

# Imagining Different Futures through the Courts: A Social Movement Assessment of Existing and Potential New Approaches to Climate Change Litigation in Australia

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## Abstract

*In response to the growing climate crisis and deficiencies in the international and domestic political responses to this crisis, climate change activists, campaign groups and others are turning towards innovative approaches to climate change litigation. Previous assessments of the potential and prospects of these new approaches have focused on perceived jurisprudential differences between a given overseas jurisdiction and Australia, both with respect to the availability and prospects of a particular cause of action, and general legal obstacles such as standing, justiciability and adverse costs.*

*Drawing on the insights of social movement literature, this article attempts to provide a more nuanced assessment of the merits of existing approaches, the potential of select new approaches, and the reasons for non-adoption of these new approaches in Australia. Specifically, this article argues that these analyses have treated aspects of the legal opportunity for new approaches as fixed when they are better considered as contingent on judicial receptiveness. This article also considers the comparative potential of these approaches to frame public debates over climate change liability, as well as socio-institutionalist and resources-based explanations. Incorporating the insights and analytical framework of social movement theory into an ongoing assessment of new climate*

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Parts of this article were delivered as the paper 'Climate Justice And Climate Litigation: The Need For A Paradigm Shift' at the 'Environmental Justice 2017: Looking Back, Looking Forward' conference at the University of Sydney, 6-8 November 2017; and as the paper 'Discourses of Climate Justice in Climate Litigation: Time for a New Approach' at the 'Imagining a Different Future: Overcoming Barriers to Climate Justice' conference at the University of Tasmania in Hobart, 8-10 February 2018. The author would like to thank those who provided feedback at those conferences.

The author would also like to thank those who provided guidance, assistance and feedback, including Hallie Warnock, several anonymous reviewers and the referees. All remaining errors and omissions are the author's own. The author may be contacted at [danny@ourchildrenstrust.org](mailto:danny@ourchildrenstrust.org).

*litigation approaches both provides a more nuanced assessment of climate change litigation's likely future trajectory in Australia and may contribute to more compelling arguments for a strategic shift towards new approaches.*

## **Keywords**

*Administrative Law; Climate Change Litigation; Framing; Justice; Social Movement Theory*

## I INTRODUCTION

Australia has a long and significant history of climate change litigation (climate litigation).<sup>1</sup> Although the term 'climate change litigation' at its broadest encompasses cases ranging from those where climate change is the central issue or subject matter to those where climate change is only a peripheral or implicit concern,<sup>2</sup> most climate litigation in Australia has involved administrative law-based challenges.<sup>3</sup> Outside of Australia, while administrative law-based approaches to litigation continue to be common,<sup>4</sup> climate change activists and campaigners, municipalities and private litigants (collectively, climate litigants) are increasingly pursuing other approaches.<sup>5</sup> Compared to the existing approach, this so-called 'next generation' of climate litigation typically involves 'an accountability model whereby legal interventions are designed to hold governments and corporations *directly* to account for the climate change implications of their activities'; 'a broader range of parties pursuing climate change-related litigation with a different range of motivations than those of first-generation litigants'; and a 'rights turn' that 'move[s] away from using only administrative law avenues under environmental legislation to also exploring causes of action found in the common law or in other areas of law outside of the environmental field'.<sup>6</sup>

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<sup>1</sup> Jacqueline Peel et al, 'Shaping the "Next Generation" of Climate Change Litigation in Australia' (2017) 41 *University of Melbourne Law Review* 793, 795. As these authors recognise, the first instance of climate change litigation in Australia was *Greenpeace Australia Ltd v Redbank Power Pty Ltd* (1994) 86 LGERA 143.

<sup>2</sup> *Ibid* 801-2. See also Jacqueline Peel and Hari Osofsky, 'Climate Change Litigation: Lessons and Pathways' (2017) 29(11) *NSW Judicial Officers' Bulletin* 99, 100-1, citing Jacqueline Peel and Hari Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015) 8.

<sup>3</sup> Peel et al, above n 1, 802 ('[i]n Australia, most climate change litigation to date has pursued a standard statutory pathway, albeit with variations depending upon the legislation under which a case is brought.' See also Peel and Osofsky, 'Climate Change Litigation', above n 2, 102 ('[t]he bread-and-butter climate change cases in the US and Australia though remain those brought under environmental statutes'.)

<sup>4</sup> Peel and Osofsky, 'Climate Change Litigation', above n 2, 102.

<sup>5</sup> *Ibid* 99-100; Peel et al, above n 1, 799.

<sup>6</sup> Peel et al, above n 1, 803-4; Jacqueline Peel and Hari Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 *Transnational Environmental Law* 37.

The emergence of these approaches to climate litigation in other jurisdictions has resulted in ongoing analysis and assessments of their strategic potential, ‘prospects of success’, and expected challenges in Australia. These assessments range from the relatively ad hoc to the relatively comprehensive,<sup>7</sup> but have almost uniformly focused on perceived legal differences between Australian law and the law in jurisdictions in which a novel approach has been pursued.<sup>8</sup> Legal

<sup>7</sup> For a discussion of the regulatory impositions related to ‘prospects of success’ in New South Wales in the context of climate change litigation, see Peter Cashman and Ross Abbs, ‘Tort Liability for Loss or Damage Arising from Human Induced Climate Change: Is This What Justice Requires and Fairness Demands’ in Rosemary Lyster (ed) *In the Wilds of Climate Law* (Australian Academic Press, 2010) 235, 261-2. For an attempted comprehensive assessment see Peel et al, above n 1. For more ad-hoc analyses see Sue Higginson, *Court Sets Emission Reduction Targets for Dutch Government* (25 June 2015) EDO NSW <[http://www.edonsw.org.au/court\\_sets\\_emission\\_reduction\\_targets\\_for\\_dutch\\_governmen](http://www.edonsw.org.au/court_sets_emission_reduction_targets_for_dutch_governmen)>; Felicity Nelson, *Dutch Climate Change Case no Roadmap for Aus* (16 July 2015) Lawyers Weekly <<https://www.lawyersweekly.com.au/news/16831-can-we-replicate-the-dutch-climate-change-victory>> ([e]nvironmental Justice Australia lawyer Ariane Wilkinson said it was unlikely an identical case [to the *Urgenda* case] could be brought in Australia’); Megan Darby, *Could Australians Sue for Stronger Climate Action?* (22 July 2015) Climate Change News <<http://www.climatechangenews.com/2015/07/22/could-australians-sue-for-stronger-climate-action/>> (“Australia has a very conservative legal system”, says Higginson. “We would have substantial and significant difficulties if we were to walk in in the same way”); Sue Higginson, ‘Climate Change Litigation: Landmark Dutch Ruling Raises Questions for Australia’ (2015) 9 *Law Society Journal* 22, 23 ([i]t is a sad indictment on the state of our climate and environmental laws in Australia that we are looking back to torts for opportunities to hold governments to account’); Tim Baxter, ‘*Urgenda*-Style Climate Litigation has Promise in Australia’ (2017) 32 *Australian Environment Review* 70.

<sup>8</sup> Some analyses have focused either additionally or instead on the categorical propriety or efficacy of courts intervening in a complex, polycentric issue like climate change. See, for example, Jacqueline Peel, ‘The Role of Climate Change Litigation in Australia’s Response to Global Warming’ (2007) 24 *Environmental and Planning Law Journal* 90, 103 (‘the ad hoc nature of court proceedings, the expense involved in bringing them, and the uncertainty as to their results means that, in the long-term, litigation alone is unlikely to be an optimal approach for bringing about effective action to address climate change’); Mathew Miller, ‘The Right Issue, the Wrong Branch: Arguments against Adjudicating Climate Change Nuisance Claims’ (2010) 109(2) *Michigan Law Review* 257; Felicity Millner and Kirsty Ruddock, ‘Climate Litigation: Lessons Learned and Future Opportunities’ (2011) 36(1) *Alternative Law Journal* 27, 32 ([c]limate litigation is necessarily ad hoc and depends on the law, the facts, and a willing and able client being available to run a case at the appropriate time. Lack of available causes of action and circumstance mean that litigation is often not an option to address the most significant or urgent aspects of climate change. It should not be seen as a means to comprehensively address the inadequate regulation of climate change causes and impacts’); Jacqueline Peel, ‘Issues in Climate Change Litigation’ (2011) 1 *Carbon and Climate Law Review* 15, 24 (‘... climate change litigation presents a number of difficult issues and as a form of governance faces challenges related to its lack of comprehensiveness and overall legitimacy’). Cf Shawn LaTourette, ‘Global Climate Change: A Political Question?’ (2008) 40 *Rutgers Law Journal* 219; Benjamin Ewing and Douglas Kysar, ‘Prods and Pleas: Limited Government in an Era of Unlimited Harm’ (2011) 121(2) *Yale Law Journal* 350; Henry Weaver and Douglas Kysar, ‘Courting Disaster: Climate Change and the Adjudication of Catastrophe’ (2017) 93(1) *Notre Dame Law Review* 295. This article discusses the propriety of judicial intervention in section V-A below.

differences previously identified include both the availability of and jurisprudence governing comparable causes of action, as well as preliminary or auxiliary features of litigation such as doctrines of standing and justiciability, and rules governing adverse costs orders.<sup>9</sup> Previous analyses have also, by and large, considered these differences to be fixed rather than potentially malleable or contingent.

This article argues that prior analyses have largely overlooked the broader issue of why climate litigants pursue litigation as a strategy, and particularly why they pursue certain litigation approaches and not others. In doing so, and in contrast to existing analyses, this article conceptualises the emergence of the ‘next generation’ of climate litigation as stemming from a conscious strategic decision by social movement organisations (SMOs), in much the same way that choosing litigation rather than lobbying or protest is itself a conscious strategic choice.<sup>10</sup> Choosing a particular litigation approach, therefore, may be influenced by factors including not only (to use the language of social movement literature) the ‘structural’ legal concerns described above, but also ‘contingent’ (that is, variable and malleable) legal and non-legal concerns, such as framing, legal culture, organisational and sectoral resources and identity, the receptiveness of individual judges, and the influence of ‘strategy entrepreneurs’.<sup>11</sup>

Section II of this article expands on and justifies its methodology by reviewing the relevant social movement literature and applying it to the context of climate change. Section III applies social movement theory in reassessing the existing approach to climate change litigation and stated justifications for continuing to pursue this approach in the future. Section IV applies social movement theory in assessing the potential, prospects, and comparative advantages and vulnerabilities of two categories of new approaches that have emerged in non-Australian jurisdictions. Section V suggests and evaluates additional explanatory factors for why climate litigants have yet to adopt these new approaches. Section VI concludes.

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<sup>9</sup> See, for example, Peel et al, above n 1, 805 ([t]he legal prospects of an *Urgenda*-style case in Australia may be significantly lower given differences between the relevant provisions of the Dutch Civil Code relied on by the *Urgenda* plaintiffs and tortious causes of action in Australia’s common law system’).

<sup>10</sup> See Bruce Wilson and Juan Carlos Cordero, ‘Legal Opportunity Structure and Social Movements: The Effects of Institutional Change on Costa Rican Politics’ (2006) 39(3) *Comparative Political Studies* 325.

<sup>11</sup> See, for example, Chris Hilson, ‘New Social Movements: the Role of Legal Opportunity’ (2002) 9(2) *Journal of European Public Policy* 238; Chris Hilson, *The Courts and Social Movements: Two Literatures and Two Methodologies Mobilising Ideas* (18 February 2013) Mobilising Ideas <<https://mobilizingideas.wordpress.com/2013/02/18/the-courts-and-social-movements-two-literatures-and-two-methodologies/>>; Lisa Vanhala, ‘Is Legal Mobilisation for the Birds? Legal Opportunity Structures and Environmental Nongovernmental Organisations in the United Kingdom, France, Finland, and Italy’ (2018) 51(3) *Comparative Political Studies* 380.

## II METHODOLOGY: CLIMATE CHANGE AND THE CHOICE OF LITIGATION APPROACHES BY SOCIAL MOVEMENT ORGANISATIONS

A varied body of social movement literature has considered why certain SMOs pursue their objectives through one strategy as opposed to others. The typical strategies considered are political lobbying, protest and litigation.<sup>12</sup> There are recognised difficulties with empirically-distinguishing the causal and extraneous factors underpinning the strategic preferences of SMOs.<sup>13</sup> Social movements are often highly heterogeneous in terms of their values, preferences and activities; it is methodologically- and practically-difficult to observe strategic decisions and isolate proposed independent variables in real-time; there may be barriers to accessing information as to the deliberative processes of social movements; and quite often the same SMOs will pursue multiple strategies concurrently or in quick succession.

One way to partly resolve these difficulties has been to adopt a multi-jurisdictional analysis, ‘which allows for some disentangling of the effects’, even if it cannot determine which is determinative.<sup>14</sup> Accordingly, this article applies recognised factors influencing the strategic choices of SMOs to the situation of the adoption (or non-adoption) of new climate litigation approaches in Australia and other jurisdictions. The most-commonly cited non-Australian jurisdiction for the purposes of this article is the United States, which has by some margin experienced the most climate change litigation of any country and has already seen many cases filed under the approaches discussed in Section IV.<sup>15</sup>

### *A Overview of Social Movement Theory*

Chris Hilson has written that a social movement organisation (SMO)’s choice of lobbying, litigation or protest (as a dependant variable) is in part determined by the social movement’s assessment of the political opportunity (PO) and legal opportunity (LO) (as independent variables) in that jurisdiction, as well as other factors.<sup>16</sup> These factors are discussed in turn. PO is described as the ‘structural openness or closedness of the political system, and... the more contingent receptivity of political elites

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<sup>12</sup> Hilson, ‘New Social Movements’, above n 11, 238.

<sup>13</sup> Hilson, *The Courts and Social Movements*, above n 11.

<sup>14</sup> Vanhala, above n 11, 382. See also Gianluca De Fazio, ‘Legal Opportunity Structure and Social Movement Strategy in Northern Ireland and Southern United States’ (2012) 53(1) *International Journal of Comparative Sociology* 3.

<sup>15</sup> Peel and Osofsky, ‘Climate Change Litigation’, above n 2, 101-2.

<sup>16</sup> Hilson, ‘New Social Movements’, above n 11, 239; Hilson, *The Courts and Social Movements*, above n 11.

to collective action'.<sup>17</sup> LO is also described as consisting of 'both structural and contingent features'.<sup>18</sup> Structural features include 'relatively stable features relating to access to justice such as laws on standing and the availability of state legal funding',<sup>19</sup> as well as 'legal stock' ('the body of laws that exist in a particular field'), 'the rules determining legal standing, and the rules on legal costs'.<sup>20</sup> Both what one might describe as 'objective LO' – the real-world prospects of a given legal strategy – and an SMO's subjective perception and understanding of LO may influence strategic choices.<sup>21</sup> With respect to the interaction between PO and LO, Hilson writes that:

'... a lack of PO may influence the adoption of litigation as a strategy in place of lobbying, and that the choice of protest as a strategy may be influenced by poor political and legal opportunities. The emphasis on "influence" here is important. ...There are numerous other factors which may also influence the choice of strategy in any particular case – such as resources, identity, ideas and values...'.<sup>22</sup>

Beyond PO and LO, the social movement literature has identified other factors that help explain the strategic choices of SMOs. These can be broadly categorised as resources-based, framing-based and sociological institutionalist explanations. Resources-based explanations are simply those that posit that SMOs adopt strategies that fit their resources, with 'resources' defined so as to include not only finances but also factors such as the professional and educational background of personnel.<sup>23</sup> Thus, SMOs pursuing litigation are likely to be those who have both sufficient financial resources to litigate and/or legally-trained staff.<sup>24</sup> Indeed, much of the social movement literature suggests that the choice of litigation as a strategy is more likely where a 'an individual within a[n] SMO or its network has direct experience of the law',<sup>25</sup> such as where an SMO employs in-house lawyers.<sup>26</sup>

Comparatively little attention appears to have been paid to the fact that, in many jurisdictions, pursuing litigation requires engaging external legal representation. In these jurisdictions, the values and preferences of these external litigators will also influence whether and what kind of litigation is pursued. In building on the theoretical basis for resources-based

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<sup>17</sup> Hilson, 'New Social Movements', above n 11, 242.

<sup>18</sup> Ibid 243.

<sup>19</sup> Ibid.

<sup>20</sup> Vanhala, above n 11, 384.

<sup>21</sup> Ibid 391.

<sup>22</sup> Hilson, 'New Social Movements', above n 11, 239.

<sup>23</sup> Ibid 240, citing John McCarthy and Mayer Zald, 'Resource Mobilisation and Social Movements: a Partial Theory' (1977) 82 *American Journal of Sociology* 1212; Paul Byrne, *Social Movements in Britain* (Routledge, 1997).

<sup>24</sup> Hilson, 'New Social Movements', above n 11, 240-1.

<sup>25</sup> Ibid 241.

<sup>26</sup> Vanhala, above n 11, 405-7.

explanation of SMO behaviour, this article argues that a more nuanced analysis of resources is required where external legal representation is present (such as Australia) compared to jurisdictions where there is no external legal representation or significant overlap between the internal and external legal expertise (such as the United States).<sup>27</sup> In the former case, it is suggested that a litigator's assessment of the legal stock and principles (i.e., structural LO) will override a more holistic strategic assessment by the SMO. Australian media reports following the *Urgenda* decision, in which lawyers from Australia's Environmental Defenders Offices (EDOs) described being approached by climate SMOs wanting to bring analogous litigation and in which those same lawyers publicly expressed doubt as to the prospects of such a case, provide some preliminary support for this proposition.<sup>28</sup>

Framing 'involves the social construction and communication of reality and is inevitably partial' and is 'a strategic choice about which aspects of an issue to focus on and which to exclude'.<sup>29</sup> Frames 'diagnose, evaluate and prescribe' social issues by 'identifying the issue or problem and its causes, ... making moral judgements, ... suggesting remedies or solutions'.<sup>30</sup> A related concept to framing is that of a 'discourse', the 'ensemble of ideas, concepts and categories through which meaning is given to social and physical phenomena'.<sup>31</sup>

The literature has typically regarded framing as a separate explanatory factor to LO or PO. Accordingly, how an SMO frames and understands a social issue – such as who is responsible for the issue and what should be done about it – shapes an SMO's strategic preferences. Given the specific focus on the choice of different approaches to climate litigation, this

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<sup>27</sup> As is well known, in the United States public interest environmental law organisations are often the nominal plaintiff in environmental litigation, and source much (if not all) of their legal representation from 'staff attorneys'. See Murray Hogarth, *Law of the Land: Rise of the Environmental Defenders* (EDO NSW, 2016) 22. This model was briefly contemplated by the Australian public interest environmental law movement before being discarded in favour of an independent, non-campaigning model, due in large part to prohibitive regulatory obstacles. See also Vanhala, above n 11.

<sup>28</sup> Abby Digham, *Environmentalists Consider Legal Challenge to Climate 'Inaction'* (1 July 2015) SBS News <<https://web.archive.org/web/20150702200055/http://www.sbs.com.au/news/article/2015/06/30/environmentalists-consider-legal-challenge-climate-inaction>>.

<sup>29</sup> Chris Hilson 'Framing Fracking: Which Frames Are Heard in English Planning and Environmental Policy and Practice?' (2015) 27 *Journal of Environmental Law* 177, 179.

<sup>30</sup> Ibid, citing Robert Entman, 'Framing: Towards Clarification of a Fractured Paradigm' (1993) 43 *Journal of Communication* 51, 52.

<sup>31</sup> Maarten Hajer and Wystke Versteeg 'A Decade of Discourse Analysis of Environmental Politics: Achievements, Challenges, Perspectives' (2005) 7(3) *Journal of Environmental Policy and Planning* 175, 175, cited in Christopher Shaw, 'Choosing a Dangerous Limit for Climate Change: Public Representations of the Decision Making Process' (2013) 23 *Global Environmental Change* 563, 564. See also Katherine Lofts, 'Analysing Rights Discourses in the International Climate Regime' in Sébastien Duyck et al (eds) *Routledge Handbook of Human Rights and Climate Governance* (Routledge, 2018) 16.

article also applies the concept of framing as an aspect of LO. That is, if different approaches to litigation embody different frames or discourses about the relationship between climate change, the law and justice, then choosing one approach over another is itself a framing exercise. ‘Law is expressive: it constructs narratives that attach moral significance to otherwise meaningless, stochastic events’.<sup>32</sup> Framing is therefore both an *internal* process within social movements and SMOs, and an *external* strategic exercise in public communication.

Much of the non-social movement literature has already recognised that climate litigation plays a role in framing and influencing these external political, social, cultural and psychological discourses surrounding climate change and climate justice.<sup>33</sup> Generally, these analyses go no further than recognising litigation’s general potential to raise government and public awareness of climate change issues and influence partisan debates.<sup>34</sup> Little attention has yet been paid to the comparative strategic advantages of different frames.<sup>35</sup> This article thus focuses its discussion of framing on this latter question.

Finally, sociological institutionalist explanations consider ‘cultural conventions, norms, and cognitive frames’, including ‘mimesis; the idea that in a context of uncertainty and limited rationality, institutions have a tendency to imitate one another.’<sup>36</sup> These explanations also consider ‘the role individuals can play in shaping organisational structure and meaning frames’, including ‘strategy entrepreneurs’ – those who pioneer the use of

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<sup>32</sup> Weaver and Kysar, above n 8, 300.

<sup>33</sup> Chris Hilson, ‘Climate Change Litigation: A Social Movement Perspective’ (Paper presented at Legal and Criminological Consequences of Climate Change Workshop, Onati, 29-30 April 2010) 6; Hari Osofsky, ‘The Continuing Importance of Climate Change Litigation’, (2010) 1 *Climate Law* 3; Ewing and Kysar, above n 8; Peel and Osofsky, *Climate Change Litigation*, above n 2, 221 (‘[l]itigation on important social issues, such as climate change, is often initiated not just to advance regulation but also with the goal of influencing the public debate’); Jonathan Cannon, *Environment in the Balance* (Harvard University Press, 2015) 27-8; Grace Nosek, *Climate Change Litigation and Narrative: How to Use Litigation to Tell Compelling Climate Stories* (2018) 42(3) *William and Mary Environmental Law and Policy Review* 733; Weaver and Kysar, above n 8, 300 (‘[l]egal narrative, in other words, imbues bare facts with social and cultural significance’).

<sup>34</sup> Osofsky, above n 33, 5; Brian Preston, ‘The Influence of Climate Change Litigation on Governments and the Private Sector’ (2011) 2 *Climate Law* 485; Peel and Osofsky, *Climate Change Litigation*, above n 2, 100.

<sup>35</sup> An exception is Nicole Rogers, ‘Making Climate Science Matter in the Courtroom’ (2017) 34 *Environmental and Planning Law Journal* 475. Rogers’ central argument is that the frames or narratives advanced by new approaches are preferable to those advanced by the existing approach. This article goes somewhat further by comparing and identifying points of differentiation and harmonisation between these emerging frames, and by proposing analytical groups for these emerging cases based not on their underlying cause(s) of action but on their frames. Another exception is Weaver and Kysar, above n 8, which considers the potential of different lawsuits and the courts’ response to them to construct narratives around and shape our understanding of the concept of catastrophe.

<sup>36</sup> Vanhala, above n 11, 397-398.

particular tactics within an SMO.<sup>37</sup> In Australia, litigators play a critical gatekeeping role to a climate SMO's access to the legal system.<sup>38</sup> Consequently, the socio-institutionalist discussion in this article will focus on structure, norms and values of the public interest environmental law sector rather than the climate SMO community more broadly.

### *B Social Movement Theory Applied to the Choice of Climate Litigation Approaches*

This article's focus on climate litigants' choice of different approaches to litigation is distinguishable from much of the social movement literature, which instead concerns itself with their choice of litigation as a strategy vis-à-vis other potential strategies. It is assumed for the purposes of this article that factors which would normally cause an SMO to choose political lobbying or protest over litigation are either not present, or only relevant to an SMO's choice of a specific litigation approach. It is also assumed that the suite of available litigation approaches should be largely identical across sample jurisdictions. Otherwise, the choice of a particular litigation approach in a given jurisdiction would not necessarily be a choice vis-à-vis other litigation approaches, but a choice vis-à-vis lobbying or protest.

This article argues that these assumptions can be made (with minimal caveating) when comparing climate change litigation preferences in the Australia and the United States.<sup>39</sup> First, in the context of climate change, the factors that the literature indicates would conventionally lead to an SMO choosing protest or lobbying appear immaterial in both the United States and Australia. With respect to protest, it is generally understood that 'protest as a strategy may be influenced by poor political and legal opportunities.'<sup>40</sup> Therefore, in jurisdictions where there is already a high frequency of climate litigation – as is the case in Australia and the United States – it can be assumed that there is at least sufficient LO that the question is not whether to pursue protest to the exclusion of legal strategies but whether to pursue protest alongside legal strategies. The same explanation applies to lobbying; that is, the pre-existence of litigation in these jurisdictions means that litigation is already regularly considered a feasible strategy alongside protest. This view is reflected in publicly available internal strategy documents from the climate SMO movement.<sup>41</sup>

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<sup>37</sup> Ibid 381, 397-398.

<sup>38</sup> Hogarth, above n 27, 57.

<sup>39</sup> Note that differences between climate litigation experiences in the US and Australia have already been analysed elsewhere. See Peel and Osofsky, *Climate Change Litigation*, above n 2, 321-324.

<sup>40</sup> Hilson, 'New Social Movements', above n 11, 239.

<sup>41</sup> John Hepburn et al, 'Stopping the Australian Coal Export Boom: Funding Proposal for the Australian Anti-Coal Movement' (Proposal, November 2011) 6.

Second, the evidence suggests that in both Australia and the United States there is a growing divide between the feasible outcomes of political lobbying and the level of emissions reductions needed to prevent dangerous climate change. The difficulties of crafting policy solutions to climate change are well-studied; climate change's characterisation as a 'super wicked' problem is frequently cited in scholarship concerning both legal and policy responses to climate change.<sup>42</sup> In contrast, the increasingly wicked and imminent consequences of multi-decadal political dysfunction on climate change have, to some extent, been underemphasised or taken for granted in the climate litigation literature.<sup>43</sup> There is, however, increasing recognition in the broader scientific literature that dangerous climate change is already upon us and that, if not quickly redressed, the consequences will be unprecedented and catastrophic.<sup>44</sup> Yet, in both the United States and Australia, greenhouse

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<sup>42</sup> See Richard Lazarus, 'Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future' (2009) 94 *Cornell Law Review* 1153; Kelly Levin et al, 'Overcoming the Tragedy of Super Wicked Problems: Constraining Our Future Selves to Ameliorate Global Climate Change' (2012) 45 *Policy Sciences* 123; Chris Hilson, 'It's All About Climate Change, Stupid! Exploring the Relationship Between Environmental Law and Climate Law' (2013) 25(3) *Journal of Environmental Law* 359, 363; Hari Osofsky and Jacqueline Peel, 'Litigation's Regulatory Pathways and the Administrative State: Lessons from US and Australian Climate Change Governance' (2013) 25 *Georgetown International Environmental Law Review* 207, 208-9; Cannon, above n 33, 287 ('[i]t is wicked because of the extremely broad dispersion of causes and effects, both spatially across the entire planet and temporally across generations, and the inadequacy of international institutions to deal with the problem at a global scale. Added to these recalcitrant features are cultural barriers that have discouraged meaningful deliberation on the science of climate change and policies to address it'); Geoffrey Palmer, 'New Zealand's Defective Law on Climate Change' (2015) 13 *New Zealand Journal of Public and International Law* 115, 115; Elizabeth Fisher and Eloise Scottford, 'Climate Change Adjudication: The Need to Foster Legal Capacity: An Editorial Comment' (2016) 28 *Journal of Environmental Law* 1, 2-3; Brian Preston, 'Foreword' (2016) 39(4) *UNSW Law Journal* 1480, 1480; Elizabeth Fisher et al, 'The Legally Disruptive Nature of Climate Change' (2017) 80(2) *The Modern Law Review* 173, 177; Rogers, above n 35, 475.

<sup>43</sup> For a recent example of this phenomenon, see Kim Bouwer, 'The Unsexy Future of Climate Change Litigation' (2018) 30 *Journal of Environmental Law* 1, 3-4, 10-11.

<sup>44</sup> A growing body of recent literature indicates, based on multiple lines of evidence, that the threshold for dangerous climate change has already been passed, and that the threshold for catastrophic and likely irreversible climate change impacts is perilously close. See, for example, Danny Harvey, 'Dangerous Anthropogenic Interference, Dangerous Climatic Change, and Harmful Climatic Change: Non-Trivial Distinctions with Significant Policy Implications' (2007) 82 *Climatic Change* 1; James Hansen et al, 'Assessing "Dangerous Climate Change": Required Reduction of Carbon Emissions to Protect Young People, Future Generations and Nature' (2013) 8(12) *PLOS One* e81468; James Hansen et al, 'Ice Melt, Sea Level Rise and Superstorms: Evidence from Paleoclimate Data, Climate Modelling, and Modern Observations that 2°C Global Warming Could be Dangerous' (2016) 16 *Atmospheric Chemistry and Physics* 3761; James Hansen et al, 'Young People's Burden: Requirement of Negative CO<sub>2</sub> Emissions' (2017) 8 *Earth System Dynamics* 577; Yangyang Xu and Veerabhadran Ramanathan, 'Well Below 2°C: Mitigation Strategies for Avoiding Dangerous to Catastrophic Climate Changes' (2017) 114(39) *Proceedings of the National Academy of Sciences* 10315; Will Steffen et al, 'Trajectories of the Earth System in the Anthropocene' (2018) 11(5) *Proceedings of the National Academy of Sciences* 8252; Joyashree Roy et al, 'Chapter 5: Sustainable Development, Poverty Eradication and

gas (GHG) emissions reduction policies and programs are being watered-down or rescinded;<sup>45</sup> there is open, ongoing support for new fossil fuel development;<sup>46</sup> government negotiators continue to obstruct progress and heightened ambition in international climate negotiations;<sup>47</sup> and national emissions continue to rise.<sup>48</sup> Globally, emissions continue to grow and remain on a trajectory that is entirely incommensurate with internationally-agreed targets and the best available science of climate stabilisation.<sup>49</sup>

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Reducing Inequalities' in Valerie Masson-Delmotte et al (eds) 'Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C Above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty' (Special Report, World Meteorological Organisation, 2018) 5-1, 5-15 <<https://www.ipcc.ch/sr15/>> ('[w]arming of 1.5°C is not considered "safe" for most nations, communities, ecosystems, and sectors and poses significant risks to natural and human systems as compared to current warming of 1°C (*high confidence*) ...'); Kevin Burke et al, 'Pliocene and Eocene Provide Best Analogues for Near-Future Climates' (2018) 115 *Proceedings of the National Academy of Sciences* 13289.

<sup>45</sup> Ryan Martel, *Unnatural Instincts: the Trump Effort to Rollback Critical Climate Regulations is Bad Science and Bad Business* (25 October 2018) Ceres <<https://www.ceres.org/news-center/blog/unnatural-instincts-trump-effort-rollback-critical-climate-regulations-bad-science>>; Adam Morton, 'Australia Abandons Plan to Cut Carbon Emissions' (2018) 561 *Nature* 293 <<https://www.nature.com/articles/d41586-018-06675-9>>.

<sup>46</sup> See eg Eric Lipton and Hiroko Tabuchi, 'Driven by Trump Policy Changes, Fracking Booms on Public Lands' *New York Times* (online) 27 October 2018 <<https://www.nytimes.com/2018/10/27/climate/trump-fracking-drilling-oil-gas.html>>; Katherine Murphy, 'Coalition Signals it will Provide Taxpayer Support for New and Existing Coal Plants' *Guardian* (online) 12 December 2018 <<https://www.theguardian.com/environment/2018/dec/13/coalition-signals-it-will-provide-taxpayer-support-for-new-and-existing-coal-plants>>.

<sup>47</sup> See eg Ben Doherty, 'Australia Only Nation to Join US at Pro-Coal Event at COP24 Climate Talks' *Guardian* (online) 10 December 2018 <<https://www.theguardian.com/environment/2018/dec/11/australia-only-nation-to-join-us-at-pro-coal-event-at-cop24-climate-talks>>; Kate Aronoff, *From Obama to Trump, Climate Negotiations Are Being Run by the Same Crew of American Technocrats* (14 December 2018) Intercept <<https://theintercept.com/2018/12/14/cop24-climate-change-talks-paris-agreement/>>.

<sup>48</sup> Lisa Cox, 'Australia on Track to Miss Paris Climate Targets as Emissions Hit Record Highs' *Guardian* (online) 13 September 2018 <<https://www.theguardian.com/australia-news/2018/sep/14/australia-on-track-to-miss-paris-climate-targets-as-emissions-hit-record-highs>>; Ari Natter, 'US Greenhouse Gas Emissions Rising Again, Defying Trump's Boasts' *Bloomberg* (online) 13 December 2018 <<https://www.bloomberg.com/news/articles/2018-12-13/u-s-greenhouse-gas-emissions-rising-again-defying-trump-boasts>>.

<sup>49</sup> United Nations Environment Programme, *The Emissions Gap Report 2018* (United Nations Environment Programme, 2018) <<https://www.unenvironment.org/resources/emissions-gap-report-2018>>; Joeri Rogelj et al, 'Paris Agreement Climate Proposals Need a Boost to Keep Warming Well Below 2°C' (2016) 534 *Nature* 631; Hansen et al, 'Assessing "Dangerous Climate Change"', above n 44, 15-16; Hansen et al, 'Young People's Burden', above n 44, 595.

These circumstances therefore suggest that what is arguably the most important policy objectives to the climate SMO community – global mitigation of greenhouse gas emissions in such a manner as to stabilise atmospheric greenhouse gas emissions and preserve a safe climate – is at this late stage unlikely to be achievable through conventional political lobbying and/or protest alone. This indicates that climate SMOs in both Australia and the United States are likely to view litigation as part of a last-ditch strategy to circumvent political gridlock or prevent further political setbacks, rather than as an alternative strategy for achieving already-pursued ends. This article therefore confines its focus to how climate litigants assess and select between different litigation approaches.

Finally, this article recognises a distinction between a descriptive analysis that seeks to explain a climate litigant's choice of litigation approaches, and instrumental arguments concerning the preferability of one approach vis-à-vis others. Most existing analyses of the potential new climate litigation approaches in Australia have either consciously or inadvertently included an instrumental component. These analyses have focused on the structural LO of a novel litigation approach pioneered outside Australia, and have typically concluded that the new approach is not legally-arguable and therefore should not be pursued in Australia. The few analyses that have incorporated framing and contingent LO have also argued on instrumental grounds that the comparative framing advantages of these new approaches should carry some weight in the strategic choices of climate litigants.<sup>50</sup> This article adopts a similar approach insofar as it uses the analytical framework of social movement theory to both assess the efficacy of existing and potential new approaches and provide a more complete explanation for the non-adoption of new approaches in Australia.

### III RE-ASSESSING THE EXISTING APPROACH TO CLIMATE LITIGATION IN AUSTRALIA THROUGH A SOCIAL MOVEMENT LENS

As noted above, the vast majority of climate litigation in Australia has been brought under an 'administrative review'-based approach: that is, an approach involving either judicial or merits review of administrative decision-making.<sup>51</sup> This approach to climate litigation is essentially an extension of the dominant approach to environmental litigation that has

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<sup>50</sup> Rogers, above n 35, 482 ('[i]t is certainly arguable that the urgency of climate science predictions is better understood and provides a more pressing imperative for effective judicial decision-making, when framed within the context of governmental duties of care and hazardous negligence, the public trust doctrine in its application to the atmosphere, civil and constitutional rights, or even the criminal defence of necessity').

<sup>51</sup> Murray Wilcox, 'The Role of Environmental Groups in Litigation' (1985) 10(1) *Adelaide Law Review* 41, 41-2; Peel, 'The Role of Climate Change Litigation in Australia's Response to Global Warming', above n 8, 91; Peel and Osofsky, 'Climate Change Litigation', above n 2, 101-2.

subsisted since the advent of statutory environmental law in the 1970s.<sup>52</sup> Climate change-related administrative challenges have most prominently involved development approvals of, *inter alia*, coal mines, power plants and airport expansions.<sup>53</sup> The most common legal challenge in Australia has been to coal mines.<sup>54</sup>

Optimistic assessments of the ongoing potential and future prospects of the existing approach to climate litigation in Australia have been made elsewhere.<sup>55</sup> Generally, these assessments reason that climate litigants have brought and continue to bring litigation under this approach because of the robustness of the 'legal stock' that underpins its LO.<sup>56</sup> In particular, there have been 'minimal problems for climate change litigants taking merits or judicial review claims under Australian environmental legislation' in establishing standing; in contrast, standing may potentially re-emerge as a major obstacle for new, non-statutory approaches.<sup>57</sup> However, characterising the existing approach as better established and less legally risky than emerging approaches underemphasises that one of the purposes of administrative law-based climate litigation is to test and push the boundaries of statutory environmental law.<sup>58</sup> Accordingly, arguments focusing solely on the perceived legal robustness of the existing approach are questionable.

#### *A Vulnerabilities Associated with Legal Opportunity*

The existing approach is not without its legal shortcomings, several of which have been brought into focus by more recent case law. These shortcomings are inherent in the dependence of the approach on favourable legal stock; namely, adequate environmental and planning statutes.<sup>59</sup> In this vein, it has been argued that the existing approach to

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<sup>52</sup> See, for example, the discussion of this paradigm in Mary Wood, *Nature's Trust: Environmental Law for a New Ecological Age* (Cambridge University Press, 2014) 49-67.

<sup>53</sup> Brian Preston, 'Climate Change Litigation (Part 2)' (2011) 2 *Carbon and Climate Law Review* 244, 247-9, citing *Australian Conservation Foundation v Latrobe City Council* (2004) 140 LGERA 100; *Gray v Minister for Planning* (2006) 152 LGERA 258.

<sup>54</sup> Rogers, above n 35, 475, citing *Osofsky and Peel*, above n 42, 212.

<sup>55</sup> Justine Bell-James and Sean Ryan, 'Climate Change Litigation in Queensland: a Case Study in Incrementalism' (2016) 33(6) *Environmental and Planning Law Journal* 515; Peel et al, above n 1, 829-30.

<sup>56</sup> Peel et al, above n 1, 831-2, 844 ('... existing approaches have achieved important successes and may represent the greatest likelihood for positive outcomes in the future').

<sup>57</sup> *Ibid* 832.

<sup>58</sup> *Ibid* 796 ('[o]ver time – in an incremental and iterative fashion – these cases have consolidated the practice of including climate change considerations in environmental impact assessment undertaken for projects with substantial GHG emissions or the potential to be impacted by climate change consequences such as sea level rise').

<sup>59</sup> Brian Preston, 'Environmental Public Interest Litigation: Conditions for Success' (Paper presented at the 'Towards an Effective Guarantee of the Green Access: Japan's Achievements and Critical Points from a Global Perspective' Symposium, Awaji Island, Japan, 30-31 March 2013) ('[f]irst and foremost the laws of the land must provide a foundation for environmental public interest litigation. The laws must create or enable

climate litigation in Australia lacks an achievement analogous to that represented by the US case of *Massachusetts v EPA*,<sup>60</sup> a result that is in no small part due to the lack of Commonwealth legislation equivalent to the United States' federal *Clean Air Act of 1970*. More fundamentally, climate change and GHG emissions are generally not listed as explicit considerations in Australian environmental and planning statutes.<sup>61</sup> In New South Wales, for instance, it is recognised that there is a 'lack of integration between the need to reduce greenhouse gas emissions and the land-use planning system'.<sup>62</sup> Specifically, there is presently 'no part of the NSW planning, development assessment, approval or licensing framework' that 'performs strategic climate risk assessment', 'links to an emissions reduction target or a finite "carbon budget"', or has an overarching global temperature goal.<sup>63</sup> At the Commonwealth level, the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) continues to lack a trigger for GHG emissions as a 'matter of national environmental significance', reflective of the Commonwealth government's recent efforts to reduce its own regulatory oversight and fast-track development approvals.<sup>64</sup>

Consequently, in many cases, climate change-related legal arguments have been pursued via other statutory considerations. These include general considerations such as the 'public interest',<sup>65</sup> and specific considerations such as impacts on particular endangered species and World Heritage areas.<sup>66</sup> Even where consideration of climate change-related issues by a decision-maker is an express or implied requirement of

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legal suits or actions in relation to the aspect of the environment that is sought to be protected. If there is no right of action, there can be no litigation'). Arguably, in the Australian context the shortcomings of the existing approach also inhere in the notion of parliamentary supremacy and the limited scope and role of the judiciary vis-à-vis the legislative and executive branches. See section V-A of this article.

<sup>60</sup> *Massachusetts v Environmental Protection Agency*, 549 US 497 (2007); Peel et al, above n 1, 796.

<sup>61</sup> Sharon Christensen et al, 'Regulating Greenhouse Gas Emissions from Coal Mining Activities in the Context of Climate Change' (2011) 28 *Environmental and Planning Law Journal* 381, 403 ('to date, a requirement for environmental impacts caused by greenhouse gas emissions to form part of the EIA process is rarely, if ever, imposed').

<sup>62</sup> EDO NSW, 'Planning for Climate Change: How the NSW Planning System can Better Tackle Greenhouse Gas Emissions' (Report, EDO NSW, July 2016) <[https://www.edonsw.org.au/planning\\_for\\_climate\\_change](https://www.edonsw.org.au/planning_for_climate_change)> 8.

<sup>63</sup> Ibid; cf *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [526]-[527], [550]-[556].

<sup>64</sup> Jacqueline Peel, 'The Role of Climate Change Litigation in Australia's Response to Global Warming', above n 8, 93; Chris McGrath, 'One Stop Shop for Environmental Approvals a Messy Backward Step for Australia' (2014) 31 *Environmental and Planning Law Journal* 164.

<sup>65</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 79C(1)(e).

<sup>66</sup> For recent examples, see *Adani Mining Pty Ltd v Land Services of Coast and Country Inc* [2015] QLC 48; *Australian Conservation Foundation Incorporated v Minister for the Environment* [2016] FCA 1042; *Australian Conservation Foundation Incorporated v Minister for the Environment and Energy* [2017] FCAFC 134.

legislation, such legislation is almost invariably drafted so as to give the decision-maker broad discretion as to the appropriate weight to give this consideration vis-à-vis others.<sup>67</sup>

The New South Wales Land and Environment Court's jurisprudence regarding the principle of 'ecologically sustainable development' (ESD) – which has been described as paradigmatic of contemporary Australian environmental law – is illustrative.<sup>68</sup> While ESD has been advanced and accepted as a legitimate ground of review in many climate change-related cases before the Court,<sup>69</sup> ultimately even minimal consideration of ESD by the decision-maker will suffice to survive judicial review.<sup>70</sup> Additionally, 'ESD principles do not require that the GHG issue, including downstream emissions, override all other considerations', and the decision-maker has the discretion to 'decide how the ESD principles in their entirety are to be applied'.<sup>71</sup> Summarising the jurisprudence of ESD-based climate litigation, Professors Peel and Osofsky wrote:

In sum, the case law seems to have been important and useful in making climate change and greenhouse gases a "mainstream" issue for consideration by decision makers assessing coal projects. However, there is concern that consideration of the issue is not producing any real change in government decision-making processes, which invariably end up approving any new coal-fired power station or coal mine application.<sup>72</sup>

Another example is the consideration of downstream (so-called 'Scope 3')<sup>73</sup> emissions in the context of coal mine approvals.<sup>74</sup> To the extent that Australian courts have required consideration of these emissions, those courts have found it both lawful and reasonable for lawmakers to accept the 'perfect substitution' argument that 'if the coalmine is not built another will supply the same amount of coal, thus leaving the quantum of global GHG emissions unchanged or even increased if the new source

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<sup>67</sup> Rogers, above n 35, 480.

<sup>68</sup> Rosemary Lyster et al, *Environmental and Planning Law in New South Wales* (Federation Press, 4<sup>th</sup> ed, 2016) 27.

<sup>69</sup> See Jacqueline Peel, 'Ecologically Sustainable Development: More Than Mere Lip Service?' (2008) 12(1) *Australasian Journal of Natural Resources Law and Policy* 1; Brian Preston, 'The Judicial Development of Ecologically Sustainable Development' (Paper presented at the 2016 IUCNAEL Colloquium, 'Environment in Court', Olso, 22 June 2016).

<sup>70</sup> *Drake-Brockman v Minister for Planning* [2007] NSWLEC 490 [129].

<sup>71</sup> *Gray v Minister for Planning* [2006] NSWLEC 720 at [136], cited in Peel, 'The Role of Climate Change Litigation in Australia's Response to Global Warming', above n 8, 100-1.

<sup>72</sup> Peel and Osofsky, *Climate Change*, above n 2, 100.

<sup>73</sup> Downstream emissions are emissions produced from combustion of fossil fuels extracted from a proposed development, such as that of the coal extracted from a coal mine or the petroleum products extracted from an oil well.

<sup>74</sup> See Kane Bennett, 'Australian Climate Change Litigation: Assessing the Impact of Carbon Emissions' (2016) 33 *Environmental and Planning Law Journal* 538.

involves “dirtier” coal.<sup>75</sup> It is telling that Australian jurisprudence in this area is considerably more deferential to this argument than that of other common law jurisdictions known for judicial deference to executive discretion,<sup>76</sup> including the United States.<sup>77</sup>

### *B Vulnerabilities Associated with Political Opportunity*

In addition to the above deficiencies with the approach’s LO, the PO for the existing approach to climate litigation has become increasingly constrained over time. For instance, the failure of successive state and federal governments to amend environmental and planning statutes to squarely and expressly incorporate consideration of GHG emissions – an act that would immediately increase the LO of the existing approach – appears politically motivated to limit opportunities for judicial review of fossil fuel development. This phenomenon is not confined to climate change. Recent examples abound of state and federal governments watering down and crafting loopholes to existing laws in response to successful legal challenges to coal mine approvals,<sup>78</sup> indigenous land-use agreements<sup>79</sup> and land-clearing regulations.<sup>80</sup> Rare legal successes have invited vehement political backlash.<sup>81</sup>

<sup>75</sup> Rogers, above n 35, 477-9; Bell-James and Ryan, above n 55; *Australian Conservation Foundation Incorporated v Minister for the Environment and Energy* [2017] FCAFC 134 [61].

<sup>76</sup> Wood, above n 52, 110-11, citing *Chevron USA v Natural Resources Defense Council* 467 US 837, 844 (1984).

<sup>77</sup> See *WildEarth Guardians v United States Bureau of Land Management*, 870 F 3d 1222, 1236 (10<sup>th</sup> Cir, 2017) (“[e]ven if we could conclude that the agency had enough data before it to choose between the preferred and no action alternatives, we would still conclude this perfect substitution assumption arbitrary and capricious because the assumption itself is irrational (i.e., contrary to basic supply and demand principles)”).

<sup>78</sup> See *Anature Incorporated v Centennial Springvale Pty Ltd* [2017] NSWCA 191; Gavin Coote and Pablo Vinales, *Springvale Mine: NSW Government to Defy Court Ruling with Legislation to Keep Coal Mine Running* (9 October 2017) ABC News <<http://www.abc.net.au/news/2017-10-09/miners-celebrate-as-springvale-mine-saved-from-closure/9030424>>; Michael McGowan, ‘NSW to Approve Coalmine Blocked by Courts for Polluting Sydney’s Drinking Water’ *Guardian* (online) 9 October 2017 <<https://www.theguardian.com/australia-news/2017/oct/09/nsw-to-approve-coalmine-blocked-by-courts-for-polluting-sydneys-drinking-water>>.

<sup>79</sup> *McGlade v Native Title Registrar* [2017] FCAFC 10; Joe Kelly, ‘Senate to Amend Native Title Clearing Way for Adani Mine’ *Australian* (online) 13 June 2017 <<https://www.theaustralian.com.au/national-affairs/indigenous/senate-to-amend-native-title-clearing-way-for-adani-mine/news-story/314b12a3838f50a6b6ad76d91640dd2f>>.

<sup>80</sup> Michael Slezak, ‘Laws that Make Land Clearing Easier Ruled Invalid by NSW Court’ *Guardian* (online) 9 March 2018 <<https://www.theguardian.com/australia-news/2018/mar/09/laws-that-make-land-clearing-easier-ruled-invalid-by-nsw-court>>; Michael Slezak, ‘NSW Laws that Make Land Clearing Easier Reinstated by Berejiklian Government’ *Guardian* (online) 11 March 2018 <<https://www.theguardian.com/australia-news/2018/mar/11/nsw-laws-that-make-land-clearing-easier-reinstated-by-berejiklian-government>>.

<sup>81</sup> See section V-C of this article.

Admittedly, a well-considered proposal for law reform has been brought forward by the Australian Panel of Experts on Environmental Law (APEEL) and the ‘Places You Love Alliance’,<sup>82</sup> which if enacted in whole or part would likely increase the space for litigation.<sup>83</sup> However, it is questionable whether the PO exists to enact and fully implement these laws, let alone in a manner and timeframe commensurate with preventing or minimising catastrophic climate change impacts.<sup>84</sup> Rather, the well-documented examples of the crony capitalism and revolving-door relationship between the fossil fuel industry and government will likely continue to stymie necessary reform.<sup>85</sup> It is also questionable whether reforms that largely reproduce the existing administrative discretion-based environmental law paradigm will redress its deficiencies, including regulatory capture and excessive judicial deference to the ‘expertise’ of executive decision-makers.<sup>86</sup> There are therefore limited prospects that

<sup>82</sup> Places You Love Alliance, *A New Generation of Nature Laws*, Places You Love <<http://www.placesyoulove.org/australiawelove/naturelaws/>>; Australian Panel of Experts on Environmental Law, *The Future of Australian Environmental Laws* (Overview Paper, 2017)

<[http://apeel.org.au/s/APEEL\\_Future\\_of\\_Australian\\_Environmental\\_Laws\\_Overview.pdf](http://apeel.org.au/s/APEEL_Future_of_Australian_Environmental_Laws_Overview.pdf)>; Bruce Lindsay and Hannah Jaireth, ‘Australian Environmental Democracy and the Rule of Law – Thoughts from APEEL’ (2016) 31(7) *Australian Environment Review* 245.

<sup>83</sup> See Australian Panel of Experts on Environmental Law, *Democracy and the Environment* (Technical Paper 8, April 2017) <[http://apeel.org.au/s/APEEL\\_democracy\\_and\\_environment.pdf](http://apeel.org.au/s/APEEL_democracy_and_environment.pdf)>.

<sup>84</sup> See Paul Karp and Lisa Cox, ‘Labor Announces Environmental Overhaul, Avoiding Pre-Election Internal Battle’ *Guardian* (online) 16 December 2018 <<https://www.theguardian.com/australia-news/2018/dec/16/labor-announces-environmental-overhaul-avoiding-pre-election-internal-battle>> ([b]ut rather than create a national environment commission, Labor will instead direct the environment department to establish national environmental plans that will set *non-binding* “targets and approaches to proactively protect the environment” (emphasis added)).

<sup>85</sup> See Clive Hamilton, *Running from the Storm: The Development of Climate Change Policy in Australia* (UNSW Press, 2001); Clive Hamilton, *Scorcher: The Dirty Politics of Climate Change* (Black Inc Agenda, 2007); Guy Pearse, *High & Dry: John Howard, Climate Change and the Selling of Australia’s Future* (Penguin Books, 2007); Guy Pearse, *Quarry Vision: Coal, Climate Change and the End of the Resources Boom* (Black Inc, 2009); Philip Chubb, *Power Failure: The Inside Story of Climate Politics Under Rudd and Gillard* (Black Inc Agenda, 2014); Maria Taylor, *Global Warming and Climate Change: What Australia Knew and Buried ... then Framed a New Reality for the Public* (Canberra, ANU Press, 2014); Marc Hudson, *How Climate Denial Gained a Foothold in the Liberal Party, and Why it Still Won’t Go Away* (10 March 2016) Conversation <<https://theconversation.com/how-climate-denial-gained-a-foothold-in-the-liberal-party-and-why-it-still-wont-go-away-56013>>; Anna Krien, *The Long Goodbye: Coal, Coral and Australia’s Climate Deadlock* (Black Inc, 2017); Mark Butler, *Climate Wars* (Melbourne University Press, 2017); Marc Hudson, *Coal and the Coalition: the Policy Knot that Still Won’t Untie* (6 September 2017) Conversation <[https://theconversation.com/coal-and-the-coalition-the-policy-knot-that-still-wont-untie83565#comment\\_1392464](https://theconversation.com/coal-and-the-coalition-the-policy-knot-that-still-wont-untie83565#comment_1392464)>.

<sup>86</sup> Mary Wood, ‘Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift’ (2009) 39 *Environmental Law* 43, 54-65; Wood, above n 52, 49-67. A paradigm of environmental law that presumes judicial deference to executive expertise is arguably even less defensible within Australia’s constitutional structure, where members of the legislature (ministers) are in charge of executive departments.

the PO for more efficacious litigation under the existing approach will increase in the short to medium term.

*C Vulnerabilities Associated with Framing*

In addition to issues with LO and PO, the existing approach to climate litigation in Australia is also, in this author's view, vulnerable from a framing standpoint. As noted above, typically the grounds of review advanced by legal challenges brought under this approach have either only tangentially concerned climate change, or have advanced arguments directly concerning climate change as an alternative or afterthought to more conventional grounds. One example of this is the *Mackay Conservation Group* challenge to the Adani Carmichael Coal Mine.<sup>87</sup> Although climate change impacts were raised as a ground of review in the initial challenge, the development approval was voluntarily rescinded (and later re-granted) by the Commonwealth Environment Minister upon realisation that insufficient consideration had been given to two endangered species: the yakka skink and the ornamental snake.<sup>88</sup> Another example is the recent challenge in New South Wales to land-clearing regulations.<sup>89</sup> Again, because the applicants succeeded on the basis of a conventional procedural error, the court's decision did not advance to consideration of the climate change-related grounds of review. These regulations were also remade, this time within hours of the NSW Land and Environment Court's decision.<sup>90</sup> Although it may be strategically sound to prioritise non-climate change-related grounds of review where doing so would achieve the same litigation outcome, such a strategy has failed to both ultimately prevent fossil fuel development approvals and fully ventilate in court the science of GHG emissions and climate change impacts.<sup>91</sup>

There is arguably an even greater issue with the existing approach's frame. This is its potential implication, both before the courts and in the public sphere, that the alleged 'injustice' giving rise to the legal challenge is merely the failure of the decision-maker to follow statutory procedure or more general norms of administrative decision-making. The real-world injustices of climate change, including the consequences of the decision-maker's approval of emissions-intensive development in exacerbating the

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<sup>87</sup> *Mackay Conservation Group v Commonwealth of Australia* (Federal Court of Australia, NSD33/2015).

<sup>88</sup> Environmental Law Australia, *Carmichael Coal Mine Cases in the Federal Court* <<http://envlaw.com.au/carmichael-coal-mine-federal-court/>>.

<sup>89</sup> See above n 80.

<sup>90</sup> *Ibid.*

<sup>91</sup> Rogers, above n 35, 480. Although the first climate change case in Australia, *Greenpeace Australia Ltd v Redbank Power Pty Ltd* (1994) 86 LGERA 143, was decided in 1994, 2018 marked the first time that expert evidence regarding global 'emissions budget' in the context of a proposed new coal mine was presented in an Australian court. See Matthew Kelly, 'Land and Environment Court Reserves its Judgement in the Rocky Hill Coal Mine Case' *Newcastle Herald* (online) 6 September 2018 <<https://www.theherald.com.au/story/5630931/court-reserves-judgement-in-rocky-hill-coal-mine-case/>>.

climate crisis, are neither litigated nor communicated by the litigation.<sup>92</sup> Put differently, both ‘existing statutory law’ and litigation brought under it ‘embod[y] the wrong cultural narrative for the climate change era’,<sup>93</sup> and therefore have little potential to frame and influence public attitudes. Admittedly, this implication is much stronger with respect to judicial review than merits review. But it should be noted that merits review is not always available for emissions-intensive development,<sup>94</sup> and even where it is available its effectiveness is limited by, *inter alia*, the strong statutory presumption in favour of approving development, and politically motivated, *ex post facto* legislative overrides.<sup>95</sup>

In either case, the standard frame under the existing approach lacks coherence with arguments being made by campaign groups outside of the courtroom. Specifically, it is difficult to argue that ‘clarifying important principles of law’ with respect to the often narrow issues that form the subject of administrative law-based litigation is the sole or dominant motivation for plaintiffs commencing litigation.<sup>96</sup> Rather, the evidence indicates that campaign groups consider litigation a pillar of the broader effort to prevent further fossil fuel development and reduce Australia’s contribution to climate change.<sup>97</sup> Consequently, where lawyers inside the courtroom are presenting arguments that it is only the decision-maker’s inherently fixable procedural or legal errors that has resulted in an injustice, but campaign groups outside the courtroom are arguing that the development’s very approval constitutes an injustice, this invites confusion and criticism across the political spectrum. Proponents of fossil fuel development can allege that litigation under the existing approach is illegitimate or vexatious, even if the empirical evidence suggests these allegations lack credibility.<sup>98</sup> Opponents of fossil fuel development, frustrated by the limited scope and results of litigation, increasingly

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<sup>92</sup> Rogers, above n 35.

<sup>93</sup> Robyn Craig, ‘Learning to Live with the Trickster: Narrating Climate Change and the Value of Resilience Thinking’ (2016) 33 *Pace Environmental Law Journal* 351, 358, cited in Rogers, above n 35, 481.

<sup>94</sup> Sarah Wright, ‘Holding Regulators to Account in New South Wales Pollution Law: Part 1 – The Limits of Merits Review’ (2016) 86 *AIAL Forum* 78, 86.

<sup>95</sup> Rogers, above n 35, 481.

<sup>96</sup> Bell-James and Ryan, above n 55, 537.

<sup>97</sup> Hepburn et al, above n 41, 6 (‘[l]egal challenges can stop projects outright, or can delay them in order to buy time to build a much stronger movement and powerful public campaigns. They can also expose the impacts, increase costs, raise investor uncertainty, and create a powerful platform for public campaigning’).

<sup>98</sup> Chris McGrath, ‘Myth drives Australian Government Attack on Standing and Environmental “Lawfare”’ (2016) 33 *Environmental and Planning Law Journal* 3; Bell-James and Ryan, above n 55, 537; Cristy Clark, ‘The Politics of Public Interest Environmental Litigation: Lawfare in Australia’ (2016) 31(7) *Australian Environment Review* 258.

question the legitimacy of the statutory environmental laws themselves and the utility of further litigation.<sup>99</sup>

This leads to a further vulnerability concerning the appropriateness of the approach's frame. The existing approach to litigation arose out of different (i.e. discrete) environmental challenges to those posed by climate change.<sup>100</sup> While the approach has been of debatable utility in addressing and remedying those discrete challenges, it is categorically unsuited to climate change's spatial and temporal aspects.<sup>101</sup> With the problem of achieving necessary atmospheric GHG mitigation and transitioning away from a fossil fuel-based economy in mind, the current frame puts forward a piecemeal and incremental response as the solution,<sup>102</sup> where a sweeping, systemic action is in fact needed. At worst, this endorses 'tinkering around the edges with approaches that have failed in the past' and 'holds no more promise than throwing a rescue rope that is too short'.<sup>103</sup> In the face of a worsening climate crisis, the existing approach communicates a frame that considers 'some progress, some minor victories, and some incremental development in the law' an indicator of success.<sup>104</sup> The approach should therefore be seriously questioned in light of new, more ambitious and more systemic approaches that seek remedies proportionate to the challenges posed by the climate crisis.<sup>105</sup>

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<sup>99</sup> Environmental Defenders Office Queensland, *ACF Appeals Federal Court Decision on Adani* (19 September 2016) <[https://www.edoqld.org.au/acf\\_appeals\\_federal\\_court\\_adani](https://www.edoqld.org.au/acf_appeals_federal_court_adani)> ([quoting then-Australian Conservation Foundation President Geoff Cousins] 'Australia's system of environment laws is broken if it allows the Federal Environment Minister to approve a mega-polluting coal mine – the biggest in Australia's history – and claim it will have no impact on the global warming and the reef').

<sup>100</sup> For a brief account of the modern public interest environmental law movement's US origins, see John Bonine, 'Private Public Interest Environmental Law: History, Hard Work, and Hope' (2009) 26(2) *Pace Environmental Law Review* 465, 466-72.

<sup>101</sup> Cannon, above n 33, 287.

<sup>102</sup> Bell-James and Ryan, above n 55, 518.

<sup>103</sup> Mary Wood, 'Atmospheric Trust Litigation' in William Rodgers et al (eds) *Climate Change: A Reader* (Carolina Academic Press, 2011) 1018, 1019.

<sup>104</sup> Bell-James and Ryan, above n 55, 531.

<sup>105</sup> Randall Abate, 'Atmospheric Trust Litigation in the United States: Pipe Dream or Pipeline to Justice for Future Generations?' in Randall Abate (ed) *Climate Justice: Case Studies in Global and Regional Governance Challenges* (West Academic, 2016) 543, 566 ('[t]he success of ATL ["Atmospheric Trust Litigation"] – part of the government mitigation approach discussed below] should be gauged not by how many victories are achieved in state and federal courts under this theory. Rather, ATL's success ultimately should be judged on the basis of the role it played in facilitating state and federal government actors in the United States and abroad to establish and enforce rights and remedies for climate justice').

#### IV EVALUATING NEW APPROACHES TO CLIMATE LITIGATION THROUGH A SOCIAL MOVEMENT LENS

##### *A Identifying New Approaches: 'Government Mitigation' and 'Adaptation Damages' Approaches*

This article considers two emerging approaches: litigation seeking court orders compelling government action to reduce GHG emissions (government mitigation approaches), and litigation seeking court-ordered damages from fossil fuel companies to fund climate change adaptation measures (adaptation damages approaches). Climate change is uniformly the central issue in the cases brought under these two approaches.<sup>106</sup> The cases under these approaches are also 'well known in the existing legal and socio-legal literature on climate change' and have been described as the 'poster child',<sup>107</sup> and 'holy grail'<sup>108</sup> climate litigation cases. Several other approaches have been pioneered that differ in whole or part from these two approaches, perhaps most notably claims based on corporations or securities law,<sup>109</sup> and the attempted use of the 'climate necessity' defence in response to criminal prosecutions of direct action protests.<sup>110</sup> However, it is argued that government mitigation and adaptation damages approaches are distinct in terms of their clear framing of climate change liability, the centrality of climate change to the legal arguments raised in the cases, and the amount of public attention they have garnered.<sup>111</sup> These cases therefore make an ideal case study because, where these approaches are pursued, it is more likely litigants are solely or predominantly pursuing climate change-related objectives rather than extraneous objectives such as prevention of localised impacts or pecuniary concerns.

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<sup>106</sup> Peel et al, above n 1, 803.

<sup>107</sup> Chris Hilson, 'Framing Time in Climate Change Litigation' (2018) *Oñati Socio-legal Series* (forthcoming) 6.

<sup>108</sup> Bower, above n 43, 2-3.

<sup>109</sup> Peel and Osofsky, 'Climate Change Litigation', above n 2, 101.

<sup>110</sup> Rogers, above n 35, 482; Nosek, above n 33, 792-800.

<sup>111</sup> Two cases that straddle the approaches discussed in this article are similarly distinct in terms of their framing and the amount of public attention they have received. The first is *Asghar Leghari v Federation of Pakistan* (Lahore High Court Green Bench, WP No 25501/2015, commenced 29 August 2015), where a plaintiff farmer successfully sued Pakistan's government for failing to implement its climate change adaptation laws. An ongoing case in Uganda, *Mbabazi et al v Attorney General* (Kampala High Court, High Court Civil Suit No 283 of 2012, commenced 20 September 2012), which was originally filed in 2012, is proceeding on similar grounds. The second is the threatened legal action by *Milieudefensie* (Friends of the Earth Netherlands) against Shell in the Netherlands, which is based on the same provision of the Dutch Civil Code and requests the same form of injunctive remedy as in the *Urgenda case*. See Karen Savage, *Netherlands Group to Shell: Stop Wrecking the Climate, Or We Will Sue* (4 April 2018) Climate Liability News <<https://www.climateliabilitynews.org/2018/04/04/royal-dutch-shell-milieudefensie-climate-change/>>.

Government mitigation approaches have been brought on a variety of legal bases. These include relatively conventional administrative law-based claims challenging emissions reductions targets set under statute and/or by executive prerogative;<sup>112</sup> tortious claims targeting government targets and/or actions;<sup>113</sup> ‘public trust doctrine’ and constitutional claims predicated on a constellation of laws, actions and policies incentivising high levels of GHG emissions;<sup>114</sup> and hybrid claims.

The government mitigation approach frames the issue of climate change as fundamentally one of government misfeasance and abrogation of sovereign responsibilities to the public – and often specifically to its most vulnerable sectors, including young people, future generations and the elderly. The solution is framed as one of relatively extraordinary judicial intervention to restrain this misfeasance. The government mitigation frame therefore:

highlight[s] the imminent perils associated with climate change, the related concerns of present and future generations, and contemporary political responsibilities and challenges far more effectively than is the case in the coalmine challenges.<sup>115</sup>

Adaptation damages approaches have a somewhat longer history than government mitigation approaches and are similarly heterogeneous. A number of earlier cases were pursued in the US by individuals, indigenous communities and several US states against fossil fuel, automobile manufacturing and electric utility companies.<sup>116</sup> Each of these

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<sup>112</sup> See *Foster v Washington Department of Ecology* (Wash Sup Ct, 14-2-25295-1 SEA, 19 November 2015) slip op; *Kain v Department of Environmental Protection*, 474 Mass 278 (2016); *Thomson v Minister for Climate Change Issues* [2018] 2 NZLR 160; *Friends of the Irish Environment CLG v Government of Ireland* (High Court of Ireland, 2017 793 JR, commenced October 2017); *Plan B Earth v Secretary of State for Business, Energy and Industrial Strategy* (High Court of the United Kingdom, Queen’s Bench Division, Claim No CO/16/2018, commenced 8 December 2017).

<sup>113</sup> *Urgenda Foundation v Government of the Netherlands (Ministry of Infrastructure and the Environment)* (The Hague District Court, ECLI:NL:RBDHA:2015:7145, commenced 24 June 2015).

<sup>114</sup> See *Juliana v United States*, 217 F Supp 3d 1224 (D Or, 2016); *Union of Swiss Senior Women for Climate Protection v Swiss Federal Council* (Supreme Court of Switzerland, A-2992/2017, commenced 25 October 2016).

<sup>115</sup> Rogers, above n 35, 482.

<sup>116</sup> *Comer v Murphy Oil USA*, 585 F 3d 855 (5<sup>th</sup> Cir, 2009); *Order of Jenkins J in California v General Motors Corp*, (ND Cal, C06-05755 MJJ, 17 September 2007); *American Electric Power Company v Connecticut*, 564 US 410 (2011); *Native Village of Kivalina v ExxonMobil Corp*, 696 F 3d 849, 11657 (9<sup>th</sup> Cir, 2012). Notably, *American Electric Power v Connecticut* is an early example of a hybrid of new approaches, insofar as the plaintiffs sought injunctive rather than damages-based relief. See *American Electric Power Company v Connecticut*, 564 US 410, 415 (2011) (‘[a]s relief, the plaintiffs ask for a decree setting carbon-dioxide emissions for each defendant at an initial cap, to be further reduced annually’).

cases was ultimately unsuccessful.<sup>117</sup> More recent iterations of this approach have been brought in the US by local municipalities,<sup>118</sup> and in one instance an assortment of local commercial fishermen.<sup>119</sup> Two of these recent cases were dismissed by their respective District Courts and have been appealed.<sup>120</sup> In Germany, an analogous cause brought by a Peruvian farmer has successfully avoided dismissal and is progressing towards trial.<sup>121</sup> A campaign involving local municipalities has also been mooted in Canada, but has to this point resulted only in municipalities sending letters of demand (so-called ‘climate accountability letters’) to fossil fuel companies.<sup>122</sup> Cases filed in the US have been based largely on various tortious grounds.

The adaptation damages approach is largely modelled on previous waves of tobacco and asbestos litigation.<sup>123</sup> Its resurgence in recent years is due

<sup>117</sup> *Comer*’s disposition, which ultimately occurred as a result of a procedural technicality, was particularly perplexing. See the discussion in Weaver and Kysar, above n 8, 323-4.

<sup>118</sup> See, eg, *County of San Mateo v Chevron Corp* (Cal Sup Ct, 7CIV03222, commenced 17 July 2017); *County of Marin v Chevron Corp* (Cal Sup Ct, CIV1702586, commenced 17 July 2017); *City of Imperial Beach v Chevron Corp* (Cal Sup Ct, C17-01227, commenced 17 July 2017); *County of Santa Cruz v Chevron Corp* (Cal Sup Ct, 17CV03242, commenced 20 December 2017); *City of Santa Cruz v Chevron Corp* (Cal Sup Ct, 17CV03243, commenced 20 December 2017); *County of Richmond v Chevron Corp* (Cal Sup Ct, C-18-00055, commenced 22 January 2018); *People of the State of California v BP PLC* (Cal Sup Ct, RG17875889, commenced 19 September 2017); *People of the State of California v BP PLC* (Cal Sup Ct, CGC-17-561370, commenced 19 September 2017); *City of New York v BP PLC* (2<sup>nd</sup> Cir, 18-2188, commenced 9 January 2018); *Board of County Commissioners of Boulder County et al v Suncor Energy (USA) Inc*, (D Colo, 1:2018cv01672, commenced 17 April 2018); *State of Rhode Island v Chevron* (RI Sup Ct, PC-2018-4716, commenced 2 July 2018); *Mayor and City Council of Baltimore v BP PLC*, (D Md, 1:18-cv-02357 commenced 20 July 2018).

<sup>119</sup> *Pacific Coast Federation of Fishermen’s Associations Inc v Chevron Corp* (Cal Sup Ct, CGC-18-571285, commenced 14 November 2018).

<sup>120</sup> *City of Oakland v BP PLC*, 2018 WL 310972 (ND Cal); *City of New York v BP PLC* (SDNY, 18 cv 182, 19 July 2018) slip op.

<sup>121</sup> *Lliuya v RWE AG* (Regional Administrative Court of Essen, Germany, Az 2 O 285/15, Decision on Appeal, commenced 15 December 2016).

<sup>122</sup> See Bill Cleverley, ‘Victoria Councillors want Fossil-Fuel Companies to Share in Climate Costs’ *Times Colonist* (online) 13 October 2017 <<http://www.timescolonist.com/news/local/victoria-councillors-want-fossil-fuel-companies-to-share-in-climate-costs-1.23063534>>. In what should be considered an interesting example of PO and LO interacting, and an indication that, at least in Canada, climate change SMOs consider the current LO for these cases to be low, but the PO for facilitating litigation high, legislators in several provinces have introduced bills seeking to provide a simplified statutory means for pursuing adaptation damages from fossil fuel companies.

<sup>123</sup> See Vincent Oleszkiewicz and Douglas Sanders, ‘The Advent of Climate Change Litigation Against Corporate Defendants’ (2004) 27 *International Environment Reporter* 936, 940-941; Angela Lipanovich, ‘Smoke Before Oil: Modeling a Suit Against the Auto and Oil Industry on the Tobacco Tort Litigation is Feasible’ (2005) 25(3) *Golden Gate University Law Review* 429; Daniel Farber, ‘Basic Compensation for Victims of Climate Change’ (2007) 155 *University of Pennsylvania Law Review* 1605, 1616; Martin Olszynski et al, ‘From Smokes to Smokestacks: Lessons from Tobacco for the Future of Climate Change Liability’ (2018) 30 *Georgetown Environmental Law Review* 1>.

to several factors. The genesis for the most recent wave of litigation in the US has been traced to a 2012 conference ‘compar[ing] the evolution of public attitudes and legal strategies related to tobacco control with those related to anthropogenic climate change’.<sup>124</sup> Further evidence has since been uncovered regarding the fossil fuel industry’s advanced knowledge of climate change dating back decades, and its attempts to confuse the public’s understanding of climate science and stymie political action to reduce GHG emissions.<sup>125</sup> This evidence forms a core part of the approach’s frame. The factual basis for adaptation damages approaches has also strengthened in other areas. Climate science has progressed to the point where it is now possible to demonstrate up to a legal standard of proof that anthropogenic GHG emissions have increased the frequency and/or severity of certain climate change-related impacts and extreme weather events.<sup>126</sup> Emissions accounting studies have quantified the proportionate historical responsibility of a number of individual fossil

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<sup>124</sup> Union of Concerned Scientists and Climate Accountability Institute, ‘Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control’ (Summary of the Workshop on Climate Accountability, Public Opinion and Legal Strategies, Martin Johnson House, Scripps Institution of Oceanography, La Jolla, California, 14-15 June 2012) 3, cited in Jack Luellen, *Climate Litigation is Coming – Is Your Co Ready?* (26 March 2018) Law360 <<https://www.law360.com/energy/articles/1025890/climate-change-litigation-is-coming-is-your-co-ready->>.

<sup>125</sup> Naomi Oreskes and Erik Conway, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth in Issues from Tobacco Smoke to Global Warming* (Bloomsbury, 2010); Neela Banerjee et al, *Exxon’s Own Research Confirmed Fossil Fuels’ Role in Global Warming Decades Ago* (16 September 2015) InsideClimate News <<https://insideclimatenews.org/news/15092015/Exxons-own-research-confirmed-fossil-fuels-role-in-global-warming->>; Centre for International Environmental Law, ‘Smoke and Fumes: The Legal and Evidentiary Basis for Holding Bil Oil Accountable for the Climate Crisis’ (Report, November 2017) <<http://www.ciel.org/wp-content/uploads/2017/11/Smoke-Fumes-FINAL.pdf>>; Centre for International Environmental Law, ‘A Crack in the Shell: New Documents Expose a Hidden Climate History’ (Report, April 2018) <[http://www.ciel.org/wp-content/uploads/2018/04/A-Crack-in-the-Shell\\_April-2018.pdf](http://www.ciel.org/wp-content/uploads/2018/04/A-Crack-in-the-Shell_April-2018.pdf)>; Geoffrey Supran and Naomi Oreskes, ‘Assessing ExxonMobil’s climate change communications (1977–2014)’ (2017) 12 *Environmental Research Letters* 084019. Interestingly, some of the most recent revelations involve Royal Dutch Shell anticipating the recent wave of lawsuits in the United States. See Karen Savage, *Documents Detail What Shell Knew About Climate Change Decades Ago* (5 April 2018) Climate Liability News <<https://www.climateliabilitynews.org/2018/04/05/shell-knew-climate-change-liability/>> (“[f]ollowing the storms, a coalition of environmental NGOs brings a class action suit against the US government and fossil-fuel companies on the grounds of neglecting what scientists (including their own) have been saying for years: that something must be done,” the report projects’).

<sup>126</sup> See Theodore Shepherd, ‘A Common Framework for Approaches to Extreme Event Attribution’ (2016) 2(1) *Current Climate Change Reports* 28; Sophie Marjanac et al, ‘Acts of God, Human Influence and Litigation’ (2017) 10 *Nature Geoscience* 616; Sophie Marjanac and Lindene Patton, ‘Extreme Weather Event Attribution Science and Climate Change Litigation: an Essential Step in the Causal Chain?’ (2018) 36(3) *Journal of Energy and Natural Resources Law* 256.

fuel companies for anthropogenic GHGs emitted since the beginning of the industrial era.<sup>127</sup>

### *B Distinguishing New Approaches from the Existing Approach*

The differences between adaptation and government mitigation, and between these approaches and the existing approach, can be further elucidated by applying social movement theory. First, in terms of PO, as described in Section II the existing approach is highly dependent on prior successful lobbying to pass environmental laws that are favourable to litigants (both in terms of permissive procedural rules in relation to, for example, standing, and the substantive laws governing judicial review). In contrast, both the government mitigation approach and the adaptation damages approach hark back to the pre-statutory environmental law era by invoking common law and constitutional causes of action and principles.<sup>128</sup> One strategic rationale for doing so is the belief that, contrary to the experience of a number of recent administrative law decisions,<sup>129</sup> a favourable judicial decision on a more fundamental legal principle may be less vulnerable to legislative override. As Elaine Johnson, principal solicitor of EDO NSW, recently commented:

... I think the challenge for us now is developing other ways to deal with environmental issues that doesn't rely on legislation that parliament has passed, because legislation can be undone and overridden if there's a political will to do so.<sup>130</sup>

With respect to LO, as mentioned earlier, successful examples of new approaches in other jurisdictions have been largely dismissed as containing lower LO than existing approaches and untranslatable to the Australian legal context. These assessments have emphasised purported jurisprudential differences between jurisdictions where new approaches

<sup>127</sup> Richard Heede, 'Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854-2010' (2013) 122 *Climactic Change* 229; Carbon Disclosure Project, 'The Carbon Majors Database: CDP Carbon Majors Report 2017' (Report, July 2017) <<https://www.cdp.net/en/reports/downloads/2327>>.

<sup>128</sup> Sue Higginson, 'Climate Change Litigation', above n 7, 23; Peel et al, above n 1, 804 ('[i]ndeed, one of the ironies of next-generation litigation is that legal advocates are often looking to the past to shape the litigation of the future').

<sup>129</sup> See, for example, above nn 78-80.

<sup>130</sup> Angela Heathcote, 'A Day in the Life of an Australian Environmental Lawyer' *Australian Geographic* (online) 10 August 2018 <<https://www.australiangeographic.com.au/topics/history-culture/2018/08/a-day-in-the-life-of-an-australian-environmental-lawyer/>>. Note, however, the risk that a ruling based on common law principles, as opposed to one based on deeply-entrenched constitutional provisions, is still relatively vulnerable to legislative override. This is reflected in the calls by the fossil fuel industry in the United States to support the introduction of a carbon tax in exchange for, *inter alia*, legislative abolition of public nuisance suits in the vein of the adaptation damages approach. See Lee Wasserman and David Kaiser, 'Beware of Oil Companies Bearing Gifts' *New York Times* (online) 25 July 2018 <<https://www.nytimes.com/2018/07/25/opinion/carbon-tax-lott-breaux.html>>.

have succeeded and Australia, which would allegedly be fatal to the prospects of an analogous case in the latter jurisdiction.<sup>131</sup> Dismissive accounts of the LO of these new approaches have been made both with respect to the underlying cause(s) of action, such as negligence or the public trust doctrine, and with respect to general obstacles to successful public interest litigation in Australia, such as standing, justiciability, the spectre of adverse costs orders<sup>132</sup> and even causation.<sup>133</sup> However, as discussed above, absent legislative reform the existing approach's LO is also relatively low.

Additionally, as other commentators have argued, dismissive assessments of the prospects of new approaches in Australia vis-à-vis other jurisdictions were likely premature.<sup>134</sup> New approaches in other jurisdictions have needed to overcome similar preliminary hurdles and have also needed to overturn or evolve legal precedent.<sup>135</sup> Australian courts are not without a history of overturning precedent when faced with a compelling case relating to an issue of broad public interest. *Mabo* is of course the most famous example.<sup>136</sup> But it is not the only one. The recent evolution of the doctrine of negligence to recognise the availability of an anticipatory injunction for imminent harm, as occurred in *Plaintiff S99/2016 v Minister for Immigration and Border Protection* and subsequent cases,<sup>137</sup> is another example. Given that some impacts associated with past and present anthropogenic GHG emissions have yet to fully materialise but are nevertheless imminent, this latter example of doctrinal evolution has potentially quite significant implications for both the government mitigation and adaptation damages approaches in Australia.<sup>138</sup>

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<sup>131</sup> See above n 33.

<sup>132</sup> Anne Kallies and Lee Godden, 'What Price Democracy? *Blue Wedges* and the Hurdles to Public Interest Environmental Litigation' (2008) 33(4) *Alternative Law Journal* 194.

<sup>133</sup> Peter Cashman, 'Litigation that Holds Government to Account' (Paper presented at 2014 National Environmental Law Association conference, 'Transformation or Train Wreck? Environmental and Climate Change Law at the Crossroads', Sydney, 21 November 2014); Cashman and Abbs, above n 7, 264.

<sup>134</sup> Baxter, above n 7, 70.

<sup>135</sup> Weaver and Kysar, above n 8, 341 ('[a]t every stage of its analysis, the *Urgenda* court overcame doctrinal barriers to a finding of climate change negligence against the most powerful defendant in its jurisdiction: the sovereign itself'). As another example, the existence of a federal public trust doctrine in the US, unlike the existence of the public trust doctrine in the 50 US states, is and will continue to be a live issue in *Juliana v United States*, 217 F Supp 3d 1224, 1256-1259, 1272-1276 (D Or, 2016). See also Michael Blumm, 'The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and *Illinois Central Railroad*' (2015) 45 *Environmental Law* 399.

<sup>136</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (overturning the doctrine of *terra nullius* and recognising the existence of native (aboriginal) title in Australia).

<sup>137</sup> *Plaintiff S99/2016 v Minister for Immigration and Border Protection* (2016) 243 FCR 17, cited in Baxter, above n 7, 71. See also *FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection* [2018] FCA 63.

<sup>138</sup> See Baxter, above n 7; Peel et al, above n 1, 822 fn 120.

Litigation predicated on the public trust doctrine could potentially be another example of a new government mitigation approach with underestimated LO.<sup>139</sup> The doctrine's treatment in contemporary Australian jurisprudence is peculiar, having been described variously as 'forgotten',<sup>140</sup> 'sleeping',<sup>141</sup> and an invention of American jurisprudence.<sup>142</sup> Each of these descriptions, while a simplification, contains some truth. The doctrine is no longer forgotten, although it has fallen into dormancy since its principles were successfully applied in a series of cases concerning the use of national parks in New South Wales in the 1990s.<sup>143</sup> More recent attempts to revive the doctrine have been unsuccessful. These attempts were arguably both convoluted and misguided, insofar as they attempted to 'graft' the public trust doctrine – a doctrine that is fundamentally about the inalienability of public rights in and government ownership of natural resources – onto, respectively, the statutory pollution licences of private parties and the lawful level of consideration given by a decision-maker to ESD and the precautionary principle.<sup>144</sup> In any case, the doctrine is hardly a US invention. Its roots run deep in the common law and Justinian Roman law. As much was recognised by the Indian Supreme Court in its wholesale adoption of US public trust jurisprudence in *MC Mehta v Kamal Nath*.<sup>145</sup> The doctrine's principles of public rights in and common ownership of natural resources are peppered throughout Australian case law.<sup>146</sup> Its evolution in the US

<sup>139</sup> Peel et al, above n 1, 815, 817 fn 94.

<sup>140</sup> Paul Finn, 'The Forgotten "Trust": the People and the State' in Malcolm Cope (ed), *Equity: Issues and Trends* (Federation Press, Sydney, 1995) 131.

<sup>141</sup> Gary Meyers, 'Divining Common Law Standards for Environmental Protection: Applications of the Public Trust Doctrine in the Context of Reforming NEPA and the Commonwealth Environmental Protection' (1994) 11 *Environmental and Planning Law Journal* 289, 297.

<sup>142</sup> Tim Bonyhady, 'A Usable Past: The Public Trust in Australia' (1995) 12 *Environmental and Planning Law Journal* 329, 331.

<sup>143</sup> Paul Stein, 'Ethical Issues in Land-Use Planning and the Public Trust' (1996) 13 *Environmental and Planning Law Journal* 493, 499-501, citing *Willoughby City Council v Minister Administering the National Parks and Wildlife Act* (1992) 78 LGERA 19, *Woollahra Municipal Council v Minister for the Environment* (1991) 23 NSWLR 710, and *Packham v Minister for the Environment* (1993) 80 LGERA 205.

<sup>144</sup> *Environment Protection Authority v Ballina Shire Council* [2006] NSWLEC 289; (2006) 148 LGERA 278 [83]; *Upper Mooki Landcare Inc v Shenhua Watermark Coal Pty Ltd* [2016] NSWLEC 6 [183]-[185]. Indeed, both these cases may well reflect the folly of sticking to a litigation approach, the success of which requires resorting to increasingly convoluted and idiosyncratic legal arguments.

<sup>145</sup> *MC Mehta v Kamal Nath* (1997) 1 SCC 388, [34] ('[o]ur legal system – based on English common law – includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership').

<sup>146</sup> See, for example, the discussion of English common law concerning the essentially trustee-beneficiary relationship between the Crown and the public in respect of public

into a coherent doctrine owes itself as much to the vision, ingenuity and persuasiveness of Sax and other scholars in weaving these principles together,<sup>147</sup> as it does to the affinity between these principles and those concerning popular sovereignty and intergenerational justice.<sup>148</sup>

Standing, justiciability and adverse costs orders are also not a complete answer to the purportedly low LO of new approaches in Australia. Similarly restrictive standing and/or justiciability rules exist in jurisdictions outside Australia. These obstacles were acknowledged by the proponents of new approaches in those jurisdictions.<sup>149</sup> They have also been raised, often unsuccessfully, by the defendants in those jurisdictions.<sup>150</sup> Litigation falling under these new approaches has also been brought in adverse cost jurisdictions including the UK, Ireland and New Zealand. As the New Zealand High Court recognised in the recent case of *Thomson v Minister for Climate Change Issues*:

...it may be appropriate for domestic courts to play a role in Government decision making about climate change policy. ...The courts have not considered the entire subject matter is a 'no go' area...

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rights of fishing and navigation in territorial waters in *Commonwealth and Australia v Yarmirr* (1999) 101 FCR 171, 292-299 (Merkel J). See also Stein, above n 143, 498-501.

<sup>147</sup> Michael Blumm and Rachel Guthrie, 'Internationalising the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision', (2012) 45 *University of California, Davis Law Review* 741, 747, citing, *inter alia*, Joseph Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' (1970) 68 *Michigan Law Review* 471, and Joseph Sax, 'Liberating the Public Trust Doctrine from Its Historical Shackles' (1980) 14 *University of California, Davis Law Review* 185. A wave of scholarship also preceded the doctrine's recent judicial expansion to the atmosphere. See Gerald Torres, 'Who Owns the Sky?' (2001) 18 *Pace Environmental Law Review* 227; Mary Wood, 'Nature's Trust: Reclaiming an Environmental Discourse' (2007) 25 *Virginia Environmental Law Journal* 243; Wood, 'Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I)', above n 86, 43; Mary Wood, 'Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II): Instilling a Fiduciary Obligation in Governance' (2009) 39(1) *Environmental Law* 91; Gregory Munro, 'The Public Trust Doctrine and the Montana Constitution as Legal Bases for Climate Change Litigation in Montana' (2012) 73 *Montana Law Review* 123; Kylie Wha Kyung Wager, 'In Common Law We Trust: How Hawai'i's Public Trust Doctrine Can Support Atmospheric Trust Litigation to Address Climate Change' (2014) 20(1) *Hastings West-Northwest Journal of Environmental Law and Policy* 55.

<sup>148</sup> Paul Finn, 'Public Trusts and Fiduciary Relations', in Charles Sampford et al (eds), *Fiduciary Duty and the Atmospheric Trust* (Routledge, 2012) 31, 35.

<sup>149</sup> Ewing and Kysar, above n 8, 355; Roger Cox, 'The Liability of European States for Climate Change' (2014) 30(78) *Utrecht Journal of International and European Law* 125, 131-4.

<sup>150</sup> See *Juliana v United States*, 217 F Supp 3d 1224, 1262 (D Or, 2016) ('[a] deep resistance to change runs through defendants' and intervenors' arguments for dismissal: they contend a decision recognising plaintiffs' standing to sue, deeming the controversy justiciable, and recognising a federal public trust and a fundamental right to climate system capable of sustaining human life would be unprecedented, as though that alone requires its dismissal'); *Thomson v Minister for Climate Change Issues* [2017] NZHC 733, [133]-[134].

The importance of the matter for all and each of us warrants some scrutiny of the public power in addition to accountability through Parliament and the General Elections.<sup>151</sup>

In terms of framing, several features of the government mitigation approach's frame distinguish it from and are arguably advantageous to that of the existing administrative law approach. The government mitigation approach shifts the focus of the litigation – in whole or in part – from plaintiffs' procedural rights (that is, their rights as interested individuals or community groups to have decision-makers comply with statutory procedure) to their substantive rights, including those protected by the common law, and corresponding governmental duties and responsibilities.<sup>152</sup> The government mitigation approach also shifts the focus of litigation from the micro-level concern of government deliberation over discrete sources of GHG emissions to the macro-level concern of government's systemic control and influence over, and consequent duties and liabilities for, the entire fossil-fuel based energy and transportation system.<sup>153</sup> As a result of these shifts, government mitigation cases invariably request more comprehensive judicial relief than the existing approach, whether that be an order that the government revise its unlawful emissions reduction target,<sup>154</sup> or an order that the government prepare a comprehensive 'climate recovery plan'.<sup>155</sup>

<sup>151</sup> *Thomson v Minister for Climate Change Issues* [2017] NZHC 733, [133]- [134] (Mallon J) ('*Thomson*'). *Thomson* is an interesting case that in many respects represented a hybrid approach between the existing approach and government mitigation approach described here, insofar as one of its claims involved a fairly conventional judicial review challenge to New Zealand's economy-wide statutory emissions reduction target (rather than, for example, a discrete fossil fuel development like a coal mine or power station). Justice Mallon's quoted findings came in the context of the applicant's second claim, which was a judicial review challenge to New Zealand's Nationally Determined Contribution under the Paris Agreement, which was not set by statute but was instead set under the Crown prerogative. In surveying various common law and non-common law authorities on the categorical justiciability of climate change, Justice Mallon rejected the respondent's argument that the challenge was *per se* non-justiciable. Her Honour nevertheless went on to find that none of the applicant's grounds of review in respect of this claim were made out.

<sup>152</sup> David Schlosberg, 'Climate Justice and Capabilities: A Framework for Adaptation Policy' (2012) 26(4) *Ethics and International Affairs* 445, 448, citing Simon Caney, 'Cosmopolitan Justice, Rights, and Global Climate Change' (2006) 19(2) *Canadian Journal of Law and Jurisprudence* 255, Simon Caney, 'Climate Change, Human Rights and Moral Thresholds' in Stephen Humphreys (ed) *Human Rights and Climate Change* (Cambridge University Press, 2010) 69, and Steve Vanderheiden, *Atmospheric Justice* (Oxford University Press, 2008); Rogers, above n 35, 482; Peel and Osofsky, above n 6, 38-40.

<sup>153</sup> Mary Wood and Dan Galpern, 'Atmospheric Recovery Litigation: Making the Fossil Fuel Industry Pay to Restore a Viable Climate System' (2015) 45 *Environmental Law* 259, 282-284.

<sup>154</sup> *Thomson* [2017] NZHC 733, [5]-[7].

<sup>155</sup> *Juliana v United States*, 217 F Supp 3d 1224, 1239 (D Or, 2016) ('[p]laintiffs do not seek to have this Court direct any individual agency to issue or enforce any particular regulation. Rather, they ask the Court to declare the United States' current environmental policy infringes their fundamental rights, direct the agencies to conduct a consumption-

Consequently, the approach's legal and framing aspects are more coherent: the shift from procedural to substantive rights and the comprehensiveness of the requested remedy means that the legal arguments brought under the government mitigation approach are more consistent with the mitigation messaging by climate litigants and other climate SMOs in fora outside the courtroom.<sup>156</sup>

The adaptation damages approach also contains a number of differences from and potential advantages over existing approaches. By targeting the activities of fossil fuel companies directly, rather than government approval of those activities, the approach arguably better reflects the attitudes and shift in lobbying and protest strategies that has occurred in sectors of the climate SMO community. As McKibben describes of his decision to switch 350.org's campaigning approach in the early 2010s:

In a way, every time I went to [Washington] DC I felt like I was visiting the cashier at the front of the store. That's the obvious place to start when you've got a problem – maybe [they] can solve it for you. But if not, going to [them] for help year after year is just perverse; at a certain point you've got to take your problem to the manager in the backroom and demand what you need. Congress is the cashier. Exxon-Mobil, the Koch brothers, and Peabody Energy are the big boys. That's who we were gearing up to go after now.<sup>157</sup>

By choosing adaptation damages approaches, climate litigants frame the issue of climate change as one where corporations hold the most power to address the issue, governments are comparatively impotent, and targeting corporations directly is the most efficacious strategy. Such a frame also parallels popular discourses regarding the intersection between climate change and the emergence of the neoliberal economic hegemony.<sup>158</sup>

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based inventory of United States CO2 emissions, and use that inventory to “prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO2 so as to stabilise the climate system and protect the vital resources on which Plaintiffs now and in the future will depend.” First Am Compl 94’).

<sup>156</sup> Abate, above n 105, 567 (‘[t]he growth of ATL is due in part to the helpful synergy it enjoys with the climate change and human rights movement at the international level that began in the wake of the Inuit petition one decade ago and has gained significant momentum since that time’); Shilpa Jindia, *Ocasio-Cortez’s Green New Deal Is a Product of Youth Uprising* (8 February 2019) Truthout <<https://truthout.org/articles/ocasio-cortezs-green-new-deal-is-a-product-of-youth-uprising/>>; Anny Martinez, *Youth Movements Changing Tactics in the Face of Climate Crisis* (11 February 2019) Inequality <<https://inequality.org/great-divide/youth-movements-climate-crisis/?source=newsletter>>.

<sup>157</sup> Bill McKibben, *Oil and Honey: The Education of an Unlikely Activist* (St Martin’s Griffin, 2014) 204.

<sup>158</sup> Naomi Klein, *This Changes Everything: Capitalism vs the Climate* (Allen Lane, 2014) 63 (‘... the real reason we are failing to rise to the climate moment is because the actions required directly challenge our reigning economic paradigm (deregulated capitalism

The frame underpinning the adaptation damages approach addresses an aspect of climate justice left unaddressed by the existing approach's focus on scrutinising discrete, proposed developments; namely, that of who should bear the costs of climate change impacts that have already occurred or are effectively 'locked in' by current levels of emissions. In the absence of such litigation, the *de facto* policy answer to this question has been the public. In Australia, the history of the 2011 Queensland floods is illustrative. There, the costs were borne variously by individuals and communities that did not or could not obtain flood insurance,<sup>159</sup> a large section of the tax-paying Australian public in the form of a one-off 'flood levy',<sup>160</sup> and potentially by dam operators arising out of a negligence-based class action lawsuit filed against them.<sup>161</sup> In the context of 'climate disasters' such as these<sup>162</sup> – that is, disasters which can be at least partially attributed to climate change<sup>163</sup> – adaptation damages approaches articulate a distributive justice frame that, in the context of climate change, is more compelling than the existing approach's focus on procedural justice.<sup>164</sup>

Additionally, compared to existing approaches, the adaptation damages approach is better situated to 'prod and plea' the political branches to implement a broader political fix to climate change.<sup>165</sup> Adaptation

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combined with public austerity), the stories on which Western cultures are founded (that we stand apart from nature and can outsmart its limits), as well as many of the activities that form our identities and define our communities (shopping, living virtually, shopping some more)'); Peter Burdon, 'Wild Law: A Proposal for Radical Social Change' (2015) 13 *New Zealand Journal of Public and International Law* 157, 168 ('[t]oday the dominant discourse that is shaping law is neoliberal capitalism'); Naomi Klein, *Capitalism Killed our Climate Momentum, Not 'Human Nature'* (3 August 2018) Intercept <<https://theintercept.com/2018/08/03/climate-change-new-york-times-magazine/>>. Cf Nathaniel Rich, 'Losing Earth: The Decade We Almost Stopped Climate Change' *New York Times Magazine* (online) 1 August 2018 <<https://www.nytimes.com/interactive/2018/08/01/magazine/climate-change-losing-earth.html>>.

<sup>159</sup> Alex Lo, *Why Are So Many Queenslanders Still Without Flood Insurance?* (29 January 2013) Conversation <<https://theconversation.com/why-are-so-many-queenslanders-still-without-flood-insurance-11829>>.

<sup>160</sup> Megan Levy, 'Levy to Pay for \$5.6b Flood Bill' *Sydney Morning Herald* (online) 27 January 2011 <<https://www.smh.com.au/business/levy-to-pay-for-5-6b-flood-bill-20110127-1a64x.html>>.

<sup>161</sup> See *Rodriguez & Sons Pty Ltd v Queensland Bulk Water Supply Authority t/as Seqwater (No 4)* [2015] NSWSC 1352.

<sup>162</sup> Rosemary Lyster and Robert Verchick, 'Introduction to the Research Handbook on Climate Disaster Law' in Rosemary Lyster and Robert Verchick (eds) *Research Handbook on Climate Disaster Law* (Edward Elgar, 2018) 1, 1-5.

<sup>163</sup> The Climate Council, 'Intense Rainfall and Flooding: The Influence of Climate Change' (Report, 1 April 2017) <<https://www.climatecouncil.org.au/uploads/5dafa61d7b3f68d156abd97603d67075.pdf>>.

<sup>164</sup> Distributive approaches to adaptation in the climate justice literature are, however, increasingly critiqued. See Schlosberg, above n 152, 449 ('[m]ost discussions of adaptation in the climate justice literature have focused on equitable distribution of the costs of adaptation, rather than the specific vulnerabilities and needs experienced by those at risk').

<sup>165</sup> Ewing and Kysar, above n 8.

damages cases are already being filed with increasing frequency. This trend will likely accelerate should one of these cases survive summary dismissal, placing pressure on the political branches to relieve an unmanageable judicial burden.<sup>166</sup> Again, previous tobacco and asbestos litigation provides both a precedent and model.<sup>167</sup> An analogous political fix can be seen in Australia in quasi-judicial fora such as the New South Wales Dust Diseases Tribunal, which are designed to reduce the cost, time and complexity of compensation claims.<sup>168</sup> Accordingly, even if ultimately unsuccessful, litigation brought under adaptation damages approaches may potentially increase the PO of other strategic decisions.

Combined, both government mitigation and adaptation damages approaches have clear advantages as a frame for climate litigation. The approaches represent a shift in focus away from what at times seems little more than a box-ticking exercise of administrative decision-making, and towards the longstanding knowledge and responsibility of both government and corporate actors for the accumulation of greenhouse gas emissions and climate change impacts. This frame accords with the approaches' requested legal remedies, which aim to redress substantive rather than procedural wrongs. In the case of government mitigation approaches, this means emissions reductions and carbon sequestration commensurate with preserving a habitable climate for present and future generations. In the case of adaptation damages approaches, this means proportionate compensation to protect against unavoidable climate change impacts to which the corporate defendants have materially contributed. These requested remedies better parallel the demands of campaign groups outside the court room. As a result, the scope and messaging of litigation under these approaches arguably have greater potential to catalyse a broader political response to climate change.

### *C Potential Vulnerabilities of New Approaches*

The above reassessment of the legal prospects, and emphasis on potential strategic advantages, of new approaches is not meant to suggest that these approaches lack vulnerabilities aside from those already identified with their legal stock. For example, views differ within these approaches regarding how to frame the science of climate change and the requisite legal remedy for the complained-of harms. Some cases have sought both

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<sup>166</sup> It is by no means certain that a political fix to a wave of adaptation damages litigation would facilitate the recovery of compensation for adaptation costs from the fossil fuel industry. Depending on the extent and nature of public pressure, the political fix could be to statutorily abolish the relevant cause of action. This would be consistent with Australian state and Commonwealth responses to successful public interest litigation in other contexts. See above nn 96-98. See also Wasserman and Kasier, above n 130.

<sup>167</sup> Michael Byers et al, 'The Internationalisation of Climate Damages Litigation' (2017) 7(2) *Washington Journal of Environmental Law and Policy* 264, 302-9.

<sup>168</sup> NSW Dust Diseases Tribunal, *History*

<[http://www.dustdiseasestribunal.justice.nsw.gov.au/Pages/ddt\\_aboutus/ddt\\_history.aspx](http://www.dustdiseasestribunal.justice.nsw.gov.au/Pages/ddt_aboutus/ddt_history.aspx)>.

court-ordered implementation of targets set under the UNFCCC, essentially through judicial notice of the scientific conclusions of the Intergovernmental Panel on Climate Change (IPCC).<sup>169</sup> This includes most notably the *Urgenda* case, which successfully argued that as the Dutch Government had endorsed UNFCCC temperature targets and IPCC reports in international fora it could not take a contrary position in domestic courts – including the necessity of domestic emissions reductions commensurate with a 2°C temperature goal.<sup>170</sup> On the other hand, numerous government mitigation cases coordinated by the US climate change SMO Our Children’s Trust have advocated for a more stringent legal standard of mitigation, on the basis of mounting evidence that targets set under the UNFCCC are demonstrably unsafe and carry unacceptable risks of surpassing catastrophic and irreversible tipping points in the climate system.<sup>171</sup> Reconciling these arguments regarding the science of climate stabilisation may therefore require difficult trade-offs between strategic considerations that seek to maximize LO, and factual considerations that seek to maximise a climate SMO’s strategic objectives.<sup>172</sup>

Another potential vulnerability concerns the framing of liability by the government mitigation and adaptation damages approaches. For instance, the frame advanced by the cases filed by the various cities, counties and states within the US (US municipalities litigation) essentially concerns both internalising the presently largely externalised costs of GHG emissions, and shifting the costs of climate change impacts from the plaintiff municipalities to those corporate entities with the highest proportionate responsibility for anthropogenic GHG emissions. The

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<sup>169</sup> See *Thomson* [2017] NZHC 733, [18] (‘[t]he New Zealand Government has approved the AR5. For the purposes of this proceeding it is appropriate to proceed on the basis of the AR5, as the plaintiff accepts, while recognising that there are respected scientific experts who regard it as conservative’). See also *Swiss Senior Women for Climate Protection v Swiss Federal Council* (Switzerland, filed 25 October 2016) <[http://klimaseniorinnen.ch/wp-content/uploads/2017/05/request\\_KlimaSeniorinnen.pdf](http://klimaseniorinnen.ch/wp-content/uploads/2017/05/request_KlimaSeniorinnen.pdf)>; *Friends of the Irish Environment CLG v Government of Ireland* (High Court of Ireland, filed October 2017); *Plan B Earth v Secretary of State for Business, Energy and Industrial Strategy* (High Court of the United Kingdom, Queen’s Bench Division, Grounds of Review filed December 2017); *Greenpeace v Norwegian Ministry of Petroleum and Energy* (Oslo District Court, No 16-166674TVI-OTIR/06, Judgement, 4 January 2018).

<sup>170</sup> Cox, above n 149, 127-8; Roger Cox, *A Climate Change Litigation Precedent: Urgenda Foundation v The State of the Netherlands* (Centre for International Governance Innovation Paper No 79, November 2015) <[https://www.cigionline.org/sites/default/files/cigi\\_paper\\_79web.pdf](https://www.cigionline.org/sites/default/files/cigi_paper_79web.pdf)> 7, 11.

<sup>171</sup> See above n 44.

<sup>172</sup> These differences are not irreconcilable. Several cases may be able to effectively argue both for compliance with the Paris Agreement’s temperature goals and for a standard of government responsibility based on the best available scientific evidence as alternative remedies or tiered levels of ambition. See *Juliana v United States*, 217 F Supp 3d 1224, 1240 (D Or, 2016) (‘[t]here is no contradiction between promising other nations the United States will reduce CO<sub>2</sub> emissions and a judicial order directing the United States to go beyond its international commitments to *more aggressively* reduce CO<sub>2</sub> emissions’).

filings in the majority of these cases therefore include language to the effect that the lawsuits do not seek to impose liability on defendants for their direct emissions of GHGs or restrain defendants from engaging in their business operations.<sup>173</sup> The inclusion of this language appears to be strategically directed at maximising LO and pre-empting defendants' justiciability arguments.

Nevertheless, this frame raises several issues. To start with, it may be difficult to square the limited liability frame in the US municipalities litigation with widespread activist support for these cases.<sup>174</sup> This is because, by limiting its scope to adaptation costs without challenging the practices causing those costs, this frame reflects a 'market-based' or 'economic rationalist' approach that arguably internalises and reinforces the logic of neoliberalism.<sup>175</sup> Additionally, there are both economic and ecological limitations to adaptation that raise questions as to whether adaptation can be successful where greenhouse gas emissions are not stopped or otherwise heavily regulated.<sup>176</sup> Given that climate change adaptation will be needed in virtually all the world's communities and

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<sup>173</sup> *The People of the State of California v BP PLC* (ND Cal, Nos 17-cv-06011-WHA and 17-cv-06012-WHA, 2 February 2018) slip op 2; *Board of County Commissioners of Boulder County v Suncor Energy (USA) Inc*, (Boulder County Dist Ct Colo, filed 17 April 2018) [6] ('[p]laintiffs are not asking this Court to stop or regulate the production of fossil fuels in Colorado or elsewhere and they are not asking this Court to stop or regulate emissions in Colorado or elsewhere; they ask only that Defendants help remediate the nuisance caused by their intentional, reckless and negligent conduct, specifically by paying their share of the Plaintiffs' abatement costs'). Note that while the pleadings filed by the cities of San Francisco, Oakland, Santa Cruz and Richmond in California, and by New York City, each contain express statements to the effect of the statement in the pleadings filed by the City of Boulder and Boulder and San Miguel Counties in Colorado, this theory of liability is only implicit in the pleadings filed by the City of Imperial Beach and by Marin and San Mateo Counties in California.

<sup>174</sup> A recent media article dubbed these US cases 'climate liability suits', despite the filings in these cases expressly disavowing the notion that they are seeking to hold the defendants liable for climate change. See Jennifer Dorroh, *Republican AGs File Brief Opposing Climate Liability Suits* (23 April 2018) Climate Liability News <<https://www.climateliabilitynews.org/2018/04/23/climate-liability-suits-republican-ags/>>. See also Chris Mooney and Dino Grandoni, 'New York City Sues Shell, ExxonMobil and Other Oil Companies Over Climate Change' *Washington Post* (online) 10 January 2018 <[https://www.washingtonpost.com/news/energy-environment/wp/2018/01/10/new-york-city-sues-shell-exxonmobil-and-other-oil-majors-over-climate-change/?noredirect=on&utm\\_term=.dec38147e7e2](https://www.washingtonpost.com/news/energy-environment/wp/2018/01/10/new-york-city-sues-shell-exxonmobil-and-other-oil-majors-over-climate-change/?noredirect=on&utm_term=.dec38147e7e2)> ('Bill McKibben, an author and co-founder of the climate advocacy group 350.org, praised the city's actions Wednesday. "I've been watching the climate fight for the last 30 years," McKibben told reporters. "This is one of the handful of most important moments in that 30-year fight"); Bill McKibben, 'Pay Up Fossil Fuel Industry – Your Free Ride to Pollute is Over' *Sydney Morning Herald* (online) 25 April 2018 <<https://www.smh.com.au/national/fossil-fuel-industry-free-ride-pollution-mckibben-20180424-p4zbbl.html>>.

<sup>175</sup> Brendan Sydes, 'The Challenges of Putting Wild Law into Practice: Reflections on the Australian Environmental Defenders Office Movement' in Michell Maloney and Peter Burdon (eds) *Wild Law – In Practice* (Routledge, 2014) 58, 65.

<sup>176</sup> CSIRO, *Why Should We All Adapt?* <<https://research.csiro.au/climate/introduction/why-should-we-all-adapt/>>.

ecosystems,<sup>177</sup> it is also questionable whether the fossil fuel industry has sufficient funds and resources to fully compensate all communities facing adaptation needs. There are further questions regarding the equity of this litigation approach's 'first-come, first-served' logic (i.e., the first plaintiff municipality to obtain a favourable court judgment or settlement will be the first to be paid). Those concerns being raised, it nevertheless should be noted that the current round of climate adaptation cases is at an early stage and we are already seeing significant variations in these cases that may better address these concerns.<sup>178</sup>

## V ADDITIONAL FACTORS EXPLAINING THE NON-ADOPTION OF NEW APPROACHES IN AUSTRALIA

### *A Judicial Receptiveness, Constitutional Structure and Legal Culture*

As the above discussion has demonstrated, legal stock-based analyses of new approaches to climate litigation are neither comprehensive nor satisfactory. They have inadvertently undersold the potential of these approaches by overlooking or underemphasising the comparative strategic value of the more compelling frames of climate justice communicated by new approaches. Furthermore, many aspects of Australia's legal stock – including the jurisprudence surrounding particular causes of action and the rules governing standing and justiciability – have been treated as largely structural, when in fact they are no more fixed or incapable of doctrinal evolution than elsewhere. Rather, experiences in other jurisdictions suggest that the success of these litigation approaches in overcoming perceived legal obstacles is in no small part contingent on the receptiveness of individual judges.

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<sup>177</sup> Intergovernmental Panel on Climate Change, *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2014) 4.

<sup>178</sup> For instance, one of the first adaptation damages cases was brought by a severely disadvantaged indigenous community in Alaska. See *Native Village of Kivalina v ExxonMobil Corp*, 696 F 3d 849 (9th Cir, 2012). The most prominent adaptation damages case pursued outside the US, *Lliuya v RWE* (Essen Regional Court, Germany, No Az 2 O 285/15), was brought by a farmer from the Peruvian Andes with the assistance of a German NGO. Additionally, the recently filed Rhode Island lawsuit has incorporated a claim based on the public trust doctrine, which has altered the framing of the case, and a case is proposed in the Netherlands in which the plaintiffs would seek injunctive relief (i.e. a reduction in emissions) rather than monetary damages. See *State of Rhode Island v Chevron* (Providence/Bristol County Sup Ct RI, No PC-2018-4716, filed 2 July 2018); Savage, above n 111. Finally, several scholars have proposed adaptation damages cases that would, at least in theory, resolve many of the concerns with the present round of cases. See Wood and Galpern, above n 153; Randall Abate, 'Corporate Responsibility and Climate Justice: A Proposal for a Polluter-Financed Relocation Fund for Federally Recognised Tribes Imperiled by Climate Change' (2015) 25(1) *Fordham Environmental Law Review* 10; Mary Wood, 'Tribal Trustees in Climate Crisis' (2017) 2(2) *American Indian Law Journal* 518.

In particular, judicial receptiveness has played and continues to play a critical role in determining whether cases brought under emerging approaches survive preliminary challenges based on justiciability and, more specifically, separation of powers arguments. Working outside of social movement theory, Benjamin Ewing and Douglas Kysar,<sup>179</sup> and later Henry Weaver and Douglas Kysar,<sup>180</sup> offer a useful framework for categorising and understanding judicial attitudes towards this issue in the context of climate change. The first attitude is to ‘duck and weave’,<sup>181</sup> or to engage in an act of ‘judicial nihilism’ by ‘refus[ing] responsibility over the extraordinary and the indeterminate’ and ‘[b]y various means, candidly or covertly, ... abdicat[ing] their duty to decide because of the complex or dramatic nature of a harm and the remedy it seems to necessitate’.<sup>182</sup> This attitude is demonstrated not only by virtually all of the first wave of adaptation damages cases in the United States, but also by two recent decisions dismissing claims brought by the cities of San Francisco and Oakland and by New York City. As pithily stated by Judge Keenan in the New York City case, ‘[c]limate change is a fact of life... But the serious problems caused thereby are not for the judiciary to ameliorate’.<sup>183</sup>

The second attitude is to ‘prod and plea’, described as ‘a corollary to the more traditionally-emphasised function of checks and balances’ that ‘redeem[s] the very possibility of law’ by ‘promot[ing] consideration of the underlying visions of right, responsibility, and social order that are adopted (or implied) by judicial decision’.<sup>184</sup> As Ewing and Kysar argue:

Rather than counselling against common law adjudication... the complexity and enormity of the climate change problem counsel in its favour, in order that baseline norms of responsibility – whatever their content – may be more clearly specified as public and private actors embark on what undoubtedly will be a centuries-long struggle to deal with greenhouse gas emissions and their impacts.<sup>185</sup>

This attitude is reflected in the Mallon J’s justiciability-related findings in *Thomson*, discussed above,<sup>186</sup> and more explicitly in the judgment of Aiken J in *Juliana v United States*,<sup>187</sup> which asserted that ‘[f]ederal courts

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<sup>179</sup> Ewing and Kysar, above n 8.

<sup>180</sup> Weaver and Kysar, above n 8.

<sup>181</sup> Ewing and Kysar, above n 8, 350, 416.

<sup>182</sup> Weaver and Kysar, above n 8, 354.

<sup>183</sup> *City of New York v BP PLC*, (SDNY, No 18 cv 182, 19 July 2018) slip op 20. See also *City of Oakland v BP PLC*, 325 F Supp 3d 1017, 1029 (ND Cal, 2018) (Alsup J) (‘[t]he dangers raised in the complaints are very real. But those dangers are worldwide. Their causes are worldwide. The benefits of fossil fuels are worldwide. ... The Court will stay its hand in favour of solutions by the legislative and executive branches’).

<sup>184</sup> Ewing and Kysar, above n 8, 354, 356; Weaver and Kysar, above n 8, 295

<sup>185</sup> Weaver and Kysar, above n 8, 356.

<sup>186</sup> See above n 151.

<sup>187</sup> *Juliana v United States*, 217 F Supp 3d 1224 (D Or, 2016).

too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it'.<sup>188</sup> As Ewing and Kysar conclude with respect to issue of separation of powers:

If the heart of the political question and related doctrines consists of 'prudential concerns calling for mutual respect among the three branches of Government', then it is significant to note that respect can mean prodding and pleading as much as it does ducking and deferring. It overstates the case only slightly to say that such actions are akin to asking the other branches of government to live up to their better instincts, rather than succumb to an institutional bias toward inaction. Respecting an equal need not mean simply letting alone. It can also mean signalling high expectations, which imply a belief in the other's ability to meet them (internal citations omitted).<sup>189</sup>

The potentially high variance of judicial attitudes with respect to fundamental legal doctrines raises the question of whether there might be other aspects of LO in Australia that are both less contingent and unfavourable towards new approaches than elsewhere. This article suggests that there are at least two. The first is Australia's constitutional structure. Although the High Court's jurisprudence has been increasingly influenced by notions of popular sovereignty,<sup>190</sup> there is little argument that Australia's constitution is historically and structurally imbued with the principle of parliamentary sovereignty and 'the Australian drafters' commitment to a philosophy of utilitarianism... and the sense that "the protections to individual rights provided by the traditions of acting as honourable men were quite sufficient for a civilised society"' (internal citations omitted).<sup>191</sup> This can be contrasted with the comparatively stronger emergence in the United Kingdom of notions of popular sovereignty and judicial supremacy,<sup>192</sup> and their dominance in the United States.<sup>193</sup> As a result, it may be argued that it is the more judicially-

<sup>188</sup> Ibid 1262 (Aiken, J.).

<sup>189</sup> Ewing and Kysar, above n 8, 416-417.

<sup>190</sup> See Brian Fitzgerald, 'Proportionality and Australian Constitutionalism' (1993) 12(2) *University of Tasmania Law Review* 263; Andrew Lynch, 'Review Essay: The High Court – Legitimacy and Change' (2001) 29(2) *Federal Law Review* 295; Michael Kirby, 'Deakin: Popular Sovereignty and the True Foundation of the Australian Constitution' (1996) 3(2) *Deakin Law Review* 129, 138-9; George Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26 *Federal Law Review* 1, 1; Finn, above n 148, 35.

<sup>191</sup> Hilary Charlesworth, 'International Human Rights Law and Australian Federalism', in Brian Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (1997, Melbourne University Press) 280, 284.

<sup>192</sup> Harley Wright, 'Sovereignty of the People – the New Constitutional *Grundnorm*?' (1998) 26 *Federal Law Review* 166.

<sup>193</sup> See Akhil Amar, 'The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem' (1993) 65 *University of Colorado Law Review* 749; Keith E Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in US History* (Princeton University Press, 2007), cited in Robert Woods, 'Rights Review in the High Court and the Cultural Limits of Judicial Power' (2013) 41 *Federal Law Review* 587, 590 fn 25.

deferential Australian constitutional structure rather than legal doctrine that renders new approaches to climate litigation less viable than they are elsewhere.

The second aspect is Australia's legal culture, and particularly that of the High Court. As Jonathan Cannon has argued in respect of the US Supreme Court, a jurisdiction's apex court 'is the exemplar of the law culture, which presents itself as distinct from surrounding culture'.<sup>194</sup> Empirically and anecdotally, the High Court in both its historical development and present constitution embodies a culture of concurrence and conformity rather than political division, doctrinal conservatism rather than reform, and efficiency in opposition to perceived 'judicial peacocking'.<sup>195</sup> It has thus been argued that 'the calcification of a deeply formalist politico-legal culture' in the High Court has 'had the effect of undercutting the Court's capacity or inclination to move into more elevated and openly political forms of rights review'.<sup>196</sup> The High Court's culture may therefore counteract variance in lower court judicial attitudes by discouraging doctrinal evolution, strong dissents and lengthy *obiter dicta* that lower courts may otherwise look to as a basis for accepting novel cases and arguments in the first instance.

### B *Socio-Institutionalist Factors*

The above discussion indicates that there may be significant structural and cultural barriers restricting judicial receptiveness of new approaches to climate litigation. To some extent, these barriers appear to be distinctly Australian. However, these barriers have generally played only a minor, implicit role in existing explanations for the non-adoption of new approaches. What, then, explains the tendency for many of the existing analyses to treat perceived doctrinal hurdles as if comparable hurdles do not exist elsewhere? Similarly, what might explain the high prevalence of dismissive analyses of climate litigation (both existing and new

<sup>194</sup> Cannon, above n 33, 37.

<sup>195</sup> Regarding the historical development of the High Court's culture, see Woods, above n 193. Regarding its current culture see Susan Kiefel, 'The Individual Judge' (2014) 88 *Australian Law Journal* 554; Katie Walsh, 'Productivity Over Prose for High Court in 21<sup>st</sup> Century: Chief Justice Susan Kiefel' *Australian Financial Review* (online) 17 March 2017 <<https://www.afr.com/news/productivity-over-prose-for-high-court-in-21st-century-chief-justice-susan-kiefel-20170315-guyz3m>>; Susan Kiefel, 'The Adaptability of the Common Law to Change' (Presentation presented at The Australasian Institute of Judicial Administration, Brisbane, 24 May 2018) <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/kiefelj/KiefelCJ24May2018.pdf>>; Michael Pelly, 'High Court Troika "the Most Powerful Bloc of Judges in History"' *Australian Financial Review* (online) 9 August 2018 ('[f]rom 2013 to 2017, all members of the court backed the final orders in 75 per cent of cases. This is well ahead of 2007-2012 (67 per cent), 2003-2007 (54 per cent) and 1998-2003 (61 per cent)'). Cf Ruth Bader Ginsburg, 'The Role of Dissenting Opinions' (2010) 95 *Minnesota Law Review* 1.

<sup>196</sup> Woods, above n 193, 605.

approaches) by litigators that frequently represent and arguably are themselves a part of the climate SMO community?<sup>197</sup>

From a socio-institutionalist perspective, one answer may be mimesis within a relatively homogeneous and conservative Australian public interest environmental law sector. With respect to the sector's homogeneity, effectively the entire Australian public interest environmental law sector has grown out of a single model – that of the EDO NSW.<sup>198</sup> This is atypical of experiences in the United States, where multiple public interest environmental lawyering models have elsewhere evolved concurrently.<sup>199</sup> As for the sector's conservatism, while some of the first lawyers at EDO NSW hoped to bring ambitious cases paralleling those in the United States, the firm's board was not in favour and the cases of the day did not lend themselves to such an approach.<sup>200</sup> Arguably, the EDOs' self-conception of their purpose has since expanded only incrementally. The EDOs continue to consider themselves at the conservative, technocratic end of the environmental movement.<sup>201</sup> This narrow, essentially defensive idea of public interest environmental litigation has solidified itself. Its dual purposes are to 'enforce the proposal examination mechanisms of environmental legislation' and 'gain time' to increase public scrutiny of and opposition to a suspect development.<sup>202</sup>

Despite this mimesis, change and diversity is slowly coming to the sector. This change is reflected in, for instance, the former Environmental Defenders Office of Victoria's decision to rename itself Environmental Justice Australia and adopt a distinct, environmental justice-centric model within the sector.<sup>203</sup> It has also been suggested recently that 'new

<sup>197</sup> Hogarth, above n 27, 14.

<sup>198</sup> See David Robinson, 'The Environmental Defender's Office NSW, 1985-1995' (1996) 13 *Environmental and Planning Law Journal* 155; Hogarth, above n 27.

<sup>199</sup> See Bonine, above n 100, 478-9 ('[p]ublic interest environmental lawyers work in six types of organisations: non-profit environmental law firms that litigate at the regional or national level, the same at state or local level, general public interest law firms that are not confined to environmental matters, environmental law clinics, legal staff in environmental groups (some of whom litigate), and "private public interest" law firms. If one's field of vision only sees Earthjustice, the Natural Resources Defence Council, the Environmental Defence Fund, or the National Wildlife Federation, that person is blinded from much of the picture'). See also Vanhala, above n 11, 397-9, 403-6.

<sup>200</sup> Hogarth, above n 27, 50-3, 128.

<sup>201</sup> Ibid 14; Sydes, above n 175, 62 ('... the work of EDOs often specifically disavows any political grounding or ethical choice. ... This is an approach to law and legal practice that aligns closely with a view of the role of lawyers as one of applying technical expertise and expert legal judgment to instructions and directions provided by clients whose interests it is the lawyers' duty to serve, subject only to the paramount duty to the court').

<sup>202</sup> Wilcox, above n 51, 47-8.

<sup>203</sup> Environmental Defenders Office Victoria, 'Environmental Justice Project: Final Report' (Report, 2011) <[https://envirojustice.org.au/sites/default/files/files/Submissions%20and%20reports/enviromental\\_justice\\_report.pdf](https://envirojustice.org.au/sites/default/files/files/Submissions%20and%20reports/enviromental_justice_report.pdf)>; Hogarth, above n 27, 131.

opportunities are emerging for advocacy organisations to partner in climate change litigation and related legal interventions with commercial players who have aligned interests in clean energy transition and adaptation'.<sup>204</sup> Nevertheless, Australia has yet to see the emergence of the kind of strategy entrepreneurs that were evidently instrumental to the advent and success (at least at a preliminary stage) of cases such as *Urgenda*<sup>205</sup> and *Juliana v United States*.<sup>206</sup>

Additionally, it can also be argued that the culture of Australia's legal sector is generally more conservative, and therefore warier of notions of 'passion' in legal practice, 'cause lawyering', 'social change lawyering' and 'law and organising' practice models than legal cultures elsewhere.<sup>207</sup> There are also significant institutional obstacles that interact with this culture. The split of the legal profession between barristers and solicitors, the existence of adverse costs, comparatively onerous economic and regulatory barriers to practising without supervision, a lack of incentives for early-career public interest legal employment,<sup>208</sup> and Australia's

<sup>204</sup> Peel et al, above n 1, 836-7.

<sup>205</sup> *Stichting Urgenda v Government of the Netherlands (Ministry of Infrastructure and the Environment)* (ECLI:NL:RBDHA:2015:7145, Rechtbank Den Haag, C/09/456689/HA ZA 13-1396, 24 June 2015). The legal strategy for the *Urgenda* case was hatched and spearheaded by a commercial lawyer from outside the public interest environmental law movement. See Felicity Nelson, *Dutch Climate Champion Brings "Case for Hope" to Australia* (24 July 2015) *Lawyers Weekly* <<https://www.lawyersweekly.com.au/news/16874-dutch-climate-champion-brings-a-case-for-hope-to-australia>> ('Urgenda's case was led by Roger Cox, a partner at the Dutch law firm Paulussen Advocaten and the author of *Revolution Justified*, which lays out the legal thinking behind the case'), cited in Peel et al, above n 1, 806 fn 48.

<sup>206</sup> Olivia Molodanof and Jessica Durney, 'Hope is a Song in a Weary Throat: An Interview with Julia Olson' (2018) 24(2) *Hastings Environmental Law Journal* 213, 214 ('I've always liked bringing worthy cases that others are unwilling to bring or think are not likely to be successful, and working hard to win them. ... I saw my colleagues and myself playing a lot of defence, trying to stop and hold the line on environmental protection, rather than being proactive and coming up with an offensive strategy. That perspective informed my desire for a new approach on climate change').

<sup>207</sup> Sydes, above n 175, 68; Robert French, 'Lawyers, Causes and Passion' (Speech presented at the EDO NSW 25<sup>th</sup> Anniversary Dinner, Sydney, 25 June 2015) <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj25June2015.pdf>>, citing Austin Sarat and Stuart Scheingold, *Cause Lawyering and the State in a Global Era* (Oxford University Press, 2001) 13, and Christos Boukalas, 'Politics as Legal Actors – Lawyers as Political Actors: Towards a Reconceptualisation of Cause Lawyering' (2013) 22(3) *Social and Legal Studies* 395, 396-7; Isabelle Reinecke, 'Global Approaches to Litigation For Change' (Winston Churchill Memorial Trust of Australia Churchill Fellowship Report 2016, 25 September 2017) <[https://www.churchilltrust.com.au/media/fellows/Reinecke\\_I\\_2016\\_People\\_and\\_systemic\\_change\\_through\\_the\\_courts\\_1.pdf](https://www.churchilltrust.com.au/media/fellows/Reinecke_I_2016_People_and_systemic_change_through_the_courts_1.pdf)>.

<sup>208</sup> Although comparing the financing of tuition fees at Australian and US law schools is likely akin to comparing apples and oranges, it is notable that many US law schools have programs in which some or all of a law graduate's education loans are forgiven for each year that graduate works in an approved public interest area, and there have been recent calls to further incentivise public interest career options for law graduates. See Richard Beck, 'Loan Repayment Assistance Programs for Public Interest Lawyers: Why Does

unique constitutional and historical political context all operate as handbrakes on more entrepreneurial public interest litigation and a larger and more diverse public interest environmental law sector.<sup>209</sup>

### *C Resources-Based Factors*

As mentioned in Section II of this article, SMOs that are poor in resources (human or financial) are expected to be unlikely to pursue litigation as a strategy. It stands to reason that resource-poor climate litigants, when choosing between litigation strategies, would therefore opt for more conventional approaches so as to minimise adverse costs risk. Peel and Osofsky have indicated that weaker sectoral financial and human resources in Australia partly explain the differences between the Australian and US climate litigation landscapes.<sup>210</sup> It has also been suggested on resources-based grounds that ‘building upon a well-established Australian litigation tradition... may have a higher rate of success than more innovative approaches’ and may therefore be a preferable future strategy.<sup>211</sup> In contrast, given that Australia has essentially a single public interest climate change litigation model based on external, independent legal advice and representation,<sup>212</sup> variance in the legal expertise of staff within climate SMOs is unlikely to have the explanatory value it potentially has in other contexts.<sup>213</sup>

Consequently, a potential obstacle for new approaches in Australia is the philanthropic funding environment for public interest environmental law. Australia’s EDOs have for much of their history been largely dependent on government funding. For instance, EDO NSW was established in its early years on only a handful of relatively modest business and civil society donations, and a more substantial grant from the Legal Aid Commission of New South Wales.<sup>214</sup> EDO NSW did not escape its precarious funding situation until it received ‘secure, meaningful and ongoing funding from the Public Purpose Fund of the Law Society of NSW’.<sup>215</sup> A truly national network of EDOs did not emerge until the

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Everyone Think They are Taxable?’ (1996) 40 *New York Law School Law Review* 251; Pete Davis, *The First Thing We Do is Nudge the Lawyers* (26 January 2016) Aeon <<https://aeon.co/ideas/law-schools-should-nudge-their-students-into-civic-minded-jobs>>.

<sup>209</sup> Christine Forster and Vedna Jivan, ‘Public Interest Litigation and Human Rights Implementation: The Indian and Australian Experience’ (2008) 3(1) *Asian Journal of Comparative Law* 1; Paula O’Brien, ‘Changing Public Interest Law: Overcoming the Law’s Barriers to Social Change Lawyering’ (2011) 36(2) *Alternative Law Journal* 82; Andrea Durbach et al, ‘Public Interest Litigation: Making the Case in Australia’ (2013) 38(4) *Alternative Law Journal* 219, 221-2.

<sup>210</sup> Peel and Osofsky, *Climate Change Litigation*, above n 2, 321-4.

<sup>211</sup> Peel et al, above n 1, 830.

<sup>212</sup> See Sydes, above n 202, 62.

<sup>213</sup> See Vanhala, above n 11, 403-6.

<sup>214</sup> Ben Boer, ‘Legal Aid in Environmental Disputes’ (1986) 3 *Environmental and Planning Law Journal* 22, 36-37.

<sup>215</sup> Hogarth, above n 27, 12.

receipt of Commonwealth funding in 1995.<sup>216</sup> This can be contrasted with the funding model in other jurisdictions such as the United States and Canada, where public interest environmental law offices were and continue to be seeded and funded primarily by large philanthropic foundations.<sup>217</sup>

The historical reliance of Australian EDOs on public funding arguably creates the apprehension that public interest environmental litigators will be more likely to view themselves as ‘insiders’,<sup>218</sup> and will be less likely to bring cases that challenge the status quo or fall outside accepted approaches. As Hogarth writes of a 2007 visit to the United States and Canada by then-EDO NSW CEO Jeff Smith:

One telling insight was: ‘US environmental and environmental legal groups seem to operate much more outside of the mainstream’. Reading between the lines, the North Americans were incredulous that the EDO could both receive government funding and sue governments. With hindsight, this can be taken as a warning of challenges to come several years later.<sup>219</sup>

This historical funding relationship between government and civil society in Australia did not, ultimately, insulate successful cases from political backlash, even where those cases only delayed rather than prevented the challenged development.<sup>220</sup> Following the high profile community victories by the plaintiffs in *Bulga Milbrodale Progress Association v Minister for Planning and Infrastructure*,<sup>221</sup> and media revelations that representatives of two EDOs had been present at an anti-coal activist

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<sup>216</sup> David Robinson, above n 199, 165; Brendan Sydes, above n 175, 60.

<sup>217</sup> Paul Sabin, ‘Environmental Law and the End of the New Deal Order’ (2015) 33(4) *Law and History Review* 965, 965 ([t]he most prominent organisations, founded between 1967 and 1971, included the Environmental Defence Fund (EDF), Centre for Law and Social Policy (CLASP), Natural Resources Defence Council (NRDC), and the Sierra Club Legal Defence Fund. Public Advocates and the Centre for Law in the Public Interest, two California-based firms founded during these same years, also initiated key litigation. These small but powerful legal organisations – all predominantly funded by the Ford Foundation – quickly achieved landmark victories that helped to define the early successes of modern environmentalism’).

<sup>218</sup> William Maloney, ‘Interest Groups and Public Policy: The Insider/Outsider Model Revisited’ (1994) 14(1) *Journal of Public Policy* 17; Klein, *This Change Everything*, above n 158, 204-11; Hogarth, above n 27, 14 (‘Walmsley nevertheless asserts that walking a political tightrope has worked surprisingly well. “Hopefully we will continue to go from strength to strength, and maintain our sophisticated relationship with government whereby we can sue a Minister on one issue while at the same time engaging with the same government on a law reform issue. In the majority of cases we still get an official Christmas card at the end of the year”. Walmsley’s scenario of mixing legal conflict with constructive policy collaboration is unusual, if not unique in the international experience of public interest environmental lawyering’).

<sup>219</sup> Hogarth, above n 27, 15.

<sup>220</sup> See above nn 78-80, 85.

<sup>221</sup> [2013] NSWLEC 48.

meeting,<sup>222</sup> EDOs throughout Australia lost most if not all of their Commonwealth and state funding.<sup>223</sup> This has, however, been something of a blessing in disguise, as non-government sources have largely filled the funding gap and, in the process, potentially opened up opportunities for litigation approaches that more directly challenge the political status quo.<sup>224</sup>

Indeed, resource considerations ultimately appear to have little explanatory value in explaining non-adoption of new approaches. 'It is fair to say that climate change cases before federal courts in Australia have not achieved success as a legal matter',<sup>225</sup> meaning adverse costs orders are presumably ordered frequently against climate litigants, and yet Australia has and continues to see a relatively high volume of climate change litigation.<sup>226</sup> Two additional developments have the potential to improve the funding environment for new approaches to climate litigation, especially with respect to the government accountability and adaptation damages approaches outlined above. The first is the establishment of Australia's first public interest litigation funder, the 'Grata Fund'.<sup>227</sup> At its inception the Grata Fund cited the *Urgenda* case in the Netherlands as the kind of system-changing litigation it seeks to fund.<sup>228</sup> Building on successful precedents for 'civic crowdfunding' of environmental litigation in Australia,<sup>229</sup> the development of a formal public interest litigation funding sector in Australia is likely to increase opportunities for pro-active, novel climate litigation in Australia. This is reflected in the Grata Fund having already funded a novel climate change-related proceeding involving allegations by Commonwealth Bank shareholders that the Commonwealth Bank's failure to report the foreseeable risks and impacts stemming from climate change was in breach of the *Corporations Act 2001* (Cth).<sup>230</sup>

<sup>222</sup> Hogarth, above n 27, 84.

<sup>223</sup> EDO NSW, *EDO Offices Face Closure After Federal Funding Cuts* (17 December 2013)

<[https://www.edonsw.org.au/edo\\_offices\\_face\\_closure\\_after\\_government\\_funding\\_cuts](https://www.edonsw.org.au/edo_offices_face_closure_after_government_funding_cuts)>.

<sup>224</sup> Hogarth, above n 27, 131.

<sup>225</sup> Peel et al, above n 1, 796 fn 8.

<sup>226</sup> Above n 1. See also EDO NSW, *Current Cases* <[https://www.edonsw.org.au/current\\_cases](https://www.edonsw.org.au/current_cases)>.

<sup>227</sup> Grata Fund, *People Powered Justice* <<http://www.gratafund.org.au/>>.

<sup>228</sup> Jennifer Robinson, 'Citizens Must be Able to Challenge Government Power' *Sydney Morning Herald* (online) 30 November 2015 <<https://www.smh.com.au/opinion/comment-jennifer-robinson-on-grata-fund-20151130-glbe10.html>> ('[i]nspired by game-changing court cases that have disrupted unjust laws around the world this year, like the US Supreme Court decision to legalise marriage equality and the Hague decision to mandate climate change emissions reductions in the Netherlands, we want to facilitate opportunities to do the same in Australia').

<sup>229</sup> Evan Hamman, 'Save the Reef! Civic Crowdfunding and Public Interest Environmental Litigation' (2015) 15(1) *QUT Law Review* 159.

<sup>230</sup> *Guy Abrahams v Commonwealth Bank of Australia* (Federal Court of Australia, VID 879/2017, Concise Statement, 8 August 2017).

The second development is the growth of commercial litigation funding in Australia.<sup>231</sup> This has particular implications for adaptation damages approaches. The majority of the recent cases filed under this approach in the United States have involved legal representation on a ‘contingency’ basis; that is, the lawyers involved will receive a percentage of any damages awarded or settlement sum reached as their fee for legal services.<sup>232</sup> Such an arrangement is prohibited in Australia. Instead, third-party commercial litigation funders contract with a plaintiff or members of a class action, funding the litigation upfront in return for receiving a percentage of any damages awarded or settlement sum reached.<sup>233</sup> Third-party litigation funding is commonly employed in class action litigation, as litigation funders are able to fund essentially one set of legal representatives while receiving a percentage of the aggregated claim value of a typically large number of clients.<sup>234</sup> Additionally, there is no requirement in Australia for class actions to receive judicial ‘certification’ in order to proceed,<sup>235</sup> and complex class actions proceedings have been brought by municipalities previously.<sup>236</sup> Consequently, Australia may have an even more favourable funding environment for litigation (specifically, class action litigation) under adaptation damages approaches than currently exists in the United States.<sup>237</sup>

## VI CONCLUSION

This article has sought to expand the discussion of what should inform decisions about the future of climate litigation in Australia, beyond the essential but well-trodden considerations of causes of action, prospects of success, standing, justiciability, evidentiary concerns and costs. Normatively, by applying an analytical framework informed by social movement theory, this article has argued that a more nuanced assessment

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<sup>231</sup> Jason Geisker and Jenny Tallis, ‘Australia’ in Leslie Perrin (ed), *The Third Party Litigation Funding Law Review* (Law Business Research, 2017) 1, 1.

<sup>232</sup> Charlie Brennan, ‘Boulder Spearheads Lawsuit Seeking Damages from ExxonMobil, Suncor Over Climate Change Impacts’ *Daily Camera* (online) 17 April 2018 <[http://www.dailycamera.com/news/boulder/ci\\_31810658/boulder-sues-exxon-suncor-climate-change](http://www.dailycamera.com/news/boulder/ci_31810658/boulder-sues-exxon-suncor-climate-change)>.

<sup>233</sup> Michael Legg and Louisa Travers, ‘Necessity is the Mother of Invention: The Adoption of Third-Party Litigation Funding and the Closed Class in Australian Class Actions’ (2009) 38(3) *Common Law World Review* 245.

<sup>234</sup> *Ibid.*

<sup>235</sup> Edward Sherman, ‘Group Litigation under Foreign Legal Systems: Variations and Alternatives to American Actions’ (2002) 52(2) *DePaul Law Review* 401, 426.

<sup>236</sup> See *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* [2012] FCA 1028; Neil Guthrie, ‘Successful Class Action by Municipalities Against Lehman Brothers Over Derivatives’ *Lexology* (online) 20 November 2012 <<https://www.lexology.com/library/detail.aspx?g=e77282ae-c921-42c1-a57b-2b3dfab8e9ab>>.

<sup>237</sup> For a balanced discussion of the advantages and disadvantages of a hypothetical negligence-based climate change class action proceeding, see Cashman and Abbs, above n 7, 261.

of both existing and proposed approaches should consider the approach's dependence on political opportunity; non-structural aspects of the approach's legal opportunity; the strategic value of the frame or frames communicated by the approach; variance in judicial receptiveness within the confines of a jurisdiction's constitutional structure and legal culture; the socio-institutionalist characteristics of litigants; and a litigant's financial and human resources. Instrumentally, this article has suggested that the deepening climate crisis, the failure of international law to adequately address this crisis, the inefficacy of the existing, administrative law-based approach to climate litigation, the framing deficiencies of the existing approach, and the framing advantages of new approaches all weigh towards increasing consideration and future adoption of novel, ambitious approaches.

The significant difficulties with isolating and empirically evaluating the factors affecting a climate litigant's strategic preferences prohibits this article from making robust conclusions regarding the reasons for the non-adoption to date of new approaches in Australia vis-à-vis the US. Nevertheless, the analysis in this article provides some weight to the argument that these preferences are as much due to, *inter alia*, differences between the cultures of each jurisdiction's judiciary and legal profession, and the absence of comparable 'strategy entrepreneurs' in the climate SMO community, as they are to supposedly immovable legal doctrine. In short, gazing into the crystal ball and imagining new futures for climate change litigation in Australia requires not only considering whether and how the law itself might change, but also whether and how the strategic choices of those availing themselves of the courts might change in the face of a deepening climate crisis.