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Standing in human rights and public interest cases

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Research Paper 9. Standing in human rights and public interest cases

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1. Threshold issues

In both private and 'public interest' litigation a threshold issue may arise as to whether the person or entity seeking to bring the proceeding is legally entitled to do so. In technical terms, this is a question of 'standing'. This will depend upon the nature of the litigation in question, the cause(s) of action relied upon and whether the right to seek a remedy is conferred by statute or is governed by the common law.

In this paper, we examine the law on standing, with particular reference to challenges to the validity of legislation and claims seeking to raise constitutional questions. We also consider standing in environmental actions and in climate change litigation, as in these forms of public interest litigation issues of standing commonly arise for detailed consideration by the courts.

2. Standing generally

Litigation is a vehicle for enforcing the law and rules of standing operate to identify those entitled to use that vehicle. Where a plaintiff[1] is legally recognised as a 'proper'[2] person to maintain particular proceedings, that person or entity is said to have 'standing' to seek the remedies in issue. Thus, the rules of standing are closely connected to the law of remedies.[3]

In general, where a person has personally suffered loss or damage no issue will usually arise as to their legal capacity to seek an individual remedy for such loss or damage. More complex issues arise when the loss or damage is more diffuse and widespread or where there is a concern to avoid or prevent future loss or damage.

Of the three broad categories of standing rules, two are relatively determinate and do not require extensive elaboration.

The first category is made up of rules confining standing to particular nominated persons, such as where the right to seek to restrain or remedy contraventions of a statute are restricted to particular government agencies or officers, or where a right to bring proceedings is conferred on a person because of their prior involvement in the relevant decision-making process.

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[1] This research paper uses the term 'plaintiff' in a generic sense to refer to the instigator of proceedings although the term 'applicant' may be used in the context of Federal Court proceedings.

[2] Australian Law Reform Commission, *Standing in Public Interest Litigation* (Report No 27, 1985) xviii.

[3] E.g., *Truth About Motorways Pty Ltd v Macquarie Infrastructure Management Ltd* (2000) 200 CLR 591, [46]-[49] (Gaudron J).

The second category are rules providing for open standing to 'any persons', such as under s 9.45 of the *Environmental Planning and Assessment Act 1979* (NSW). Some remedies under the general law are not subject to standing requirements, such as writs of habeas corpus, and strangers may be able to apply for writs of prohibition, certiorari and quo warranto. The lack of a standing requirement for certiorari has been stated by judges of the High Court on various occasions.[4] However, the decision to grant a remedy of, for example, certiorari, remains a matter for the discretion of the court and this will entail consideration of the plaintiff's connection to, or interest in, the decision they wish to quash.[5]

In the remaining category of rules, the standing of the plaintiff may be a matter of controversy between the parties. These rules condition standing on the existence of a particular qualitative relation between the plaintiff and the conduct or decision sought to be impugned, or the remedies sought.

In general, the rules of standing require plaintiffs to demonstrate that they are possessed of certain prescribed attributes, such as the requirement for a personal or 'special interest' in the subject matter of the litigation. This can create significant problems for those seeking to bring such an action in connection with a desire to promote or protect human rights. Many such potential litigants will seek declaratory relief, and it is in this area that the exact outline of the intertwined concepts of 'matter' and 'standing' are most clouded, compounded by the broad discretion of the court to grant a remedy in the circumstances of the case before it.[6]

Statutory provisions that create public law process rights often refer to the matter of standing by reference to various generic formulae, demanding that a plaintiff be, for example, 'aggrieved'[7] or 'interested'[8] in relation to the subject matter of proposed proceedings, or have 'interests affected by'[9] the matters with which those proceedings are concerned.

Perhaps the most prominent example of a statutory scheme anchored by one of these formulae is that established by the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('ADJR Act'). Access to its 'ambulatory'[10] judicial review machinery is restricted to a person who is 'aggrieved' by a decision to which the ADJR Act applies,[11] and the ADJR Act specifically stipulates that a person whose interests are 'adversely affected' by the decision will qualify.[12]

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[4] *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at [162], [211]; *re McBain; ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at [89], [260]. This has been disputed in secondary literature but appears to be supported by the preponderance of judicial authority; see *Motor Accidents Authority of New South Wales v Mills* (2010) 78 NSWLR 125 [82].

[5] See, e.g., consideration of High Court authorities on certiorari in *Abraham v The Hon Peter Charles Collier MLC, Minister for Aboriginal Affairs* [2016] WASC 269, [62]-[67] (Pritchard J).

[6] See the discussion of the Full Court of the Federal Court in *Clarence City Council v Commonwealth of Australia* (2020) 382 ALR 273, [57]-[75].

[7] See e.g., *Australian Human Rights Commission Act* 1986 (Cth), s 46P (complaint of unlawful discrimination under the *Racial Discrimination Act* 1975 (Cth), *Sex Discrimination Act* 1984 (Cth), *Disability Discrimination Act* 1992 (Cth) or *Age Discrimination Act* 2004 (Cth); *Renewable Energy (Electricity) Act* 2000, s 154S (injunction to restrain offence or contravention of civil penalty provision); *Gene Technology Act* 2000, s 147 (injunction to restrain offence).

[8] See e.g., *Environment Protection (Sea Dumping) Act 1981* (Cth), s 33 (injunction to restrain offences under Act).

[9] See e.g., *Great Barrier Reef Marine Park Act 1975* (Cth), s 61AGA (injunction to restrain offence or contravention of civil penalty provision).

[10] *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport* (1986) 13 FCR 124, 133 (Gummow J).

[11] ADJR Act, ss 5, 6, 7.

[12] ADJR Act, s 3(4); cf *Victorian Civil and Administrative Tribunal Act* 1998 (Vic), s 5.

Standing tends not to arise for separate consideration in the private law context, where the kind of interpersonal rights and duties that underpin the substantive law also determine those eligible to be parties to litigation, such that standing of the plaintiff is bound up in the possession of a viable cause of action.[13]

In contrast, public law is concerned with rights and duties arising in favour of the public generally, and any 'damage' occasioned by a contravention of public law will often have something of a diffuse quality.[14]

Rules of standing are of significance in public law, for example, in connection with attempts to 'prevent the violation of a public right or to enforce the performance of a public duty. …A private citizen who has no special interest is incapable of bringing proceedings for that purpose, unless, of course, he is permitted by statute to do so.'[15]

The conservative approach to standing of the High Court was confirmed by the requirement for a 'special interest' set out in *ACF v Commonwealth.*[16] In *ACF*, the Australian Conservation Foundation sought review of certain decisions connected with a tourist development in Queensland, and relief in the form of various declarations and injunctions. In proceedings before a single judge of the High Court, the proceedings were struck out for want of standing. The Foundation, which at that time was a well-established organisation having some 6,500 members, appealed. It contended that Australian law supported the proposition that standing could be founded on 'what might be called ideological interests such as beliefs or objectives shared by a number of people or a section of society on a moral, social or environmental question'.[17] The majority of the Court held that it was necessary that a 'public interest' applicant for review have a 'special interest in the subject matter of the action over and above that enjoyed by the public generally'[18]. Gibbs J acknowledged that 'a person might have a special interest in the preservation of a particular environment' but stressed that 'a mere intellectual or emotional concern' was insufficient to support a right of standing[19]:

> A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds ... A belief, however strongly felt, that the law generally or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi.

Stephen J considered that the Foundation could not succeed unless the law was 'that any person with genuinely held convictions upon a topic of public concern thereby acquires standing to enforce a public right to breach of which it takes exception'. His Honour held that it was not so.[20] Mason J noted the possibility that 'apprehended or actual injury or damage to ... social and political interests' might supply a basis for standing, but declined to elaborate as to how such interests might be constituted, echoing Gibbs J in emphasising the need for action to be animated by something more than a 'mere belief or concern'.[21]

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[13] *Batemans Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 264.
[14] Konrad Schiemann, 'Locus Standi' (1990) *Public Law* 342, 346-7.
[15] *ACF v Commonwealth* (1980) 146 CLR 493, 526.
[16] *ACF v Commonwealth* (1980) 146 CLR 493 ('*ACF*').
[17] *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, 513.
[18] (1980) 146 CLR 493, 547 (Mason J); cf *Boyce v Paddington Borough Council* ('*Boyce*') [1903] 1 Ch 109, 114 (Buckley J).
[19] (1980) 146 CLR 493, 530.
[20] (1980) 146 CLR 493, 539.
[21] (1980) 146 CLR 493, 548.

Further clarification was afforded by the case of *Onus v Alcoa of Australia Ltd*[22], which was decided by the High Court shortly after *ACF*. In *Onus*, the applicants, two members of the Gournditch-jmara people, sought to restrain the commission of an offence under legislation protective of, inter alia, Aboriginal relics. The conduct in issue comprised works associated with the construction of an aluminium smelter on land containing stone artefact scatters and other traces of Aboriginal occupation. The High Court was called upon to determine the limited question of whether the Victorian Supreme Court had been correct to strike out the proceedings for want of standing.

The High Court found that the applicants had a sufficient 'special interest' to bring the proceedings. notwithstanding the limitations of the material said to demonstrate that interest.[23] Gibbs CJ sought to distinguish the circumstances from those that obtained in *ACF*[24]:

> The present is not a case in which a plaintiff sues in an attempt to give effect to his beliefs or opinions on a matter which does not affect him personally except in so far as he holds beliefs and opinions about it. The appellants claim not only that their relics have a cultural and spiritual significance, but that they are custodians of them according to the laws and customs of their people, and that they actually use them. The position of a small community of aboriginal people of a particular group living in a particular area which that group has traditionally occupied, and which claims an interest in the relics of their ancestors found in that area, is very different indeed from that of a diverse group of white Australians associated by some common opinion on a matter of social policy which might equally concern any other Australian.

The particularity of the applicants' relationship to the relics in question was similarly critical to other judgments, with Wilson J, for example, remarking that in his view mere aboriginality would not have sufficed to support standing had the applicants been unable to also point to a relatively specific ancestral connection[25]. Broadly speaking, it was this feature of particularity that was said to elevate the interest of the applicants above that of the Foundation in *ACF*. Whether and to what extent the judges discerned a relevant qualitative difference between the cultural interests asserted in *Onus* and the more generic environmental concern that animated the *ACF* proceedings is less clear.

Onus was a liberalising decision, in so far as it recognised as a basis for standing a circumstance the significance of which would otherwise have been debatable.[26] However, the contrast between *ACF* and *Onus* made abundantly clear the difficulty likely to be faced by public interest litigants under the 'special interest' test. Where the interest of a plaintiff could not be referred to some tangible right or material interest, a court would be left to make its own assessment as to the significance of the plaintiff's concern. Effectively, the High Court 'rated [the cultural and spiritual] concerns [at stake in *Onus*] far more highly than conservationists' concern for the environment'[27]. However, Douglas has observed that the distinction drawn between *Onus* and *ACF* was far from convincing[28]:

> [I]t is certainly not clear how spiritual interests differ from emotional ones … [Wilson J] described the plaintiffs' interests as 'deeper and more significant than mere emotional

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[22] *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 ('*Onus*').

[23] Aickin J was more circumspect, holding only that the material before the Court was insufficiently decisive to support a strike out application: *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 56-57.

[24] (1981) 149 CLR 27, 37.

[25] (1981) 149 CLR 27, 63.

[26] See, for example, the comment at 35-6 of Gibbs CJ: 'The rule is obviously a flexible one since, as was pointed out in that case, the question what is a sufficient interest will vary according to the nature of the subject matter of the litigation'.

[27] Michael Head, *Administrative Law: Context and Critique* (Federation Press, 3rd ed, 2012) 138.

[28] Roger Douglas, 'Standing' in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrine* (2007) 158, 162.

attachment', but the basis for this conclusion is unclear. Is the criterion the depth of attachment of those seeking standing ... or is it to be determined objectively, and if so, how?

Following the establishment of the 'special interest' criterion, numerous plaintiffs attempted to secure general law remedies by negotiating the amorphous space between *ACF* and *Onus*.[29]

Where the 'special interest' test or one of the generic statutory formulae applies, standing will generally be extended to the holder of a private legal right with which the decision or action under challenge is liable to interfere, including in circumstances where a plaintiff seeks to be heard in defence of process rights specifically due to him or her. Similarly, a plaintiff's claim will usually be permitted where he or she is able to point to adverse effects on reasonably concrete economic or property interest. Whether prospective plaintiffs, including human rights or other public interest organisations, will have standing in other circumstances, such as where litigation seeking to compel adherence to public law is primarily motivated by questions of principle or 'public interest', is less clear. It is an inquiry of 'fact and degree'.[30]

Clearly, a certain particularity and sufficiency of interest is required and the cases indicate that only interests deemed to be of an 'appropriate' character are likely to attract recognition. Such an approach is unlikely to be very satisfactory unless 'sufficiency' and 'quality' of interest can be measured on some kind of meaningful scale, or at least assessed by reference to a consistent normative framework – presumably, given the context, one reflecting a coherent theory of public accountability.

Complications arise when attempting to map the effects of standing requirements in different areas of the law. Contestable issues of standing arise in a variety of contexts, in connection with different laws and remedies, and are considered by judges in different jurisdictions and with differing or developing 'attitudes as to the availability of the courts for the resolution of legal issues causing concern in the community.'[31] The doctrine of standing continues to be a 'house of many rooms.'[32] The case law is fragmented, and offers little encouragement to those who would seek to extract general principles.

Both the 'special interest' test and the recurrent statutory standing formulae have an irreducible exclusory function: there must always be some category of persons who are not 'aggrieved', not

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[29] For the purposes of judicial review of administrative decisions, the *Administrative Decisions (Judicial Review) Act 1977* (Cth) may apply, such as in *Ogle v Strickland* (1987) 13 FCR 306. Under the statute, a person seeking review must demonstrate that they are a person 'aggrieved' by the decision and this requirement is viewed broadly. See generally, Matthew Groves, 'The Evolution and Reform of Standing in Australian Administrative Law' (2016) 44 *Federal Law Review* 167, 174-5. There is a degree of convergence between the statutory and general law approaches to standing. For example, in *Cameron v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 509, the plaintiff sought to challenge the legality of a programme by which Australian government aid was distributed in Fiji, arguing that a policy of splitting certain scholarships equally between indigenous Fijians and Fijian Indians contravened the *Racial Discrimination Act 1975* (Cth). However, the Full Court of the Federal Court agreed with Davies J at first instance that he was not a 'person aggrieved' for the purposes of the Act. Despite having various links to Fiji, and a history of interest in civil rights in that country, the applicant was insufficiently personally affected by the policy, lacking a 'direct personal and professional interest' such as was found to have existed in *Ogle.* See also the liberal application in *Animals' Angels e.V. v Secretary, Department of Agriculture* **(**2014) 228 FCR 35.

[30] *Argos Pty Ltd v Corbell* (2014) 254 CLR 394 at [37]-[39].

[31] *Ogle v Strickland* (1987) 13 FCR 306, 320. See Australian Law Reform Commission, *Beyond the door-keeper: Standing to sue for public remedies*, Report No 78, (1996).

[32] *Batemans Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 280 [92]. At [46], Gaudron, Gummow and Kirby J warned against 'the dangers involved in the adoption of any precise formula as to what suffices for a special interest in the subject matter of the action, where the consequences of doing so may be unduly to constrict the availability of equitable remedies to support that public interest in due administration which enlivens equitable intervention in public law.'

'specially interested', not in possession of 'affected interests' in relation to a particular subject matter. As such, the 'worthy' plaintiff is in some way exceptional. The result, in practice, has been that access to the courts is usually contingent on the ability of a plaintiff to demonstrate that his or her claim is animated by something other than a mere desire to see a particular law enforced.

As noted by Groves, the restrictive approach to standing for judicial review applied by the High Court in the seminal *Australian Conservation Foundation* case was 'slowly chipped away' by less restrictive approaches in lower courts, particularly in environmental cases.[33]

In *Australian Conservation Foundation v Minister for Resources,*[34] the Foundation and a private landowner[35] sought review under the ADJR Act of a Ministerial decision to grant a licence enabling the export of woodchips sourced from the South East Forests in New South Wales. The licence was said to have been issued in contravention of heritage legislation protective of the National Estate, of which the South East Forests were part. Davies J rejected the submission that the *ACF* case 'laid it down as a matter of law that the ... Foundation has no standing in a case such as the present', emphasising the flexibility and case-specificity of the standing inquiry. Davies J noted the relevance of a number of factors,[36] including that logging in south-east Australia was 'one of the major environmental issues of the present day'; the South East Forests had been included in the National Estates Register; since the decision in *ACF*, public awareness of the desirability of conservationist advocacy had increased; the Foundation was 'no mere association of individuals having like views', but rather 'a large enterprise' receiving 'substantial annual funding from both State and Commonwealth governments'; and the Foundation had demonstrated an ongoing interest in both the conservation of the National Estate generally and sustainable forestry, particularly in connection with the South-East Forests.

In the event, Davies J concluded[37]:

> While the ... Foundation does not have standing to challenge *any* decision which might affect the environment, the evidence thus establishes that [it] has a special interest in relation to the South East Forests and certainly in those areas ... that are National Estate. The ... Foundation is not just a busybody in this area. It was established and functions with governmental financial support to concern itself with such an issue. It is pre-eminently the body concerned with that issue. *If the ... Foundation does not have a special interest in the South East Forests, there is no reason for its existence.* ...
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> In determining standing, it is necessary to take account of current community perceptions and values ... In my opinion, the community at the present time expect that there will be a body such as the ... Foundation to concern itself with this particular issue and expects the ... Foundation to act in the public interest to put forward a conservation viewpoint as a counter to the viewpoint of economic exploitation.

Echoes of the reasoning of Davies J can be found in the influential decision of Sackville J in *North Coast Environmental Council Inc v Minister for Resources* ('*North Coast*')[38]. In *North Coast,*[39] Sackville J employed a multifactorial approach to determine whether the plaintiff organisation had standing to seek the remedy sought. In *North Coast,* a non-profit conservation organisation concerned with

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[33] Matthew Groves, 'The Evolution and Reform of Standing in Australian Administrative Law' (2016) 44 *Federal Law Review* 167.

[34] (1989) 76 LGRA 200.

[35] Allars notes that '[t]he landowner no doubt was included as a second applicant in the action for strategic reasons, in order that the action could proceed if an objection to the standing of the ACF were successful': Margaret Allars, 'Standing: The Role and Evolution of the Test' (1991) 20 *Federal Law Review* 83, 105.

[36] (1989) 76 LGRA 200, 204-206.

[37] (1989) 76 LGRA 200, 206-207.

[38] (1994) 55 FCR 492.

[39] (1994) 55 FCR 492 (*North Coast*).

environmental issues affecting a defined territory along the north coast of New South Wales sought a statement of reasons for the Minister's decision to extend the licence of a third party (Sawmillers Exports Pty Ltd) to export woodchips sourced from both State Forests and private land within that territory. The Minister had refused to provide such a statement on the basis that the plaintiff was not a 'person aggrieved' for the purposes of the relevant provision of the ADJR Act.

However, having conducted a detailed analysis of the facts and the authorities, Sackville J held that a confluence of factors justified a contrary conclusion. Importantly, the plaintiff was the peak environmental organisation in the region, having been constituted in 1977 to represent the kind of smaller, more localised environmental groups that continued to comprise the bulk of its membership. It had been recognised by both Commonwealth and State governments as 'a significant and responsible environmental organisation', evidenced by its receipt of both recurrent and project-specific funding grants, and by its involvement in various government decision-making processes. It was also able to demonstrate a history of interest in forestry management issues, particularly with respect to woodchipping.[40] The motivations of the plaintiff in bringing the action were less significant in this approach than their capacity to bring the action. In subsequent cases, the factors identified by Sackville J in *North Coast* allowed for flexibility in determination of questions of standing, up to a point. The overriding notion of a 'special interest' from *ACF* and *Onus* continued to apply.[41]

In *Bateman's Bay*, members of the High Court questioned the logic of requiring a plaintiff to demonstrate some form of heightened interest as a prerequisite to public law standing, contending that it resulted in an 'unsatisfactory weighting of the scales in favour of defendant public bodies'.[42] Their Honours appeared to view the 'special interest' requirement as an unhelpful distraction from the real issue, being the existence of an 'abuse or threatened abuse of public administration which attracts equitable intervention'.[43] While the Court made a decision on standing with reference to the *ACF* test, Gaudron, Gummow and Kirby JJ emphasised that '[r]easons of history and the exigencies of present times indicate that [the "special interest"] criterion is to be construed as an enabling, not a restrictive, procedural stipulation.'[44]

Notwithstanding this pattern of inconsistent liberalisation in the application of the rules of standing, the principles have not been subject to subsequent alteration by the High Court.[45] The standing of

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[40] *North Coast* (1994) 55 FCR 492, 512-4.

[41] See also Peter Cane, Leighton McDonald and Kristen Rundle, *Principles of Administrative Law* (Oxford University Press, 3rd ed, 2018), chapter 5, especially at 218. Cane, McDonald and Rundle suggest that a 'tipping point' has been reached: while the special interest test is purportedly applied, courts approach standing according to an enforcement model, rather than an interests model.

[42] *Bateman's Bay Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 261 [34] (Gaudron, Gummow and Kirby JJ). Cane and McDonald observe that '[t]hese comments ... may ... indicate willingness to embrace "open standing" if and when the opportunity presents itself'): Cane and McDonald, *Principles of Administrative Law*, 192.

[43] Ibid. See also at 267 [50] (Gaudron, Gummow and Kirby JJ) ('The first question is why equity, even at the instance of the Attorney-General, would intervene. The answer given for a long period has been the public interest in the observance by such statutory authorities, particularly those with recourse to public revenues, of the limitations upon their activities which the legislature has imposed. Where there is a need for urgent interlocutory relief, or where the fiat has been refused, as in this litigation, or its grant is an unlikely prospect, the question then is whether the opportunity for vindication of the public interest in equity is to be denied for want of a competent plaintiff').

[44] (1998) 194 CLR 247, 267 [50] (Gaudron, Gummow and Kirby JJ). In so far as they addressed the subject-matter of the plurality critique, McHugh J and Hayne J were more ambivalent: see the discussion below of the comments of McHugh J.

[45] See *Lock the Gate Alliance Ltd v The Minister for Natural Resources and Mines* (2019) 1 Qd R, [71] (Bowskill J).

community groups or individuals who wish to hold the government to account in matters of public law may still be denied on the basis that they are viewed has having a 'mere emotional or intellectual' interest no greater than any other member of the public.[46] Public interest and environmental groups may struggle to overcome this threshold because their strongly-held and widely-shared interests can be characterised as emotional or intellectual.[47] The point at which such interests morph into a higher-level interest, whether political, ideological, cultural or religious, is rarely entirely clear and attempts to delineate such interests may be artificial.

As Douglas has noted some time ago, standing issues have a profound 'implications whose importance is disproportionate to their frequency.'[48] While standing has been the subject of some judicial comment in subsequent years, this observation continues to have relevance today. The incidence of cases in which matters of standing are addressed in detail is low and, particularly in the context of judicial consideration of standing in constitutional cases, the law continues to be 'complex, draws invidious distinctions, and produces unnecessary uncertainty.'[49]

2.1 High Court consideration of standing in the period 2015 to date.

Issues of standing have arisen or been considered in a number of cases before the High Court in the period 2015 to date.

These cases encompass a variety of legal and factual disputes, including:

- the standing of a person with an interest under a testamentary document to challenge the provisions of a later will;[50]
- the standing of an industrial organisation to apply for orders on the basis that it was entitled to represent the industrial interests of persons within the meaning of s 540(6)(b)(ii) of the *Fair Work Act 2009* (Cth);[51]
- the standing of persons to challenge the constitutional validity of state legislation under which they were charged with certain offences after the charges were withdrawn'[52]
- the standing of various plaintiffs to bring an action for declarations, injunctions and writs of prohibition arising out of the proposed carrying out of a plebiscite in connection with the issue of gay marriage;[53]
- the standing of a plaintiff to challenge, inter alia, the legality of various administrative and other arrangements, a Ministerial directive, and a legislative provision purporting to authorise the taking of the plaintiff to Papua New Guinea in connection with the processing of the plaintiff's application for refugee status;[54]

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[46] *ACF v Commonwealth* (1980) 146 CLR 493, 530 (Gibbs J). See, e.g., *Save Surfers Paradise Inc v Gold Coast City Council* [2018] QSC 181.

[47] Matthew Groves, 'The Evolution and Reform of Standing in Australian Administrative Law' (2016) 44 *Federal Law Review* 167, 172.

[48] Roger Douglas, 'Uses of standing rules 1980-2006' (2006) 14 *Australian Journal of Administrative Law* 22, 35.

[49] Simon Evans, 'Standing to Raise Constitutional Issues Reconsidered' (2010) 22(3) *Bond Law Review* 38. Cf Patrick Keyzer, 'Standing to Raise Constitutional Issues Reconsidered, Considered' (2010) 22(3) *Bond Law Review* 60. See also the Hon Justice Janine Pritchard, 'Standing Requirements in Judicial Review Applications' (2017) 90 AIAL Forum 65, who advocates for 'open' standing.

[50] *Nobarani v Mariconte* (2018) 265 CLR 236 (Kiefel CJ, Gageler, Nettle, Gordon and Edelman JJ).

[51] *Regional Express Holdings Limited v Australian Federation of Air Pilots* (2017) 262 CLR 456 (Kiefel CJ, Keane, Nettle, Gordon and Edelman JJ).

[52] *Brown v Tasmania* (2017) 261 CLR 328 (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

[53] *Wilkie v The Commonwealth*; *Australian Marriage Equality Ltd v Cormann* (2017) 263 CLR 487 (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

[54] *Plaintiff S195/2016 v Minister for Immigration and Border Protection* (2017) 261 CLR 622 (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) 346 ALR 181. As the Court noted, no issue was raised in that case as to the standing of the plaintiff to seek the relief sought, at [13].

- the standing of a plaintiff to challenge the validity of s 74AA of the *Corrections Act 1986* (Vic) on the grounds that it is contrary to Chapter III of the Constitution;[55]
- the standing of two plaintiffs to seek certain relief, including a declaration that a number of provisions of the *Electoral Act 1918* (Cth) are invalid;[56]
- the standing of a number of plaintiffs to seek relief in respect of the alleged invalidity of Parts 3 and 4 of the *Bell Group of Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015* (WA) on the grounds of inconsistency between Commonwealth and State laws;[57]
- whether certain plaintiffs had a sufficient interest in the proceeds of various insurance policies to provide them with standing to seek declaratory relief;[58]
- whether a journalist and her employer, a news organisation, had a 'sufficient interest' to confer standing to challenge the validity of s 79(3) of the *Crimes Act 1914* (Cth), where they had not been charged under that provision, beyond its connection to the validity of a search warrant executed against the journalist's home;[59]
- the standing of a plaintiff to challenge whether the conduct of the Commonwealth or a Minister of the Commonwealth (in securing, funding and participating in the plaintiff's detention on Nauru) was authorised by a valid law of the Commonwealth or by the executive power of the Commonwealth;[60]
- the standing of plaintiffs to seek against the Northern Territory a declaration to the effect that Division 4AA of the *Police Administration Act 1978* (NT) was invalid insofar as it purported to authorise the arrest and detention for up to four hours of persons in relation to an infringement notice offence;[61]
- the standing of local councils to seek declaratory relief as to the obligations of various entities, which were leasing parts of the airport from the Commonwealth, to make ex-gratia payments to the councils in lieu of council rates pursuant to an obligation under provisions of lease.[62]

In some of the cases to which we have referred, the issue of standing was discussed although no issue of standing was legally determined in the proceedings. For example, in *North Australian*

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[55] *Knight v Victoria* (2017) 261 CLR 306 (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
[56] *Murphy v Electoral Commissioner* (2016) 261 CLR 28 (French CJ and Bell J).
[57] *Bell Group N.V. (in liquidation) v Western Australia*; *W.A. Glendinning & Associates Pty Ltd v Western Australia*; *Maranoa Transport Pty Ltd (in liq) v Western Australia* (2016) 260 CLR 500 (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ).
[58] *CGU Insurance Limited v Blakeley* (2016) 259 CLR 339 (French CJ, Kiefel, Bell and Keane J).
[59] *Smethurst v Commissioner of Police* (2020) 94 ALJR 502; 376 ALR 575; [106], [198]. The question was answered in the negative in the joint judgment of Kiefel CJ, Bell and Keane JJ. In dissent, although in agreement with the joint judgment on this point, Gordon J was of the view that the journalist had standing to complain of the act in excess of power and had been 'specially harmed' by the act in excess of power. Accordingly, she was able to obtain a remedy in the form of a mandatory injunction under s 75(v) of the *Constitution* to restore her to the position she would have been in had that act not occurred, namely, an injunction requiring the police to deliver up the data obtained in excess of power under the search warrant [186]-[187]. As noted by Edelman J, also in dissent: 'It was not in dispute that the plaintiffs had standing to challenge the constitutional validity of s 79(3) of the *Crimes Act',* pursuant to which the warrant had been obtained, at [280].
[60] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ).
[61] *North Australian Aboriginal Justice Agency Limited v Northern Territory* (2015) 256 CLR 569 (French CJ, Kiefel, Bell, Gageler and Keane JJ).
[62] *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234. Despite the councils being third parties to the leases the majority (Kiefel CJ, Gageler, Keane, Gordon and Gleeson JJ; Edelman and Steward JJ dissenting) held that the councils had standing to seek the declarations.

Aboriginal Justice Agency Limited v Northern Territory,[63] the defendant did not take issue with the standing of either of the plaintiffs to seek the relief sought, concerning the validity of the Northern Territory legislation under which they were detained by police. Keane J referred to what he described as the 'relatively liberal rules that prevail in Australia as to the standing necessary to challenge the validity of legislation'[64] and contrasted this position with the more restrictive United States approach.[65]

In *Kuczborski* Crennan, Kiefel, Gageler and Kean JJ referred to the observation in *Batemans Bay* that a party has a sufficient special interest where the interest is a 'matter of practical reality… immediate, significant and peculiar to them'[66] and proceeded to note that:

> The established requirements as to standing ensure that the work of the courts remains focused upon the determination of rights, duties, liabilities and obligations as the most concrete and specific expression of the law in its practical operation, rather than the writing of essays of essentially academic interest. To recognise that a person has a sufficient interest to seek the exercise of judicial power where that exercise is apt to affect 'the legal situation of persons subject to the jurisdiction of the court' serves to maintain the ordinary characteristics of judicial power.
>
> It may be accepted that there is a general public interest that governments act in accordance with the law enforced by the courts; but to conclude that the plaintiff's sense of grievance at the injustice of these laws is not an interest which suffices to give him standing to challenge their validity is not to undermine this aspect of the rule of law.[67]

A number of cases are discussed in further detail below, with particular reference to the issue of standing to raise constitutional issues.

2.2 Recent cases in which standing issues have arisen

Issues of standing continue to loom large in a number of private disputes and in a variety of environmental and public interest cases. An electronic search of Australian case law determined in the period 2020 to February 2024 using the term 'locus standi'[68] revealed 69 reported cases. These included cases dealing with:

- injunction proceedings by an environmental organisation to prevent forestry operations until habitat searches were conducted[69]
- judicial review proceedings arising out of opposition to above ground electricity transmission lines[70]
- a challenge to the standing of the plaintiffs to challenge the validity of a provision of the *Crimes Act 1900* (NSW)[71]

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[63] *North Australian Aboriginal Justice Agency Limited v Northern Territory* (2015) 256 CLR 569.
[64] At [150], citing *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493, 530; [1980] HCA 53; *Croome v Tasmania* (1997) 191 CLR 119, 127, 137; [1997] HCA 5.
[65] At [150], referring to: *United States v Students Challenging Regulatory Agency Procedures* 412 US 669 at 686-687 (1973); *Valley Forge Christian College v Americans United for Separation of Church and State Inc* 454 US 464 at 472-473 (1982); *Lujan v Defenders of Wildlife* 504 US 555 at 560-561 (1992); *Steel Co v Citizens for a Better Environment* 523 US 83 (1998); and Cass Sunstein, 'What's Standing after *Lujan*? Of Citizen Suits, "Injuries", and Article III' (1992) 91 *Michigan Law Review* 163.
[66] *Batemans Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at [52].
[67] *Kuczborski v Queensland,* (2014) 254 CLR 51 at [184]-[185].
[68] Using the search engine BarNet *Jade*.
[69] *South East Forest Rescue Incorporated INC9894030 v Forestry Corporation of New South Wales* [2024] NSWLEC 7.
[70] *Moorabool and Central Highlands Power Alliance v Minister for Energy and Resource* [2023] VSC 774.
[71] *Kvelde v State of New South Wales* [2023] NSWSC 1560.

- judicial review proceedings arising out of a challenge to the approval of operational forestry plans[72]
- an appeal arising out of proceedings challenging proposed arrangements in respect of a referendum under s 128 of the Australian *Constitution*[73]
- proceedings by an environmental organisation for injunctive and declaratory relief arising out of forestry operations[74]
- a challenge to directions requiring vaccinations against the Covid-19 virus[75]
- an application seeking the cancellation or suspension of the registration on three COVID-19 vaccines[76]
- proceedings by a landowner concerned at construction of a nearby highway interchange[77]
- residential tenancy disputes where the standing of a real estate agent arose out of the terms of a lease[78]
- whether bankrupts had standing to commence or defend proceedings, seek review of decisions or lodge an appeal[79]
- whether a declared vexatious litigant could commence proceedings[80]
- whether a plaintiff had standing to challenge alleged unlawful logging operations[81]
- whether a plaintiff had standing to challenge public health orders made as a result of the COVID-19 pandemic[82]
- class action proceedings (in which it was alleged that 'material climate change information' had not been disclosed in connection with the issuing of Government Bonds) where certain claims were struck out on the basis that the applicant had no standing to bring them[83]
- a security for costs application in proceedings in which a party claimed entitlement to sue, as trustee of a unit trust, for recovery of trust assets[84]
- proceedings for the winding up of a company in which an issue arose as to the standing of a creditor[85]
- proceedings arising out of objection to a planning permit[86]
- whether a personal injury plaintiff had standing to seek re-instatement of a company in aid of his common law claim[87]
- the standing of shareholders to enforce the duties of company directors[88]

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[72] *North East Forest Alliance Incorporated (Inc1601738) v Forestry Corporation of NSW* [2023] NSWLEC 124.
[73] *Babet v Electoral Commissioner* [2023] FCAFC 164.
[74] *Warburton Environment Inc v VicForests (No 5)* [2022] VSC 633.
[75] *Beale v Chief Health Officer* [2022] QCA 188.
[76] *Australian Vaccination-Risks Network Incorporated v Secretary, Department of Health* [2022] FCA 320.
[77] *Casimaty v Hazell Bros Group Pty Ltd (No 2)* [2022] TASSC 9.
[78] *Donnelly v Ray White Cairns Beaches* [2022] QCATA 30; *De Bruyne v Ray White Waterford* [2020] QCATA 113; *L J Hooker Stafford v Roberts* [2020] QCATA 94.
[79] *Singh v Secretary, Department of Communities and Justice* [2022] NSWSC 78*; Tjiong v Tjiong* [2021] NSWSC 1389; *Westpac v Hines* [2020] VSC 715; *Hanna v Deputy Commissioner of Taxation* [2020] FCA 1021; *Willi v Interprac Financial Planning* [2020] QCATA 104.
[80] *Clarke v Nursing and Midwifery Council of New South Wales* [2022] NSWSC 15.
[81] *Binginwarri Friends of the Jack and Albert River Catchment Area Inc v VicForests* [2021] VSC 824; *VicForests v Kinglake Friends of the Forest* [2021] 395 ALR 367; *Kinglake Friends of the Forest Inc. v VicForests (No 4)* [2021] VSC 70; *Warburton Environment Inc v VicForests (No 2)* [2020] VSC 738.
[82] *Can v State of New South Wales* [2021] NSWSC 1480; 363 FLR 111; *Loielo v Giles* (2020) 63 VR 1.
[83] *O'Donnell v Commonwealth of Australia* [2021] FCA 1223.
[84] *Mahommed v Greenhills Securities Pty Ltd* [2021] NSWSC 1178.
[85] *Re Optimal Mining Ltd* [2021] VSC 635.
[86] *Hughes v Ballarat CC* [2021] VCAT 802.
[87] *In the Matter of Richards Contracting Co Management Pty Ltd* (2021)104 NSWLR 385; 391 ALR 122.
[88] *In the matter of Pacific Springs Pty Ltd* [2021] NSWSC 66.

- whether a bankrupt facing criminal charges relating to a tax debt has standing to seek an extension of time within which to lodge an application for review of a taxation decision[89]
- whether an applicant had standing to challenge the appointment of a tutor[90]
- whether municipal councils had standing to seek a declaration in respect of the interpretation of leases of airports to which they were not a party[91]
- whether a shareholder had standing to seek orders for production of the register of shares[92]
- whether an applicant had standing to bring a proceeding seeking declaratory and injunctive relief to restrain Parks Victoria from implementing a decision to commence shooting feral horses in the Alpine National Park[93]
- whether particular persons had standing in connection with insolvency and bankruptcy proceedings and in applications for probate.

In environmental and public interest cases doctrinal principles limiting access to the courts to those considered to have a legally recognised sufficient interest, either at common law or pursuant to statute, continue to preclude the judicial resolution of important issues.

As noted recently by Perry J, the question of whether a sufficient interest to establish standing has been established does not involve a question of *discretion* but it does involve a question of *degree*.[94]

The question of whether there are different standing requirements in *public* and *private* law contexts was discussed by members of the High Court in *Hobart International* and further examined by Perry J in *Australian Vaccination-Risks Network Incorporated*. As Perry J notes:

Different approaches to this issue emerge from a consideration of the judgments in *Hobart International.* The sharp dichotomy for which the applicants here contend is not reflected in the reasons of Kiefel, Keane and Gordon JJ, who held that:

> 33. The requirement that an applicant for declaratory relief have a "sufficient" or "real" interest in obtaining the relief has work to do in both public and private law contexts. "However, the requirement applies differently to different sorts of controversies" [quoting *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 5th ed (2015) at 626 [19-175]].

Edelman and Steward JJ stated that they agreed with Kiefel CJ, Keane and Gordon JJ as to the relevant principles, albeit disagreeing as to their application in the appeal, but held that there is a fundamental divide between standing in the context of public and private rights (at [83]-[99]).

Gageler and Gleeson JJ, however, rejected any public/private law divide, holding that the High Court had not followed developments in the United Kingdom introducing a substantive and procedural distinction between standing in the private law contexts and standing in public law contexts (at [67]). In their Honours' view, no such bright line distinction could ever be drawn (ibid). Rather, after discussing the language used in the cases to express the interest required to establish standing to seek a declaration or injunction (at [62]-[64]), Gageler and Gleeson JJ held that:

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[89] *Pitman and Commissioner of Taxation (Taxation)* [2020] AATA 5308.

[90] *Daniel Henry Resler Walton by his Tutor John Mann v Terence George Hartmann as Executor of the Estate of Wanda Resler* [2020] NSWSC 1628.

[91] *Clarence City Council v Commonwealth of Australia* (2020) 280 FCR 265; *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234.

[92] *Hongkong Xinhe International Investment Company Limited v Bullseye Mining Limited* [2020] WASC 276.

[93] *Philip Maguire v Parks Victoria* (2020) 245 LGERA 141; *Maguire v Parks Victoria* [2020] VSC 303.

[94] *Australian Vaccination-Risks Network Incorporated v Secretary, Department of Health* [2022] FCA 320 [70] citing *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234 at [66] (Gageler and Gleeson JJ) and referring to *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 75 (Brennan J), quoting *Baker v Carr* (1962) 369 US 186 at 204; *Kuczborski v Queensland* (2014) 254 CLR 51 at 109 [184]-[186] (Crennan, Kiefel, Gageler and Keane JJ).

> 65. Though the expression of standing has been variously in terms of a "sufficient interest", a "sufficient material interest", a "special interest" or a "real interest", the conception of standing developed through that body of case law has been consistent. That conception of standing has involved recognition that a person who does not claim to have a legal right or equitable interest to be vindicated by a declaration or other order that would resolve a controversy about a right or obligation may yet have a material interest in seeking the order. In this context, an interest will be "material" if the person "***is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if [the order is made] or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if [the order is not made***]" [quoting *ACF* at 530]. Depending on the totality of the circumstances, the material interest that the person has in seeking the order may be sufficient to justify a court entertaining the proceeding in which the order is sought.
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> 66. In *Robinson* [(1977) 138 CLR 283 at 327-328], Mason J observed that "the cases are infinitely various" and that "what is a sufficient interest in one case may be less than sufficient in another". In *Onus* [(1981) 149 CLR 27 at 75, quoting *Baker v Carr* (1962) 369 US 186 at 204], Brennan J added to that observation that the sufficiency of the interest of a person in a particular case "must be a question of degree, but not a question of discretion" and that in answering that question of degree it is appropriate to consider both whether the interest is "sufficient to assure that 'concrete adverseness which sharpens the presentation of issues' falling for determination" and whether the interest is "so distinctive" as to avoid a multiplicity of proceedings. (Emphasis added.)[95]

2.3 The interconnected requirements of a matter and standing

In constitutional law cases, the question of standing is largely submerged within the question of whether or not there is a 'matter' for the determination of the court.[96]

As noted by Evans in 2010,[97] the decision of the High Court in *Pape*[98] was the latest reminder in a long sequence that litigants seeking to challenge governmental action as unconstitutional must demonstrate that they have the requisite '*special interest*' in the subject matter of the proceedings in order to have standing.[99]

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[95] *Australian Vaccination-Risks Network Incorporated v Secretary, Department of Health* [2022] FCA 320 at [77]-[78].

[96] See Simon Evans and Stephen Donoghue, 'Standing to Raise Constitutional Issues in Australia' in Gabriël Moens and Rodolphe Biffot (eds), *The Convergence of Legal Systems in the 21st Century: An Australian Approach* (The Australian Institute of Foreign and Comparative Law and contributors, 2002) 53. The approach of the High Court to questions of standing in constitutional cases is set out in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1.

[97] Simon Evans, 'Standing to Raise Constitutional Issues Reconsidered' (2010) 22(3) *Bond Law Review* 38.

[98] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1.

[99] Evans notes that a *special interest* is not invariably required given that (a) it is not necessary in applications for some remedies (e.g., prohibition and habeas corpus); (b) it is only notionally required when constitutional litigation is instituted by government and (c) it is often conceded or assumed (note 6, 40). In general terms, a sufficient special interest will be required for the intervention of equity in public law cases but this requirement is flexible, see *Batemans Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 256, 265-6 and *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552, 558. One recent application of the 'special interest' requirement is *Maguire v Parks Victoria* [2020] VSCA 172. The plaintiff did not have standing to seek declaratory and injunctive relief to restrain the implementation of a decision to commence a cull of brumbies, or feral horses, by the defendant on land adjoining the plaintiff's land. His proximity to the land, and his claim that he would

One potentially confounding issue, which is discussed in some detail by Evans, is the distinction between standing requirements and the requirement that there be a 'matter' (in the constitutional sense) for judicial determination in the federal jurisdiction.[100]

In a number of instances the High Court has indicated that in the federal jurisdiction, questions of 'standing', when they arise, are subsumed within the constitutional requirement of a 'matter'.[101] As Evans notes, what this means is not necessarily clear.[102]

In *Kuczborski v Queensland,*[103] a member of a motorcycle club attempted to bring an action seeking a declaration of invalidity of the *Vicious Lawless Association Disestablishment Act 2013* (Qld) and provisions of the *Criminal Code 1899* (Qld)*, Bail Act 1980* (Qld) and *Liquor Act 1992* (Qld) as contrary to Chapter III of the Constitution. The package of laws was 'directed at disrupting the operations of such clubs'.[104] The plaintiff had not been charged with an offence which would have led to the application of that Act and various statutory provisions. Accordingly, the defendant challenged his standing to bring the action.

French CJ stated:

> The question whether there is a matter grounding federal jurisdiction to entertain a claim for relief is linked to the question of standing to claim that relief. They are concepts with distinct origins and histories. Standing is a question that arises in federal and non-federal jurisdictions. Both concepts are concerned to "mark out the boundaries of judicial power". Their attempted severance has been described as "conceptually awkward, if not impossible." [105]

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participate in the public consultation process did not provide him with the requisite special interest under the statutory scheme [121]. The flexibility of the principle of a requirement for a 'special interest' was restated in another context in the case of *Taylor v Attorney-General (Cth)* (2019) 372 ALR 581, [104]-[105]. In *Loielo v Giles (No 2)* [2020] VSC 722, a restaurateur was held to have standing to challenge a curfew imposed as a measure to prevent the spread of the COVID -19 pandemic. The defendant had challenged the plaintiffs standing following revocation of the curfew as, at that stage, the plaintiff was seeking a declaration in respect of an alleged violation of a public right and could not establish a special interest. The plaintiff framed her action in terms of a violation of her private rights and human rights but was unsuccessful on the merits. The plaintiff had standing as a result of the substantial adverse impact of the curfew on her business. Given the defendant had accepted the standing of the plaintiff while the curfew was in place, its revocation was relevant to the discretion of the court to grant the remedy, not to deny her standing, at [141]-[145].

[100] See *CGU Insurance Limited v Blakeley* (2016) 259 CLR 339, [27], [30] (French CJ, Kiefel, Bell and Keane JJ), citing Henry Burmester, 'Limitations on Federal Adjudication' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 227, 232, for the proposition that the requirement for a 'matter' comprises two elements, subject matter jurisdiction and an adversarial dispute, or justiciable controversy,

[101] See, e.g., *ACF v Commonwealth* (1980) 146 CLR 493, 550-1 (Mason J); *Batemans Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 262 [37] (Gaudron, Gummow and Kirby JJ; *Croome v Tasmania* (1997) 191 CLR 119, 132-3 (Gaudron, McHugh and Gummow JJ); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 35 [50]-[51] (French CJ), 68 [152] (Gummow, Crennan and Bell JJ), 99 [273] (Hayne and Kiefel JJ) cited by Evans at 56, notes 98-101. Cf the view of French CJ in *Kuczborski v Queensland* (2014) 254 CLR 51, [5].

[102] Simon Evans, 'Standing to Raise Constitutional Issues Reconsidered' (2010) 22(3) *Bond Law Review* 38, 56. Evans elaborates on this in some detail at 57-9. See also *Meagher's Gummow & Lehane's Equity: Doctrines & Remedies* (LexisNexis Butterworths, 5th ed, 2015), 627, cited in *Clarence City Council v Commonwealth of Australia* (2020) 382 ALR 273, [74].

[103] (2014) 254 CLR 51.

[104] *Kuczborski v Queensland* (2014) 254 CLR 51, [1].

[105] Ibid, [5] (citations omitted).

While the lack of a 'matter' for the purposes of Ch III 'would render the question of the plaintiff's standing moot', the existence of a matter may not signify that the plaintiff has standing.[106]

In *Wilkie* and *Australian Marriage Equality,*[107] the defendants in each of the proceedings contested the standing of each of the plaintiffs to seek the relief claimed. As all members of the Court noted in a joint judgment at [57]:

> The contest as to standing gave rise to a number of significant issues. Not least of them was the nature and scope of the constitutional writ of prohibition[108], the sufficiency of the interest of a Senator or Member of the House of Representatives in the performance of his or her parliamentary responsibilities to seek declaratory and injunctive relief to prevent an alleged contravention by the Government of s 83 of the *Constitution*[109], and the relevance to standing to seek the relief claimed of conceptions of public interest.[110]

Although referring to earlier statements of the Court which have linked the need for 'standing' to the need for a 'matter' founding jurisdiction[111] (such as that of French CJ above), it was noted that the Court has not in practice insisted on determining standing as a threshold issue, but has treated itself as having discretion in an appropriate case to proceed immediately to an examination of the merits.[112] None of the parties having contended that the approach of the majority in *Combet* was wrong or not available in the present matter, the Court concluded that the grounds relied upon were 'demonstrably without substance' and thus rejected the claims for relief without determining the standing issues.[113]

As a matter of procedure, the stage at which the court will make a finding with regard to the standing of a plaintiff which has been subject to challenge by a defendant or respondent will depend upon the circumstances of the case, as 'it is often not possible or is undesirable to determine standing as a preliminary issue'.[114] This is due to a concern that, at a preliminary stage, relevant contextual material may be insufficiently developed to allow a conclusive opinion to be formed on the matter.

Given that Australian courts usually discuss issues of standing in terms suggesting that they are quarantined from any view of the merits, however, there is, at least in theory, no benefit to allowing proceedings to play out fully before pronouncing on the standing of the plaintiff – and indeed, there is a significant potential disadvantage in that any costs incurred in agitating the merits will essentially have been wasted if standing is ultimately denied. In this connection, it is interesting to note the review of case law from 1980 to 2006 by Douglas, who observed that standing has been raised and

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[106] Ibid, [5].

[107] *Wilkie v The Commonwealth*; *Australian Marriage Equality Ltd v Cormann* (2017) 263 CLR 487.

[108] Cf *R v Wright; Ex parte Waterside Workers' Federation of Australia* (1955) 93 CLR 528 at 541-542; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 101-104 [43]-[45], 140-142 [162]-[166].

[109] Cf *Combet v The Commonwealth* (2005) 224 CLR 494 at 556-557 [97], 620 [308]-[309].

[110] Cf *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 267 [50].

[111] *Wilkie v The Commonwealth*; *Australian Marriage Equality Ltd v Cormann* (2017) 263 CLR 487, [57] citing *Croome v Tasmania* (1997) 191 CLR 119 at 126-127; [1997] HCA 5; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 35 [50]-[51], 68 [152], 98-99 [271]-[273] as examples.

[112] *Wilkie v The Commonwealth*; *Australian Marriage Equality Ltd v Cormann* (2017) 263 CLR 487, [57], citing *Combet v The Commonwealth* (2005) 224 CLR 494. In *Combet*, the Court resolved that there was no basis for the relief sought and thus felt it unnecessary to determine whether either of the plaintiffs had standing. See also *Kuczborski v Queensland* (2014) 254 CLR 51, [7] (French CJ), citing Gibbs J in *Robinson v Western Australian Museum* (1977) 138 CLR 283 at 302-3.

[113] *Wilkie v The Commonwealth*; *Australian Marriage Equality Ltd v Cormann* (2017) 263 CLR 487, [58]. The Court also noted the 'inadequacy' of the arguments put on standing as a further ground for the conclusion that it was inappropriate to address standing.

[114] *Loielo v Giles* [2020] VSC 723, [10].

determined preliminarily in the majority of cases in which it has constituted a live issue, but that where it is dealt with at the stage of final hearing, it is 'almost invariably resolved in favour of the plaintiff'.[115]

In *Plaintiff M68/2015 v Minister for Immigration and Border Protection*,[116] the 'central question' identified by the plaintiff was said to be whether the Commonwealth's involvement in her detention on Nauru was authorised by a valid Commonwealth statute.[117] The Commonwealth parties contended that she lacked standing to challenge the allegedly unlawful conduct of the Commonwealth parties in enforcing and procuring her detention on Nauru (including by entering into contracts requiring or causing constraints on her liberty) because the declaration claimed related to past conduct and would allegedly produce no foreseeable consequence for her. Thus, her standing to seek the relief sought was considered in each of the five judgments of members of the Court.

In their joint judgment, French CJ, Kiefel and Nettle JJ noted, without elaboration, that the question of 'standing' cannot be detached from the notion of a 'matter' and is related to the relief claimed.[118] They proceeded to note that:

> … the declaration sought by the plaintiff would resolve the question as to the lawfulness of the Commonwealth's conduct with respect to the plaintiff's detention and whether such conduct was authorised by Commonwealth law. This is not a hypothetical question. It will determine the question whether the Commonwealth is at liberty to repeat that conduct if things change on Nauru and it is proposed, once again, to detain the plaintiff at the Centre …[119]

According to Bell J:[120]

> … the declaratory relief that the plaintiff claims does not raise some abstract or hypothetical question. It involves the determination of a legal controversy in respect of which the plaintiff has a "real interest"[121]. The declaration sought cannot be said to have no foreseeable consequences given that Nauru may choose to revert to a scheme under which asylum seekers taken to it by the Commonwealth are detained.

According to Gageler J, the fact that the plaintiff had been 'affected' personally by purportedly unconstitutional conduct gave her a 'sufficient interest' to give her standing to seek the declaration sought at the commencement of the proceeding.[122] The change in circumstances, whereby it was announced that persons would no longer be held in detention at a Regional Processing Centre on

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[115] Roger Douglas, 'Uses of Standing Rules 1980-2006' (2006) 14 *Australian Journal of Administrative Law* 22, 34.

[116] (2016) 257 CLR 42 (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ).

[117] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 [29] (French CJ, Kiefel and Nettle JJ).

[118] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, [22] citing *Abebe v The Commonwealth* (1999) 197 CLR 510, 528 [32*]; Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, 637 [122].

[119] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, [23] citing *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 581-582.

[120] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, [64].

[121] Citing *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 582 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319, 359 [103] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 355-6 [46]-[47] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[122] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, [112], citing *Toowoomba Foundry Pty Ltd v The Commonwealth* (1945) 71 CLR 545 at 570; quoted in Croome v Tasmania (1997) 191 CLR 119, 126, 137.

Nauru, did not either deprive her of standing to continue to seek the relief sought or render such relief moot.

Keane J reached a similar conclusion.[123] As he noted:

> A party who has been detained in custody has standing to question the lawfulness of that detention even though that party has not chosen to pursue a claim for damages for false imprisonment. The interference with the liberty of that person is sufficient to confer standing to seek a declaration of the legal position from a court even though no other legal consequences are said to attend the case.[124] And even though it may be unlikely, as a practical matter, that the arrangements under which the detention was effected will be applied in the future, it is difficult not to be "impressed with the view that really what is at issue is whether what has been done can be repeated."[125]

Although Keane J was of the view that the plaintiff had standing to seek a determination of the lawfulness of any restriction on her liberty procured or funded by the Commonwealth, in his view it was not necessary to determine whether the plaintiff had standing to challenge the validity of the Commonwealth's contractual arrangements with Transfield or the validity of Nauruan laws which were said to be contrary to the *Constitution* of Nauru.[126]

Gordon J also agreed that the plaintiff had standing to challenge the lawfulness of the Commonwealth's past conduct.[127] The declaratory relief was directed at a live legal question as to whether her detention in Nauru was unlawful under Australian law.

A discussion by the High Court of the interrelated questions of standing and 'matter' under Chapter III of the *Constitution* is contained in the decision in *Hobart International*.[128]

According to Gageler and Gleeson JJ:

> … The central conception of a matter is of a justiciable controversy between defined persons or classes of persons about an existing legal right or legal obligation. The controversy is justiciable if it is capable of being resolved in the exercise of judicial power by an order of a court which, if made, would operate to put an end to the question in controversy by the creation of "a new charter by reference to which that question is in future to be decided as between those persons or classes of persons" [quoting *R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374]. Conversely, a controversy between defined persons or classes of persons about an existing legal right or legal obligation which is not capable of being resolved in the exercise of judicial power by an order of the court is not justiciable and is not a matter.
>
> That was the point made be Gleeson CJ and McHugh J when they said in *Abebe v Commonwealth* [[1999] HCA 14; (1999) 197 CLR 510 at 527]:
>
> A "matter" cannot exist in the abstract. If there is no legal remedy for a "wrong", there can be no "matter". A legally enforceable remedy is as essential to the existence of a "matter" as the right, duty or liability which gives rise to the remedy. Without the right to bring a curial proceeding, there can be no matter.
>
> … the justiciability of a controversy between defined persons or classes of persons about the content of an existing legal right or obligation depends on: (1) the power of a court to make an order that would operate to resolve the controversy between those persons; and (2) the

[123] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, [235].
[124] Citing *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 581-582, 596-597.
[125] Citing *Wragg v State of New South Wales* (1953) 88 CLR 353, 371.
[126] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, [236].
[127] Ibid, [349].
[128] *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234.

> right of one or more of those persons to seek that order from that court. Standing, in the sense of a right to seek from a court an order that would operate to resolve the controversy, is in that way inseparable from justiciability and, therefore, is intrinsic to the existence of the matter without which the federal jurisdiction of the court to make the order cannot exist. That is what has been meant when it has often been said that standing is "subsumed within the constitutional requirement of a matter".[129]

As Perry J has noted recently in *Australian Vaccination-Risks Network* (AVRN) [130] what is required to establish standing will vary according to the relief sought. Thus, although different considerations may arise in relation to whether the relief sought is certiorari, mandamus or declaratory relief, in that case none of the parties contended that there was any difference in what the applicant had to establish to have standing in respect of each of the types of relief sought.

3. Climate change litigation

In recent years, there has been a proliferation of litigation and forensic focus on human rights in the context of climate change.[131] This has been stimulated in part by the remarkable success of the *Urgenda* litigation in the Netherlands, where the Dutch Government was found by Dutch courts to owe a duty of care to limit carbon emissions. Contentions that the lack of action was non justiciable and that the local contribution to climate change was *de minimus* were rejected.[132]

Litigious enthusiasm by environmental and climate change activists has, however, been diminished by the outcome of a number of other cases, including the (majority) decision of the United States Court of Appeals for the Ninth Circuit in *Juliana v the United States*[133] that the claims in that case[134] against the United States President and various federal agencies were not justiciable.[135]The plaintiffs

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[129] At [47]-[49] (some footnotes omitted).

[130] *Australian Vaccination-Risks Network Incorporated v Secretary, Department of Health* [2022] FCA 320 at [72] citing *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234 (Kiefel CJ, Keane and Gordon JJ) at [32] (referring with approval in the footnote to *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 at 511).

[131] The 2020 *Global Climate Litigation Report* by the United Nations Environment Programme describes climate change litigation as ''cases that raise material issues of law or fact relating to climate change mitigation, adaptation, or the science of climate change': *Global Climate Litigation Report*: 2020 Status Review, available at: https://www.unep.org/resources/report/global-climate-litigation-report-2020-status-review. See also: Jacqueline Peel and Hari M Osofsky, 'Climate Change Litigation' (2020) 16 *Annual Review of Law and Social Science* 21, 23.

[132][132] *Urgenda Foundation v Netherlands (Ministry of Infrastructure and the Environment*), Hague District Court, Chamber for Commercial Affairs, No C/09/456689 HA ZA 131396 (June 24, 2015), [4.65]. English translation available at <http://www.urgenda.nl/documents/VerdictDistrictCourt-UrgendavStaat-24.06.2015.pdf> Relevant documents for the case are available at <http://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/>. On 20 December 2019, the Supreme Court of the Netherlands upheld two previous decisions by lower courts, requiring the State of the Netherlands to reduce its greenhouse gas emissions by at least 25% compared with 1990 levels by the end of 2020. The Supreme Court held that Dutch courts do have power to enforce compliance with international treaties against a national government and upheld the 2018 Court of Appeal decision which found that the state has a duty of care to protect its citizens from climate change in accordance with its obligations under Articles 2 and 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR). *State of the Netherlands v. Urgenda Foundation,* ECLI:NL:HR:2019:2007, Supreme Court of the Netherlands. (Dec. 20, 2019).

[133] Case No 18-36082, (9th Cir. 2020).

[134]The plaintiffs alleged multiple violations by the Federal Government, including violations of the plaintiffs' substantive rights under the Due Process Clause and of equal protection, both under the Fifth Amendment; the plaintiffs' rights under the Ninth Amendment; and the Public Trust Doctrine.

[135] See generally, Kevin Gaynor et al., 'Challenges Plaintiffs Face in Litigating Federal Common-Law Climate Change Claims' (2010) 40 *Environmental Law Reporter* 10845, 10845.

were said to lack standing because they were unable to demonstrate that their alleged harms from climate change were redressable by the Article III courts. The Court held that it lacked the power to order, supervise or implement the requested remedial plan to phase out fossil fuel emissions and to reduce excessive atmospheric carbon dioxide.

in *West Virginia v the EPA* the US Supreme Court limited the authority of the EPA to regulate CO2 emissions in the United States from existing coal- and natural-gas-fired plants carbon emissions.

More recently, the United States Supreme Court declined to consider five cases[136] in which fossil fuel companies contended that climate change related tort claims should be heard in federal rather than state courts where they would contend that federal common law would pre-empt the state law claims and thus terminate the proceedings.[137]

In the sphere of climate change litigation, there have been a number of further developments in recent years and a number of climate change cases are presently under active consideration.[138]

In its database on climate change litigation in early 2022 the Sabin Center for Climate Change Law listed 115 Australian cases.[139] Many of these are decisions concerning planning applications. In early 2024, 134 cases were listed, including cases in respect of misleading or deceptive corporate conduct.

The UK based *Grantham Research Institute on Climate Change & the Environment* at the London School of Economics and Political Science maintains a data base on climate change laws of the world and also a data base on climate change litigation. It also produces annual reports on trends in litigation with the 2024 report forthcoming at the time of writing.

To date there have been over 2,340 climate change cases, 1,590 of which have been in the United States. 190 cases have been filed in the last 12 months. The highest number of annual cases to date was in 2021. Such cases have been filed in 51 countries worldwide. In addition, there are 50 cases pending before European courts. A recent New York University study notes that there are presently over 300 cases involving human rights and climate change. At the time of writing there were nine climate change cases before 11 international and regional courts, UN Treaty bodies and the UNFCCC compliance committee.[140]

The *Climate Litigation Network* was established by the *Urgenda Foundation* following its landmark climate change case against the Durch Government in 2015. As Mead has noted, in a number of

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[136] *Suncor Energy, Inc., et al. v. Board of County Commissioners of Boulder City, et al.; BP P.L.C., et al. v. Mayor and City Council of Baltimore; Chevron Corp., et al. v San Mateo County, et al.; Sunoco LP, et al. v. Honolulu, et al.;* and *Shell Oil Products Co., et al. v. Rhode Island.*

[137] For a recent update on developments in climate change litigation in the United States see the January 2024 Update published by the *Sabin Centre for Climate Change Law*: https://climate.law.columbia.edu/news/january-2024-updates-climate-case-charts.

[138] Some of the legal issues arising out of climate change litigation are discussed in several earlier publications co-authored by the author: Peter Cashman and Ross Abbs, 'Liability in Tort for Loss or Damage Arising from Human- Induced Climate Change' in Rosemary Lyster (ed.), *In the Wilds of Climate Law* (Australian Academic Press, 2010), 235-271; Ross Abbs, Peter Cashman and Tim Stephens, 'Australia' in Richard Lord, Silke Goldberg, Lavagna Rajamani and Jutta Brunnee (eds.), *Climate Change Liability: Transnational Law and Practice*, (Cambridge University Press, 2012), 67-111.

[139] Sabin Center Climate Change Litigation Databases, 'Australia' <http://climatecasechart.com/non-us-jurisdiction/australia/>.

[140] These figures are based on the paper by Catherine Higham of the Grantham Research Institute presented at the session on *Law in the Era of Climate Crisis: Unearthing the Legal Challenges*, at the World Bar Conference 2024 in Dublin, 17 May 2024.

cases litigants have challenged the targets or implementation of the overall policy response of governments to climate change.[141]

International climate change cases, some of which relied at least in part on human rights grounds, encompass matters in the following jurisdictions.

- **Ireland**:

Friends of the Irish Environment v Ireland[142] is one of a small number of 'strategic' climate cases, in which the highest national court of a country has found that a government's climate mitigation policies do not comply with the law.

On 31 July 2020, the Supreme Court of Ireland quashed the Government's National Mitigation Plan, the centrepiece of the Irish Government's climate mitigation policy, because the Plan failed to specify the manner in which it was proposed to achieve the 'national transition objective,' as required under the 2015 *Climate Act*. The 'national transition objective' is defined by the 2015 Act as a 'transition to a low carbon, climate resilient, and environmentally sustainable economy' by 2050.

- **The United Kingdom**:

On 18 July 2022 the English High Court ruled that the UK Government's Net Zero Strategy (NZS) is unlawful in part, requiring the UK Government to produce a new NZS by March 2023 detailing how a shortfall of 5% in required emissions reductions will be met.

- **European Court of Human Rights**:

In *Verein Klimaseniorinnen Schweiz & Ors v Switzerland* in order to meet its obligations under ECHR, the European Court of Human Rights held that State must 'adopt, and effectively apply in practice' a regulatory framework to tackle climate change, with rigorous, science-based emissions reduction targets and plans for 2030 and beyond. The Court acknowledged that States have the responsibility to combat climate change to protect human rights. The Court confirmed a violation of the right to respect for private and family life of Swiss elderly women because Switzerland failed to implement sufficient measures to combat climate change.[143]

- **India:**

In *MK Ranjitsinh et al. v Union of India et al*.,[144] the jurisdiction of the Supreme Court of India was invoked for the purpose of protecting the great Indian bustard and the lesser florican, both of which are on the verge of extinction. The Court held that the people have a right to be free from the adverse effects of climate change within the ambit of fundamental rights. Articles 14 and 21 of the *Constitution of India* guarantee the fundamental rights to equality and life respectively. The right to a clean environment has earlier been recognised as a fundamental right within the ambit of the right to life by the Court in a plethora of decisions.

The two critically endangered bird species are on the International Union for Conservation of Nature (IUCN) Red List. Both are scheduled species listed under Part III of Schedule I of the *Wild Life (Protection) Act*, *1972*. These vulnerable species face several challenges because of pollution, climate change, predators and invasive species. The Court also partly attributed the decline of the species'

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[141] Paper by Sarah Mead, Co-Director, Climate Litigation Network, Urgenda, presented at the session on *Law in the Era of Climate Crisis: Unearthing the Legal Challenges*, at the World Bar Conference 2024 in Dublin, 17 May 2024.

[142] [2020] IESC 49.

[143] For a summary see: https://ennhri.org/news-and-blog/the-grand-chamber-of-the-european-court-of-human-rights-issues-groundbreaking-judgment-on-climate-change-and-human-rights/.

[143] See https://www.downtoearth.org.in/news/governance/analysis-what-does-the-new-supreme-court-judgment-mean-for-climate-action-in-india--95462.

[144] 2024 INSC 280.

population to overhead transmission lines. In an earlier decision in April 2021, restrictions were imposed on the setting up of overhead transmission lines in a large area of territory of about 99,000 square kilometres.

The Court reviewed in detail the international and domestic obligations entered into by the Government of India to reduce climate change, including constitutional provisions said not to be justiciable. According to the Court:

> The right to equality under Article 14 and the right to life under Article 21 must be appreciated in the context of the decisions of this Court, the actions and commitments of the state on the national and international level, and scientific consensus on climate change and its adverse effects. From these, it emerges that there is a right to be free from the adverse effects of climate change. [27]

The Court proceeded to consider the interconnection between climate change and various human rights.

Reference was made to the decisions of other courts worldwide on climate change 'not because they have precedential value in the adjudication of this case but to highlight global trends in climate change litigation and to assess the manner in which courts have understood their own role in such litigation.' [45]

On the facts of the case before it the Court noted that:

> Unlike the conventional notion of sustainable development, which often pits economic growth against environmental conservation, the dilemma here involves a nuanced interplay between safeguarding biodiversity and mitigating the impact of climate change. It is not a binary choice between conservation and development but rather a dynamic interplay between protecting a critically endangered species and addressing the pressing global challenge of climate change.\ [53]

The Court was of the view that it must give effect to international instruments which India is party to even if not enacted into domestic law. [57]-[58].

Accepting that the decision on whether to convert the overhead power transmission lines into underground lines is a matter of environmental policy the Court held that it

> must be circumspect in issuing sweeping directions. In view of the implications of the direction issuing a blanket prohibition on overhead transmission lines, we are of the view that the [earlier] direction needs to be recalled and it will be appropriate if an expert committee is appointed. The committee may balance the need for the preservation of the GIB which is nonnegotiable, on one hand, with the need for sustainable development, especially in the context of meeting the international commitments of the country towards promoting renewable sources of energy, on the other hand. By leveraging scientific expertise and engaging stakeholders in meaningful consultations, this approach ensures that conservation efforts are grounded in evidence and inclusive of diverse perspectives. [61]

Having invited suggestions from the lawyers appearing for the parties, the Court proceeded to constitute an Expert Committee to examine and report on or before 31 July 2024 on various questions which were specified. The Committee was said to be at liberty to recommend to the Court any further measures that are required to enhance the protection of the GIB. [69]

In its evidence before the Court the Indian Government detailed the steps it had taken to date and also undertaken to implement in the future, which are aimed at conserving the critically endangered GIB. The Government and the concerned ministries were directed to implement the various measures identified in the judgment.

Brazil:

On 30 June, 2022, the Supreme Court of Brazil in *PSB et al v Brazil*[145] acknowledged that the *Paris Agreement* was a treaty safeguarding human rights. The declaration was made as part of the court's first climate change ruling, which ordered the Brazilian Government to fully reactivate its national climate fund. According to the Court:

> Treaties on environmental law are a type of human rights treaty and, for that reason, enjoy supranational status. There is therefore no legally valid option to simply omit to combat climate change.

The litigation was commenced against the Brazilian Federal Government by four political parties: the Workers' Party, Socialism and Liberty Party, Brazilian Socialist Party and Sustainability Network. They contended that the climate fund (Fundo Clima) set up in 2009 as part of Brazil's national climate policy plan was inoperative in 2019; annual plans had not been prepared and money had not been disbursed to support projects that mitigate climate change. The court held a public hearing in September 2020, which included scientists, academics and people representing civil society and Indigenous groups.

In the judgment, endorsed by ten out of 11 presiding justices, Justice Luís Roberto Barroso noted the huge increase in deforestation in the Brazilian Amazon in 2021 – a problem that has shown no sign of slowing down. Brazil is the world's fifth largest carbon emitter and deforestation is its largest source of emissions.[146]

- **Germany**:

As noted by the Sabin Centre:

> On November 30, 2023, the Higher Administrative Court Berlin-Brandenburg ruled in *DUH and BUND v. Germany* that the federal government must adopt an immediate action program ('Sofortprogramm') under the *Federal Climate Change Act*.
>
> In *Neubauer, et al. v. Germany* a group of German youth filed a legal challenge to Germany's *Federal Climate Protection Act* ("Bundesklimaschutzgesetz" or "KSG") in the Federal Constitutional Court, arguing that the KSG's target of reducing GHGs by 55% until 2030 from 1990 levels was insufficient. The complainants alleged that the KSG therefore violated their human rights as protected by the Basic Law, Germany's constitution.
>
> The complainants alleged that the KSG's 2030 target did not take into account Germany's and the EU's obligation under the Paris Agreement to limit global temperature rise to 'well below 2 degrees Celsius.' The complainants argued that in order to 'do its part' to achieve the *Paris Agreement* targets, Germany would need to reduce GHGs by 70% from 1990 levels by 2030.
>
> Their claims mainly arose out of alleged violations of the fundamental right to a future consistent with human dignity enshrined in Article 1 (1), and the fundamental right to life and physical integrity enshrined in Article 2 (2) of the Basic Law, both in conjunction with Article 20a of the Basic Law, which binds the political process to protect the natural foundations of life in responsibility for future generations. Complainants argued that by requiring insufficient short and medium term GHG reductions and allowing for the transfer of emission allocations between Germany and other EU Member States, despite the inadequacy of the overall EU emissions reduction target, the KSG allowed for climate impacts that violate their fundamental rights.

[145] *Partido Socialista Brasileiro (PSB), Partido Socialismo e Liberdade (PSOL), Partido dos Trabalhadores (PT) e Rede Sustentabilidade v. União Federal.*
[146] See https://www.climatechangenews.com/2022/07/07/brazilian-court-worlds-first-to-recognise-paris-agreement-as-human-rights-treaty/; https://climatecasechart.com/non-us-case/psb-et-al-v-federal-union/.

> ‘The complainants asked the Federal Constitutional Court to declare that the German legislature violated the Basic Law by only requiring a 55% reduction in GHGs from 1990 levels by 2030 and to declare that the legislature was required to issue new reduction quotas to ensure that Germany's emissions are kept as low as possible, taking into account the principle of proportionality.
>
> Three other groups of claimants filed simultaneous constitutional complaints targeting the government’s climate protection measures: (i) BUND (Friends of the Earth Germany) and the Association of Solar Supporters and Others in November 2018; (ii) Yi Yi Prue and other individuals from Bangladesh and Nepal in January 2020; (iii) Steinmetz and other individual German youths in January 2020. The Constitutional Court decided jointly on these complaints.
>
> On April 29, 2021, the Federal Constitutional Court published its decision striking down parts of the KSG as incompatible with fundamental rights for failing to set sufficient provisions for emission cuts beyond 2030. The Court found that Article 20a of the Basic Law not only obliges the legislature to protect the climate and aim towards achieving climate neutrality, but “also concerns how environmental burdens are spread out between different generations”. For the first time in its jurisprudence, the Court stated that “the fundamental rights - as intertemporal guarantees of freedom - afford protection against the greenhouse gas reduction burdens imposed by Art. 20a of the Basic Law being unilaterally offloaded onto the future”. It further stated that the KSG’s emission provisions in question constituted an “advance interference-like effect”, which possibly violates the complainants’ fundamental rights and thus renders the complaints admissible.
>
> Accepting arguments that the legislature must follow a carbon budget approach to limit warming to well below 2°C and, if possible, to 1.5°C, the Court found that legislature had not proportionally distributed the budget between current and future generations, writing "one generation must not be allowed to consume large portions of the CO2 budget while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom”. The Court also noted that the fact that “no state can resolve the problems of climate change on its own (…) does not invalidate the national obligation to take climate action.”
>
> The Court ordered the legislature to set clear provisions for reduction targets from 2031 onward by the end of 2022. In response to the decision, the federal lawmakers passed a bill approving an adapted KSG that requires, at a minimum, reduction of 65% in GHGs from 1990 levels by 2030. It has been in effect since August 31, 2021.[147]

On 12 September 2022 the Stuttgart Regional Court dismissed parts of climate related claims brought by several individuals, Greenpeace and the German environmental organisation *Deutsche Umwelthilfe* (DUH) against Mercedes-Benz and other manufacturers. Representatives of DUH unsuccessfully sought to prevent Mercedes-Benz from marketing internal combustion engines after 31 October 2030. At the time of writing other claims and appeals were unresolved.

- **Belgium**:

As noted by the climate case database, in *VZW Klimaatzaak v. Kingdom of Belgium & Others*:

> The Court of Appeal of Brussels handed down its decision on November 30, 2023. The Court confirmed the finding of breaches established at first instance (except in the case of the Walloon Region), but in addition, ordered the condemned authorities to reduce their GHG emissions. Unlike the judge at first instance, the Court therefore considers that using its

[147] https://climatecasechart.com/non-us-case/neubauer-et-al-v-germany/.

power of injunction against public authorities does not necessarily infringe the principle of separation of powers, provided that the judge does not take the place of the authorities in choosing the means to remedy violations. Competent Belgian public authorities (the Federal State, Flemish Region and the Brussels-Capital Region) have been ordered to reduce their GHG emissions of 55% compared to the 1990 level by 2030. The grounds of this decision are based on the breach of human rights (articles 2 and 8 of the ECHR) and civil liability rules (articles 1382 and 1383 of the (Former) Civil Code).

However, the Court reformed the first instance judgment towards the Walloon Region by establishing that this authority is already playing its role in the fight against climate change. Therefore, the Court observes that there is no breach of human rights or civil liability rules on the part of the Walloon Region. The Court suspended its ruling on the question of the penalty payment and the production of the GHG emissions reports, depending on the official figures to be produced for the period 2020-2024 by the convicted authorities. The parties have 3 months to lodge a final recourse with the Court of Cassation.[148]

As also noted by other authors:

> The binding reduction targets for EU Member States are pivotal in establishing the 55% reduction target for the Belgian governments. As such, the judgment shows how increasingly binding climate legislation, against the backdrop of the increasing human rights and environmental impacts of climate change, will increasingly provide new grounds for climate litigation in the years to come. The question remains whether a reasoning similar to the one developed in the Court's judgment could be developed to impose a fixed emissions reduction goal on private actors.[149]

- **Netherlands**:

In *Milieudefensie et al. v. Royal Dutch Shell plc*., at issue was whether a private company violated a duty of care and human rights obligations by failing to take adequate action to curb contributions to climate change.

On May 26, 2021, the District Court of The Hague handed down a judgment in collective action proceedings initiated by several non-governmental organizations against Royal Dutch Shell plc. The NGOs claimed that Shell had to reduce its overall CO2 emissions by at least 45% from 2019 levels, by the end of 2030 (the Target Reduction). The Court ruled in favour of the NGOs and ordered Shell to reach the Target Reduction . This is said to be the first time that a court ordered a company to reduce its CO2 emissions in line with the climate goals included in the Paris Agreement.[150] At the time of writing the decision was under appeal with the likelihood of a further appeal to the Dutch Supreme Court.

In December 2019, the Supreme Court of the Netherlands ruled that the Netherlands has a positive obligation under the ECHR to reduce its emissions by at least 25% by the end of 2020, compared to 1990 levels.

- **Colombia**:

In April 2018, the Supreme Court of Colombia ordered the formulation and implementation of action plans to address deforestation in the Amazon based on the links between fundamental rights and

[148] https://climatecasechart.com/non-us-case/vzw-klimaatzaak-v-kingdom-of-belgium-et-al/.
[149] https://www.nautadutilh.com/en/insights/esg-matters-the-belgian-climate-case-klimaatzaak/#:~:text=The%20judgment%3A%20a%20new%20development%20in%20climate%20litigation&text=As%20a%20relief%2C%20the%20Court,by%202030%20compared%20with%201990.
[150] See https://www.nortonrosefulbright.com/en/knowledge/publications/eb28cbe1/dutch-court-orders-shell-to-reduce-co2-emissions-in-collective-action-proceedings.

the environment; intergenerational equity; and the Colombian Amazon being recognised as a 'subject of rights.'

- **New Zealand**:

In early 2024 the New Zealand High Court held (unanimously) that claims in tort relating to damage caused by climate change could proceed to trial. This overturned an earlier decision of the Court of Appeal in 2021 striking out the claims. The case was brought by a Maori elder, Mike Smith, against seven of the largest greenhouse gas emitters in New Zealand.[151]The Court allowed the claims in negligence, public nuisance and a new tort regarding 'climate system damage',[152] to proceed.

- **Overview**:

Differing approaches by different courts in divergent jurisdictions make it clear that climate change litigation may both hinder or facilitate climate action at a governmental level. In many instances laws on standing have not precluded climate change litigation. However, different constitutional and legal frameworks in other countries are of limited relevance in an Australian context.

As noted by Preston and Silbert, human rights-based climate litigation in Australia has differed from developments in other jurisdictions.[153] As they note, causes of action based on international and regional treaties, statutory human rights provisions or constitutional rights are limited in scope and availability in Australia. They suggest two possibilities for human right based climate change litigation in Australia: using human rights for the purpose of statutory interpretation and using human rights to understand breaches of other laws, including planning and environmental laws.

- **Australian developments:**

The University of Melbourne maintains a data base on climate change litigation, including settled cases, in Australia, New Zealand and the Pacific Islands.[154]

The Australian Government Solicitor has also published a briefing note on recent trends in climate change litigation in Australia.[155] As at 1 June 2022 the cumulative number of climate related cases had more than doubled since 2015, with over 1,000 new cases commenced in the preceding 6 years worldwide.

According to law firm Jones Day, climate change cases determined or settled in Australia as at August 2023 fall into three categories:

> Investor- or activist-led claims designed not to extract compensation but to obtain declaratory and injunctive relief that seeks to change corporate and boardroom behaviour, or information to enable a plaintiff to investigate a potential claim;
>
> Tortious claims by community groups against government and corporations seeking redress for harm caused by climate change or other environmental impacts; and

[151] *Smith v Fonterra* [2024] NZSC 5.
[152] This encompasses 'a proposed new tort involving a duty, cognisable at law, to cease materially contributing to: damage to the climate system; dangerous anthropogenic interference with the climate system; and the adverse effects of climate change'. See Caroline E Foster, '*Tort Law and New Zealand's Corporate Greenhouse Gas Emissions: The New Zealand Supreme Court's 2024 Climate Change Decision in Smith v Fonterra Cooperative Group Ltd and others'* : https://verfassungsblog.de/tort-law-and-new-zealands-corporate-greenhouse-gas-emissions/.
[153] Brian J Preston and Nicola Silbert, 'Trends in human rights-based climate litigation: pathways for litigation in Australia' 49 (1) *Monash University Law Review* 39. See also: Brian Preston, 'Mapping Climate Change Litigation' (2018) 92 *Australian Law Journal* 774.
[154] https://law.app.unimelb.edu.au/climate-change/
[155] https://www.ags.gov.au/publications/legal-briefing/lb-20220601.

> Challenges to government authorizations to energy and resources projects alleging unacceptable climate change and human rights impacts.[156]

In Australia, thorny questions of standing often arise in the context of environmental or climate change cases. As noted above, the courts may find that plaintiffs to this litigation lack an interest above a mere emotional or intellectual concern, no greater than other members of the public.

It is possible for individual laws to clarify the meaning of the generic statutory formulae for the purposes of particular statutory contexts. For instance, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act') specifies that a plaintiff able to point to 'a series of' recent activities 'for the protection or conservation of, or research into, the environment' undertaken in Australia within the two year period preceding the conduct sought to be reviewed will be taken to be a 'person aggrieved' in connection with a relevant application under the ADJR Act.[157] Such a plaintiff is also entitled to seek an injunction to restrain an actual or an anticipated contravention of the EPBC Act.[158]

The criterion thus established has some resonance with the *North Coast* decision and associated cases, although as Bates notes, the statute appears to 'go further [than *North Coast*] by not requiring any specific connection between the matter being litigated and the activities of the plaintiff; a general environmental interest would seem to suffice'.[159] By putting the standing inquiry on a more concrete footing, s 487 has undoubtedly simplified access to the courts for some individuals[160] and groups[161] seeking to enforce compliance with the EPBC Act, although it also throws into question the status of those unable to demonstrate an extensive history of relevant involvement. In this respect, it falls short of establishing open standing.[162] Moreover, Edgar has argued that the beneficial effects of the EPBC Act standing regime have likely been mitigated by the adoption of a 'restrained approach' to the grounds of judicial review when decisions under the Act are challenged.[163]

The EPBC Act regime has been the subject of sharp criticism.[164] However, in a review carried out by Professor Graeme Samuel, the findings were supportive of the third-party actions available under the EPBC Act:[165]

> Third-party court actions over the life of the EPBC Act have been diverse in nature and stable in number. The ability of the public to hold decision-makers to account is a fundamental foundation of Australia's democracy. To characterise these types of actions as 'lawfare' misrepresents the importance of legal review in Australian society.

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[156] Jones Day Insights, 'Climate Litigation in Australia: Current State of Play', https://www.jonesday.com/en/insights/2023/08/climate-litigation-in-australia-current-state-of-play.

[157] Section 487 (although note that where the plaintiff is 'an organisation or association (whether incorporated or not)', it must also have had as one of its 'objects or purposes' the 'protection or conservation of, or research into, the environment' at the time of the conduct sought to be reviewed).

[158] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 475.

[159] Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 8th ed, 2013) [17.42].

[160] See, e.g., *Booth v Bosworth* [2000] FCA 1878, [5] (Spender J).

[161] See, e.g., *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2007] FCA 1480, [2] (Stone J).

[162] See *Paterson v Minister for the Environment and Heritage* [2004] FMCA 924.

[163] Andrew Edgar, 'Extended Standing – Enhanced Accountability? Judicial Review of Commonwealth Environmental Decisions' (2011) 38 *Federal Law Review* 435.

[164] E.g., *Wide Bay Conservation Council Inc v Burnett Water Pty Ltd (No 8)* (2011) 192 FCR 1, 4-6 [17]-[27].

[165] Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999,* Final Report, Executive Summary (October 2020) <https://epbcactreview.environment.gov.au/resources/final-report/executive-summary>.

> The Review does not agree that the current standing provisions in section 487 of the EPBC Act should be removed or changed. Standing has not been interpreted broadly by the courts, because it is aimed at protecting the public interest rather than private concerns. Broad standing remains an important feature of environmental legislation, particularly given the presence of collective harm resulting from damage to environmental or heritage values.
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> The courts have the capacity to deal with baseless or vexatious litigation, and litigation with no reasonable prospect of success can be dismissed in the first instance. The EPBC Act should require an applicant seeking to rely on the extended standing provisions to demonstrate that they have an arguable case, or that the case raises matters of public importance, before it can proceed (for example, by seeking the advice of senior counsel).

Other recent Australian developments include judgments of courts accepting the relevance of climate change in environmental litigation;[166] a focus on corporate governance and disclosure of risks arising out of climate change;[167] civil litigation by a group of school students against the Federal Minister for the Environment, seeking an injunction to prevent an extension of a mining project in northern NSW on the grounds that it is likely to cause significant climate change related harm;[168] a class action on behalf of government bond holders, alleging a failure in a duty to disclose the impact of climate change on the value of bonds[169]and a class action against the Commonwealth Government.

Although successful at first instance[170] the decision in *Sharma* was overturned on appeal.[171]

The class action by two Torres Strait islanders contends that the Commonwealth was negligent and in breach of its duty of care to the applicants and group members in failing to take any or any reasonable steps to, inter alia, identify the risks of climate change; prevent or minimise current and

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[166] In April 2019, the Chief Judge of the NSW Land & Environment Court upheld the refusal of an application to develop an open cut coal mine in the Hunter Valley, including on climate change grounds: *Gloucester Resources limited v Minster for Planning* [2019] NSWLEC 7. See also: *Friends of Leadbeater's Possum Inc v VicForests (No 4)* [2020] FCA 704. The group Bushfire Survivors for Climate Action has commenced legal action in the NSW Land and Environment Court seeking orders to require the EPA to take climate change mitigation action under the *Protection of the Environment Operations Act 1997* (NSW).

[167] As noted by Law firm Allens Linklaters: In September 2018, ASIC issued a set of recommendations in its report, *Climate Risk Disclosure by Australia's Listed Companie*s highlighting that managing climate risk is an important governance and disclosure issue. In August 2019, ASIC published two updated Regulatory Guides, including to add new types of climate change risk to the examples of common risks that may need to be disclosed in certain prospectuses, and to flag climate change as a systemic risk which could affect an entity's financial prospects in the future and which the entity might need to disclose. ASIC also announced a plan to conduct surveillance of climate change-related disclosure practices by selected listed companies, and in mid-December 2019 ASIC had started contacting large corporates as part of this surveillance work. APRA has adopted a similar approach, noting recently in an open letter on 24 February 2020 that 'the financial risks of climate change will continue to be a focus of APRA's efforts to increase industry resilience, and more supervisory attention is being given to understanding these risks'. See 'An ever-brightening spotlight on governance and disclosure' <https://content.allens.com.au/climate-change-litigation/governance-and-disclosure/>.

[168] *Anjali Sharma & Ors (By Their Litigation Representative Sister Marie Brigid Arthur) v Minister for the Environment (Commonwealth)* (Federal Court, VID607/2020, filed 8 September 2020).

[169] *Kathleen O'Donnell v Commonwealth Of Australia & Ors* (Federal Court, VID482/2020, filed 22 July 2020).

[170] *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment [2021] FCA 560; Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment (No 2)* [2021] FCA 774.

[171] *Minister for the Environment v Sharma* [2022] FCAFC 35 (Allsop CJ; Beach and Wheelahan JJ) 291 FCR 311; 400 ALR 203; 15 ARLR 390; *Minister for the Environment v Sharma (No 2)* [2022] FCAFC 65 (Allsop CJ; Beach and Wheelahan JJ) 401 ALR 108.

projected impacts; avoid injury and harm to Torres Strait Islanders; implement measures to reduce Australia's emissions and implement measures to protect the land and marine environment of the Torres Strait islands.[172]At the time of writing the decision of Wigney J was reserved, the proceedings having concluded in May 2024.

The link between human rights law and climate change litigation is sometimes contested. However, climate change litigation is a forum for the protection of human rights of increasing importance. Without doubt, climate change action can have significant human rights implications. Human rights protective mechanisms are also increasingly utilised by groups wishing to combat climate change.

For example, in May 2019 a group of Torres Strait islanders lodged a complaint against the Australian Government with the United Nations Human Rights Committee alleging that the Australian Government has failed to take adequate action to reduce emissions or pursue proper adaptation measures and, as a consequence, has violated a number of articles of the Universal Declaration of Human Rights, including the right to culture (article 27), the right to be free from arbitrary interference with privacy, family and home (article 12), and the right to life (article 3). The outcome of that case is discussed in research paper 7.

In addition, the newly enacted *Human Rights Act 2019* in Queensland was relied upon to challenge the proposed Galilee Coal Project (one of nine proposed mines in the Galilee Basin) in central Queensland. Youth Verdict, a group of young people represented by the Environmental Defenders Office, lodged an objection against the mine in the Queensland Land Court, arguing that it infringes a number of their rights under the human rights legislation, including the right to life, the protection of children and the right to culture.[173] This has resulted in a number of judgments of the Land Court of Queensland.[174] One of the objections to the thermal coal mine proposed by the mining company concerns the impact it would have on the human rights of Aboriginal and Torres Strait Islander peoples in Queensland. A recent judgment in the case arose out of an application to take evidence from First Nations witnesses as a group, 'on country'.[175]The function of the Land Court of Queensland was to make recommendations concerning the mining lease application with the final decision to be made by the Minister. It was recommended that the applications be refused.[176]

In the decision the Court examined in considerable detail whether the proposed project would limit human rights on climate change grounds and reviewed a considerable body of Australian and international jurisprudence and expert evidence.[177]

At the time of revising this paper the decision of Charlesworth J in *Munkara v Santos NA Barossa Pty Ltd (No 3)*[178]was delivered. Aboriginal people from the Tiwi Islands challenged the authorisation to construct a 262km long offshore gas pipeline in the Timor Sea which was alleged to: adversely impact the applicants' spiritual connection with sea country, interrupt song lines, interfere with the travels of ancestral beings and cause damage to tangible cultural heritage. It was contended that under the relevant regulation Santos was required to submit a revised environmental plan. The application was dismissed. In the judgment Charlesworth J was critical of aspects of the conduct of the case by the Environmental Defender's Office and the evidence of one of the expert witnesses relied upon by the applicants.

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[172] *Pabai and Kabai v Commonwealth of Australia* (Federal Court, No VID622/2021).
[173] *Youth Verdict v Waratah Coal.* See Sabin Center Climate Change Litigation Databases, '*Youth Verdict v Waratah Coal*' <http://climatecasechart.com/non-us-case/youth-verdict-v-waratah-coal/>.
[174] *Waratah Coal Pty Ltd v Youth Verdict Ltd* [2020] QLC 33; *Waratah Coal Pty Ltd v Youth Verdict Ltd (No 2)* [2021] QLC 4; *Waratah Coal Pty Ltd v Youth Verdict Ltd (No 3)* [2021] QLC 36; *Waratah Coal Pty Ltd v Youth Verdict Ltd (No 4)* [2022] QLC 3; *Waratah Coal Pty Ltd v Youth Verdict Ltd (No 5)* [2022] QLC 4.
[175] *Waratah Coal Pty Ltd v Youth Verdict Ltd (No 5)* [2022] QLC 4.
[176] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21.
[177] At [1288]-[1705].
[178] [2024] FCA 9.

Perceptive observations on climate change and the law in Australia are to be found in the writings and conference presentations by Chief Judge Brian Preston of the NSW Land & Environment Court.[179]

Apart from litigation there have been a number of non-litigious strategies adopted by those concerned about climate change. There has also been an apparent increase in the use of the OECD National Contact Point complaints process, as a non-litigious strategy to fight climate change. This has included a complaint against the National Australia Bank by the environmental group Friends of the Earth Australia, along with a group of bushfire survivors, claiming that the bank breached the OECD Guidelines by failing to prevent or mitigate the adverse environmental impacts of its investments in coal and fossil fuel projects. The complaint also alleged that the bank was failing to adhere to the Paris Agreement reduction targets across its lending portfolio.[180]

The above-mentioned class action proceeding by school students against the (former) Minister for the Environment is of particular legal interest. At first instance, although Bromberg J refused to grant the injunctive relief sought, he held that the Minister had a duty at common law to take reasonable care to avoid causing personal injury to the children when deciding, under s 130 and s 133 of the EPBC Act, to approve or not approve of an application to extend mining operations.[181] The decision was overturned by the Full Federal Court.[182] Although unanimous, there are some important differences in the reasoning adopted by members of the Court. These are explained in the summary of the decision prepared by the Court:

> The Chief Justice is of the view that the duty should not be imposed for a number of reasons. First, the content and scope of the duty would call forth at the point of assessment of breach the need to re-evaluate, change or maintain high public policy, the assessment of which is unsuited to decision by the judicial branch in private litigation. Secondly, the imposition would be incoherent and inconsistent with the decision-making in question under the EPBC Act according to its terms, as understood in its context as part of Commonwealth and State responsibilities for the protection of the environment. Thirdly, taken in conjunction with these two matters, the lack of control over the harm (as distinct from over the tiny contribution to the overall risk of damage from climate change), a lack of special vulnerability in the legal sense, the indeterminacy of liability and the lack of proportionality between the tiny increase in risk and lack of control and liability for all damage by heatwaves, bushfires and rising sea levels to all Australians under the age of 18, ongoing into the future, mean that the duty in tort should not be imposed.
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> Justice Beach is also of the view that the duty should not be imposed. His Honour has given emphasis to two factors in support of that conclusion. First, in his Honour's view there is not

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[179] See e.g., 'The Right to a Clean, Sustainable and Healthy Environment: Nature, Content and Realisation' , paper presented to the 2023 Blackshield Lecture, Macquarie Law School, Macquarie University, 2 November 2023; 'The role of the courts in delivering environmental justice' paper presented to the University of Newcastle School of Law and Justice - Sir Ninian Lecture on 4 August 2023; 'Trends in Human Rights-Based Climate Litigation' paper presented to the 2021 Castan Centre for Human Rights Law and King & Wood Mallesons Annual Lecture, Monash University available at: https://lec.nsw.gov.au/publications-and-resources/judicial-speeches-and-papers.html.

[180] *Bushfire Survivors for Climate Action v Environment Protection Authority.* See Sabin Center Climate Change Litigation Databases, 'Bushfire Survivors for Climate Action v Environment Protection Authority' <http://climatecasechart.com/non-us-case/bushfire-survivors-for-climate-action-incorporated-v-environment-protection-authority/>. An earlier attempt seeking declaratory relief in the Federal Court was unsuccessful: *Australasian Centre for Corporate Responsibility (ACCR) v Commonwealth Bank of Australia* [2015] FCA 785; 325 ALR 736.

[181] *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* (2021) 391 ALR 1 at [491].

[182] *Minister for the Environment v Sharma* [2022] FCAFC 35.

> sufficient closeness and directness between the Minister's exercise of statutory power and the likely risk of harm to the respondents and the class that they represent. Secondly, to impose a duty would result in indeterminate liability. As for the other matters argued by the Minister, in his Honour's view none of them individually or collectively warrant not recognising the duty found by the primary judge.
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> Justice Wheelahan is of the view that no duty of care arises for three main reasons. The first is that the EPBC Act does not erect or facilitate a relationship between the Minister, and the respondents and those whom they represent, that supports the recognition of a duty of care. In particular, his Honour is of the view that the control of carbon dioxide emissions, and the protection of the public from personal injury caused by the effects of climate change, were not roles that the Commonwealth Parliament conferred on the Minister under the EPBC Act. Secondly, his Honour is of the view that it would not be feasible to establish an appropriate standard of care, with the consequence that there would be incoherence between the suggested duty and the discharge of the Minister's statutory functions. Thirdly, his Honour is not persuaded that it is reasonably foreseeable that the approval of the extension to the coal mine would be a cause of personal injury to the respondents or those whom they represent, as the concept of causation is understood for the purposes of the common law tort of negligence.[183]

It would appear that an application for special leave to appeal the Full Court decision to the High court was not made.

The role and responsibility of the Australian Government in relation to climate change requires re-consideration following the election of the Albanese Government in May 2022. The incoming Government has indicated a more far-reaching commitment to dealing with climate change than the outgoing Morrison Government. It remains to be seen how this will be translated into practice.

A detailed consideration of human rights-based climate change litigation is beyond the scope of the present paper. However, its importance is attested to by the increasing volume of litigation and legal writing on the subject.[184]

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[183] *Minister for the Environment v Sharma* [2022] FCAFC 35, Summary. As the Court notes, the summary is not a complete statement of the conclusions reached by the Court and reference should be made to the published reasons for judgment.

[184] As Canadian academic Jasminka Kalajdzic notes: '[t]he literature is vast': 'Climate Change Class Actions in Canada' (2021) 100 *Supreme Court Law Review* 31 at n 20. She refers to: Sumudu Atapattu, *Human Rights Approaches to Climate Change: Challenges and Opportunities* (Routledge, 2018); Jacqueline Peel and Hari M. Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) *Transnational Environmental Law* 37; Damilola S. Olawuyi, *The Human Rights-Based Approach to Carbon Finance* (Cambridge University Press, 2016); Tracey Skillington, *Climate Justice and Human Rights* (Palgrave MacMillan, 2017); Sam Adelman, 'Human Rights and Climate Change' in Gordon DiGiacomo (ed.), *Human Rights: Current Issues and Controversies* (University of Toronto Press, 2016); David Boyd, *The Environmental Rights Revolution: a Global Study of Constitutions, Human Rights and the Environment* (UBC Press, 2011); Stephen Humphreys (ed). *Human Rights and Climate Change* (Cambridge University Press, 2010); Dinah Shelton, 'Litigating a Rights-Based Approach to Climate Change' (2009) *Proceedings of the International Conference on Human Rights and the Environment* 211 (and at n 55): Michael C. Blumm and Mary C. Wood, '"No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine' (2017) 67(1) *American University Law Review* 1; Sam Varvastian, 'The Human Right to a Clean and Healthy Environment in Climate Change Litigation' (Research Paper No. 2019-09, Max Planck Institute for Comparative Public Law & International Law (MPIL), 10 April 2019); Annalisa Savaresi and Juan Auz, 'Climate Change Litigation and Human Rights: Pushing the Boundaries' (2019) 9(3) *Climate Law* 242. As Kalajdzic also notes (at n 55), many articles are referred to in the International Bar Association's *Model Statute for Proceedings Challenging Government Failure to Act on Climate Change* (February 2020). An electronic database on climate change litigation is maintained by the Sabin Center for Climate Change Law at Columbia Law School. The University of Melbourne also maintains an electronic database on Australian and

Important recent developments include: the UNEP Global Climate Change litigation report, 2020; [185]2020 Asian Development Bank reports[186]; a commentary on the preamble to the Paris Agreement on Climate Change[187]; recent Pakistani jurisprudence,[188]including a significant judgment of the Supreme Court of Pakistan[189] and the Dutch Shell case.[190]

At the time of revising this paper a research report published in the journal *Science Magazine* noted that 2485 climate change cases have been filed globally in 52 national jurisdictions.[191]As at November 2023, 134 had been brought in Australia. Worldwide, approximately 100 climate change cases have been commenced each year since 2015.

In some jurisdictions, such as in the United States, federal common nuisance claims against fossil fuel companies seeking compensation for the consequences of climate change have been held to be displaced by federal environmental statutes. This has led to an increase in claims based on state laws. However, the US Court of Appeals held that government plaintiffs may not utilise state tort law to hold multi-national oil companies liable for the damages caused by global greenhouse emissions.[192]

The expanding jurisprudence arising out of climate change litigation has also been accompanied by increasing prosecutions of climate change protesters and political and legislative action to circumvent or overrule court rulings.[193]

4. Commentary

Pacific climate change litigation. A legal briefing by the Australian Government Solicitor's Office in June 2022 notes that the number of climate change cases has doubled in the period since 2015 with over 1,000 cases brought in the past 6 years: https://www.ags.gov.au/publications/legal-briefing/lb-20220601.

[185] United Nations Environment Programme, *Global Climate Litigation Report: 2020 Status Review* (2020).

[186] Asian Development Bank, *Climate Change, Coming soon to a court near you: Climate litigation in Asia and the Pacific and beyond*, December 2020 (3 volumes).

[187] Ben Boer, 'The preamble' chapter in Geert Van Calster and Leonie Reins (eds), *The Paris Agreement on Climate Change: A Commentary*, (Edward Elgar, 2021).

[188] Anam Gill, '*Farmer sues Pakistan's government to demand action on climate change*', Thomson Reuters Foundation, November 2015.

[189] *DG Khan Cement Company Ltd v Government of Punjab*, C.P.1290-L/2019, Supreme Court of Pakistan, 20210415_13410_judgment.pdf. Discussed by Ben Boer, Editorial, *Chinese Journal of Environmental Law* 5 (2021) 1-10.

[190] *Milieudefensie v Royal Dutch Shell plc* (the Dutch Shell Case), case number C/09/571932/ HA ZA 19-379. The Hague District Court on 26 May 2021 found that Shell has an obligation, arising from an 'unwritten duty of care', to mitigate adverse human rights impacts arising from climate change, by reducing its scope 1 to 3 emissions. It ordered [Royal Dutch Shell (RDS)], "both directly and via the companies and legal entities it commonly includes in its consolidated annual accounts and with which it jointly forms the Shell group, to limit or cause to be limited the aggregate annual volume of all CO2 emissions into the atmosphere (Scope 1, 2 and 3) due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels." The case has been extensively discussed, including by Ben Boer, Editorial, *Chinese Journal of Environmental Law* 5 (2021) 1-10. On 27 May 2021 Shell stated that it expected to appeal the decision. On December 20, 2021 Shell changed its name to Shell plc.

[191] Thom Wetzer, Rupert Stuart-Smith and Arjuna Dibley, 'Climate risk assessments must engage with the law', *Science Magazine* 12 January 2024, 152.

[192] *City of New York v Chevron Corp*., 993 F. 3d 81 (2nd Cir. 2021). See generally, Jonathan H Adler, *Displacement and Preemption of Climate Nuisance claims*, Case Western Reserve University Research Paper Series in Legal Studies, available at http://ssrn.com/abstract=3950715. 17.2 *Journal of Law, Economics & Policy* [2022] 217.

[193] See the report by the Human Rights Law Centre, Greenpeace Australia Pacific and the Environmental Defenders Office, *Global Warning: the threat to climate defenders in Australia*, 2021.

The rules of standing continue to be complex, unwieldy, and a significant obstacle for those wishing to pursue litigation in the public interest, whether that is for the protection and promotion of human rights or to address environmental concerns.

The question of whether or not a prospective plaintiff has standing to bring a proposed action will depend upon (a) the connection, if any, between the prospective litigant and the conduct said to give rise to the cause(s) of action; (b) the nature of the cause(s) of action; (c) the relief or remedy sought and (d) any statutory provisions or common law rules that may facilitate or restrict standing.

Undoubtedly, the proliferation of provisions establishing open standing in particular statutory contexts has been a positive development, at least from the perspective of public interest plaintiffs. However, the mainstream 'law of standing', such as it is, continues to comprise little more than the aggregate of a series of context-specific determinations, with the resulting patchwork difficult to rationalise by reference to the kind of norms of that one would expect to find. The picture is one of considerable fluidity. Statutory standing tests, many of which continue to revolve around familiar vague formulae, are poorly differentiated from the test applicable under the general law.

In one sense, it is hardly surprising that the law should have something of a fragmented quality, given the variety of contexts in which standing issues arise.[194] Ultimately, it is difficult to avoid the impression that restrictions on standing have in some contexts been perpetuated largely because their necessity has been assumed by reason of a (somewhat dubious) historical association with certain kinds of proceedings.

In the context of contemporary public law, they often have the appearance of having been 'grafted on': they are not directly referable to the core issue in the kind of proceedings in which they tend to arise, that being 'the existence of a public wrong'.[195] To say this is not to deny that restrictions on standing may be desirable, or at least defensible, in some contexts, but simply that a lack of clarity as to the values served by impeding particular proceedings for want of standing risks leaving them looking residuary and anachronistic and of questionable practical value.

The argument that restrictive standing requirements are necessary to shield the courts from a flood of meritless or trivial litigation no longer has much force not least because informal filters (like the cost of litigation and the risk of adverse costs) operate to discourage ill-conceived proceedings and, as has often been pointed out, courts are well-equipped to dispose of meritless cases anyway.[196]

They can perhaps more plausibly be grounded by appealing to notions of efficiency and priority: it might be said that the purpose of a presumption against standing is not to block 'bothersome' litigation per se, but rather to ensure that the attention of courts is directed in the first instance to claims deemed, for whatever reason, to be of more pressing importance.

Narrowing the courts' focus in such a manner might be justified not only, or even primarily, by reference to considerations of judicial economy, but also as a matter of public policy. Because litigation of the general kind under discussion frequently has the potential to arrest, or seriously delay, whatever action is under challenge, it may be oppressive – not only to the relevant actor or decision-maker, who may be put 'to very great cost and inconvenience in defending the legality of his [or her]

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[194] See e.g., Australian Law Reform Commission, *Standing in Public Interest Litigation* (Report No 27, 1985) 124 [225] (noting that given the diversity of the circumstances in which questions of standing arise, 'the vigorous pursuit of uniformity may be unwise').

[195] Margaret Allars, 'Standing: The Role and Evolution of the Test' (1991) 20 *Federal Law Review* 83, 91.

[196] See e.g., *Truth About Motorways* (2000) 200 CLR 591, 654 [165] (Kirby J) ('The obligations to find legal costs including, where appropriate, security for costs, and to submit to orders as to costs of failed proceedings represent substantial hurdles in the path of meritless proceedings ... Courts retain significant powers to bring obviously meritless claims to a speedy conclusion or to impose strict conditions on their continuance'); Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (4th ed, 2009) [11.50].

actions',[197] but also to anyone whatsoever who is reliant on his or her effectiveness. Restricting rights of challenge to those directly affected may be viewed as a way of limiting the extent to which governmental (and other) decisions can be placed 'in suspense'[198] pending the outcome of legal proceedings.

Yet, the idea that the public interest in the observance of law can be judicially 'balanced away' by reference to pragmatic considerations is intrinsically unappealing. There is much to be said for the view of Kirby J that the practical effects of allowing a claim to proceed should be of little concern to the courts: 'if review is available as a matter of law, disruption and inconvenience are not valid objections'[199]. It is far from clear how a court could or should determine which processes should be privileged, or (effectively) which potential defendants should be shielded from the claims of would-be plaintiffs. It is far from clear that a court can plausibly weigh relevant factors against one another anyway, with judges being ill-situated to draw inferences about matters like, for example, the priority or degree of urgency to be ascribed to particular types of action, or the proper allocation of public resources.[200] Judicial conclusions on such matters are likely to be problematic.

Given the increased emphasis in contemporary public law on notions of access to justice and accountability for the exercise of public power, the failure of courts to revisit the traditional common law approach has left the law of standing looking increasingly like a roadblock in search of a rationale.

Where a person or organisation cannot overcome this roadblock so as to seek relief by initiating or being a party to litigation, there are other procedural avenues available. Through these avenues, they may be able, either as of right, or in the exercise of judicial discretion, be able to participate in litigation brought by a person or entity that does have standing. In research paper 10 we review these procedural alternatives, which include participation in the proceedings as *amicus curiae* or *intervention* in proceedings which are already on foot.

[197] *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 35 (Gibbs CJ).
[198] Konrad Schiemann, 'Locus Standi' [1990] *Public Law* 342, 348-349.
[199] *Allan v Transurban City Link Ltd* (2001) 208 CLR 167, 190 [69] (Kirby J).
[200] cf Konrad Schiemann, 'Locus Standi' [1990] *Public Law* 342, 350-351.