies and projects. For instance, through its joint project with Mitsubishi Corporation in Queensland, the BHP Mitsubishi Alliance, BHP is Australia's largest coal producer. If an action in private nuisance were to be brought against BHP, it is likely that the plaintiffs would need to name its wholly and jointly owned subsidiaries (eg BHP Mitsubishi Alliance) and joint venture partners such as Mitsubishi Corporation, and find grounds for the court to impute liability from the subsidiary to the parent companies, for the parents to be liable.[175]

170 For an empirical study of Australian cases in which the corporate veil has been pierced, and under what circumstances, see Ian M Ramsay and David B Noakes, 'Piercing the Corporate Veil in Australia' (2001) 19(4) *Company and Securities Law Journal* 250.

171 See John H Matheson, 'The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context' (2009) 87(4) *North Carolina Law Review* 1091; Ian Ramsay and Geof Stapledon, 'Corporate Groups in Australia' (Research Report, Centre for Corporate Law and Securities Regulation, The University of Melbourne, 1998).

172 (1989) 16 NSWLR 549, 578.

173 'Unified Corporate Structure', *BHP* (Web Page, 2022) <https://www.bhp.com/about/our-businesses/unified-corporate-structure>.

174 Location is important as it may have territoriality implications: see Lynn M LoPucki, 'The Death of Liability' (1996) 106(1) *Yale Law Journal* 1, 13.

175 Note, however, the recent decision by the UK Supreme Court in *HRH Emere Godwin Bebe Okpabi v Royal Dutch Shell Plc* [2021] 1 WLR 1294. While not a nuisance action and not a decision of the merits of the case, this decision on a jurisdiction challenge found that a UK parent company may be liable in negligence for its international subsidiary if the parent company can be found to owe the claimants a duty of care.