Becoming a Climate Conscious Lawyer

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Climate Change and the Australian Legal System

Julia Dehm; Nicole Graham; Zoe Nay; Anna Huggins; Ellen Hawkins; Steven Tudor; and Nicole Rogers

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Contents

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About the Editors

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Nicole Graham is a professor of climate law at Bond University, where she teaches into a world first climate law degree. She has researched and published widely in the areas of climate law, wild law, interdisciplinary climate studies, and performance studies theory and the law. In 2014, she instigated and then co-led the Wild Law Judgment project, which culminated in an edited publication of collected wild law judgments. Her 2019 monograph, *Law, Fiction and Activism in a Time of Climate Change*, was shortlisted for the 2020 Hart-SLSA Book Prize and the inaugural 2020 Australian Legal Research Book Award. Her latest co-edited book, *The Anthropocene Judgments Project: Futureproofing the Common Law* (Routledge, 2023), is the product of an international, interdisciplinary, collaborative project in which participants were tasked with writing the judgments of the future.

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About the Authors

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Nicole Rogers is a professor of climate law at Bond University, where she teaches into a world first climate law degree. She has researched and published widely in the areas of climate law, wild law, interdisciplinary climate studies, and performance studies theory and the law. In 2014, she instigated and then co-led the Wild Law Judgment project, which culminated in an edited publication of collected wild law judgments. Her 2019 monograph, *Law, Fiction and Activism in a Time of Climate Change*, was shortlisted for the 2020 Hart-SLSA Book Prize and the inaugural 2020 Australian Legal Research Book Award. Her latest co-edited book, *The Anthropocene Judgments Project: Futureproofing the Common Law* (Routledge, 2023), is the product of an international, interdisciplinary, collaborative project in which participants were tasked with writing the judgments of the future.

Acknowledgments

We recognise that this book was conceptualised, written and published on stolen lands of Aboriginal & Torres Strait Islander people and respect that sovereignty of those lands was never ceded. We pay respect to Elders, past and present, and acknowledge the pivotal role that Aboriginal & Torres Strait Islander people play in addressing challenges faced by climate change and climate resilience.

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Each chapter was anonymously peer reviewed by at least two academic experts and/or legal professionals. We are incredibly grateful to all the anonymous reviewers and especially to the lawyers at the Environmental Defenders Office and The Chancery Lane Project for their support of this project and their expert guidance.

Foreword

Justice Brian Preston, Chief Judge of Land and Environment Court of NSW

Climate change is one of the planetary crises challenging the law, legal practice and the legal system. Climate change prompts not only legal development, the normal evolution of the law in response to a changing society, but also legal disruption. Legal disruption occurs when problems cannot be managed using existing laws and legal institutions, thereby necessitating change. In short, climate change is legally disruptive.

Conversely, the law, legal practice and the legal system are implicated in climate change. Climate change is an externality of a socio-economic system that is built on the commodification and exploitation of Earth's natural resources. The law and legal institutions enable and encourage that socio-economic system and hence the environmental externalities. In short, the law is environmentally disruptive.

Law students of today will be practising during the time when urgent action to address climate change needs to be taken. To hold the global average temperature increase to no more than 2 °C, and preferably 1.5 °C, above pre-industrial levels by 2050 – the targets set under the Paris Agreement – our socio-economic system, including aspects of modes of production, need to be transformed radically to achieve the needed energy transition.

That energy transition is required not only to achieve ecological sustainability – a liveable planet – but also environmental justice for all people. Climate change is a cause of injustice in so many ways. One way is that the people who have contributed the least to climate change suffer the most. The law

enables and ensures this distributive injustice. But taking the transformative action required to tackle climate change can itself cause injustice. The energy transition must also be just, not redistributing injustice between different groups in society.

To equip law students with the knowledge and skills to practice law in a climate-transformed world, legal education needs to teach them about the legal disruption of climate change and the environmental disruption of the law and how to justly address both. This demands a transformation in legal education by mainstreaming climate change in all aspects of the legal curriculum. This transformation entails a journey into uncharted territory. A map is required to navigate the journey. This book provides the map.

Edited by Julia Dehm, Nicole Graham and Zoe Nay, this book is a valuable collection addressing the core legal curriculum – the 11 compulsory academic areas of knowledge known as the Priestley 11 – and a range of elective subjects taught at Australian law schools. The chapters identify, first, the legal disruptions and developments that climate change is causing to these areas of substantive and adjective law; second, why and how climate change is causing these disruptions and developments; and third, what and how legal change can and should be made to achieve sustainability for the planet and justice for all its people.

The book provides the map for the journey; it is our task to follow it.

Justice Brian Preston
Chief Judge of Land and Environment Court of NSW

Chapter 1: Legal Education in a Changing Climate

Julia Dehm, Nicole Graham and Zoe Nay

Figure 1.1: Student climate strikes in Australia in March 2019. Source: School Strike 4 Climate, used with permission.

Climate change impacts and the transition to a low-carbon society are already posing fundamental challenges to key legal doctrines and principles and thereby transforming of many areas of law. Further changes to key legal doctrines and principles across all areas of law will be necessary to address the future impacts of climate change and to ensure a rapid transition to a low-carbon society that is just and equitable. This introductory chapter provides crucial background to complement for the later chapters.

The chapter briefly synthesises the current state of the scientific evidence surrounding the climate crisis, with a focus on the impacts of climate change in Australia. The chapter begins by providing an overview of what is required to transition to a low-carbon society and prevent further dangerous anthropogenic interference with the global climate system (section 2). It then introduces the role

of law in the changing climate context and describes legal responses to climate change on both international and national levels, with a particular focus on the Australian context (section 3). In addition, the chapter highlights how all areas of law and the Australia legal system are implicated in climate change (section 4) and provides a broad overview of the skills and attributes needed to be a 'climate conscious lawyer' (section 5). The chapter concludes with reflections on the method and pedagogy underpinning this book (section 6), the importance of considering 'climate anxiety' when learning or teaching about climate change (section 7), and the outline of current and forthcoming chapters (section 8).

KEY QUESTIONS

- How ambitious, effective and equitable do you consider existing laws and regulations addressing climate change at the international and domestic legal to be?
- How do you understand the role of law in regulating, redressing, and facilitating climate change?
- What do you think are the essential competencies of a 'climate conscious lawyer' or legal professional? How can you better develop these skills and attributes?
- Do you think legal education should be more 'climate conscious'? Why/why not?

CHAPTER OUTLINE

This chapter will cover the following topics:

LIST OF FIGURES

1. Introduction

Climate change impacts and the transition to a low-carbon society are already posing fundamental challenges to key legal doctrines and principles and thereby transforming of many areas of law. Further changes to key legal doctrines and principles across all areas of law will be necessary to address the future impacts of climate change and to ensure a rapid transition to a low-carbon society that is just and equitable. The widespread legal change necessary extends beyond the specialised fields of 'climate' and 'environmental' laws and implicates all areas of law and legal practice, including corporate and fiduciary duties, property and tort law, constitutional administrative law and criminal law, as well as civil procedure, evidence law, professional obligations and many more.[1] Legal change is already occurring through dispersed and multilevel approaches, including by way of international negotiation, domestic policymaking, climate change litigation and political activism.[2]

This book is for all academic and practising lawyers, and law students and law academics who want to understand these legal changes in order to strategically and successfully navigate the rapidly changing legal landscape. This book provides crucial insights and resources for those who choose to use their skills and expertise to contribute towards advancing climate change **mitigation** and **adaptation**.

Law students need a transformative legal education that will support them to become 'climate conscious' legal professionals with the competency and knowledge to be thoughtful, strategic and successful advocates in a climate-transformed world. Many law students recognise that addressing climate change is an urgent imperative and would like to develop their skills and knowledge to promote climate mitigation and adaptation. When law graduates enter the legal profession, they need to navigate a fundamentally transformed climate context, with widespread but unequally distributed impacts experienced across systems, regions and sectors. An understanding of the impacts of climate change and its intersections with the law is necessary for law students to become strategic and successful legal professionals in a world grappling with intersecting and complex climate impacts.[3] Finally, law students will become leaders of the profession at the middle of this century, a time at which the global community has committed to reaching 'net zero' emissions.[4] They need not simply

1. Margaret Young, 'Climate Change and Law: A Global Challenge for Legal Education' (2021) 40(3) *University of Queensland Law Journal* 351–370.
2. Thomas Hale, '"All Hands on Deck": The Paris Agreement and Nonstate Climate Action' (2016) 16(3) *Global Environmental Politics* 12–22; Robert Falkner, 'The Paris Agreement and the New Logic of International Climate Politics' (2016) 92(5) *International Affairs* 1107–1125.
3. Monica Taylor, 'Climate Crisis, Legal Education and Law Student Well-Being: Pedagogical Strategies for Action' (2021) 40(3) *University of Queensland Law Journal* 459.
4. Kim Bouwer, 'Net Zero Rule of Law: Climate Consciousness and Legal Education', *Climate Change and the Rule of Law* (University of College London, Centre for Law and the Environment, 10 March 2022) <https://www.ucl.ac.uk/law-environment/blog-climate-change-and-rule-law/net-zero-rule-law-climate-consciousness-and-legal-education>.

to adapt to change but drive change in their professional lives. It is therefore crucial that climate change considerations are mainstreamed across legal education.[5]

About this Collection

This edited collection identifies the cutting-edge developments emerging in response to climate change and analyses the conceptual challenges that climate change presents to different areas of law. As the contributors to the edited collection demonstrate, **greenhouse gas** (GHG) emitting human activities that cause or exacerbate climate change are facilitated, regulated and limited by law. Moving beyond a siloed focus on international climate change law as a distinct legal field of sub-disciplinary knowledge, this edited collection contains chapters addressing core curriculum law subjects, as well as a range of elective subjects taught across Australian law schools. We hope that this edited collection will provide resources to embed climate change considerations throughout professionally accredited law cources, to equip the next generation of lawyers to deliver legal services and promote justice in a world transformed by climate change.

To provide the conceptual foundations for the forthcoming chapters, this introductory chapter will briefly synthesise the current state of the scientific evidence surrounding the climate crisis, with a focus on the impacts of climate change in Australia. The chapter begins by providing an overview of what is required to transition to a low-carbon society and prevent further dangerous anthropogenic interference with the global climate system (section 2). It then introduces the role of law in the changing climate context and describes legal responses to climate change at international and national levels, with a particular focus on the Australian context (section 3). In addition, the chapter highlights how all areas of law and the Australia legal system are implicated in climate change (section 4) and provides a broad overview of the skills and attributes needed to be a 'climate conscious lawyer' (section 5). The chapter concludes with reflections on the method and pedagogy underpinning this book (section 6), the importance of considering 'climate anxiety' when learning or teaching about climate change (section 7) and an outline of forthcoming chapters (section 8).

5. Liz Fisher, 'Climate Change, Legal Change, and Legal Imagination', *Climate Change and the Rule of Law* (University of College London, Centre for Law and the Environment, 13 December 2021) <https://www.ucl.ac.uk/law-environment/blog-climate-change-and-rule-law/climate-change-legal-change-and-legal-imagination>.

2. Climate Science

The **Intergovernmental Panel on Climate Change** (IPCC) is the main international scientific body on climate change and issues periodic assessment reports.[1] The most recent IPCC Assessment Report concludes that it is 'unequivocal' that GHG-emitting human activities are the primary cause of global warming since the mid-20th century.[2] The primary emissions-intensive activities driving global warming are first, fossil-fuel combustion and industrial activities, and second, the clearing of land for agriculture, industry and other human activities.[3] These activities contribute to the emission of four main GHGs (carbon dioxide, nitrous oxide, methane and halocarbons). GHG emissions trap heat in the atmosphere, leading to global warming and the consequential impacts of climate change. Concentrations of carbon dioxide in the atmosphere are unprecedented in comparison with the past 2 million years, and atmospheric concentrations of methane and nitrous oxide are higher than any time in the past 800,000 years.[4] In this context, global temperatures have already risen by approximately 1.2°C since the pre-industrial era.[5] Moreover, states' GHG emission reduction commitments set the world on a course for a global temperature rise of an estimated 2.9°C by 2100.[6]

1. Intergovernmental Panel on Climate Change, *Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C Above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* (Cambridge University Press, 2019); Intergovernmental Panel on Climate Change, *The Ocean and Cryosphere in a Changing Climate: A Special Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2019) Summary for Policy Makers ('*2019 IPCC Special Report*'); Intergovernmental Panel on Climate Change, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2021) ('AR6 WGI'); Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation and Vulnerability: Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2022) ('AR6 WGII'); Intergovernmental Panel on Climate Change, *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2022) ('AR6 WGIII').
2. Intergovernmental Panel on Climate Change, 'Summary for Policymakers' in *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2023) A.1 ('IPCC Synthesis of the Sixth Assessment Report').
3. Ibid A.1.4.
4. Ibid A.1.3.
5. World Meteorological Organization, *Provisional State of the Global Climate 2023* (WMO Annual Report, 30 November 2023).
6. According to the United Nations Environment Programme, current policies and unconditional nationally determined contributions are projected to result in global warming of 2.9°C (with a range of 2.0 to 3.7). If all conditional nationally determined contributions are implemented, temperature rise may peak at 2.5°C. If all net-zero pledges are also fulfilled, temperature rise may be limited to 2.0°C. See United Nations Environment Programme, *Emission Gap Report 2023: Broken Record — Temperatures hit new highs, yet world fails to cut emissions (again)* (UNEP Report, 2023) Table 4.4.

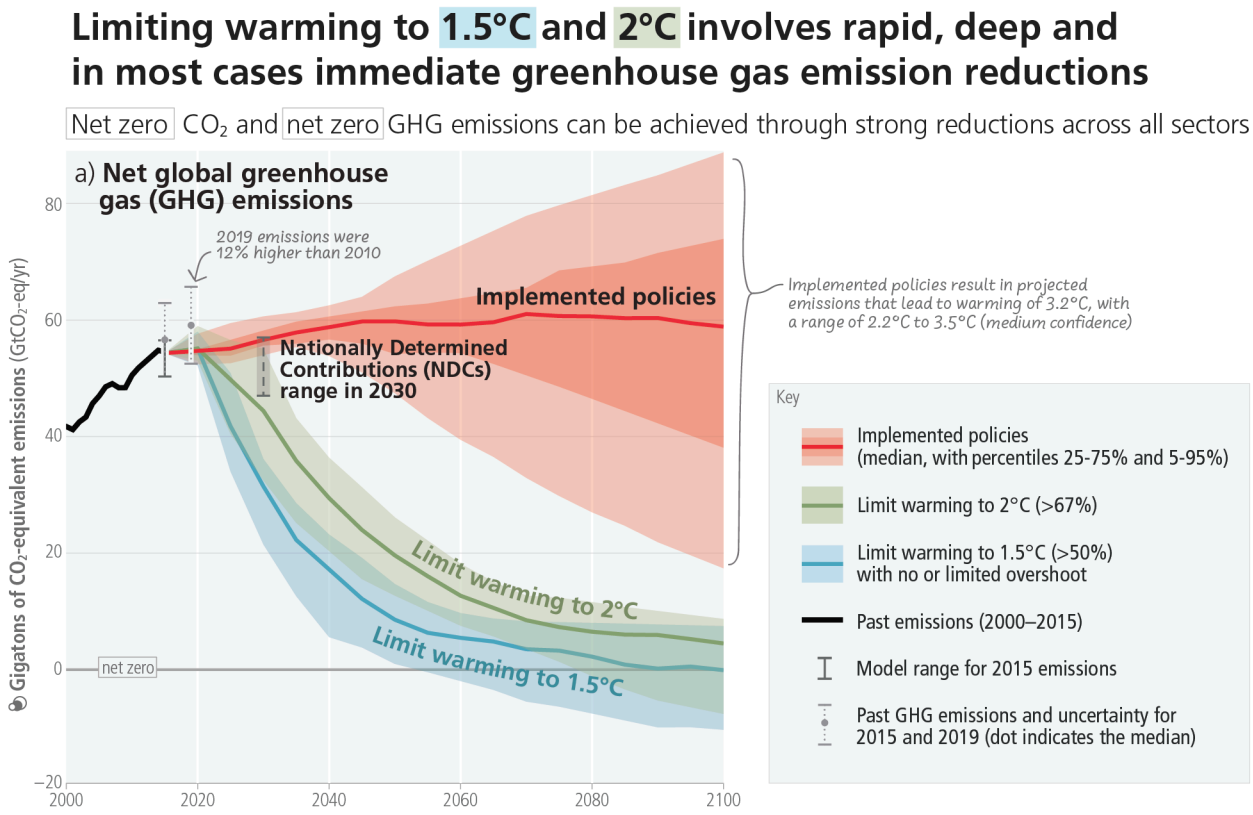

Figure 1.2: Expected warming in 2100 from policies implemented by the end of 2020 (red), compared with emissions cuts needed to limit warming to 1.5°C (blue) or 2°C (green). Source: IPCC (2023) SPM.5, used with permission.

Human-induced climate change is associated with the increased occurrence and severity of extreme events, such as heatwaves and floods, as well as slow-onset events like temperature rise and ocean warming. These extreme and slow-onset events are already causing widespread but unevenly distributed adverse impacts and related **losses and damages** to natural and human systems, such as losses of biodiversity and ecosystem services; food and water insecurity; harmful outcomes for human health; damage to cities, infrastructure and settlements; and losses of territory, cultural heritage and Indigenous or local knowledges. Those that have contributed least to historic and current GHG emissions often face the first and worst impacts of climate change.[7] Conversely, those that have contributed most to the causes of climate change, and thus benefited most from GHG-intensive activities, now possess more resources to respond and adapt to the impacts of climate change.

Australia is in a unique position with respect to climate change, being highly vulnerable to the impacts of climate change while also disproportionally contributing to atmospheric GHG emissions relative to its population size. In Australia, temperatures have risen by an estimated 1.47°C since 1910.[8] This temperature rise has contributed to in an increased risk of bushfires in Australia.[9]

7. IPCC Synthesis of the Sixth Assessment Report (n 7) A.2.
8. Commonwealth Scientific and Industrial Research Organisation and the Bureau of Meteorology, *State of the Climate 2022* (CSIRO Report, 2022) 2.
9. Josep G. Canadell, 'Multi-decadal Increase of Forest Burned Area in Australia is Linked to Climate Change' (2021) 12 *Nature Communications* 6921.

Simultaneously, surrounding sea levels are rising at a rate faster than the global average, resulting in coastal erosion and flooding throughout Australia's coastal regions and low-lying islands.[10] The degradation of Australia's coral reefs and marine biodiversity similarly illustrates the adverse impacts of climate change in our region. Australia's coral reefs provide critical habitats for marine biodiversity and support ecosystem services in the coastal environment, such as fisheries productivity, drawing carbon from the atmosphere ('carbon sequestration') and helping to reduce marine pollution.[11] The degradation of Australia's marine environment therefore has implications for economic and food security[12] and the capacity for Australia to achieve and uphold emission limitation and reduction standards,[13] as well as the continued habitability of surrounding low-lying islands.[14]

10. Intergovernmental Panel on Climate Change, 'Australasia' in *Climate Change 2022: Impacts, Adaptation and Vulnerability: Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2022), Table 11.1, Table Box 11.6.2.
11. Aaron M. Eger et al, 'The Value of Ecosystem Services in Global Marine Kelp Forests' (2023) 14(2841) *Nature Communications* 1; Aaron M. Eger at el, 'Quantifying the Ecosystem Services of the Great Southern Reef' (Final Report, National Environmental Science Program, University of New South Wales, November 2022).
12. Economic losses associated with climate change in Australia are predicted to amount to $5 trillion by 2100: Tom Kompas, Ellen Witte, and Marcia Keegan, *Australia's Clean Energy Future: Costs and Benefits* (Melbourne Sustainable Society Institute Issues Paper 12, The University of Melbourne, 2023).
13. Micheli Duarte de Paula Costa et al, 'Current and Future Carbon Stocks in Coastal Wetlands within the Great Barrier Reef catchments' (2021) 27(14) *Global Change Biology* 3257; Linwood Pendleton et al, 'The Great Barrier Reef: Vulnerabilities and solutions in the face of ocean acidification' (2019) 31 *Regional Studies in Marine Science* 100729.
14. Intergovernmental Panel on Climate Change, 'Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities' in *The Ocean and Cryosphere in a Changing Climate: A Special Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2019).

3. Climate Law

Given all that is at stake, it is unsurprising that 'climate law' has emerged as a specialised field of international law. International climate change law is based on three international law treaties — the 1992 United Nations Framework Convention on Climate Change (UNFCCC),[1] the 1997 Kyoto Protocol[2] and the 2015 Paris Agreement[3] — as well as the annual Conference of the Parties (COP) as the main decision-making body of the UNFCCC, subsidiary institutions and mechanisms, and the decisions and practices adopted therein. International climate change law interacts with many other fields of international law and has implications for almost all aspect of states' national policies, including energy, agriculture, transportation, disaster planning and health. In this context, most states have adopted laws and policies that govern action on climate change, generally relating to mitigating GHG emissions, adapting to the impacts of climate change, and disaster risk management.[4] A subset of those domestic laws and policies link national and international action on climate change. The next section of the chapter will briefly describe the field of international climate change law and introduce Australia's approach to linking its international obligations with national laws and policies.

3.1 International Climate Change Law

The 1992 UNFCCC acknowledges that "'change in the Earth's climate and its adverse effects are a common concern of humankind"'.[5] The Convention sets out key principles that are intended to inform and guide the development of subsequent treaties, including that parties to the Convention should protect the climate on the basis of equity and in accordance with their "'common but differentiated responsibilities and respective capabilities"'.[6] It also highlights the "'specific needs and special circumstances of developing country Parties"', especially those "'particularly vulnerable to the effects of climate change"',[7] and the need for "'precautionary measures"'.[8]

In the negotiation of the UNFCCC, state parties were unable to agree on specific legally binding emission reduction targets. In light of this, the UNFCCC primarily set out some general obligations and established institutions and processes, including subsidiary bodies, a secretariat and annual

1. United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 24 March 1994) 1771 UNTS 107 (UNFCCC).
2. Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted on 11 December 1997, entered into force on 16 February 2005) 2303 UNTS 162 (Kyoto Protocol).
3. Paris Agreement to the United Nations Framework Convention on Climate Change, (adopted 12 December 2015, entered into force 4 November 2016) Doc. FCCC/CP/2015/10/Add.1 (Paris Agreement).
4. Grantham Research Institute on Climate Change and the Environment and the Sabin Center for Climate Change Law, 'Climate Change Laws of the World' <https://climate-laws.org>.
5. UNFCCC (n 20) preambular para 1.
6. Ibid Article 3.1.
7. Ibid Article 3.2.
8. Ibid Article 3.3.

conferences (the COP) to allow for ongoing negotiations and norm development under the framework Convention. The UNFCCC created obligations for all parties to develop and publish national inventories and formulate and implement programs containing measures to mitigate climate change by addressing emissions from sources and removals by **sinks**.[9] It also created further obligations for countries listed in Annex I of the Convention (industrialised countries that were part of the OECD, the Organisation for Economic Co-operation and Development, in 1992 and countries with economies in transition) to adopt national policies and take corresponding measures to limit emissions of GHGs and protect and enhance sinks.[10] Finally, the UNFCCC created additional obligations for countries listed in Annex II (just the industrialised countries that were part of the OECD in 1992) relating to the provision of financial resources and technology transfer to support developing country parties, especially those that are particularly vulnerable to climate change.[11]

The subsequent 1997 Kyoto Protocol established some binding reduction commitments for Annex I, the developed countries party to the original Convention. In total, the Protocol sought to reduce overall GHG emission by at least 5 per cent below 1990 levels during its first commitment period (2008–2012).[12] The quantified emission limitation or reduction commitments for each developed country was listed in Annex B. Australia was able to negotiate significant concessions at Kyoto: while other developed countries committed to emission reductions, Australia negotiated an agreed target that would allow it to increase its emissions by 8 per cent over the first commitment period (2008–2012). Another major concession was the so-called Australia clause (Article 3.3), which allowed Australia to obtain credit for reductions in land clearing since 1990 that were caused by separate policy changes. Despite negotiating an increasingly favourable deal, the Coalition government of Australia at the time, headed by Prime Minister John Howard, choose not to ratify the Kyoto Protocol. It was not until 2007 that Australia ratified the Protocol, after the election of the Labor Party led by Prime Minister Kevin Rudd.

The Kyoto Protocol also established an international system of carbon trading,[13] including two carbon offset schemes, 'Joint Implementation'[14] and the 'Clean Development Mechanism'.[15] The former allowed developed country parties to support emission reduction in other developed country parties and in return allow the resulting emission reduction units from the project to be counted towards its own emission reduction commitments. The Clean Development Mechanism allowed developed country parties to support emission reduction projects in developing countries and in return allow the resulting certified emission reductions from the project to be counted towards its own emission reduction commitments. The Clean Development Mechanism was intended to generate win-win outcomes for developed and developing country parties, as well as the climate, but has been

9. Ibid Article 4.1.
10. Ibid Article 4.2.
11. Ibid Article 4.3.
12. Kyoto Protocol (n 21) Article 3.1.
13. Ibid Article 17.
14. Ibid Article 6.
15. Ibid Article 12.

heavily criticised for failing to generate real and additional emission reductions and, at times, for contributing to negative human rights and social impacts where the projects were located.[16]

The Kyoto Protocol did not come into force until 2005; however, the focus of international negotiations had already moved to what would come after it. The 2007 Bali Action Plan launched a "'process to enable the full, effective and sustained implementation of the Convention"' up to and beyond 2012.[17] This process sought to address a shared vision for long-term cooperative action, as well as enhanced action on **mitigation**, **adaptation**, technology development, and transfer and provision of financial resources and investment to support action. There were high hopes that a post-2012 agreement would be reached at COP15 held in Copenhagen in 2009; however, the conference only produced the controversial 'Copenhagen Accord', which was 'noted' but not adopted by the COP.[18] However, a few years later in 2011 a last-minute breakthrough in Durban saw a commitment to "'develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties"' by 2015.[19]

The subsequent 2015 Paris Agreement was widely celebrated as a 'landmark' and 'historical' agreement, even though climate justice groups simultaneously warned that it was an "'accord that failed humanity"' and a "'disaster for the world's most vulnerable and future generations"'.[20] The Paris Agreement sets out a number of key objectives, including "'holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels"'.[21] Its objectives also include increasing the capacity to adapt to the adverse impacts of climate change[22] and directing finance towards GHG emission reductions and climate-resilient development.[23] In contrast to the Kyoto Protocol, the Paris Agreement adopts a more 'bottom up' architecture and allows each country to put forward their own intended 'nationally determined contributions' (NDCs) — intended plans of action to reduce GHG emissions and adapt to the adverse impacts of climate change.[24] State parties are required to submit an NDC every five years,[25] each reflecting a progression on their previous NDC and reflecting the particular country's "'highest possible ambition"'.[26] Additionally, a "'global stocktake"' on collective progress towards achieving the objective of the Paris Agreement will be held every five years.[27] The first global stocktake concluded in 2023, underlining that there remains a problematic

16. See generally, Alex Y. Lo and Ren Cong, 'Emission Reduction Targets and Outcomes of the Clear Development Mechanism (2005–2020)' (2022) 1(8) *PLOS Climate* e0000046.
17. UNFCCC, Decision 1/CP.13, 'Bali Action Plan', UN Doc. FCCC/CP/2007/6/Add.1 (14 March 2008).
18. UNFCCC, Decision 1/CP. 15, 'Copenhagen Accord', UN Doc. FCCC/CP/2009/11/Add.1 (30 March 2010).
19. UNFCCC, Decision 1/CP.17, 'Durban Platform', UN Doc. FCCC/CP/2011/9/Add.1 (15 March 2012).
20. Julia Dehm, 'Reflections on Paris: Thoughts towards a critical approach to climate law' (2018) *Revue Québécoise de Droit International* 61–91.
21. Paris Agreement (n 22) Article 2.1(a).
22. Ibid Article 2.1(b).
23. Ibid Article 2.1(c).
24. Ibid Article 4. 2.
25. Ibid Article 4.9.
26. Ibid Article 4.3.
27. Ibid Article 14.

gap between the NDCs put forward by state parties and the emission reductions necessary to stay within the global temperature limit set out under the Paris Agreement (see Figure 32).[28]

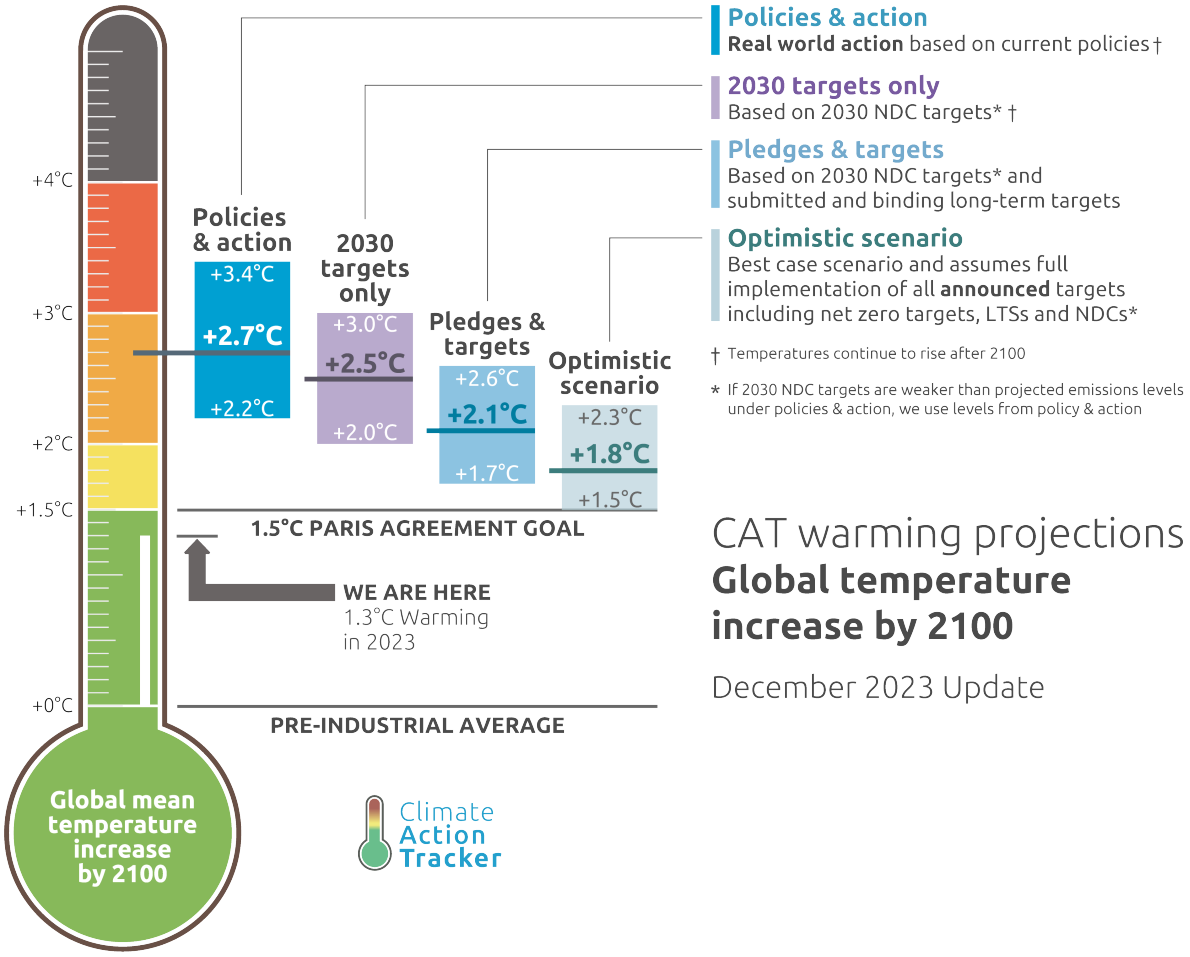

Figure 1.3: The CAT Thermometer. Source: Climate Action Tracker, used under CC BY.

The Paris Agreement also includes provisions on adaptation (Article 7), **loss and damage** (Article 8), finance (Article 9), technology transfer (Article 10) and capacity building (Article 11). More specifically, Article 7 sets out "'the global goal on adaptation of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change"', taking into account the sustainable development needs of state parties and the temperature limit in Article 2 of the agreement.[29]

Despite mitigation and adaptation action, some losses and damages associated with climate change have already occurred and will continue to occur into the future. In Article 8 of the Paris Agreement, state parties "'recognized the importance of averting, minimizing, and addressing loss and damage

28. UNFCCC, Draft decision/CMA.5, 'First Global Stocktake', UN Doc. FCCC/PA/CMA/2023/L.17 (13 December 2023).
29. Paris Agreement (n 22) Article 7.

associated with the adverse effects of climate change"'.[30] Articles 9, 10 and 11 reaffirm that developed country parties must help developing countries in mitigation and adaptation by providing financial assistance, technology transfer and capacity-building support, respectively.[31]

The international climate treaties have been surprisingly silent on the main causes of global climate change, namely the burning of fossil fuels. Although the 1988 Toronto Conference on the Changing Atmosphere had already recommended that half of all emission reductions should come from decreasing fossil fuel supply,[32] the UNFCCC and Paris Agreement do not include any commitment to reduce fossil fuel extraction or combustion. A key outcome of the 2021 Glasgow Climate Pact[33] was a reference to "'accelerating efforts towards the phasedown of unabated coal power and phase-out of inefficient fossil fuel subsidies"'.[34] The question of fossil fuels was central to the negotiations at COP28 in Dubai; however, the final text only called on parties to take action, including "'[a]ccelerating efforts towards the phase-down of unabated coal power"', "'[t]ransitioning away from fossil fuels in energy systems"' and "'[p]hasing out inefficient fossil fuel subsidies that do not address energy poverty or just transitions"'.[35]

KEY QUESTIONS

- Do you think the international legal climate regime is adequately and equitably addressing the challenge of climate change? Why/why not?
- What additional or changed legal frameworks do you think might be needed?

3.2 Australia's Climate Change Laws and Policies

There are many compelling reasons for Australia to take strong and ambitious climate action. Australia has a high level of vulnerability to climate impacts, especially extreme weather events such as floods and fires.[36] Moreover, economic assessments have consistently shown that 'business as usual' is not a viable option and that the costs of acting will increase the longer we delay.[37] Finally, Australia has many opportunities to benefit from and be a global leader in the transition to a low-

30. Ibid Article 8(1).
31. Ibid Articles 9, 10, and 11.
32. World Meteorological Organization, *Proceedings of the World Conference on the Changing Atmosphere: Implications for Global Security* (27–30 June 1988) ('Toronto Conference on the Changing Atmosphere').
33. UNFCCC, Decision 1/CMA.3, 'Glasgow Climate Pact', FCC/PA/CMA/2021/l.16 (2021).
34. Ibid para 36.
35. UNFCCC, Decision -/CMA.5, 'First Global Stocktake', FCCC/PA/CMA/2023/L.17 (13 December 2023).
36. IPCC, *Regional Fact Sheet — Australasia, Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2021).
37. Kate Crowley, 'Fighting the Future: The Politics of Climate Policy Failure in Australia (2015–2020)' (2021) 12(5) *WIREs Climate Change* e75; Tek Maraseni and Kathryn Reardon-Smith, 'Meeting National Emissions Reduction Obligations: A Case Study of Australia' (2019) 12(3) *Energies* 438.

carbon society.[38] Yet despite this, Australia has historically been a 'laggard' not a 'leader' on climate policy.[39]

Australia has one of the higher levels of per capita GHG emissions in the world: 15.1 tonnes in 2021, which is almost double China's 8 tonnes per capita, or 50 times the per capita emissions of low-income countries (see Figure 43).[40] This is due to the high reliance on coal and gas in Australia's energy portfolio, GHG emissions from coal mines, and the degradation of carbon sequestration in soils and forestry through agricultural activities and other land-use changes. Australia's largest contribution to global climate change is through its exports of fossil fuels, especially coal and gas. Australia has some of the largest coal reserves in the world and is the second largest coal exporter internationally.[41] The emissions from Australian coal that is burnt overseas are almost double our domestic emissions.[42] Australia is also the world's largest liquefied natural gas exporter.[43]

38. Climate Change Authority, *Prospering in a Low-Emissions World: An updated climate policy toolkit for Australia* (Australian Government, March 2020); Ross Garnaut, *Superpower: Australia's Low-Carbon Opportunity* (La Trobe University Press, 2019).
39. Beyond Zero Emissions, *Laggard to Leader: How Australia can lead the world to zero carbon prosperity* (June 2012).
40. Ember, *G20 Per Capita Coal Power Emissions 2023: Australia and South Korea retain their positions as G20's top polluters (*Report, 5 September 2023).
41. Australian Government, 'Coal', *Geoscience Australia* (accessed 13 December 2023) <https://www.ga.gov.au/digital-publication/aecr2023/coal#:~:text=Australia exported 10,324 PJ of,the Environment and Water 2022c)>.
42. Graham Readfearn, 'Australian coal burnt overseas creates nearly twice the nation's domestic emissions', *The Guardian* (2 June 2021) <https://www.theguardian.com/environment/2021/jun/02/australian-coal-burnt-overseas-creates-nearly-twice-the-nations-domestic-emissions>.
43. Australian Government, 'Gas', *Geoscience Australia* (accessed 13 December 2023) <https://www.ga.gov.au/digital-publication/aecr2022/gas>.

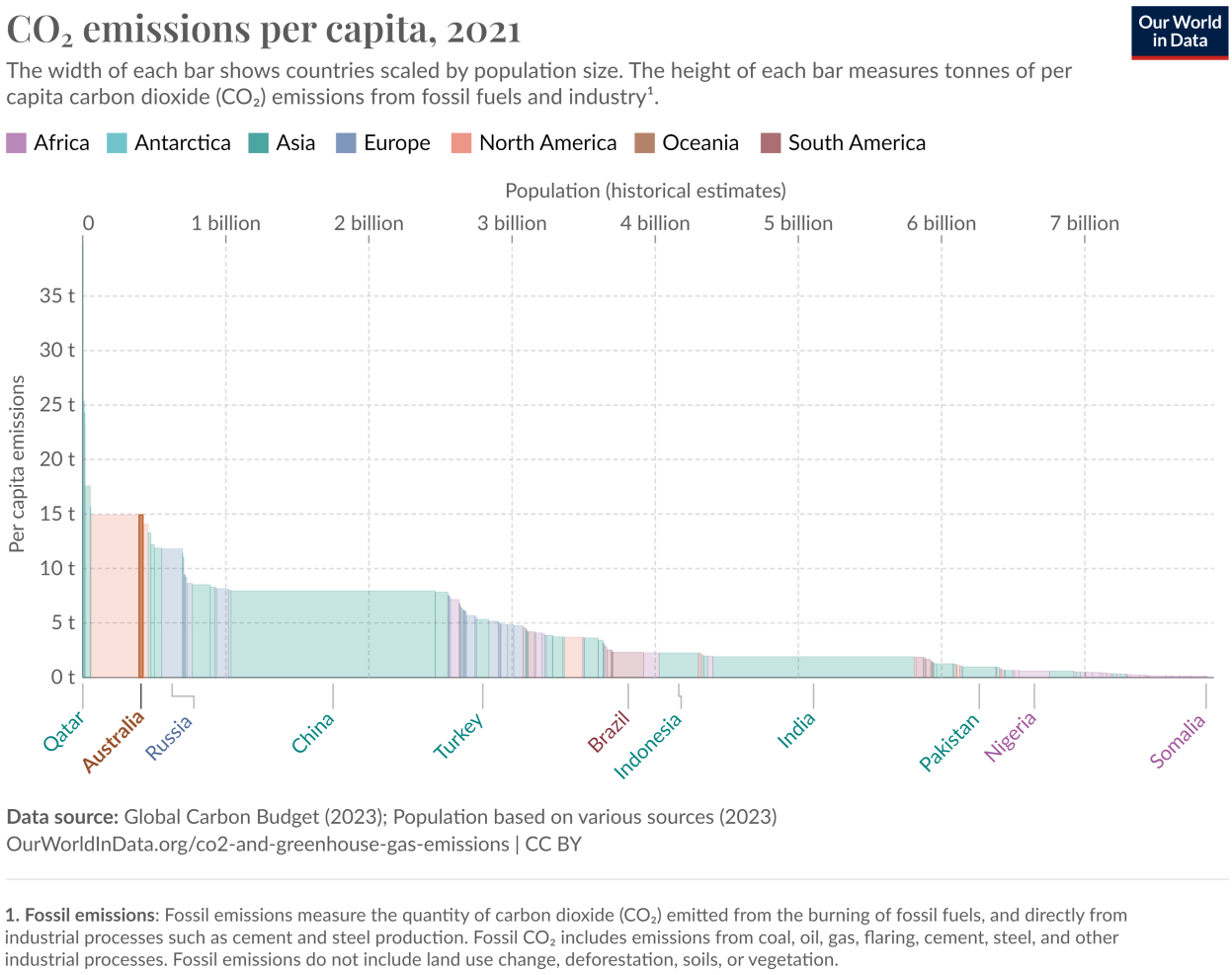

Figure 1.4: CO_2 emissions per capita, 2021. The width of each bar shows countries scaled by population size. The height of each bar measures tonnes of per capita carbon dioxide (CO_2) emissions from fossil fuels and industry. Source: Our World in Data (2024) used under CC BY.

A recent Oil Change International report, Planet Wreckers, shows that just 20 countries are likely to be responsible for almost 90 per cent of the carbon pollution from new coal and gas fields between 2035 and 2050, and over 50 per cent of this planned expansion comes from five countries: Australia, the United States, Canada, Norway and the United Kingdom. However, there remains bipartisan support for fossil fuel production in Australia and there is "'no national policy framework aiming to restrict fossil fuel exploration, production, or infrastructure development"'.[44] Australian policy has thus long been blinded by a "'quarry vision"'[45] and fossil fuel industries have "'constructed a covert network of lobbyists and revolving door appointments which has ensured that industry interests continue to dominate Australia's energy policy"'.[46] As the United Nations Environment Program

44. Stockholm Environment Institute, Climate Analytics, E3G, International Institute for Sustainable Development, and United Nations Environment Programme, *Production Gap Report 2023: Phasing down or phasing up? Top fossil fuel producers plan even more extraction despite climate promises* (SEI, Climate Analytics, E3G, IISD, and UNEP report, 2023) 55 ('Production Gap Report 2023').
45. Guy Pearce, *Quarry Vision: Coal, Climate Change and the End of the Resource Boom* (Quarterly Essay, 2009).
46. Adam Lucas, 'Investigating Networks of Corporate Influence on Government Decision-Making: The Case of Australia's Climate Change and Energy Policies' (2021) 81 *Energy Research & Social Science* 102271.

Production Gap Report 2023 notes, "'coal and gas industries have strong influence in political debate, diplomacy, economic strategy, and policy development, both nationally and in fossil-fuel-exporting states"'.[47]

Climate policy is historically contentious and politically fraught in Australia: there has been a lack of bipartisan consensus about climate action, and climate debates have been a catalyst for change in government and internal party leadership in both major parties. The period from around 2007 to 2023 is often characterised at the 'climate wars'. There were several unsuccessful attempts to introduce a national climate policy, including the Rudd Labor government's Carbon Pollution Reduction Scheme (introduced into Parliament in 2009, which was unable to pass and postponed indefinitely in 2010). Subsequently the Gillard Labor government, with support from the Australian Greens and independents, enacted the Clean Energy Future legislative package in 2011. This established a carbon pricing scheme, with an initial fixed price on carbon before the transition to a carbon trading scheme linked to international markets. Although the Clean Energy Future scheme was already influencing emission reductions,[48] it was persistently opposed by the Liberal–National coalition in opposition. In 2014, shortly after they won government in 2013, the Liberal–National Abbott government repealed the scheme, replacing it with an Emission Reduction Fund that built upon the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) (which was part of the Clean Energy Future package).[49]

In the lead up to the Paris Agreement, Australia submitted an intended NDC to reduce emissions by 26 to 28 per cent below 2005 levels by 2030. This commitment was widely viewed to be insufficient, particularly considering that Australia is a developed country expected to take the lead in mitigating GHG emissions.[50] While most countries updated their NDCs prior to COP26 in 2021, the Australian government led by Scott Morrison simply resubmitted the unrevised, highly insufficient target. The Morrison government also released a plan to achieve net zero by 2050 which relied heavily on the future development of low-emission technology, land-use reduction and international offsets. It did not include any plan to phase out coal or reduce fossil fuel exports. In August 2022, the newly elected Albanese Labor government submitted Australia's new NDC to the UNFCCC. It included a target to reduce GHG emissions by 43 per cent by 2030 below 2005 levels. While Climate Action Tracker described this as a significant improvement in ambition it still gave the updated NDC an overall rating of 'insufficient', given it was consistent with a temperature rise of 3 °C above pre-industrial levels, far exceeding what the Paris Agreement establishes as necessary to prevent dangerous anthropogenic interference with the climate (see Figure 54).

47. Production Gap Report 2023 (n 63) 54.
48. Kate Crowley, 'Up and Down with Climate Politics 2013–2016: The Repeal of Carbon Pricing in Australia' (2017) 8(3) *WIREs Climate Change* e458; Jacqueline Peel, 'The Australian Carbon Pricing Mechanism: Promise and Pitfalls on the Pathway to a Clean Energy Future' (2014) 15(1) *Minnesota Journal of Law, Science & Technology* 429.
49. For the history see Tim Baxter, George Gilligan, and Cosima Hay McRae, 'Australian Climate Change Regulation and Political Math' (2018) 20(7) *University of Melbourne Legal Studies Research Paper* No. 798.
50. Climate Action Tracker, 'Australia' <https://climateactiontracker.org/countries/australia/targets/>.

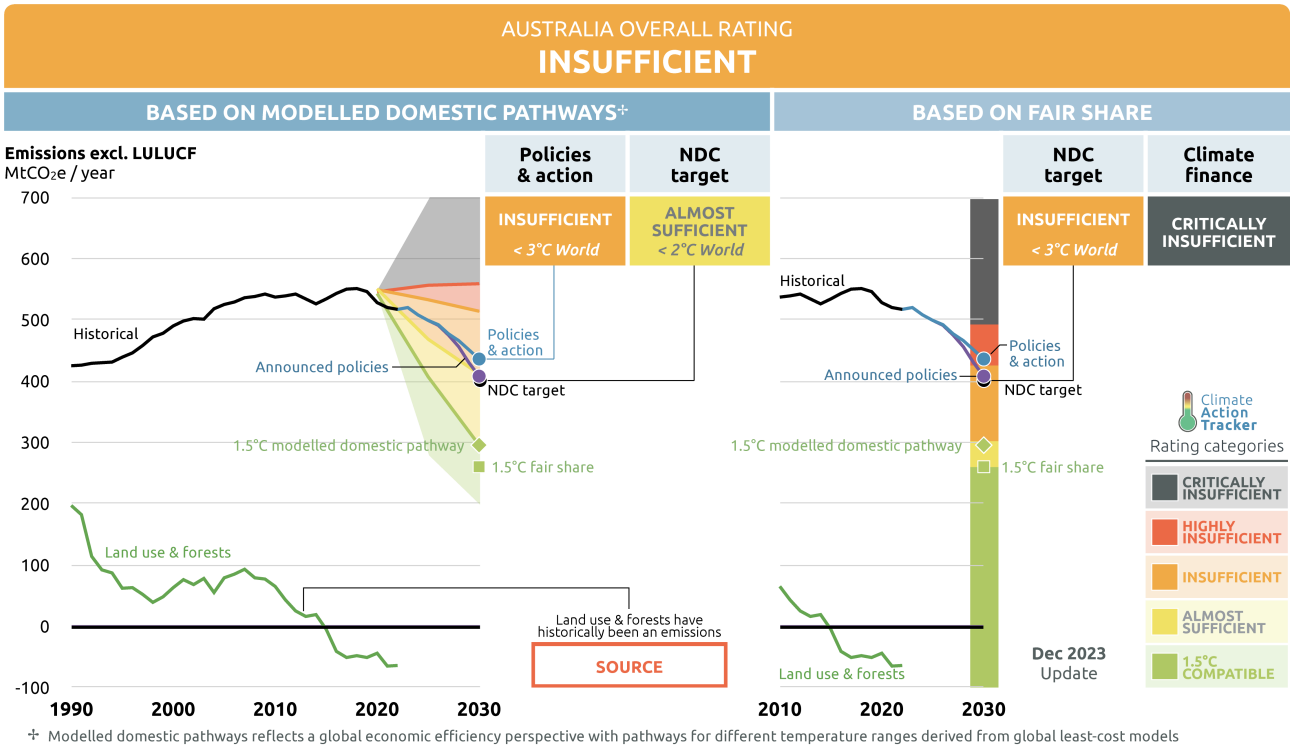

Figure 1.5: Australia's nationally determined contribution (NDC) target, policies and action, and climate finance. Source: Climate Action Tracker (2023), used with permission.

Australia has sought to codify its updated international NDC at the national level through the adoption of the *Climate Change Act 2022* (Cth). The Climate Change Act is the main legislation in Australia that codifies Australia's international commitments to reduce net GHG emissions by 43 per cent below 2005 levels by 2030 and reach net zero by 2050. It also requires that a climate change statement is prepared annually and tabled in Parliament and provides that the Climate Change Authority should advise the current minister on this statement and on updated emission reduction targets. Various state and territory governments also have climate legislation that sets specific mitigation targets and promotes climate adaptation.[51]

The other key national tool governing climate action in Australia is the 'Safeguard Mechanism', which has been in place since 2016. The Safeguard Mechanism is enacted through the *National Greenhouse and Energy Reporting Act 2007* (Cth), although key details are included in various regulations.[52] The Safeguard Mechanism requires facilities that emit more than 100,000 tonnes of CO2 equivalent (abbreviated as tCO2-e) of covered emissions[53] annually to comply with emissions

51. *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment & Heritage* [2006] FCA 736; *Australian Conservation Foundation (ACF) v Minister for the Environment* [2017] FCAFC 134; *Environment Council of Central Queensland Inc v Minister for the Environment and Water (No 2)* [2023] FCA 1208.
52. National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule 2015 (Safeguard Rule), alongside the Carbon Credits (Carbon Farming Initiative) Rule 2015, and the Australian National Registry of Emissions Units Regulations 2011.
53. Safeguard Rule (n 71). Covered emissions are defined in section 22XL as "'[pb_glossary id="187"]scope 1 emissions[/pb_glossary] of one or more [pb_glossary id="169"]greenhouse gases[/pb_glossary], other than emissions of a kind specified in the safeguard rules"'. There are also a number of exceptions including: legacy emissions from the operation of a landfill facility (that is, emissions from waste deposited at the landfill before 1 July 2016); emissions which occur in the Greater Sunrise special regime

limitations. Prior to 2023, the emissions limit was relatively consistent and set at business-as-usual levels. However, from 2023 onwards, facilities covered by the Safeguard Mechanism must reduce their emissions in alignment with Australia's international commitments. Facilities that exceed their emissions limits have the option to purchase 'carbon credits'[54] that are produced from 'eligible activities' focused on emission reduction or carbon sequestration.[55] However, a number of academic studies and civil society groups have highlighted environmental integrity issues with these carbon credits, and there are concerns that around 75 per cent of the credits do not represent new, additional or real emission reductions.[56]

Outside of specific climate laws and policies, Australia's main environmental protection law — the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) — does not explicitly address the climate impacts of GHG-intensive projects.[57] Various independent reviews and reports on the EPBC Act have called for the inclusion of a 'climate trigger'.[58] However, to date no such trigger has been included in the legislation. That said, as of 2023 and at the time of writing, there were two private member bills before Parliament that sought to modify the EPBC Act to require the consideration of GHG emissions and climate change considerations.[59] There have also been various attempts through litigation to ask courts to interpret the decision-making provisions of the EPBC Act to require the consideration of GHG emissions, including in *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch v Minister for the Environment and Heritage* ('Wildlife Whitsunday Ccase'), *Australian Conservation Foundation (ACF) v Minister for the Environment* ('Carmichael Coal Mine' Ccase') and *Environment Council of Central Queensland Inc v Minister for the Environment and Water (No 2)* ('Living Wonder' Ccase'). These cases have (to date) been unsuccessful.

More broadly, there has also been growing use of the courts to try to achieve climate regulatory outcomes.[60] '**Climate litigation**' has been defined as "'cases that raise material issues of law or fact relating to climate change mitigation, adaptation, or the science of climate change … brought before a range of administrative, judicial, and other adjudicatory bodies"'.[61] There has been a drastic

area; emissions from the operation of a grid-connected electricity generator in a year covered by the sectoral baseline; emissions not covered under the National Greenhouse and Energy Reporting (Measurement) Determination 2008.

54. These are called Australian Carbon Credits Units (ACCUs), see *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth).
55. *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth).
56. Polly Hemming, Richie Merzian, and Annica Schoo, *Questionable Integrity: Non-additionality in the Emission Reduction Fund's Avoided Deforestation Method* (The Australia Institute, 2021); Paul J. Burke, 'Undermined by Adverse Selection: Australia's Direct Action Abatement Subsidies' (2016) 35(3) *Economic Papers* 216.
57. Jacqueline Peel, *Legal opinion: Gaps in the Environment Protection and Biodiversity Conservation Act and other Federal Laws for Protection of the Climate* (Report for the Climate Council, 2023).
58. See especially, Australian Government Department of the Environment, Water, Heritage and the Arts, Allan Hawke, *The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (Final report, October 2009)
59. *Environment Protection and Biodiversity Conservation Amendment (Climate Trigger) Bill 2022 [No. 2]*; Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023.
60. Jacqueline Peel and Hari M. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015).
61. United Nations Environment Programme, *Global Climate Litigation Report: 2020 Status Review* (UNEP, 2020).

growth in climate litigation over the past decade globally.[62] Over recent years, there has been a global and domestic surge in climate change related litigation. As of July 2023, some 2,180 climate change related court cases have commenced or concluded globally, spanning courts in 65 domestic jurisdictions and international and regional courts, tribunals and quasi-judiciary bodies.[63] A small but growing subset of these cases strategically seek to push states to enhance and implement state mitigation or adaptation commitments.[64]

Australia is, after the United States, the jurisdiction that has seen the most climate litigation actions, with over 134 cases filed. While the 'first generation' of climate litigation in Australia primarily used administrative law to challenge governmental decision-making, especially around coal-fired power stations and coal mines, the 'second generation' of climate litigation has innovatively deployed a range of laws — including company, trust, constitutional, tort, human rights laws and others — to promote an "'accountability model whereby legal interventions are designed to hold governments and corporations directly to account for the climate change implications of their activities"'.[65] Various arguments developed in climate litigation will be discussed in chapters throughout this book.

KEY QUESTIONS

- Why do you think Australia has been such a 'laggard' on climate action? What would it take to turn Australia from a laggard to a leader?
- Do you think Australia's commitment to reduce GHG emissions by 43 per cent below 2005 levels by 2030 is adequate or equitable? Why/why not?
- Do you think existing Australian laws and policies will effectively achieve the policy objectives to reduce GHG emissions by 43 per cent below 2005 levels by 2030? Why/why not?
- What additional or changed legal frameworks do you think might be needed?

62. United Nations Environment Programme, *Global Climate Litigation Report: 2023 Status Review* (UNEP, 2023).
63. For an overview of the main types of climate change cases used to strategically influence policy outcomes and the behaviour of relevant actors, see Joana Setzer and Catherine Higham, *Global Trends in Climate Change Litigation: 2023 Snapshot* (Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 2023) 19–25.
64. Ben Batros & Tessa Khan, *Thinking Strategically About Climate Litigation*, Open Global Rights (June 28, 2020) <https://www.openglobalrights.org/thinking-strategically-about-climate-litigation/>.
65. Jacqueline Peel, Hari Osofsky, and Anita Foerster, 'Shaping the "Next generation" of Climate Change Litigation in Australia' (2017) 41 *Melbourne University Law Review* 793.

4. The Climate Crisis and the Australian Legal System

The previous section described the specialised international and domestic laws addressing climate change. However, if we just focus on the specialised fields of law that are concerned with promoting climate change **mitigation** and **adaptation**, we will fail to see how all areas of law have relevance for climate change. To understand better how current legal relations are implicated in facilitating the climate crisis, and how they could be re-purposed to mitigate or adapt to the effects of climate change, a deeper interrogation of the role of law in relation to climate change is needed.

One of the main drivers of climate change is the institutionally protected entitlement to, accumulation of and subsequent disposal of the environment[1] at a global scale by European and British imperial powers through their colonisation of places and peoples across the world.[2] Research by legal scholars from several sub-disciplines of law illustrates the significant role that the law plays in producing and reproducing the socio-economic conditions of climate change, as well as the crucial role that laws and policies can play in addressing this.[3] It is impossible to appreciate the sociogenic[4] complexity of climate change without analysing how the law, as a powerful socio-economic institution and specialist regulatory toolbox, conceived and constructed the rights of polluters to emit GHGs. International and domestic legal regimes also enabled the legal rights of fossil fuel producers and distributors to do what they do in lawful ways.

Legal research on the significance of law to climate change is consistent with many First Nations and Indigenous analyses of adverse impacts on landscapes, waterscapes and countries from European

1. Usha Natarajan and Julia Dehm (eds), *Locating Nature: The Making and Unmaking of International Law* (Cambridge University Press, 2022) 70–107.
2. Anna Grear, '"Anthropocene, Capitalocene, Chthulucene": Re-encountering Environmental Law and its "Subject" with Haraway and New Materialism' in Louis J. Kotzé (ed), *Environmental Law and Governance for the Anthropocene* (Bloomsbury, 2017) 77.
3. Natarajan and Dehm (eds), *Locating Nature* (n 83); Rosemary Rayfuse, 'The Anthropocene, Autopoiesis and the Disingenuousness of the Genuine Link: Addressing Enforcement Gaps in the Legal Regime for Areas beyond National Jurisdiction' in Erik J Molenaar and Alex G Oude Elferink (eds), *The International Legal Regime of Areas beyond National Jurisdiction: Current and Future Developments* (Martinus Nijhoff Publishers, 2010) 165; William Boyd, 'Climate Change, Fragmentation, and the Challenges of Global Environmental Law: Elements of a Post-Copenhagen Assemblage' (2010) 32(2) *University of Pennsylvania Journal of International Law* 457; Louis J Kotzé, 'Rethinking Global Environmental Law and Governance in the Anthropocene' (2014) 32(2) *Journal of Energy and Natural Resources Law* 121; Shalanda Helen Baker, 'Adaptive Law in the Anthropocene' (2015) 90(2) *Chicago-Kent Law Review* 563; Eric Biber, 'Law in the Anthropocene Epoch' (2017) 106(1) *Georgetown Law Journal* 1; Sally Wheeler, 'The Corporation and the Anthropocene' in Louis J Kotzé (ed), *Environmental Law and Governance for the Anthropocene* (Hart Publishing, 2017) 289; John G Sprankling, 'Property Law for the Anthropocene Era' (2017) 59(3) *Arizona Law Review* 737; Tim Stephens, 'Governing Antarctica in the Anthropocene' in Elizabeth Leane and Jeffrey McGee (eds), *Anthropocene Antarctica: Perspectives from the Humanities, Law and Social Sciences* (Routledge, 2019) 17; Anna Grear, 'Deconstructing Anthropos: A Critical Legal Reflection on "Anthropocentric" Law and Anthropocene "Humanity"' (2015) 26(3) *Law and Critique* 225; Alain Pottage, 'Holocene Jurisprudence' (2019) 10(2) *Journal of Human Rights and the Environment* 153.
4. The term 'sociogenic' is used in place of 'anthropogenic' to indicate that the conditions of climate change do not arise from and across all human societies, that there is nothing inherently 'human' about climate change. Rather, climate change is caused by the activities and choices of a particular kind of human society characterised by capitalist forms of economy. See Malm and Hornborg 2014, 66.

and British colonisation and their maladapted legal institutions.[5] The laws of Indigenous peoples are often understood as being 'place-based', which means that they are responsive and specific to particular local geographical conditions and ecologies. Indigenous laws and regulatory regimes are often characterised by holistic ways of thinking about life and the world. Holistic ontologies (ways of being in the world) contrast with the dominant western worldview in which landscapes and ecologies are regarded as a suite of separable natural resources for the purposes of commodification, ownership and exchange. The sociogenic logic of nature as a suite of resources through which British and European laws regulate human relationships with non-human things as commodities constructed "'regimes of dispossession"'[6] and entitlement to the goods of life. The universalising and abstract nature of this logic contrasts with the geographically specific and seasonally responsive nature of Indigenous legal regimes.

It is important to recognise that there is no pan-Indigenous legal regime. But historical, anthropological and socio-legal scholarship is replete with studies of the myriad ways through which many place-based economies and laws foreground the authority, contingency and presence of non-human life, the interdependence of all life and the situation of life within the dynamism of time.[7] These legal regimes are antithetical to economic models of infinite growth and global development.[8]

Some of the dominant Anglo-European legal concepts and doctrines of our time — indeed the private-public taxonomy of law itself — were arguably developed to protect and defend the socio-economic institutions that constructed the conditions of what we now recognise to be climate change. One legal historian contends that the separation of public from private laws in the development of English common law was manufactured to shield private interests from the "'pursuit of collective goals"' in liberal democracies.[9] Such historical accounts resonate with analyses of contemporary law as a form of regulatory capitalism through which markets themselves have now become "'important national, regional and global regulators"' protecting private interests from public interests such as taxation, public health and industrial relations.[10]

Private law plays an instrumental role in climate change through its regulation of the "'building

5. Nicole Redvers et al, 'Indigenous Natural and First Law in Planetary Health' (2020) 11(29) *Challenges* 1. See also Clinton L Beckford et al, 'Aboriginal Environmental Wisdom, Stewardship and Sustainability: Lessons from the Walpole Island First Nations, Ontario, Canada' (2010) 41(4) *Journal of Environmental Education* 239; John Borrows, 'Earth-Bound: Indigenous Laws and Environmental Reconciliation' in Michael Asch, John Borrows and James Tully (eds), *Resurgence and Reconciliation: Indigenous–Settler Relations and Earth Teachings* (University of Toronto Press, 2018) 49; Kim TallBear, 'Caretaking Relations, Not American Dreaming' (2019) 6(1) *Kalfou* 24; Marcia Langton, 'The "Wild", the Market and the Native: Indigenous People Face New Forms of Global Colonization' in William Adams and Martin Mulligan (eds), *Decolonizing Nature: Strategies for Conservation in a Post-Colonial Era* (Earthscan Publications, 2003) 79.
6. Michael Levien, 'Regimes of Dispossession: From Steel Towns to Special Economic Zones' (2013) 44(2) *Development and Change* 381.
7. See, for exampleeg, Gay'Wu Group of Women, *Song Spirals: Sharing Women's Wisdom of Country through Songlines* (Allen & Unwin, 2019.
8. Sundhya Pahuja, 'Beheading the Hydra: Legal Positivism and Development' (2007) 1 *Law, Social Justice & Global Development Journal* 1.
9. Dan Priel, 'The Political Origins of English Private Law' (2013) 40(4) *Journal of Law and Society* 481, 504–5.
10. John Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better* (Edward Elgar, 2008) 29.

blocks of economic development"' and by "'promoting the maximisation of economic growth"'.[11] Today, private corporations boast some of the largest economies in the world and are the locus of the vast majority of the goods of life. Groundbreaking analysis by Richard Heede has quantified the contribution of different corporate actors to the climate crisis and shown that just 90 producers of fossil fuels and cement — the so-called carbon majors — have created 63 per cent of cumulative worldwide emissions from 1751 to 2010.[12] The legal rights to those goods are largely concentrated and protected through the key institutions of law: the corporation and private property.[13] As such we might say that "'the structure of the corporate form in terms of its purpose and its relationships is incompatible with the world's fragile environmental ecosystem"'.[14] Legal research has brought to light the global environmental harms facilitated by these legal institutions and their rich doctrinal toolboxes.[15] The characteristic abstractness of Anglo-European laws and their disconnection from physical and material contexts is problematic in the context of climate change, since institutions such as corporations and rights over property are not situated within the materiality of geographical and metabolic relations and limits.[16] The laws of all human societies are significant to the health and viability of terrestrial, atmospheric, riparian and marine environments and ecosystems within and between their jurisdictions. In the case of the dominant global legal forms of the corporation and private property, that significance is profoundly upscaled: these legal forms and attendant armour have become contingent features of and threats to planetary health.

The paradigms of the Enlightenment and liberalism that underpin the dominant legal subject, that imaginary autonomous individual who acts rationally and in their own self-interest. The paradigms have long been critiqued as inaccurate and unrealistic characterisations of human decision-making, since our relationships with others are fundamental to our experience and wellbeing in more connected, complex and networked ways.[17] In addressing climate change, we must recognise that the dominant view of legal subjectivity as individualistic and self-interested is unhelpful at best and is at worst a barrier to adaptation. There are no solutions available to us by extending or reproducing these dated ideas of human decision-making and the economic models and legal doctrines "'born in

11. Bram Akkermans, 'Sustainable Property Law: Towards a Revaluation of Our System of Property Law' in Bram Akkermans and Gijs van Dijck (eds), *Sustainability and Private Law* (Eleven International Publishing, 2020), 38. See also Graham UQLJ, 2021.
12. Richard Heede, 'Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers: 1854–2010' (2014) 122 *Climatic Change* 229.
13. Nicole Graham, 'Dephysicalisation and Entitlement: Legal and Cultural Discourses of Place as Property' in Brad Jessup and Kim Rubenstein (eds), *Environmental Discourses in Public and International Law* (Cambridge University Press, 2012) 96; Graham, Nicole 'This is Not a Thing: Land, Sustainability and Legal Education' *Journal of Environmental Law* 26(3) 395–422; Sarah Keenan, *Subversive Property: Law and the Production of Spaces of Belonging* (Routledge, 2015); Wheeler, 'The Corporation and the Anthropocene' (n 85).
14. Wheeler, 'The Corporation and the Anthropocene' (n 85) 296.
15. Joseph L Sax, 'Environmental Law Forty Years Later: Looking Back and Looking Ahead' in Michael I Jeffery, Jeremy Firestone and Karen Bubna-Litic (eds), *Biodiversity Conservation, Law and Livelihoods: Bridging the North–South Divide* (Cambridge University Press, 2008) 9; Sean Coyle and Karen Morrow, *The Philosophical Foundations of Environmental Law: Property, Rights and Nature* (Hart Publishing, 2004); Graham, 'This is Not a Thing' (n 95); Sally Wheeler, 'Climate Change, Hans Jonas and Indirect Investors' (2012) 3(1) *Journal of Human Rights and the Environment* 92.
16. Nicole Graham, *Lawscape: Property, Environment, Law* (Routledge, 2011); Wheeler, 'The Corporation and the Anthropocene' (n 85)
17. See, for exampleeg, Margaret Davies, *Asking the Law Question* (Thomson, 2023) Chapters 6 and 7.

colonial Britain"'.[18] "'To continue current global trends of "'progress and development"' is to ensure the decline of all life on Earth."'[19] The affluent populations of the world must "'open their eyes wide … to see and know law beyond the colonialist foundation"'.[20] It is necessary for lawyers to think and learn about the significance of law in the world differently — but how should we think differently?

18. Alf Hornborg, 'Colonialism in the Anthropocene: The Political Ecology of the Money-Energy-Technology Complex' (2019) 10(1) *Journal of Human Rights and the Environment* 7, 8.
19. Irene Watson, 'Aboriginal Relationships to the Natural World: Colonial "Protection" of Human Rights and the Environment' (2018) 9(2) *Journal of Human Rights and the Environment* 119, 125.
20. Ibid 138.

5. Doing Law Differently: Climate Conscious Lawyering

Law cannot solve the climate crisis independently of other socio-economic and political institutions. However, lawyers can and must play an important part in broader collective and collaborative strategies to address climate change by developing and executing effective, equitable and rapid responses in the sphere of regulation. 'Law and legal institutions constitute a critical component of a society's adaptive capacity, and their influence may be positive or negative.'[1] Moreover, identifying 'institutions that are resistant to change or that change in small increments', including law, as 'barriers to adaptation', 'especially when transformational shifts are required', is critically important to addressing climate change. The converse is also true: institutions such as law can 'facilitate the implementation of adaptation policies and respond quickly to new knowledge'.[2]

KEY QUESTION

- How can the institution of law shift from a negative influence on the adaptive capacity of society — a 'barrier to adaptation' — to a positive one?

The impact of climate change on law and regulation is apparent across all fields of law. The Law Council of Australia is the peak body for the legal profession in Australia and in 2021 issued its Climate Change Policy.[3] The policy highlights the various implications that climate change has for the legal profession and the shifting legal demands it creates through the changing needs of multiple sectors, industries and business entities to transition to a low-carbon economy. The policy observes that there are impacts to 'agricultural, insurance and tourism sectors', as well as changes in 'employment … to support just transitions'. The policy also notes that the legal implications of climate change 'are being tested before Australian, foreign and international courts and tribunals'.[4]

Novel (new) causes of action involving complex questions of law are arising across multiple legal practice areas, including administrative law, corporations law, tort, consumer law, contract law, insurance law, occupational health and safety laws, planning laws and water rights.[5] Particular industries and sectors require tailored legal advice to meet a myriad of climate change related challenges and opportunities. Diverse groups of Australians also present new demands, including

1. Jan McDonald, 'Mapping the Legal Landscape of Climate Change Adaptation' in Tim Bonyhady, Andrew Macintosh and Jan McDonald (eds), *Adaptation to Climate Change: Law and Policy* (Federation Press 2010), 11.
2. Ibid 11.
3. Law Council of Australia, *Climate Change Policy* (Policy Statement, 27 November 2021).
4. Ibid 4.
5. Law Council of Australia (n 105) 8.

rural, regional and remote communities and First Nations communities. The Law Council of Australia acknowledges that 'the Australian legal profession has a critical part to play as it advises clients on the legal implications of all these shifts, challenges and opportunities [and] participates in the development of **mitigation** and **adaptation** measures'.[6]

In light of the impacts of climate change on all areas of law and legal practice, 'climate conscious lawyering' is increasingly encouraged and championed as appropriate, if not necessary, to legal professional development and ethics.[7] As Justice Brian Preston — the Chief Judge of the Land and Environment Court in New South Wales — has explained, climate conscious lawyering requires an attentiveness to the relevance of climate change for different areas of law, and the provision of legal services, in a manner that seeks to meaningfully address climate change.[8] This edited collection adopts and expands upon Preston CJ of the NSW Land and Environment Court's

conceptualisation of climate conscious lawyering by examining not only the significant role of law and legal practitioners in addressing the adverse impacts of climate change and promoting justice in a climate-transformed world but also critically engaging with the ways in which different areas of law may be implicated in authorising excessive GHG emissions leading to climate change and contributing to inequalities that underpin the climate crisis (see Figure 6).[9]

6. Ibid 4.
7. Brian J Preston, 'Climate Conscious Lawyering' (2021) 95(1) *Australian Law Journal* 51. See also Stephen Tang, Vivien Holmes, and Tony Foley, 'Ethical Climate, Job Satisfaction and Wellbeing; Observations from an Empirical Study of New Australian Lawyers' (2020) 33 *Georgetown Journal of Legal Ethics* 1035; Steven Vaughan, 'Existential Ethics: Thinking Hard About Lawyer Responsibility for Clients' Environmental Harms' (2023) 76(1) *Current Legal Problems* 1.
8. Preston, 'Climate Conscious Lawyering' (n 111) 62.
9. See further, Julia Dehm, 'Reconfiguring Environmental Governance in the Green Economy: Extraction, Stewardship and Natural Capital' in Usha Natarajan and Julia Dehm (eds), *Locating Nature: The Making and Unmaking of International Law* (Cambridge University Press, 2022) 70–107.

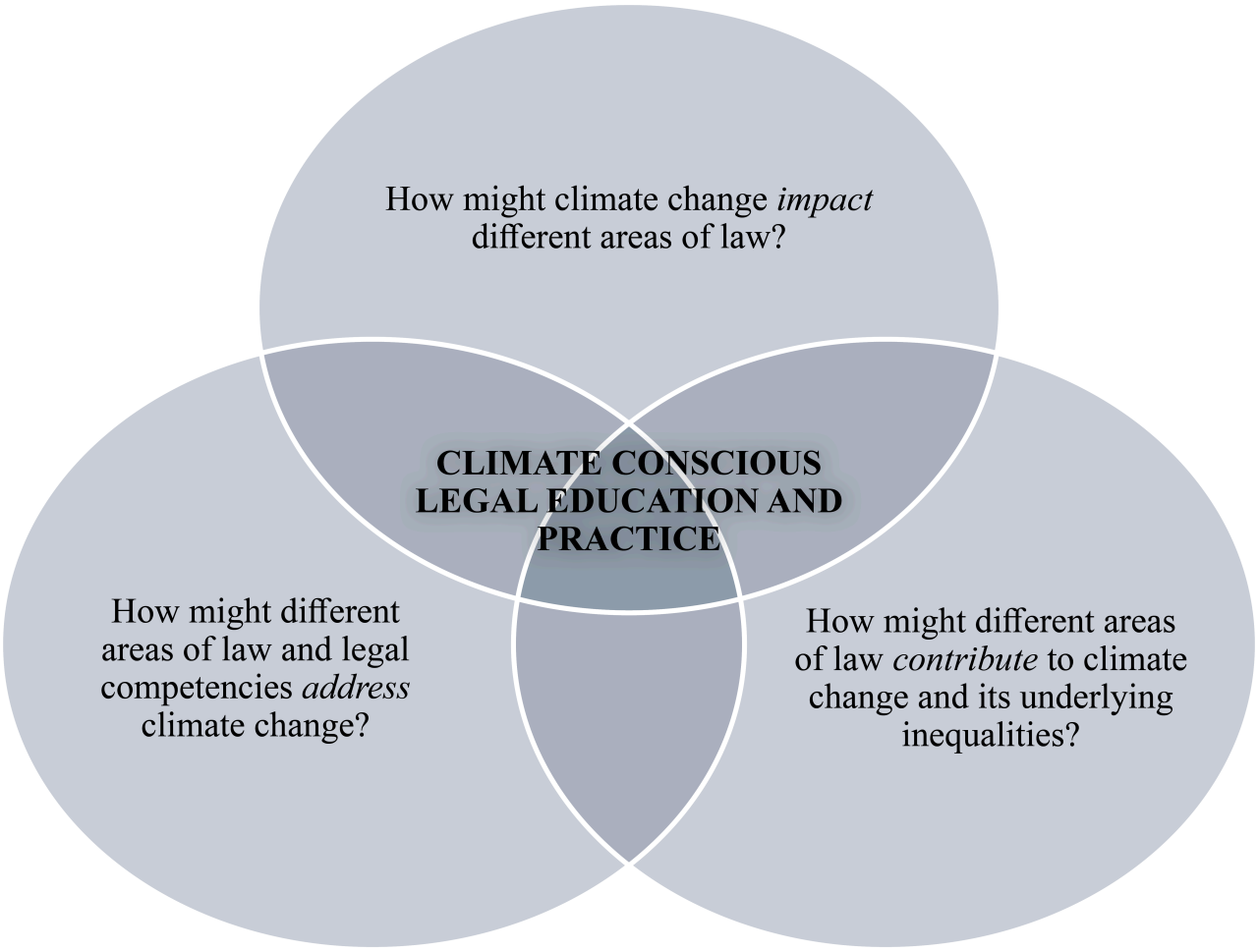

Figure 1.6: A framework for understanding climate conscious legal education and practice.

In agreement with other scholars calling for climate conscious lawyering, we support the development of several legal competencies necessary for 'climate conscious legal education and practice'. These include essential competencies for lawyers more generally, such as 'problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counselling, negotiation, litigation and dispute resolution, procedures, organisation and management of legal work, and resolution of ethical dilemmas'.[10]

At the same time, due to the 'legally disruptive' nature of climate change,[11] this edited collection suggests that additional legal competencies will be necessary to respond to the climate crisis, including an understanding of the interaction between different areas of law in terms of the applicability to climate change; an appreciation of multi-level approaches to climate change governance, including international, regional, national and subnational laws and policies; a critical awareness of the broader context of climate change, including issues of globalisation, justice and

10. Michael Mehling, Harro van Asselt, Kati Kulovesi, and Elisa Morgera, 'Teaching Climate Law: Trends, Methods and Outlook' (2020) 32 *Journal of Environmental Law* 417, 433.
11. Elizabeth Fisher, Eloise Scotford and Emily Barritt, 'The Legally Disruptive Nature of Climate Change' (2017) 80 *Modern Law Review* 173.

equity; and an attentiveness to interdisciplinary insights, including a basic understanding of climate science and economics, among other disciplines.

Finally, because climate change reflects and reproduces existing inequalities and vulnerabilities it is also unavoidably an issue of equity and fairness. ‘Climate justice’ draws attention to how the responsibility for anthropocentric climate change is unevenly distributed and that the impacts of climate change will be unequally felt, and that it is often those who contributed least to causing climate change who will suffer most from its effects. Climate justice has various aspects:

- Distributive justice: paying attention to inequalities in the causes, burdens of addressing and experience of impacts.
- Procedural justice: ensuring participatory, accessible, fair and inclusive processes to address climate change.
- Recognition justice: centring voices of those who have historically been marginalised, such as First Nations in Australia.
- Reparative or corrective justice: considering what actions are necessary to redress and repair harms caused.[12]

Thus, an additional legal competency necessary for climate conscious lawyers is attention to the complex, intersecting and cumulative justice issues that climate change enlivens, and how different legal and regulatory measures may accentuate injustice or promote greater equity and fairness.

These competencies have been introduced in this introductory chapter and will be further developed in the forthcoming chapters of this edited collection.

KEY QUESTIONS

- What do you think ‘climate conscious lawyering’ must involve?
- What are the various competencies you think a ‘climate conscious lawyer’ or legal professional should have?
- How could you best develop these skills and attributes?

12. Monica Taylor and Bronwyn Lay, ‘Community Lawyering and Climate Justice: A New Frontier’ (2022) 47(3) *Alternative Law Journal* 199.

6. Mainstreaming Climate Change in Legal Education

As recommended by the United Nations,[1] numerous legal organisations around the world,[2] including the Law Council of Australia,[3] legal scholars[4] and many legal educators, are beginning to incorporate climate change related case law, legislation and policy into learning materials, learning activities and assessments in the core and elective curricula of undergraduate and graduate law programs. Some law faculties and legal educators have made significant progress in formalising this inclusion, either through referring to sustainability or climate change in unit learning outcomes (at the subject level) or in course learning outcomes (at the program level). A small number of Australian universities have moved to include education and curriculum in various strategy statements and documents, and there is also discussion about introducing sustainability and climate change into university-level graduate attributes and qualities to apply to all award courses at some institutions. We are at a critical turning point, and the first edition of this book is intended to play its part in supporting the educational transformation underway across the country. Future editions will necessarily update content and broaden the scope to parts of the curriculum not yet included.

It is imperative that legal educators enable the climate-striker generation to critically evaluate the role of law in acting as a barrier to or facilitator of positive action on climate change. Situating legal doctrines and categories within their broader socio-economic function is one way to help students understand the transformative potential of law to effect real-world change. Context-free pedagogy reproduces the notion that law functions in isolation from other social, economic, moral and environmental contexts or that law can be understood purely in its own terms. That approach would constrain law students' capabilities to retrieve or extend legal concepts and rules that are potentially helpful, and limit their competence and confidence to modify and reform those concepts and rules that are unhelpful in addressing climate change.

The close relationship between affluence and the conditions of climate change[5] means that effective regulatory approaches to addressing climate change will unavoidably involve changes to the legal mechanisms and institutions that facilitate and protect wealth generation and concentration. These changes increase the role of government and public law in regulating resource extraction and distribution and the control of its uses. Closely regulating the private sector is in some ways a

1. United Nations, 'Transforming Our World: the 2030 Agenda for Sustainable Development' UN General Assembly, A/RES/70/1. 2015.
2. International Bar Association, 'Climate Crisis Statement' (Policy Statement, 5 May 2020) <https://www.ibanet.org/document?id=822C1967-F851-4819-8200-2FE298164922>.
3. Law Council of Australia, 'Climate Change Policy' (Policy Statement, 27 November 2021) 4 <https://lawcouncil.au/publicassets/4cc8f2e4-375d-ec11-9445-005056be13b5/2021 11 27 - P - Climate Change Policy.pdf>.
4. Graham, 'This is Not a Thing' (n 95); Brad Jessup and Carroll, C; 'The Sustainability Business Clinic — Australian Clinical Legal Education for a 'New Environmentalism' and New Environmental Law' (2017) 34(6) *Environmental and Planning Law Journal* 542.
5. Thomas Wiedmann et al, 'Scientists' Warning on Affluence' (2020) 11(3107) *Nature Communications* 1.

contradiction of the structure and logic of modern western legal systems and will 'test a range of legal doctrines intended to protect individual rights against government overreach'.[6] This makes questions and decisions about effective **law reform** hard or even unthinkable. Nonetheless, law graduates need to be able to not only think about legal change but also do the changing. Legal change requires law graduates to have the highest levels of knowledge of existing doctrines and regulatory frameworks, so they understand which laws need to change and how to go about that work. Law graduates need not merely an intellectual openness to change but also the professional competence and confidence to develop and implement genuinely consequential changes which are likely to be subject to controversy and 'sharp, sometimes bitter, legal and political contests'.[7] Legal education is thus responsible for not only preparing law students for practice in the time of climate change with legal knowledge but also preparing them with critical competencies and insights to work in an era of transformational legal change.

The ability to collaborate with a wide range of professional specialists who possess disciplinary and practical expertise beyond law, to listen to the perspectives and experiences of others from a diverse range of cultural and economic backgrounds and to strategise and prioritise changes in logical and viable ways may not be competencies we consider essential to legal education, and they may not be competencies we ourselves (as teachers) have from our own professional experience and training. But these are important skills for law students to develop because legal institutions remain viable and authoritative over time only to the extent that they are responsive to the times in which they operate. The disruptive nature of climate change[8] brings an end to a paradigm of law that has seemed so viable and authoritative as to be right and natural, and it illuminates the reasons for different legal concepts, rules and functions. Law teachers could wait for 'top-down structural changes to happen over time'[9] but climate change is a time-sensitive problem and 'the rate at which these legal changes will be developed' will not wait.[10] As legal educators, 'we must take up pedagogical opportunities to effect change before tipping points are reached beyond which such endeavours would be ineffectual'.[11]

6. Eric Biber, 'Law in the Anthropocene Epoch' *Georgetown Law Journal* 106(1) 1, 5.
7. Ibid 65.
8. Elizabeth Fisher, 'Environmental Law as "Hot" Law' (2013) 25(3) *Journal of Environmental Law* 347.
9. David Rousell, 'Dwelling in the Anthropocene: Reimagining University Learning Environments in Response to Social an d Ecological Change' (2016) 32(2) *Australian Journal of Environmental Education* 137, 142.
10. Biber, 'Law in the Anthropocene Epoch' (n 122) 42.
11. Nicole Graham, 'Learning Sacrifice: Legal Education in the Anthropocene' in Kirsten Anker et al (eds) *From Environmental to Ecological Law* (Routledge, 2021) 209.

7. Climate Anxiety

It is very likely that legal professionals, law students and legal academics engaging with and working on climate change related issues will experience 'climate anxiety'. It is vital to support the emotional wellbeing and psychological resilience of legal professionals, law students and law academics. Due to the time lag between the emission of GHGs into the atmosphere and the manifestation of climate change impacts, many of the negative impacts of climate change will primarily and disproportionately affect young people and unborn future generations. According to a global survey of 10,000 young people aged 18 to 25, young people understand climate change to be the most important issue facing the world.[1] There is a growing body of evidence linking the pressing issue of climate change to feelings of anxiety, despair, powerlessness and anger in young people.[2] A perceived lack of government action to adequately respond to the climate crisis is associated with increased distress.[3] In this sense, the phenomenon of climate anxiety is often rooted in the realities of what it means to live in a climate-transformed world and in uncertainties about the future.

For law students who are learning about the role of law in regulating, redressing and even contributing to the climate crisis, this experience of climate anxiety may be particularly pronounced. On the one hand, to effectively respond to the crisis law students need to understand the challenges posed by climate change, as well as the systemic inequalities underpinning its causes and distributional impacts. However, it is equally important to equip students with the knowledge and skills to respond to climate crisis, and to work towards a more climate just future. Indeed, the first decades of the 21st century have seen a proliferation of youth-led climate activism, litigation, and political engagement, demonstrating that young people are not only affected by climate change but are also active agents of change. These youth-led movements and legal interventions can serve as a form of 'disruptive dissent'[4] through which young people seek to 'transform norms, rules, regulations and institutions within existing political and economic structures'.[5] Equally, these forums can empower young climate activists and amplify historically marginalised voices.[6] Thus, when

1. Amnesty International, 'Climate change ranks highest as vital issue of our time — Generation Z survey' (10 December 2019) <https://www.amnesty.org/en/latest/press-release/2019/12/climate-change-ranks-highest-as-vital-issue-of-our-time/>.
2. Karen Nairn, 'Learning from Young People Engaged in Climate Activism: The Potential of Collectivizing Despair and Hope' (2019) 27(5) *Young* 435.
3. Elizabeth Marks et al, 'Young People's Voices on Climate Anxiety, Government Betrayal and Moral Injury: A Global Phenomenon' (2021) 5(12) *The Lancet Planetary Health* e863–e873.
4. Karen O'Brien, Elin Selboe, and Bronwyn M Hayward, 'Exploring Youth Activism on Climate Change: Dutiful, Disruptive, and Dangerous Dissent' (2018) 23 *Ecology and Society* 44. See also, Blanche Verlie and Alicia Flynn, 'School Strike for Climate: A Reckoning for Education' (2022) 38 *Australian Journal of Environmental Education* 1.
5. Larissa Parker et al, 'When the Kids Put Climate Change on Trial: Youth-Focused Rights-Based Climate Litigation around the World' (2021) 13(1) *Journal of Human Rights and the Environment* 64.
6. O'Brien, Selboe, and Hayward, 'Exploring Youth Activism on Climate Change' (n 131); David Rousell, Eve Mayes, and Blanche Verlie, 'Atmospheres of Youth Climate Justice Activism: Movements of Affective Political Participation' in Johanna Wyn, Helen Cahill, Hernan Cuervo (eds), *Handbook of Children and Youth Studies* (Springer Link, 2020) 1–14.

equipped with resources not only for understanding the law but also for managing climate emotions, law students have the potential to meaningfully contribute to sustainable climate action.

There is a growing body of resources for managing climate anxiety, many of which foreground the needs and interests of young people, educators, those working on issues related to climate change, and marginalised or otherwise groups that are in situations of particular vulnerability to the adverse effects of climate change.[7]

See the further reading section for a list of these resources.

7. Blanche Verlie, 'Bearing Worlds: Learning to Live with Climate Change' (2019) 25 *Environmental Education Research* 751; Blanche Verlie, *Learning to Live with Climate Change: From Anxiety to Transformation* (Taylor & Francis, 2022).

8. Current and Forthcoming Chapters Outline

This edited collection aims to provide the first detailed resource for law students, academics and practitioners focused on mainstreaming climate change in legal education in Australia.

The collection will be published in three stages. The substantive chapters of the first tranche include constitutional law, administrative law, and criminal law and procedure.

The second tranche, to be published in February 2025, will include chapters on Indigenous peoples and the law, property law, equity and trusts, ethics and professional responsibilities, company law, public law, evidence law and civil procedure.

The third tranche, to be published in April 2025, will include chapters on human rights law, migration and refugee law, labour law, health law, intellectual property and technology law, consumer law, international law and clinical legal education.

This edited collection will be regularly updated, with new editions reflecting the fast-evolving nature of law and legal practice as it relates to climate change.

9. Recommended Further Reading

General Resources

Intergovernmental Panel on Climate Change, 'Summary for Policymakers' in *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2023)

Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press, 2017)

Benoit Mayer, *The International Law on Climate Change* (Cambridge University Press, 2018)

Gerry Bates, *Environmental Law in Australia* (11th edition, LexisNexis, 2023), Chapter 4

Climate Anxiety Resources

Books

Ayana Elizabeth Johnson and Katharine K. Wilkinson, *All We Can Save: Truth, Courage, and Solutions for the Climate Crisis* (One World, 2021)[1]

Britt Wray, *Generation Dread: Finding Purpose in an Age of Eco-Anxiety* (Knopf Canada, 2022)[2]

Sarah Jaquette Ray, *A Field Guide to Climate Anxiety: How to Keep your Cool on a Warming Planet* (University of California Press, 2020)

Online Resources, Networks and Organisations

- Climate Awakening: Climate Emotions Conversations
- Climate Resilience Network
- Climate Superpowers
- Climate Wellbeing Network
- Good Grief Network
- Headspace Climate Change Online Community

1. The All We Can Save project have also created materials to facilitate a reading group, taking the edited collection as a starting point. See, All We Can Save, 'Circles' <https://www.allwecansave.earth/circles>.
2. Britt Wray also authors a newsletter, GenDread, which shares tools on how to cope with the climate crisis, informed by psychology and climate change research. See, 'Gen Dread' <https://gendread.substack.com>.

- Psychology for a Safe Climate
- Work That Reconnects Network

Podcasts and Presentations

- Ayana Elizabeth Johnson, 'How to Find Joy in Climate Action' (TED Talk presentation)
- BCC, 'How do our listeners stay positive on climate?', *The Climate Question* (podcast episode)
- Gimlet, *How to Save a Planet* (podcast)
- Greenpeace, *Heaps Better* (podcast)
- TED Audio Collective, 'How to turn climate anxiety into action (with Luisa Neubauer)', *How to Be a Better Human* (podcast episode)
- TED Audio Collective, *Outrage and Optimism* (podcast)
- Wonder Media Network, *As She Rises* (podcast)

Take Action or Join an Organisation

Complete the climate action Venn diagram developed by Ayana Elizabeth Johnson to find how you can specifically contribute to developing climate solutions.

Climate activism organisations in Australia:

- The Climate Reality Project: Australia and Pacific
- Australian Youth Climate Coalition
- Seed Indigenous Youth Climate Network
- 350 Org Australia
- Climate Council of Australia
- Friends of the Earth Australia

Environmental law firms:

- Environmental Defenders Office Australia
- Equity Generation Lawyers
- Environmental Justice Australia

Chapter 2: Climate Change and Administrative Law

Anna Huggins and Ellen Hawkins

Figure 2.1: Extinction Rebellion “speak out”, Swanston Street, Melbourne, Australia, 21 June 2019. Source: Photograph by Julian Meehan, used with permission.

Administrative law provides an important avenue for protecting the rights and interests of citizens affected by the decisions and actions of government agencies. Governments regularly make a range of climate-related decisions, such as deciding whether to approve new coalmines. Concomitantly, there is a high volume of climate-related administrative law challenges in Australia and internationally. Although these legal challenges have met with mixed success, their broader significance includes generating pressure for evolution in regulatory and policy frameworks.

This chapter considers the extent to which climate change is disrupting administrative law. It considers climate-related challenges under the three main categories of **judicial review**: illegality, irrationality and procedural impropriety. It also considers **merits review** cases involving climate change.

The chapter invites you to reflect on why **climate litigation** has not, to date, significantly disrupted well-established Australian administrative law doctrines, particularly through the judicial review avenue. It also encourages reflection on the important role administrative law plays as a pathway for catalysing regulatory change in Australia and beyond.

KEY QUESTIONS

- To what extent is climate litigation disrupting administrative law in Australia against the backdrop of the **separation of powers**?
- In what ways are administrative law cases involving climate change creating pressure for evolution in regulatory frameworks in Australia and internationally?

CHAPTER OUTLINE

This chapter will cover the following topics:

This chapter does not provide a comprehensive coverage of relevant doctrines, frameworks, cases and scholarly commentary relevant to climate litigation in administrative law. Rather, it provides select examples to illustrate key themes. See the references for more information on these topics.

1. Administrative Law and Climate Change

Climate change generates a high volume of administrative law challenges in Australia and internationally.[1] Climate-related litigation has become an important avenue for seeking to enforce governments' climate change obligations. Indeed, more than 70 per cent of climate litigation internationally names the government as respondent or defendant in diverse cases brought by non-governmental organisations, individuals and companies.[2] Within Australia and globally, litigation of climate change matters often takes the form of judicial reviews of administrative decisions to approve potentially climate-damaging projects such as coalmines.[3] Indeed, the 'first generation' of climate litigation in Australia largely concerned administrative law challenges to government decision-making, particularly under planning and environment legislation.[4]

A frequent argument in administrative law challenges is that government decision-makers have failed to adequately consider climate change in statutory decision-making processes.[5] A common 'climate conscious' approach to administrative law advocacy has involved seeking to incorporate climate change within the scope of decision-making, particularly for projects with substantial climate impacts, by reference to broader statutory purposes.[6] While climate litigation in administrative law has met with mixed success, its significance extends beyond the court room as an important mechanism for raising public and political awareness of climate change and generating pressure for broader regulatory change.[7]

Climate change requires an urgent response and is widely understood to be legally disruptive.[8] In

1. Setzer and Higham's 2021 analysis of global trends in climate litigation indicates that the most common grounds of argument, featuring in 69 of the 93 cases analysed, are based in constitutional and administrative law: Joana Setzer and Catherine Higham, *Global Trends in Climate Change Litigation: 2022 Snapshot* (Policy Report, Grantham Research Institute on Climate Change and the Environment, 30 June 2022) 6 <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2022/>.
2. Ibid 1–2.
3. See, eg, Victoria McGinness and Murray Raff, 'Coal and Climate Change: A Study of Contemporary Climate Litigation in Australia' (2020) 37 *Environmental and Planning Law Journal* 87, 102; Justine Bell-James, 'Climate Change Litigation in Australia' in Wolfgang Kahl and Marc-Phillippe Weller (eds), *Climate Change Litigation: A Handbook* (Bloomsbury, 2021) 288, 289–90; *Earthlife Africa Johannesburg v The Minister for Environmental Affairs* [2017] 2 All SA 519; [2017] ZAGPPHC 58; *Gloucester Resources v Minister for Planning* (2019) 234 LGERA 257 ('*Gloucester*').
4. Jacqueline Peel, Hari Osofsky and Anita Foerster, 'Shaping the "Next Generation" of Climate Change Litigation in Australia' (2017) 41 *Melbourne University Law Review* 793, 795.
5. Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) *Transnational Environmental Law* 37, 39; Jacqueline Peel and Hari M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015) ('*Climate Change Litigation*').
6. Peel, Osofsky and Foerster (n 5) 795–6.
7. Anna Huggins, 'Is Climate Change Litigation an Effective Strategy for Promoting Greater Action to Address Climate Change?' (2008) 13 *Local Government Law Journal* 184, 191. See also Peel and Osofsky, *Climate Change Litigation* (n 5).
8. See, eg, Elizabeth Fisher, Eloise Scotford and Emily Barritt, 'The Legally Disruptive Nature of Climate Change' (2017) 80(2) *The Modern Law Review* 173, 177; Elizabeth Fisher, 'Environmental Law as "Hot" Law' (2013) 25(3) *Journal of Environmental Law* 347, 350; JB Ruhl and James Salzman, 'Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide

response to disruptive situations, 'legal frameworks must evolve or new authoritative legal frames must be developed'.[9] However, the potential for climate change to generate pressure for evolution in legal doctrines and frameworks is in tension with the comparatively rigid and homeostatic nature of administrative law. This is particularly the case for Australian administrative law, which is characterised by, among other things, prescriptive judicial review legislation, a 'preference to work within existing historic or doctrinal categories' and Australia's 'especially rigid' and constitutionally entrenched separation of judicial power.[10] It is thus important to distinguish between legal disruption and legal development. Legal disruption occurs when problems cannot be managed using existing legal frameworks, thus necessitating a change in business-as-usual practices. In contrast to legal disruption, legal development is the normal evolution of the law. Disruption is therefore a useful frame, as it allows for categorising and defining disruptive processes that have more than a normal evolutionary impact on legal doctrines and frameworks.[11]

The distinction between legal disruption and development raises two important questions that are explored in this chapter.

KEY QUESTIONS

- To what extent is climate change disrupting administrative law doctrines against the backdrop of the **separation of powers**?
- In what ways is climate litigation in administrative law generating pressure for evolution in regulatory frameworks?

In examining the first question, this chapter primarily focuses on the Australian administrative law context, which, as noted above, is distinctive in terms of its strict and constitutionally entrenched separation of powers constraints. We examine climate litigation in judicial review generally under each of the three main categories of review: illegality, irrationality and procedural impropriety.[12] We also explore the disruptive potential of climate change for both **judicial review** and **merits review**.

In addressing the second question, relevant examples from Australia and pertinent comparator jurisdictions illustrate possibilities for climate litigation in administrative law to generate pressure for change in regulatory frameworks. The chapter considers a perspective that climate litigation is

for Whittling Away' (2010) 98(1) *California Law Review* 59 73; Sam Adelman and Louis Kotzé, 'Introduction: Climate Justice in the Anthropocene' (2021) 11(1) *Oñati Socio-Legal Series* 30, 43.

9. Fisher, Scotford and Barritt (n 8) 178.
10. Michael Taggart, '"Australian Exceptionalism" in Judicial Review' (2008) 36 *Federal Law Review* 1, 8–9.
11. Fisher, Scotford and Barritt (n 8) 174.
12. Brian J Preston, 'Mapping Climate Change Litigation' (2018) 92 *Australian Law Journal* 774. See also Nicole Graham et al, 'All Legal Education is Climate Law Education: The Core Curriculum Matters' in Amanda Kennedy et al (eds), *Re-Imagining Environmental Law* (Edward Elgar, forthcoming 2024).

not significantly disrupting well-established Australian administrative law doctrines. Even so, we consider whether it is true to say that it still plays an important role in catalysing regulatory evolution, particularly through the judicial review avenue, both in Australia and beyond.

1.1. Climate-Related Legal Disruption in Administrative Law

As background for your evaluation of the extent to which climate change is disrupting existing doctrines and frameworks, it is useful to check your broad understanding of the Australian administrative law context. Administrative law provides important mechanisms for protecting the rights and interests of citizens affected by the decisions and actions of government agencies. Two of the key avenues of administrative law, judicial review and merits review, are the primary focus of this chapter. The availability of judicial review is entrenched in s 75(v) of the *Australian Constitution.*[13] The High Court has reinforced the importance of the judicial review process in Australia, confirming that there is 'an entrenched minimum provision of judicial review' in Commonwealth matters.[14] Legislative grounds of judicial review, which largely codify the pre-existing common law grounds of review, are found at both Commonwealth and state and territory levels.[15]

Judicial review is the avenue of administrative law in which climate-related challenges are most frequently initiated.[16] Within judicial review matters, climate change can be raised as a central or peripheral consideration.[17] Decisions made under environmental and planning laws provide the most common context for raising climate change issues in a judicial review.[18] As considerations of climate change, the land and the environment are almost wholly governed by legislation, statutory interpretation plays an important role in climate-related administrative law challenges.[19] The courts' discretion in statutory interpretation is largely exercised within the boundaries of upholding the separation of powers doctrine, as the courts are required to interpret statutes in line with the intention of Parliament.[20] Within the judicial review process, disruption can occur when novel arguments or

13. See further Debbie Mortimer, 'The Constitutionalization of Administrative Law' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 1st ed, 2018) 696, 698–9.
14. *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513 [103].
15. Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' (2017) 45(2) *Federal Law Review* 153, 176.
16. Ben Batros and Tessa Khan, 'Thinking Strategically about Climate Litigation' in César Rodríguez-Garavito (ed), *Litigating the Climate Emergency* (Cambridge University Press, 1st ed, 2022) 97, 99; McGinness and Raff (n 3) 102.
17. Sébastien Jodoin, Annalisa Savaresi and Margaretha Wewerinke-Singh, 'Rights-Based Approaches to Climate Decision-Making' (2021) 52 *Current Opinion in Environmental Sustainability* 45, 47; Lee Godden et al, 'Law, Governance and Risk: Deconstructing the Public-Private Divide in Climate Change Adaptation' (2013) 36(1) *University of New South Wales Law Journal* 224, 242; Danny Noonan, 'Imagining Different Futures through the Courts: A Social Movement Assessment of Existing and Potential New Approaches to Climate Change Litigation in Australia' (2018) 37(2) *University of Tasmania Law Review* 25, 46.
18. Australian Government Solicitor, *Recent Trends in Climate Change Litigation* (Legal Briefing, 2022) 2; Preston (n 12) 782.
19. Rachel Pepper, 'Environment and Planning Law in the Age of Statutes' (2022) 29(2) *Australian Journal of Administrative Law* 99, 99; John Basten, 'Statute and the Common Law' (2019) 93(12) *Australian Law Journal* 985, 985; *Forrest & Forrest Pty Ltd v Wilson* (2017) 262 CLR 510, 529–30, [64]–[65].
20. Pepper (n 19) 100; *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky v Australian Broadcasting Authority*').

interpretations of statutes lead to climate change being read into existing doctrines, which may in turn promote climate conscious decision-making.[21]

The rule of law and separation of powers both shape and constrain administrative law. Australian government ministers and officials are often the respondents in judicial review proceedings. This is an important aspect of the rule of law which holds that the Parliament, the executive and the judiciary are bound by rules and procedures to ensure that the law is knowable, and that it applies to all.[22] There are also separation of powers constraints that define the powers that can be exercised by the judiciary in administrative law. Under Australia's constitutionally entrenched separation of powers, two functions that are exclusively judicial in character are the power to conclusively interpret the legal meaning of a statute,[23] and the power to determine the validity of executive action by reference to the authorising statute.[24] Unlike in the United States, Australian courts do not defer to a government agency's reasonable interpretation of an ambiguous legislative phrase, despite an agency's experience working with the legislation it routinely administers.[25]

The separation of judicial power underpins the important distinction between legality and merits in administrative law. In judicial review, courts must confine their analysis to the legality of a decision — that is, whether there has been a legal error. The legality/merits distinction is seen clearly in judicial review matters in which a court remits a decision back to the original decision-maker to be remade in accordance with law if the court determines that there has been a legal error. In contrast, merits review tribunals are able to take into account the facts and merits of a case.[26] Merits review tribunals have broader review powers and, as a result, climate change may have a greater disruptive impact.[27]

Against this backdrop, this chapter considers potential legal disruption arising from climate litigation in administrative law. First, in Section 2, we examine the extent to which climate litigation is causing legal disruption via evolution in administrative law doctrines through the avenues of judicial

21. Ryan Rafaty, Sugandha Srivastav and Björn Hoops, 'Revoking Coal Mining Permits: An Economic and Legal Analysis' (2020) 20(8) *Climate Policy* 980, 992–3; Victoria Adelmant, Philip Alston and Matthew Blainey, 'Human Rights and Climate Change Litigation: One Step Forward, Two Steps Backwards in the Irish Supreme Court' (2021) 13(1) *Journal of Human Rights Practice* 1, 2; Jacqueline Peel and Rebekkah Markey-Towler, 'Recipe for Success?: Lessons for Strategic Climate Litigation from the Sharma, Neubauer, and Shell Cases' (2022) 22(8) *German Law Journal* 1484, 1495.
22. Roger Michener and AV Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, Incorporated, 1982) 110.
23. *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 153–4 [44] (Gleeson CJ, Gummow, Kirby and Hayne JJ) ('*Enfield*') (Gleeson CJ, Gummow, Kirby and Hayne JJ); *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36 (Brennan J) ('*Quin*'); *Communist Party v Commonwealth* (1951) 83 CLR 1, 205 (McTiernan J); Stephen Gageler, 'The Legitimate Scope of Judicial Review' (2002) 21 *Australian Bar Review* 279, 279–80.
24. *Enfield* (n 23) 152–3 (Gleeson CJ, Gummow, Kirby and Hayne JJ). See generally Gageler (n 23).
25. In obiter dicta in *Enfield*, the majority of the High Court indicated that the doctrine of deference, endorsed in the 1984 US case of *Chevron v Natural Resources Defense Council*, 467 US 837, 843–4, 865 (1984), does not apply in Australia: *Enfield* (n 23) 152–3 (Gleeson CJ, Gummow, Kirby and Hayne JJ). The Full Federal Court has affirmed that: 'It is clear that the *Chevron* doctrine is not a principle that applies in Australia': see *Minister for Immigration and Citizenship v Yucesan and Another* (2008) 247 ALR 443, [15] (Emmett, Stone and Edmonds JJ).
26. *Quin* (n 23) 36 (Brennan J).
27. See further Section 2.2.

review and merits review. Second, in Section 3, we consider the ways in which climate litigation is generating pressure for evolution in regulatory frameworks responding to climate change.

2. Developments in Administrative Law in Response to Climate Change

2.1. Judicial Review

In this section, we invite you to evaluate **climate litigation** cases across the three broad categories of **judicial review** grounds: illegality, irrationality and procedural impropriety.[1]

2.1.1. Illegality

For a lawful decision, the 'decision-maker must understand correctly the law that regulates [the] decision-making power and must give effect to it'.[2] In contrast, illegality can include a failure to consider or comply with statutory requirements in the exercise of government power in administrative decision-making.[3] An example of an administrative law case in this category is *Australian Conservation Foundation v Minister for the Environment*.[4] This case involved a judicial review challenge of the environment Minister's decision to approve the Carmichael coalmine in central Queensland. One of the grounds of review the Australian Conservation Foundation (ACF) raised was that the Minister had not correctly applied s 137 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the EPBC Act), which requires the Minister not to act inconsistently with Australia's obligations under the World Heritage Convention (WHC).

The ACF claimed that the Minister made an error of law in failing to apply the statutory prohibition in s 137 of the EPBC Act. Namely, approval of the mine was claimed to be inconsistent with Australia's obligations under the WHC, as the effect of the mine's combustion emissions overseas posed a risk to the World Heritage listed Great Barrier Reef.[5] While the Federal Court of Australia accepted that a challenge on this basis was justiciable, it nevertheless held that the ACF failed to establish that the Minister had breached the statutory prohibition imposed by s 137, as he had sufficient regard to his obligation not to act inconsistently with the WHC in making the decision to approve the mine.[6]

1. Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, 410–1 ('Council of Civil Services Unions'); Preston (n 12).
2. Council of Civil Service Unions (n 28) 410 (Diplock J).
3. Ibid 410–1.
4. (2016) 251 FCR 308.
5. Ibid [65].
6. Ibid [205].

KEY QUESTIONS

- Does the case of *Australian Conservation Foundation v Minister for the Environment* evidence legal disruption?
- What is the role of the legality/merits divide in this decision?

2.1.2. Irrationality

The category of irrationality includes grounds of review such as a failure to take into account relevant considerations expressly required or implied by a statute, which is the most common way of framing judicial review challenges involving climate change.[7] It also encompasses legal irrationality, illogicality and unreasonableness. In this subsection, we first consider cases where climate change is a mandatory consideration, before examining cases where consideration of climate change is implied by a statute. We conclude by examining the limits of irrationality arguments in the context of climate-related administrative law cases.

a) Mandatory Requirements

An example of an administrative law challenge in which consideration of climate change impacts was mandatory is *KEPCO Bylong Australia Pty Ltd v Independent Planning Commission & Anor* ('*KEPCO Case*').[8] In September 2019, the NSW Independent Planning Commission (IPC) rejected an application from KEPCO Bylong Australia to construct an open-cut and underground coalmine in NSW due to, inter alia, inadequate plans for minimising downstream **scope 3 greenhouse gas (GHG) emissions**.[9] KEPCO initiated an unsuccessful judicial review challenge in the NSW Land and Environment Court[10] and a further unsuccessful challenge in the NSW Court of Appeal.[11] A key issue in both judicial review proceedings was whether the IPC had taken non-applicable considerations into account, including by considering the NSW Climate Change Policy Framework, which contains a net zero emissions objective, in its decision. Relevantly, under cl 14(2) of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (NSW) (the Mining SEPP), the consent authority — in this case, the IPC — must consider an assessment of potential GHG emissions from a proposed mining development, including downstream emissions, and must do so having regard to any applicable state or national policies, programs or guidelines.[12] In dismissing the appeal, the NSW Court of Appeal held that the IPC is entitled to

7. McGinness and Raff (n 3) 99.
8. (2021) 250 LGERA 39 ('*KEPCO* case').
9. NSW Independent Planning Commission, 'Statement of Reasons for Decision: Bylong Coal Project (SSD 6367)', 18 September 2019, available at:<https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2018/10/bylong-coal-project/determination/bylong-coal-project-ssd-6367--statement-of-reasons-for-decision.pdf> ('*Statement of Reasons for Decision: Bylong Coal Project*').
10. *KEPCO Bylong Australia Pty Ltd v Independent Planning Commission (No 2)* (2020) 247 LGERA 130.
11. KEPCO Bylong Australia Pty Ltd v Bylong Valley Projection Alliance Inc [2021] NSWCA 216.
12. State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (NSW) cl 14 ('*SEPP*').

consider the NSW Climate Change Policy Framework for the purposes of 'applicable … policies, programs or guidelines' under the Mining SEPP.[13]

The *KEPCO Case* thus confirms that the IPC can exercise its discretion in applying and constructing the mandatory consideration in cl 14(2) of the Mining SEPP. Specifically, it has broad discretion in determining what constitutes an 'applicable' policy or guideline for assessing potential GHG emissions from a proposed project. We consider that the court requiring the IPC to take into account the considerations specified in cl 14(2) of the Mining SEPP is not necessarily disruptive; this is a straightforward application of the requirement to consider relevant mandatory considerations in administrative law. However, the NSW Court of Appeal's construction of cl 14(2) was broad, reinforcing the wide discretion of planning authorities in assessing climate change impacts.

KEY QUESTION

- Do you consider that the court's interpretation of the scope of the cl 14(2) requirement in the *KEPCO Case* has a disruptive impact beyond the standard incremental development of the law?

b) Implied Requirements

More commonly, there is no express legislative requirement to consider climate change or GHG emissions, raising the question of whether a statute impliedly requires consideration of these matters. This requires consideration of a statute's subject matter, scope and purpose.[14] For example, Australia's principal federal environmental statute, the EPBC Act, notably does not mention climate change once in its more than 500 provisions, let alone require its inclusion as a mandatory consideration in administrative decision-making processes. There have been various calls for legislative change to include an express legislative requirement or a 'climate trigger', including a proposed 'duty of care' Bill.[15] The Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023 (Cth) requires authorised officers making decisions that facilitate the financing and development of projects that may significantly increase GHG emissions to be (a) required to consider the impact of significant decisions on the health and wellbeing of current and future Australian children;[16] and (b) prevented from making significant decisions involving the exploration or extraction of coal, oil or gas that could harm the health and wellbeing of current and future Australian children.[17]

13. *KEPCO* case (n 35) [181]–[182].
14. Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24, 39–42 (Mason J).
15. Jacqueline Peel, 'Legal opinion: Gaps in the Environment Protection and Biodiversity Conservation Act and other federal laws for protection of the climate' (Report for the Climate Council, 2023).
16. Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023 (Cth) cl 15D.
17. Ibid cl 15E.

Despite the general lack of legislative requirements to consider climate change, the courts' interpretation of environmental principles of 'ecologically sustainable development' (ESD) commonly referred to in environmental statutes, including the 'precautionary principle' and 'intergenerational equity', does allow for consideration of climate change.[18] As part of the principles of ESD, which encourage integration of short- and long-term environmental, economic and social factors in decision-making, the precautionary principle seeks to ensure that scientific uncertainty does not prevent a prudent approach to minimising the risk of serious and irreversible impacts, and the principle of intergenerational equity aims to take into account the welfare of future as well as present generations.[19] By their very nature, these principles require weighing of competing considerations, and they are not prescriptive. Thus, if a decision-maker appropriately considers climate change in applying these principles, they will not have failed to take into account a relevant consideration if they ultimately prioritise other considerations.

An example of an administrative law case in which consideration of climate change was impliedly required is *Gray v Minister for Planning*.[20] The matter concerned a proposal to build the Anvil Hill coalmine, an open-cut mine in the NSW Hunter Valley. In this case, the NSW Land and Environment Court held that the Director-General was to have regard to the principles of ESD, particularly the precautionary principle and the principle of intergenerational equity, in determining the adequacy of environmental assessment required under pt 3A of the *Environmental Planning and Assessment Act 1979* (NSW).[21] The expansive interpretation of relevant considerations in this case evidences doctrinal evolution. Moreover, this case subsequently prompted the introduction of the Mining SEPP discussed above, which expressly requires downstream scope 3 GHG emissions to be assessed for all coal projects.[22] Thus, although the case did not ultimately prevent the mine from going ahead, it had a disruptive effect by generating pressure for development in associated doctrinal and policy frameworks. This is significant, as it illustrates the potential for climate litigation in administrative law to disrupt regulations and government policy.

c) Flawed Reasoning Processes

Another potential ground of review for challenging administrative decisions on climate grounds is legal unreasonableness, including serious irrationality or illogicality. Reasonableness in

18. Laura Schuijers and Margaret Young, 'Climate Change Litigation in Australia: Law and Practice in the Sunburnt Country' in Ivano Alogna, Christine Bakker and Jean-Pierre Gauci (eds), *Climate Change Litigation: Global Perspectives* (BRILL, 2021) 52–5. *Greenpeace Australia Ltd v Redbank Power Company Pty Ltd and Singleton Council* (1994) 86 LGERA 143 was the first Australian case to interpret the precautionary principle as including consideration of climate change. The precautionary principle was the primary consideration used in the 'first wave' of Australian administrative cases that began to expressly consider climate change in the judicial review process at a Commonwealth level: Jacqueline Peel and Hari M Osofsky, 'Climate Change Litigation' (2020) 16(1) *Annual Review of Law and Social Science* 21, 30. See also the discussion of the Anvil Hill case below.
19. Schuijers and Young (n 44) 54–5.
20. (2006) 152 LGERA 258; [2006] NSWLEC 720. Similar arguments have also been made in *Australian Conservation Foundation & Ors v Minister for Planning* [2004] VCAT 2029; and in *Coast and Country Association of Queensland Inc v Smith* [2016] QCA 242.
21. Ibid [122]–[134].
22. *SEPP* (n 39) cl 14; McGinness and Raff (n 3) 100.

administrative law is 'inherently sensitive to context' and 'cannot be reduced to a formulary'.[23] Unreasonableness has been variously described as decisions or conduct that are arbitrary, capricious, illogical, irrational, unjust[24] or that lack 'an evident and intelligible justification'.[25] These words and phrases should not be viewed as different categories of unreasonableness,[26] but rather as useful markers.

Despite an expansion of the scope of unreasonableness review in the last decade,[27] unreasonableness is difficult to establish and often remains a ground of 'last resort'.[28] There is also a significant risk that unreasonableness review will descend into merits review. Indeed, 'of all the jurisdictional error grounds, none is more fraught with the possibility of impermissible transgression by the judicial branch into the constitutional remit of the executive branch than unreasonableness'.[29]

Although unreasonableness is often a ground of last resort, in the case of *Bushfire Survivors for Climate Action v Narrabri Coal Operations*,[30] the sole basis of the applicant's judicial review challenge against the IPC's grant of development consent for the Narrabri coalmine expansion was that the decision was legally unreasonable. The judicial review challenge was ultimately unsuccessful, with the NSW Land and Environment Court ruling that the IPC's approval of the coalmine expansion was legally reasonable even though the project will emit the equivalent of Australia's total annual carbon dioxide emissions.[31] The court considered that a finding of legal unreasonableness in this instance would involve engaging in a 'substitution of the Court's determination of the merits of the Application — such is not open in proceedings such as these'.[32]

The Federal Court case of *Environment Council of Central Queensland Inc v Minister for the Environment and Water (No 2)*[33] further exemplifies these limits in the context of climate litigation. The case involved challenges to the federal environment Minister's findings that decisions on new or expanded coalmines can legally exclude assessment of their climate impacts under the EPBC Act. The applicant argued that the Minister's reasoning was flawed in multiple respects, including that it was legally irrational.[34] The Federal Court rejected all the applicant's appeal grounds, and emphasised the limited role of courts in judicial review in assessing the Minister's reasoning. As McElwaine J observed:

23. Minister for Immigration and Border Protection v SZVFW (2018) 264 CLR 541, 567 (Gageler J).
24. Minister for Immigration and Border Protection v Stretton (2016) 237 FCR 1, 3 [2] (Allsop J) ('Stretton').
25. Minister for Immigration and Citizenship v Li (2013) 249 CLR 332, 351 [28].
26. *Stretton* (n 50).
27. A high watermark in the development of unreasonableness review in Australia was *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.
28. Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal [2012] HCATrans 52 (Gummow J).
29. Ogawa v Finance Minister [2021] FCAFC 17, [17].
30. Bushfire Survivors for Climate Action Incorporated (INC 1901160) v Narrabri Coal Operations Pty Ltd (ACN 129850139) [2023] NSWLEC 69.
31. Ibid [184] (Duggan J).
32. Ibid.
33. [2023] FCA 1208.
34. Ibid [118]–[148].

> [T]his Court is not concerned with the merits of the Minister's decision. The judicial function is a limited one. The question is not whether the Minister made the correct or preferable decision on the merits or whether this Court disagrees with the outcome. To succeed, the applicant must demonstrate that the Minister erred in her understanding of the nature or the limits of the statutory power or, as contended in the proceedings, made legally irrational findings. … It was legally open to the Minister to weigh and assess the applicant's material and submissions cognisant of the potentially catastrophic effects of climate change on MNES. The Minister in discharging what is clearly a heavy responsibility was not obliged to reason in the manner contended by the applicant. Ultimately, the applicant's arguments, anchored by the extensive scientific material relied on, raise matters for Parliament to consider whether the Minister's powers must be exercised to explicitly consider the anthropogenic effects of climate change in the manner the applicant submits they must.[35]

We consider that the court's strict adherence to the legality/merits divide in this case foreclosed opportunities for either legal disruption or development. As noted above, the EPBC Act does not explicitly require consideration of climate impacts in assessing projects, raising the question of whether legislative reform is needed to address this gap.

KEY QUESTION

- Should the EPBC Act be reformed to require consideration of climate impacts in assessing projects?

2.1.3. Procedural Impropriety

Finally, the category of procedural impropriety encompasses a failure by a decision-maker to comply with a procedure required by statute. There is a legal error if procedures a statute specifies need to be observed in the making of a decision were not observed. Not all breaches of procedures required by statute will invalidate a decision; rather, the key question is: do the subject matter, scope and purpose of the Act indicate that it was a purpose of the legislation that an act done in breach of the relevant procedural provision should render the decision invalid?[36] For decisions regarding development applications, a statutory requirement for the preparation of an environmental impact assessment (EIA) is likely to be construed as a necessary precondition to a valid decision to approve a development.

For example, in *Gray v Minister for Planning,* discussed above, the EIA for the proposed Anvil Hill coalmine was held to be inadequate, as it failed to assess the impact of downstream GHG emissions caused by the burning of the coal. Accordingly, it did not adequately satisfy the EIA requirements prescribed by the Director-General under pt 3A of the *Environmental Planning and Assessment Act 1979* (NSW). However, the procedural nature of EIA mechanisms do not prescribe particular

35. Ibid [5]–[7].

36. Project Blue Sky Inc v Australian Broadcasting Authority (n 20) 390–1 (McHugh, Gummow, Kirby and Hayne JJ).

outcomes. This means that if procedural EIA requirements have been met, or are subsequently rectified after judicial review, a project may proceed even if the EIA process shows that the project will have adverse climate change impacts. The ultimate outcome of a successful judicial review application may thus be an extension of the initial environmental assessment undertaken, or reconsideration by the original decision-maker, even if the final outcome is substantively similar or unchanged.[37]

Administrative law challenges on climate-related grounds most commonly pertain to decisions under environmental and planning laws, but they do on occasion relate to decisions made under other types of legislation. For example, in *The Environment Centre NT Inc v Minister for Resources and Water (No 2)*,[38] an environmental group sought judicial review of decisions of the Minister for Resources and Water providing for grants to an oil and gas company for exploratory drilling under the *Public Governance, Performance and Accountability Act 2013* (Cth) (the PGPA Act). There were two relevant grounds raised relating to climate change. The first was that the minister failed to make reasonable inquiries in respect of climate change and climate change impacts and as a result failed to comply with s 71(1) of the PGPA Act. This section prohibits expenditure of relevant money unless the Minister is satisfied, after making reasonable inquiries, that the expenditure would be of proper use.[39] The second was that by failing to have adequate regard to climate change and climate change risks, the Minister's decisions were legally unreasonable, illogical or irrational.[40] The first ground is an example of procedural impropriety as it pertains to failing to follow procedural rules set out in legislation. The second ground is an example of the irrationality category, discussed above.

Although the court upheld a challenge to one of the impugned decisions on other grounds, neither of the applicant's grounds relating to climate change was successful. The court found that the requirement in s 71(1) of the PGPA Act for 'reasonable inquiries' to be made before determining whether expenditure of public money would be a proper use of that money involved the subjective, self-directed assessment of the Minister as to what inquiries were reasonable.[41] Moreover, the court rejected the applicant's claim that the Minister failed to consider climate change risks when deciding whether the project expenditure was a proper use of money, as the Minister was only required to be satisfied that granting funds to the project was a proper use of money in the context of the program.[42] Similarly, in relation to the second ground, the court was not convinced that the making of the statutory instrument or the approval decision were legally unreasonable due to the Minister's alleged failure to consider climate change and its associated risks.[43]

In relation to both unsuccessful grounds of review, the court was mindful of the legality/merits divide and the importance of not encroaching on **merits review**. Regarding the first ground, Griffiths J in

37. McGinness and Raff (n 3) 102.
38. (2021) 253 LGERA 114.
39. Ibid 125 [4].
40. Ibid 125 [5].
41. Ibid 139 [79]–[80].
42. Ibid 142 [90].
43. Ibid 146 [115].

the Federal Court noted that 'there is considerable force in the Commonwealth's submission that the applicant's position threatens to draw the Court into a form of merits-based assessment of Ministerial expenditure decisions across the full gamut of Commonwealth policy areas'.[44] Similarly, in relation to the legal unreasonableness claim, Griffiths J opined that the argument that climate change risks were significant and directly relevant to the minister's decision 'reveals disagreement with the merits of the Approval Decision, not legal unreasonableness'.[45] Thus, despite the novel interpretation of the legislative provisions presented by the applicant, there was limited scope for legal disruption due to the court's adherence to the constitutionally entrenched separation of judicial power.

KEY QUESTION

- The preceding discussion has highlighted some of the legal challenges of successful climate litigation in administrative law. Brainstorm some of the other practical considerations that might influence a potential applicant's decision as to whether it is feasible to initiate an administrative law challenge on climate grounds. What might be the role and limitations of environmental public interest litigation in this context?

2.2. Merits Review

In contrast, merits review has a wider scope than judicial review, which may allow climate change to have a more disruptive impact on existing doctrines.[46] While judicial review focuses on the lawfulness of an administrative decision, merits review involves the reconsideration of the facts, law and policy aspects to determine the correct and preferable decision.[47] In merits review, the tribunal or court conducting the review re-exercises the same power as the original decision-maker. The merits review avenue is frequently provided for in statutes, but notably there is no provision for merits review under the EPBC Act. However, merits review is provided for in some state-based environmental legislation, and it has on occasion facilitated successful challenges of administrative decisions on climate change grounds.

KEY QUESTION

- Merits review appeal rights are limited in many statutes and jurisdictions. Should

44. Ibid 138 [74]
45. Ibid 146 [114].
46. McGinness and Raff (n 3) 99.
47. Shi v Migrations Agents Registration Authority (2008) 235 CLR 286.

> they be more readily available, particularly in environmental and planning legislation?

For instance, in the case of *Gloucester Resources v Minister for Planning* ('*Gloucester Case*'),[48] Preston CJ of the NSW Land and Environment Court undertook a merits review of a government decision to refuse an application for the 'Rocky Hill Mine Project'.[49] This was an important case in which an Australian court rejected a coalmine application, in part due to climate change impacts. The case took the form of a merits review under div 8.3 of the *Environmental Planning and Assessment Act 1979* (NSW), which provides that the court can exercise all the functions and directions available to the original decision-maker when reviewing development approval decisions.

Preston CJ ultimately dismissed the appeal on the basis that the negative impacts of the project, including the climate change impacts, outweighed the other public benefits of the project.[50] In his judgment, Preston CJ stated:

> In short, an open cut coal mine in this part of the Gloucester valley would be in the wrong place at the wrong time. Wrong place because an open cut coal mine in this scenic and cultural landscape, proximate to many people's homes and farms, will cause significant planning, amenity, visual and social impacts. Wrong time because the GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at a time when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions. These dire consequences should be avoided. The Project should be refused.[51]

Although the principal reason for refusing the mine on the basis of significant and unacceptable planning, visual and social impacts is not in itself disruptive, Preston CJ's reasoning on the 'market substitution' argument arguably is. This argument is based on the premise that refusing coalmine projects due to their GHG emissions may not achieve overall emissions reductions, as the avoided emissions will be generated or substituted elsewhere.[52] In *Gloucester*, Preston CJ considered and rejected this market substitution argument.[53] He noted that '[t]he potential for a hypothetical but uncertain alternative development to cause some unacceptable environmental impact is not a reason to approve a definite development that will certainly cause the unacceptable environmental impacts'.[54] This reasoning has influenced subsequent decisions; for example, the NSW IPC's

48. *Gloucester* (n 3).
49. Ibid 265 [1], [7]; Brian Preston, 'The Influence of the Paris Agreement on Climate Litigation: Legal Obligations and Norms (Part I)' (2021) 33(1) *Journal of Environmental Law* 1, 12, 27.
50. *Gloucester* (n 3) 401–2 [688], 403 [700] (Preston CJ).
51. Ibid 404 [699].
52. Schuijers and Young (n 44) 59.
53. *Gloucester* (n 3) [534]–[545].
54. Ibid [545]. For commentary, see Justine Bell-James and Briana Collins, '"If We Don't Mine Coal, Someone Else Will": Debunking the "Market Substitution Assumption" in Queensland Climate Change Litigation' (2020) 37 *Environmental and Planning Law Journal* 167.

rejection of the Bylong Coal Project in September 2019, discussed above, was based on similar reasoning to Preston CJ in *Gloucester*, including rejection of the market substitution argument.[55]

Administrative challenges before decisions about mining lease approvals are made can also facilitate closer scrutiny of claims made in EIAs. For example, the Land Court of Queensland has a role in hearing objections to mining leases and other approvals before a decision is made by the ultimate decision-maker. In an objections hearing in *Adani Mining v Land Services of Coast and Country*,[56] the Land Services of Coast and Country challenged the granting of mining leases and environmental authorities in respect of the Carmichael coalmine. The court concluded that certain evidence about the financial and economic benefit of the mine in the environmental impact statement (EIS) was overstated. Specifically, while the EIS estimated the number of Queensland jobs generated by the mine alone to be over 10,000 full-time equivalent (FTE) jobs per annum by 2024, the correct figures, based on expert evidence before the court, were that the mine project would increase average annual employment by 1,206 FTE jobs in Queensland and 1,464 FTE jobs in Australia.[57] The court drew this information to the attention of the Minister who was the ultimate decision-maker for the mining lease and environmental authority decisions.[58]

In sum, the wider scope of merits review provides the reviewing body with broader review powers. As a result, climate change may have a more disruptive impact on the development of legal reasoning, as seen in the *Gloucester Case*. This is supported by international climate litigation trends identified by Setzer and Higham; namely, that 54 per cent of relevant procedural decisions made on merits had successful outcomes favourable to climate change action.[59]

KEY QUESTION

- Why does the **separation of powers** doctrine have a more significant limiting effect on the consideration of climate change within judicial review than within merits review?

55. Statement of Reasons for Decision: Bylong Coal Project (n 36) [648]–[697].
56. Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors [2015] QLC 48 (CAC MacDonald).
57. Ibid [575] (CAC MacDonald).
58. Ibid.
59. Setzer and Higham (n 1) 3.

3. Future Trajectories of Administrative Law: Climate Litigation and Regulatory Evolution

The above analysis considers the perspective that, at least in the context of **judicial review**, there is limited scope for climate-related legal disruption to administrative law doctrine, particularly as the existing law is strongly shaped by **separation of powers** constraints. This is unsurprising given the general limits of achieving systemic change through judicial review.[1] Nevertheless, at times administrative law challenges can play an important role in catalysing regulatory and policy reform to address climate change.[2] This is significant, as an increase in regulation and policies requiring consideration of climate change in decision-making may lead to a rise in successful **climate litigation** and vice versa.[3] In this section, we consider climate litigation cases from Australia, the United Kingdom (UK) and the United States (US)[4] that have generated pressure for evolution in regulatory and policy frameworks.

Climate litigation in administrative law can create impetus for development in policy guidelines to ensure administrative decision-makers adequately consider climate change. For example, in *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority*,[5] a climate action group sought an order in the nature of **mandamus** to compel the NSW Environmental Protection Authority's (EPA) performance of a duty to regulate GHG emissions under the *Protection of the Environment Operations Act 1997* (NSW) (the PEOA). In the NSW Land and Environment Court, Preston CJ held that there was a failure to perform a public duty and ordered the NSW EPA to 'develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change' under s 9(1)(a) of the PEOA.[6] Therefore, even in instances where legislation does not enshrine climate change as a relevant consideration for administrative decisions, it may still be open to the judiciary to require government to develop policies to address these limitations.

Similarly, in the US, climate litigation has played an important role in shaping regulatory responses to climate change.[7] The Obama administration justified significant regulation of motor vehicle and power plant emissions under the US Clean Air Act in response to the US Supreme Court's landmark

1. Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (6th ed, Thomson Reuters 2017) 5–6.
2. Huggins (n 7) 191. See also Peel and Osofsky, *Climate Change Litigation* (n 5).
3. Laura Burgers, 'Should Judges Make Climate Change Law?' (2020) 9(1) *Transnational Environmental Law* 55, 75.
4. The constitutional systems of Australia, the UK and the US have many similarities, including the premise that administrative power is limited by law as ultimately declared by the judiciary. However, there are important differences arising from the constitutional and political context, values and culture in each jurisdiction: Peter Cane, *Controlling Administrative Power: An Historical Companion* (CUP 2016).
5. *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* (2021) 250 LGERA 1.
6. Ibid 38–9 [147]–[149].
7. See generally Peel and Osofsky, *Climate Change Litigation* (n 5).

2007 decision in *Massachusetts v EPA*.[8] The substantive legal issue in this case[9] was a statutory interpretation question as to whether the EPA had the authority to regulate GHG emissions from motor vehicles under s 202 of the Clean Air Act.[10] The Supreme Court concluded that the provisions of the Clean Air Act, while not specifically referencing fossil fuel burning, were sufficiently broad to confer statutory power on the EPA to regulate GHG emissions from new motor vehicles.[11] In response to the Supreme Court's decision in *Massachusetts v EPA,* the Obama administration introduced regulations to limit GHG emissions from motor vehicles and stationary sources such as power plants.[12] Although many of these Obama administration regulations were subsequently rolled back under the Trump administration,[13] this case exemplifies climate litigation that directly catalysed regulatory reform.

A recent example of a UK administrative law case that led to policy reform was *R (on the application of Friends of the Earth) v Secretary of State for Business, Energy and Industrial Strategy*.[14] This judicial review case was premised on the argument that the Secretary of State failed to comply with ss 13 and 14 of the *Climate Change Act 2008* when reaching certain conclusions in the government's economy-wide decarbonisation plan, the 'Net Zero Strategy'.[15] Section 13 imposes a duty on the Secretary of State to prepare policies and proposals to enable the carbon budgets as per the Climate Change Act to be met, and s 14 provides that the Secretary must produce a report to Parliament setting out policies and proposals for meeting the budgetary periods as soon as practicable after setting a carbon budget.[16] The applicants claimed that the Secretary was not entitled to reach the conclusion that the proposals in the Net Zero Strategy would enable the carbon budgets to be met as per s 13, and that he did not include information legally required to discharge reporting obligations under s 14, including omitting explanations of how the proposals would allow the carbon budget to be met.[17] The High Court of Justice held that the Secretary lacked the legally required information to adopt the Net Zero Strategy and did not take into account the risk that policies would not achieve the statutory carbon budget as required under s 13 of the Climate Change Act.[18] The s 14 ground was also upheld by the court, with some exceptions.[19] Importantly, the court required the government to

8. 549 US 497 (2007) ('*Massachusetts v EPA*'). See Peel and Osofsky, *Climate Change Litigation* (n 5) 63–71.
9. This case also involved an unusual standing issue, with the US Supreme Court ultimately holding that the State of Massachusetts had standing to challenge the EPA's denial of its petition to regulate GHG emissions under the *Clean Air Act.* The Court held that Massachusetts had standing as it suffered an injury as a result of the emissions as it was the owner of the coastal land which would be affected by storms and sea level rise associated with climate change: *Massachusetts v EPA* (n 93) IV (Stevens J).
10. *Massachusetts v EPA* (n 93) II (Stevens J).
11. Ibid VI (Stevens J).
12. See, eg, Jacqueline Peel, Hari Osofky and Anita Foerster, 'A "Next Generation" of Climate Change Litigation?: An Australian Perspective' (2018) 9 *Oñati Socio-legal Series* 275, 278–9; *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed Reg 64661 (October 23, 2015).
13. See, eg, Peel, Osofky and Foerster (n 97) 279.
14. [2022] EWHC 1841.
15. Ibid [13].
16. Ibid [14].
17. Ibid [16].
18. Ibid [217].
19. Ibid [258]–[260].

produce, re-approve and publish a revised and improved strategy by March 2023.[20] This case thus further exemplifies an administrative law challenge that has resulted in policy reform to promote more robust action on climate change.

20. The UK Government have published a revised strategy through the Department for Energy Security and Net Zero, *Carbon Budget Delivery Plan* (March, 2023).

4. Conclusion

This chapter has invited you to reflect on why climate change is not significantly disrupting well-established Australian administrative law doctrines, particularly through the avenue of **judicial review**. It suggests that these trends are unsurprising in light of the legality/merits divide against the backdrop of Australia's constitutionally entrenched **separation of powers**. There is, however, greater evidence of legal disruption in merits review cases such as *Gloucester*. Moreover, the significance of **climate litigation** extends beyond the courtroom as an important mechanism for catalysing regulatory and policy change, both in Australia and relevant comparator jurisdictions such as the US and the UK. Although the disruptive impacts of climate change on administrative law doctrine are relatively limited to date, this chapter considers that climate litigation is playing an important role in creating pressure for regulatory evolution in Australia and internationally. These challenges and opportunities are important to consider in weighing the desirability of pursuing a climate-related action in administrative law compared to other legal pathways.

5. Recommended Further Reading

Articles, Books and Reports

Fisher, Elizabeth, Eloise Scotford and Emily Barritt, 'The Legally Disruptive Nature of Climate Change' (2017) 80(2) *The Modern Law Review* 173

McGinness, Victoria, and Murray Raff, 'Coal and Climate Change: A Study of Contemporary Climate Litigation in Australia' (2020) 37 *Environmental and Planning Law Journal* 87

Peel, Jacqueline, and Hari M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015)

Preston, Brian J, 'Mapping Climate Change Litigation' (2018) 92 *Australian Law Journal* 774

Cases

Australian Conservation Foundation v Minister for the Environment (2016) 251 FCR 308

Environment Council of Central Queensland Inc v Minister for the Environment and Water (No 2) [2023] FCA 1208

Gloucester Resources v Minister for Planning (2019) 234 LGERA 257

Gray v Minister for Planning (2006) 152 LGERA 258

The Environment Centre NT Inc v Minister for Resources and Water (No 2) (2021) 253 LGERA 114

Legislation

Environment Protection and Biodiversity Conservation Act 1999 (Cth)

Environmental Planning and Assessment Act 1979 (NSW)

Chapter 3: Climate Change and Criminal Law

Steven Tudor and Nicole Rogers[1]

Figure 3.1: Image of climate protestor, Violet Maree CoCo, being arrested on 22 March 2021, Melbourne, Australia. Photograph by Julian Meehan, used with permission.

This chapter explores a range of issues about the connections between climate change and criminal law and procedure. The aim is to help students broaden and deepen their understanding of each, and their connections. The chapter addresses various issues concerning the interpretation of existing law, critical analysis of the law, conceptual reconfigurations of the law's possibilities and normative prescriptions for law reform. These different topics intersect in multifarious ways and should not be treated in isolation.

Through the actions the law criminalises and the ways the criminal justice system processes accused persons and offenders, a society formally recognises what counts as 'harms', who counts as a 'victim' and who counts as a 'criminal' — and these will reflect and express a range of fundamentally important social and political values. The criminalisation of conduct and the subsequent prosecution

1. The authors of this chapter would like to thank Joanna Kyriakakis for her valuable help with this chapter, especially her guidance regarding ecocide.

and punishment of crimes are also very important ways through which a society seeks to change the behaviour of some of its members. The creation of new criminal laws, and the prosecution and punishment of criminal offenders, are usually intended to deter undesirable future behaviour (such as pollution or environmental destruction) and possibly encourage desirable behaviour (such as lower carbon emissions). The criminal law can also be an effective, if rather blunt, tool in protecting the status quo, by criminalising and punishing activism that seeks to change how things are being done and by *not* criminalising environmentally destructive activity.

CHPATER OUTLINE

The chapter focuses on two general areas of interest:

- how criminal law and procedure is and might be used to help (or hinder) efforts to combat climate change (section 1); and
- how criminal law and procedure can and should be deployed when dealing with activists and others seeking to combat climate change (section 2).

This list does not exhaust the range of topics raised by the intersection of climate change and criminal law and procedure, but it provides some starting points for exploring this large and important legal domain.

1. Criminal Law and Combating Climate Change

1.1. Criminalising Excessive Greenhouse Gas Emissions and Production of Fossil Fuels

1.1.1. Criminalisation as Means of Reducing Greenhouse Gas Emissions

Given that the main cause of anthropogenic climate change is excessive emissions of **greenhouse gases**, much effort has been put into law reform proposals that aim at reducing such emissions, through incentives, disincentives, or a combination of both. Such proposals include emissions trading schemes, tax incentives for cleaner energy sources, government subsidies for reducing emissions, and licensing regimes whereby only industries that emit within specified limits may retain their licence.[1] Another option is to make it a *criminal offence* to emit excessive amounts of greenhouse gas (GHG). This involves imposing the disincentive of criminal punishment, and would clearly be a more radical step, as criminalisation is usually regarded as properly only a 'last resort', after other forms of legal regulation have at least been considered.[2]

1.1.2. The Justification of Criminalisation

What would be an acceptable policy basis for criminalising excessive GHG emissions? 'Traditional' serious crimes such as assault, theft or threats to kill are usually made offences because they are actions which not only cause harm but also do so wrongfully or culpably. That is, it is not just because someone is harmed by such acts (eg they suffer physical pain, injury, loss of property, fear) that they are made criminal offences, it is also because these acts involve inflicting such harm in a morally objectionable or wrongful way (eg the acts are done with intent to harm, or with awareness of the probability of harm, or with dishonesty). The criminal law, as Simester and von Hirsch have argued, is 'a morally loaded regulatory tool',[3] which means that making something a crime is not just a matter of prohibiting it but also of censuring (or morally blaming) those who commit such acts.[4]

That may (or may not) be relatively straightforward for traditional crimes against the person or property offences, but how well would this approach to criminalisation apply to a 'non-traditional' crime such as excessive GHG emissions? Emitting greenhouse gases can now be regarded as a harmful activity, but what makes such conduct wrongful or morally culpable? Does it merit the morally loaded label of being a crime? Is that label merited because, now that it is clear to reasonable

1. For an overview and analysis of Australian law reform efforts in this area, see Gerry Bates, *Environmental Law in Australia* (LexisNexis, 11th ed, 2023) [4.22]–[4.62].
2. For a discussion of the idea of the criminal law as properly being only a last resort, see Douglas Husak, 'The Criminal Law as Last Resort' (2004) 24(2) *Oxford Journal of Legal Studies* 207
3. AP Simester and A von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing, 2014) 10.
4. See AP Simester and A von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing, 2014) ch 1.

people that such emissions are harmful (to humans, other animals and other organisms), to engage in such action intentionally, knowingly, recklessly or grossly negligently is sufficiently morally blameworthy to warrant being censured as 'a crime'?

Alternatively, criminalisation might be justified on the basis simply that it is socially desirable that emissions be reduced. Making excessive emissions a criminal offence, on this argument, is not so much a moral condemnation as just a way to 'nudge' people into complying with socially desirable behaviours, in much the same way that parking offences are a tool for getting people to use parking spaces fairly, and not a form of moral condemnation.

KEY QUESTIONS

- Do you find either of these arguments persuasive?
- Is there another justification for criminalisation of excessive emissions?

1.1.3. Defining the New Crime

If the legislature decided to make excessive GHG emissions a crime, there is then the question of how this new offence should be defined. The legal definition of a criminal offence consists of the *elements* of the offence, these being the distinct factual matters that need to be proved for the offence in question to be proved. Criminal offence elements are traditionally divided into two basic kinds: physical elements (***actus reus*** — the guilty act) and mental or fault elements (***mens rea*** — the guilty mind).[5] Physical elements are usually one of three kinds: conduct, circumstance and result. The most common fault elements are intention, knowledge, recklessness, gross negligence and dishonesty.

In brief, in the definition of a criminal act, a person performs some act or omits to do so (the conduct), does so in a particular situation (circumstance) and does so with some result being caused by that conduct. Not every criminal offence has to have a circumstance or result; some criminal offences have just a conduct element as the physical element. Each physical element might also have a fault element associated with it; for example, the conduct might have been intentional, with the circumstance being known, and the person being reckless as to the result.

With regard to the definition of a new offence of excessive GHG emissions, it would seem that the conduct element would need to be a matter of emitting a specified GHG beyond a specified amount, over a particular time period. It would also seem necessary to specify under what circumstances the excessive emission occurred; for example, are the emitters to be anyone or just certain industries?

5. See the High Court case of *He Kaw Teh v R* (1985) 157 CLR 523 for the highly influential analyses of criminal offence elements by Gibbs CJ and Brennan J (as he then was). Chapter 2 of the Commonwealth *Criminal Code* (being a schedule to the *Criminal Code Act 1995* (Cth)) sets out a clear analysis of the basic types of criminal elements for Commonwealth offences, influenced by the analysis in *He Kaw Teh* (via the national Model Criminal Code project of the 1990s).

Most criminal offences apply to everyone: murder, theft and threats to kill do not specify that they only apply to some people. Should that approach apply to a new offence of excessive emissions? Or would it be appropriate to restrict the offence so that it applied only to corporations or individuals engaged in identified GHG-emitting industries?

With regard to the fault elements of the new offence, it would seem that there could be a range of possible mental states: there could be different offences for intentional, knowing, reckless and negligent breaches of the relevant limit. There is also the possibility that the new offence should have no fault elements. No-fault offences consist solely of the physical elements, with no need for the prosecution to prove any fault elements. If the accused is allowed by law to raise the defence of mistake of fact in relation to such an offence, then the offence is a *strict liability offence*; if the defence is not available, then the offence is an *absolute liability offence*. That defence is satisfied if the accused mistakenly but reasonably believed in the existence of facts which, had they existed, would have meant that the accused's conduct would not have constituted an offence. Usually, the accused needs to provide or point to evidence that raises the issue (the evidential burden); the onus is then on the prosecution to disprove it.[6]

Similar to the defence of honest and reasonable mistake is the defence of due diligence. This appears in various statutory provisions and allows, in essence, that it is a defence if the accused corporation took reasonable precautions and exercised due diligence to avoid committing an offence and the offence occurred because of causes beyond the accused's control.[7]

KEY QUESTIONS

- How do you think a new offence of excessive GHG emissions should be defined?
- What physical and fault elements would you give the offence?
- What defences, if any, would you make available for the offence?

1.1.4. The Effectiveness of Criminalisation

Creating criminal offences is often a cheap, easy and supposedly popular way for legislatures to be seen to be doing something.[8] However, the question must always be asked whether criminalisation is effective in changing behaviour. This is especially important where what is being criminalised is not a clear moral wrong that most people would see as deserving condemnation and punishment

6. For the Commonwealth *Criminal Code's* version of this defence see s 9.2. For the burdens of proof in relation to the defence see ss 13.3 and 13.1. See ss 6.1 and 6.2 on the distinction between strict and absolute liability offences.
7. See, eg, *Protection of the Environment Operations Act 1997* (NSW) s 118, *Environment Protection Act 2017* (Vic) s 350(3), and Commonwealth *Criminal Code* s 12.3(3). The terms of the defence can vary.
8. See, eg, J Pratt, *Penal Populism* (Routledge, 2007) and D Garland, 'What's Wrong with Penal Populism? Politics, the Public and Criminological Expertise' (2021) 16 *Asian Journal of Criminology* 257.

(such as murder or rape) but is more a matter of something that is socially undesirable. The point of criminalising such conduct is to try to prevent the conduct from happening in the first place rather than punish those who have engaged in it. If the point of criminalisation is not so much to morally censure offenders but to deter people from offending, then there should normally be good evidence to support the claim that criminalisation would be effective as a deterrent.

One of the fears concerning the criminalisation of conduct where the main offenders are commercial corporations is that where fines constitute the penalty for breaking the law, that burden simply becomes part of the cost of doing business. The criminal penalty thus runs the risk of being simply the 'government fee' for engaging in the targeted conduct, rather than an effective deterrent.

KEY QUESTIONS

- Do you think the creation of a new criminal offence would be an effective way to reduce GHG emissions?
- What would the penalty need to be for it to be effective?
- How would the new law need to be policed and enforced in order to be effective?

1.2. Ecocide

1.2.1. Background to the Proposed Offence of Ecocide

The scale of the effects of climate change has raised the prospect of the destruction of whole ecosystems. This has renewed calls for the creation of a new offence, under international criminal law, of '**ecocide**'. International criminal law is criminal law that has been created at the international level, in contrast with domestic or national criminal law, which is where most criminal offences are found. International law as such usually concerns the rights and obligations of states; international criminal law, however, imposes criminal liability directly on individuals and provides for enforcement through international judicial institutions such as the International Criminal Court.[9]

According to one of the champions of the idea of ecocide, the late Polly Higgins,

> [e]cocide is the extensive damage to, destruction of or loss of ecosystem(s) of a given

9. See, eg, Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 4th ed, 2019) ch 1.

> territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished.[10]

The term 'ecocide' has gained currency since the 1960s. Ecocide was originally conceived as a possible war crime.[11] But the idea has since evolved such that large-scale environmental harm is something that can be done in peacetime and with sufficiently harmful effects that it should be part of both domestic and international criminal law.

Higgins and others have argued that ecocide should be included in the *Rome Statute of the International Criminal Court*, an international treaty adopted in 1998 that established the International Criminal Court.[12] The jurisdiction of that court is limited to 'the most serious crimes of concern to the international community as a whole' (Article 5, para 1). Ecocide, it has been argued, should be included as a fifth international atrocity crime, after the existing four core international crimes of genocide, crimes against humanity, war crimes, and the crime of aggression.[13]

1.2.2. Proposed Definition of 'Ecocide'

In June 2021, an Independent Expert Panel for the Legal Definition of Ecocide, convened by the Stop Ecocide Foundation, proposed a definition of 'ecocide' to be inserted into the Rome Statute:

> "ecocide" means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.

The Panel then proposed that the following definitions of key terms also be included in the Rome Statute:

> a. "Wanton" means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated;
> b. "Severe" means damage which involves very serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources;
> c. "Widespread" means damage which extends beyond a limited geographic area, crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings;
> d. "Long-term" means damage which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time;
> e. "Environment" means the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space.

10. Polly Higgins, Damien Short and Nigel South, 'Protecting the Planet: A Proposal for a Law of Ecocide' (2013) 59(3) *Crime, Law and Social Change* 251–266, 257.
11. The works of Richard Falk were very influential in this regard. See, eg, his early article, 'Environmental Warfare and Ecocide — Facts, Appraisal, and Proposals' (1973) 4(1) *Bulletin of Peace Proposals* 80–96.
12. See, eg, Darryl Robinson, 'Ecocide — Puzzles and Possibilities' (2022) 20(2) *Journal of International Criminal Justice* 313–347.
13. Genocide, crimes against humanity and war crimes have been incorporated into the Commonwealth *Criminal Code*; see Ch 8, Division 268.

READ THE PANEL'S COMMENTARY ON THE PROPOSED OFFENCE AND DEFINITIONS, AND THEN CONSIDER THE FOLLOWING QUESTIONS:

- Are the elements of the proposed offence sufficiently clear to enable them to be readily applied to conduct in the real world?
- To whose actions do you think the offence would most likely apply? Governments? Corporations? Individuals?
- If the offence covers damage to 'any element of the environment' so long as it was very serious and either widespread or long term, would that mean that eradicating all the rabbits on Macquarie Island was a case of ecocide? If it was, would that be a problem for the definition of ecocide? If it was not a case of ecocide, is that because we assume that that population of rabbits was not 'an element of the environment' or because eradication of a 'pest species' is not actually a harm to the environment, even if thousands of animals died painfully in the process?

1.2.3. Is Ecocide Still a Human-Centric Concept?

The offence of ecocide represents a major shift in thinking as to *whose or what interests* the criminal law can and should protect. The criminal law relating to fatal offences has traditionally been very human-centred. Fatal offences in Australia such as murder and manslaughter have been limited to the killing of human beings.[14] The killing of animals, where it is a crime, has largely been left to offences under legislation intended to prevent cruelty to animals.[15] Human-centrism is also the norm in international criminal law.[16]

KEY QUESTIONS

- Some proposals for a crime of ecocide present it as a crime involving a breach of the duty of care owed to humanity in general.[17] Is that a human-centric way of looking at things? That is, does it measure environmental harm primarily in terms of the harm it does to human beings? Is that desirable?
- Should ecocide instead be restricted to the idea that ecosystems and non-human living entities have inherent value in themselves and can suffer harms regardless of whether human beings suffer any harm?[18]

14. See, eg, *R v Hutty* [1953] VLR 338.
15. See, eg, the *Prevention of Cruelty to Animals Act 1986* (Vic) s 10 (killing an animal simply treated as an aggravated form of cruelty) and similar statutes in other states.
16. See, eg, Frederic Megret, 'The Problem of an International Criminal Law of the Environment' (2011) 36(2) *Columbia Journal of Environmental Law* 195 at 208–209.
17. See, eg, Mark Allen Gray, 'The International Crime of Ecocide,' (1996) 26(2) *California Western International Law Journal* 215–272, 216.
18. See, eg, Avanti Deshpande, 'Recognising Ecocide as an International Crime: Rejecting Anthropocentricism by Embracing an Eco-Centric Approach', *King's Student Law Review* (Blog Post, 26 August 2022) <https://blogs.kcl.ac.uk/kslr/2022/08/26/recognising-

- How human-centric is the Independent Expert Panel's definition of 'ecocide', given it includes damage to cultural and economic resources?

1.3. Criminal Responsibility of Corporations for Climate Offences

1.3.1. Corporate Criminal Responsibility

Much of the activity that contributes to climate change is performed by corporations rather than individual human beings. It may be argued, then, that if ecocide or emitting excessive amounts of greenhouse gases were to be criminalised, the offences should be drafted to reflect the fact that the most likely (and most important) culprits will be corporate entities.

A corporation is an artificial legal person, and, being a legal person, can acquire and dispose of property, enter into contracts, and sue or be sued. It can also be held criminally responsible. It is conceptually reasonably straightforward to attribute the *actus reus* or physical element of a criminal offence to a corporation: where the employees, servants or agents of the corporation engage in certain conduct while performing their contractual duties, that conduct can be attributed to the corporation.

It is more difficult to make sense of how *mens rea* or fault elements (things such as intention, knowledge, recklessness, negligence and dishonesty) are to be attributed to an abstract entity with no real mind of its own. One of the main ways that the common law attributes fault to a corporation is to identify some particular human being (or more than one) who embodies 'the mind and will' of the corporation.[19] If a human being is the corporation's guiding mind and will and, while they were acting in their role, they had the relevant intention or knowledge, then that intention or knowledge can be attributed to the corporation. Such people will usually be very senior officers of a corporation: directors, chief executives or senior managers. The Commonwealth *Criminal Code* provides for the attribution of fault where the board of directors or a 'high managerial agent' of the corporation 'explicitly, tacitly or impliedly authorised or permitted the commission of the offence'.[20]

ecocide-as-an-international-crime-rejecting-anthropocentricism-by-embracing-an-eco-centric-approach>.

19. See, eg, *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153.
20. Commonwealth *Criminal Code*, ss 12.3(2)(a) and (b).

KEY QUESTIONS

- What if a junior officer of the corporation committed the offence and had the relevant fault element? If the junior officer was acting outside the scope of what their senior managers authorised or permitted, should the corporation be allowed to argue that it is not responsible for such a 'rogue' employee?
- Should the corporation also be required to prove a defence of 'due diligence' and show that it took appropriate positive steps (eg education and training of staff) to *prevent* the offence from happening?[21]
- What could such appropriate steps be in the case of new climate offences such as ecocide or excessive emission of greenhouse gases?

1.3.2. Corporate Culture

Another approach to corporate criminal liability is not to look at the level of individuals' conduct but to look instead at the corporation's 'culture'. The Commonwealth *Criminal Code* defines this as 'an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes [sic] place'.[22] A corporate culture is thus something distinct from and not reducible to the minds of individuals.

The Code provides that criminal fault can be proved where there was a corporate culture 'that directed, encouraged, tolerated or led to non-compliance with the relevant provision'.[23] This can be especially relevant to offences involving omissions or negligence.

KEY QUESTIONS

- What evidence do you think would prove the existence of the relevant kind of corporate culture?
- If a corporation's culture of disregarding environmental harms simply reflected the broader society's culture of such disregard, would it be fair to find that corporation to be criminally responsible?

21. See Commonwealth *Criminal Code* s 12.3(3).
22. Ibid s 12.3(6).
23. Ibid ss 12.3(2)(c) and (d).

1.3.3. Would the 'Carbon Majors' be Complicit in Criminally Excessive Emissions?

There is also the question of the responsibility of corporations which *extract and supply* the fossil fuels whose subsequent consumption creates excessive GHG emissions. Some have argued that the major fossil fuel production corporations (the 'carbon majors') can be seen as *complicit* where they knew such emissions would follow when they supplied the fuels, in much the same way that a person who gives another person a gun, knowing that they will use it to murder someone else, can be regarded as an accessory to the subsequent murder.[24]

Under the Commonwealth *Criminal Code*, criminal responsibility is extended, via the concept of complicity, to those who thus enable the principal offender to commit the offence:

A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.[25]

KEY QUESTIONS

- If a multinational coalmining corporation knew that the coal that it extracts and exports from Australia will be burnt in another country, producing tonnes of greenhouse gases in excess of agreed limits under an international agreement, would that corporation be complicit in the acts of unlawful emissions?
- Which jurisdiction's complicity laws would apply?
- Could the corporation successfully deny being complicit in the offending by arguing that it did not actually burn the coal?
- What would be the appropriate punishment for a corporation found guilty of complicity in such a case?

24. See Jeremy Moss, *Carbon Justice: The Scandal of Australia's Biggest Contribution to Climate Change* (Sydney: University of New South Wales Press, 2021).
25. See Commonwealth *Criminal Code*, s 11.2.(1). The laws of complicity in the other Australian state and territory jurisdictions are in similar, but not all identical, terms.

2. Criminal Law and Climate Activism

2.1. Anti-Protest Laws

Climate activists engage in lawful forms of advocacy and various forms of **civil disobedience**. The concept of 'civil disobedience' is much contested, but one influential definition presents it as 'a public, non-violent and conscientious breach of law undertaken with the aim of bringing about a change in laws or government policies'.[1] There has been a long history of environmental activists engaging in civil disobedience.[2] Law-abiding climate activism, including school climate strikes, can be very effective. Nevertheless, law-breaking on the part of climate activists has become more common in recent years. 'Extinction Rebellion' is a powerful global phenomenon; this climate activist group embraces the tenet that civil disobedience is a necessary pathway to the radical social and political changes required to prevent cataclysmic climate change.[3] Subsequently, the arrival of even more radical offshoots, such as 'Just Stop Oil' in the United Kingdom (UK) and 'Blockade Australia' and 'Disrupt Burrup Hub' in Australia, has heralded a further escalation in tactics, with a focus on disruption and real or simulated property damage.[4] This includes the throwing of food and gluing of hands to the perspex covers of major artworks in public galleries.

It is important to keep in mind that the approach adopted by groups such as Extinction Rebellion in which activists should be prepared to be arrested for acts of civil disobedience does not necessarily factor in the discriminatory treatment of people of colour within criminal justice systems. In 2019, the grassroots collective 'Wretched of the Earth' wrote that '[t]he strategy of XR [Extinction Rebellion], with the primary tactic of being arrested, is a valid one – but it needs to be underlined by an ongoing analysis of privilege as well as the reality of police and state violence'.[5]

Anti-protest laws that clearly target environmental activists have been passed in most Australian jurisdictions.[6] Such legislation has been enacted despite a High Court ruling[7] that Tasmania's

1. See Delmas, Candice and Kimberley Brownlee, 'Civil Disobedience', *The Stanford Encyclopedia of Philosophy* (Fall 2023 Edition), Edward N Zalta & Uri Nodelman (eds), <https://plato.stanford.edu/entries/civil-disobedience/> (citing John Rawls, *A Theory of Justice* (Harvard University Press, revised ed 1999 [1971]) p. 320) (viewed 4 February 2024).
2. See Jennifer Welchman, 'Environmental Civil Disobedience' in Benjamin Hale et al (eds) *The Routledge Companion to Environmental Ethics* (Routledge, 2022) 783–793.
3. Extinction Rebellion, *This is Not a Drill. An Extinction Rebellion Handbook* (Penguin Press, 2019).
4. Andreas Malm puts forward a case for targeted acts of property destruction, on the part of climate activists, in *How to Blow Up a Pipeline : Learning to Fight in a World on Fire* (Verso, 2021). In 2023, a film with the same title was released; this is a fictitious portrayal of young activists preparing to destroy an oil pipeline. You can watch the trailer here: <https://www.youtube.com/watch?v=bSb585bGYmQ>.
5. Wretched of the Earth, 'An Open Letter to Extinction Rebellion', *Red Pepper* (Web Page, 3 May 2019) <https://www.redpepper.org.uk/an-open-letter-to-extinction-rebellion>.
6. See, eg, *Summary Offences and Other Legislation Amendment Act 2019* (Qld), *Sustainable Forests Timber Amendment (Timber Harvesting Safety Zones) Act 2022* (Vic), *Roads and Crimes Legislation Amendment Act 2022* (NSW) and *Police Offences Amendment (Workplace Protection) Act 2022 (Tas).*
7. *Brown v Tasmania* (2017) 261 CLR 328.

original anti-protest legislation infringed a constitutional implied freedom of political communication. In another constitutional challenge in 2023, *Kvelde v NSW* [2023] NSWSC 1560, NSW anti-protest legislation passed in 2022 was struck down as invalid. This legislation imposed penalties of up to two years imprisonment and/or fines of up to $22,000 for disrupting or damaging major roads or major public facilities. Similarly draconian anti-protest legislation has recently been enacted in the UK.[8]

Some activists arrested for minor offences, such as traffic obstruction, have been granted **bail** with conditions that are far more onerous than those usually imposed in relation to such charges.[9] These conditions seem to be aimed directly at preventing the protester from exercising basic civil and political rights. One example is that of Scott Ludlum, a former Senator for the Greens Party, who was arrested and charged with obstructing traffic and granted bail by police on the condition that he not come within 2.5 km of the Sydney Town Hall or attend future Extinction Rebellion events.[10]

Problematically, acts of civil disobedience on the part of climate activists are increasingly conflated with acts of terrorism or 'ecoterrorism'. Governments in the Global North are resorting to various forms of counterterrorism surveillance.[11] There have been pre-emptive strikes on Australian activists, mirroring the pre-emptive nature of many anti-terrorism offences. In June 2022, a police raid on a gathering of climate activists at Mount Colo led to the arrest of seven activists, with the so-called leader charged with 'aiding and abetting the commission of a future crime' and refused bail.[12] Later that year, police officers, including members of the Queensland counter-terror command unit, visited the homes of climate activists to deter them from participating in protests at the forthcoming International Mining and Resources Conference.[13] The pre-emptive surveillance and policing of Australian climate activists in Western Australia was exposed in a 2023 *Four Corners* program.[14]

8. For instance, the *Public Order Act 2023* targets climate activists with new offences of 'locking on', going to protests with equipment to lock on, obstructing major transport works, interfering with national infrastructure and tunnelling; there are maximum penalties of prison sentences (up to three years for tunnelling) and/or unlimited fines.
9. When a person has been arrested and charged with a criminal offence, there is a fundamentally important question as to whether they should be kept ('remanded') in custody until their trial or whether they should be given back their freedom (granted bail) on the understanding that they will voluntarily attend their trial. Often, it will be a magistrate or bail justice who makes the decision about bail, but police can grant bail as well. A presumption of bail is reflected in Article 9(3) of the *International Covenant on Civil and Political Rights* (1966), which provides (in part): 'It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and should occasion arise, for execution of the judgement.'
10. Naaman Zhou. 'Extinction Rebellion: Scott Ludlum has "Absurd" Bail Conditions Dismissed by Judge', *The Guardian* (online, 10 October 2019) <https://www.theguardian.com/environment/2019/oct/10/extinction-rebellion-scott-ludlam-has-absurd-bail-conditions-dismissed-by-judge>.
11. Peter D Burdon, 'The Targeting of Environmentalists with State-Corporate Intelligence Networks' in Kirsten Anker et al (eds), *From Environmental to Ecological Law* (Routledge, 2020) 25.
12. Joe Hinchliffe, Sean Ruse and Michael McGowan, 'Violet Coco is Not Alone: the Climate Activists Facing Jail', *The Guardian* (online, 10 December 2022) <https://www.theguardian.com/australia-news/2022/dec/10/violet-coco-is-not-alone-the-climate-activists-facing-jail>.
13. Nino Bucci, 'Environmental Activist's Home Visited by Queensland Police Ahead of Planned Protests in Sydney', *The Guardian* (online, 1 November 2022) <https://www.theguardian.com/environment/2022/nov/01/environmental-activists-home-visited-by-queensland-police-ahead-of-planned-protests-in-sydney>.
14. 'Escalation: Climate, Protest and the Fight for the Future', *Four Corners* (Australian Broadcasting Corporation, 9 October 2023) <https://www.abc.net.au/news/2023-10-09/escalation:-climate,-protest-and-the-fight-for-the/102953710>.

There are also international instances in which law-breaking activists have received sentences designed for terrorists. For instance, in 2016 and 2017, Jessica Reznicek and Ruby Montoya blasted holes in parts of the Dakota Access Pipeline in the United States (US) with a blowtorch. Reznicek was sentenced to 96 months in prison, and three years of supervised release, after a court applied a 'terrorism enhancement' clause. Her appeal against this sentence was unsuccessful.[15]

We are familiar with historical examples of law-abiding behaviour being retrospectively criminalised, as in the Israeli trial of Nazi bureaucrat Adolf Eichmann, who was following orders in orchestrating the transportation of countless people to concentration camps. The converse position, as articulated by many in the climate movement, is that 'protesters condemned as criminals today will be the heroes of tomorrow'.[16]

KEY QUESTIONS

Do you think that acts of civil disobedience by climate activists should be punished as crimes or acts of terrorism? Why/why not?

2.2. Defence of Emergency or Necessity

In raising the defence of necessity,[17] a defendant in a criminal prosecution does not dispute that they committed the act which constitutes the alleged offence but claims that it was justified on the basis that it was a necessary action to prevent or avert a greater evil. Climate activists are using this defence to argue that it is necessary to break the law in order to avert the far greater evils associated with climate change.

In Australia, the common law defence of necessity is available in NSW[18] but, to date, has not been successfully invoked by climate activists. In other Australian jurisdictions, the defence is codified as the extraordinary emergency defence. In Queensland, 'a person is not criminally responsible for

15. *USA v Reznicek* (unpublished) US 21-2548 (8th Cir, 2022).
16. George Monbiot, 'Today's Climate Activist "Criminals" Are Tomorrow's Heroes: Silencing Them in Court is Immoral', *The Guardian* (online, 22 February 2023) <https://www.theguardian.com/commentisfree/2023/feb/22/climate-activist-criminals-heroes-truth>.
17. The defence of necessity or sudden or extraordinary emergency is available in all Australian jurisdictions. The Commonwealth *Criminal Code's* version of the defence of sudden or extraordinary emergency (s 10.3) is representative: '(1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in response to circumstances of sudden or extraordinary emergency. (2) This section applies if and only if the person carrying out the conduct reasonably believes that: (a) circumstances of sudden or extraordinary emergency exist; and (b) committing the offence is the only reasonable way to deal with the emergency; and (c) the conduct is a reasonable response to the emergency.'
18. See, eg, *Veira v Cook* [2021] NSWCA 302 (an animal rescue case, in which rescuing chickens from cruel conditions did not satisfy the defence of necessity).

an act done under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise'.[19]

An early success with the defence, framed as lawful excuse, occurred at the 2008 trial in the UK of six members of Greenpeace. They were charged with criminal damage after climbing the Kingsnorth power station chimney, graffitiing it, and causing the temporary closure of the power station. A jury acquitted them after five expert witnesses explained the property damage that would result from climate change. One activist posed this question:

> If jurors from the heart of Middle England say it's legitimate for a direct action group to shut down a coal-fired power station because of the harm it does to our planet, then where does that leave government energy policy?[20]

British climate activists have had little subsequent success in presenting the defence of necessity, with judges holding that it is inapplicable. This was certainly the direction to the jury in the 2019 trial of Extinction Rebellion founder Roger Hallam and another climate activist for property damage; the jury nevertheless acquitted them after hearing evidence on climate change risks.[21] Arguing the defence or even alluding to the climate crisis, in the face of judicial instructions to the contrary, can have serious consequences; defendants who do so have been jailed for contempt of court.[22] Even holding up a sign stating 'Jurors: you have an absolute right to acquit a defendant according to your conscience' outside a courtroom in which climate activists are tried could lead to contempt charges.[23]

In the US, there have been no acquittals on the basis of necessity. The defence has been allowed to be put to the jury in a number of trials,[24] including the 2014 trial of two activists who used a lobster boat to block the delivery of coal to a generating station and the 2016 trial of the 'Delta Five', who blocked railway tracks used by crude oil trains. In 2019, Ken Ward, one of five 'valve turners' who shut down emergency valves on tar sands crude oil pipelines, successfully appealed a lower court's refusal to allow him to argue necessity.[25]

19. Section 25 of the *Criminal Code 1899* (Qld). In Victoria and South Australia the common law defence of necessity has been abolished and replaced with a statutory defence of 'sudden or extraordinary emergency': see *Crimes Act 1958* (Vic) s 322R and *Criminal Law Consolidation Act* 1935 (SA) s 15E.
20. 'Greenpeace Protesters Cleared Over Coal Protest', *Reuters* (online, 11 September 2008) <https://www.reuters.com/article/uk-britain-greenpeace-idUKLA34747320080910>.
21. Sandra Laville and agencies, 'Extinction Rebellion Founder Cleared Over King's College Protest', *The Guardian* (online, 10 May 2019) <https://www.theguardian.com/environment/2019/may/09/extinction-rebellion-founder-cleared-over-kings-college-protest>.
22. Sandra Laville, 'Charge Us With Contempt Too, Say 40 People, If Climate Activist Prosecuted', The Guardian (online, 17 August 2023) <https://www.theguardian.com/uk-news/2023/aug/17/charge-us-with-contempt-too-say-40-people-if-climate-activist-trudi-warner-prosecuted>.
23. Ibid. Juries in common law countries have the right to acquit an accused even if they believe the accused is guilty of the offence charged. This is the right to return a 'perverse verdict' (in the United States it is referred to as 'jury nullification'). It may be that, in some cases where the necessity defence has been argued, the jury has not been persuaded that the evidence meets the legal test for the defence, but nonetheless has in good conscience acquitted the accused because they believe that, morally speaking, they do not deserve to be convicted. See Richard Vogler, 'Trudy Warner Reveals the Dark Secret of English Courts: Juries Do Have the Right to Follow Their Conscience' *The Guardian* (online, 27 September 2023) <https://www.theguardian.com/commentisfree/2023/sep/27/trudi-warner-english-courts-juries>.
24. Lance N Long and Ted Hamilton, 'The Climate Necessity Defense: Proof and Judicial Error in Climate Protest Cases' (2018) 38 *Stanford Environmental Law Journal* 57.
25. *State v Ward* 438 P3d 588 (Wash Ct App, 2019).

In January 2020, a Swiss court upheld the defence of necessity in the trial of climate activists who played tennis in a Lausanne branch of Credit Suisse, but this decision was later overturned on appeal.[26] Climate activists have also argued in a number of French courts that unhooking President Macron's official portraits to highlight climate inaction can be justified on the basis of necessity.[27]

Climate change constitutes an extraordinary emergency, even if it is not a sudden one and the peril is not perceived as imminent. Would or should 'an ordinary person possessing ordinary powers of self-control' respond with acts of civil disobedience? It may well be viewed as reasonable to respond to this global emergency with actions designed to prevent the construction of a large coalmine or impede the transportation of coal by rail. This has not, however, been the approach taken by Queensland magistrates, as activist Greg Rolles found out in his 2019 trial.[28] Four others have subsequently failed to establish that the extraordinary emergency of climate change justifies or excuses law-breaking in Queensland.

The **defence of emergency** or necessity permits law-breaking and can be viewed as undermining legal norms, and hence the rule of law. Climate activists, however, believe that the climate crisis poses a far greater threat to the rule of law than do non-violent acts of civil disobedience.

KEY QUESTION

- Why do *you* think that judges/magistrates are so reluctant to accept the defence of emergency or necessity?

2.3. Sentencing of Climate Activists

In the past, common law courts tended to treat conscientious acts of non-violent, restrained civil disobedience more leniently than ordinary crimes.[29] More recently we are seeing onerous penalties, including substantial jail terms, imposed on climate activists who engage in such activities.[30]

26. 'Swiss Court Rejects Appeal by Climate Activists Who Occupied Bank', *Reuters* (online, 11 June 2021) <https://www.reuters.com/business/environment/swiss-court-rejects-appeal-by-climate-activists-who-occupied-bank-2021-06-11>.
27. Nicolas Vaux-Montagny, 'Climate Activists Stealing Macron Portraits Met with Mixed Response from French Courts', *Independent* (online, 3 November 2019) <https://www.independent.co.uk/news/world/europe/france-climate-change-macron-paris-agreement-lyon-court-trial-a9182976.html>.
28. See Nicole Rogers, 'Climate Activism and the Extraordinary Emergency Defence' (2020) 94 *Australian Law Journal* 217. Rolles' appeal against his conviction was unsuccessful: *Rolles v Commissioner of Police* [2020] QDC 331.
29. *R v Jones (Margaret)* [2006] UKHL 16; [2007] 1 AC 136 at [89] per Lord Hoffman.
30. See, eg, Helena Horton and agencies, 'Just Stop Oil Protesters Jailed for Dartford Crossing Protest', *The Guardian* (online, 22 April 2023) <https://www.theguardian.com/environment/2023/apr/21/just-stop-oil-protesters-jailed-for-dartford-crossing-protest>.

KEY QUESTION

- How ought climate activists who break the law be sentenced?

2.3.1. Sentencing Purposes Relevant to Unlawful Climate Activism

When imposing sentence on a person found guilty of a criminal offence, the sentencing judge needs to decide not just what the sentencing order will be (eg imprisonment, community-based order, fine) but also the *purpose* the sentence is to serve. The standard permitted sentencing purposes are retribution (or just punishment), deterrence (both of the offender specifically and other potential offenders generally), community protection, denunciation of the offending, and rehabilitation of the offender.[31]

KEY QUESTIONS

- Which sentencing orders and which sentencing purposes, if any, do you think are most relevant in sentencing climate activists? Why?
- How important is it, for sentencing purposes, that the activist's law-breaking was non-violent and restrained?
- If a climate protest involved violence, physical resistance, threatening behaviour or property damage by a protester, should that change which sentencing orders and sentencing purposes are relevant?

2.3.2. Are Climate Protesters' Motives Mitigating or Aggravating?

When deciding the sentence, the sentencing judge needs to consider a range of relevant factors, some of which aggravate the sentence to be imposed (eg premeditation, use of a weapon, the particular vulnerability of the victim), while others mitigate the sentence (eg the offender's youth, their remorse, their good character). One very important factor is *motive*. If the offender acted out of genuine altruism, for example, that might mitigate the seriousness of the punishment they deserve. In contrast, if the offender acted out of greed or revenge, that could aggravate the punishment.[32]

31. These form the standard suite of permissible sentencing purpose, though the various Australian jurisdictions may vary in which purposes are legislated for, and how they are to govern sentencing. See *Sentencing Act 1991* (Vic), s 5; *Crimes Act 1914* (Cth), s 16A(2), *Crimes (Sentencing Procedure) Act 1999* (NSW), *Sentencing Act 2017* (SA) ss 3 and 4, *Penalties and Sentences Act 1992* (Qld) s 9, *Sentencing Act 1997* (Tas) s 3, *Sentencing Act 1995* (WA) s 9, *Sentencing Act 1995* (NT) s 5, *Crimes (Sentencing) Act 2005* (ACT) s 7.
32. See, eg, Judicial College of Victoria, *Victorian Sentencing Manual* section 6.3.1 <https://resources.judicialcollege.vic.edu.au/article/669236> (viewed 8 February 2024) and Judicial Commission of NSW, *Sentencing Bench Book*, [2-240] <https://www.judcom.nsw.gov.au/sentencing/> (viewed 8 February 2024).

Many, if not most, climate activists who commit criminal offences do so in order to draw attention to the problems of climate change and the need for action, and not for any personal gain or out of malice or ill-will. Many climate activists are also deeply committed to the broader political cause of trying to change many of our well-entrenched economic and commercial practices, in order to avert or mitigate the damage threatened by climate change, and some are prepared to keep breaking the law and go to jail repeatedly in order to further that broader cause.[33]

KEY QUESTIONS

- If a climate activist commits a criminal offence for altruistic motives, how, if at all, should that fact influence the sentencing judge's decision?
- If a climate activist is prepared to break the criminal law repeatedly in pursuit of the political goal of shutting down the coal industry, does that mean they are 'fanatical' or 'extremist' and are more at risk of future offending? Or does it just show how sincere their altruism is? How, if at all, should that affect the sentencing judge's decision?

33. See, eg, the case of Tasmanian climate protester Colette Joan Harmsen, who in 2023 was sentenced to three months imprisonment for breaching a suspended sentence for protest-related activity: <https://www.theguardian.com/world/2023/jul/14/tasmanian-court-sentences-environmental-activist-to-jail-for-first-time-in-more-than-a-decade>.

3. Conclusion

This chapter has briefly introduced just some of the important issues concerning climate change and criminal law and procedure. It is hoped that this will enrich your understanding of the complexity of the challenges posed by climate change and deepen your appreciation of the relevance of criminal law and procedure.

To conclude this chapter, you are invited to reflect on some key general issues.

KEY QUESTIONS

- What are the real crimes being committed in relation to climate change?
- Who are the real criminals?
- How should the criminal law and the criminal justice system be used to address the existential crisis of climate change?
- What are the limits to what criminal law and procedure can actually do in combating or mitigating climate change?

4. Recommended Further Reading

Article, Books and Reports

Elizabeth Cripps, *What Climate Justice Means and Why We Should Care* (Bloomsbury Continuum, 2022)

Jeremy Moss (ed), *Climate Change and Justice* (Cambridge University Press, 2015)

Rob White, *Climate Change Criminol*ogy (Bristol University Press, 2020)

David Arkush and Donald Braman, 'Climate Homicide: Prosecuting Big Oil for Climate Deaths' (2024) 48(1) *Harvard Environmental Law Review* (forthcoming)

Mark Byrne, 'Climate Crime: Can Responsibility for Climate Change Damage be Criminalised?' (2010) 4(3) *Carbon & Climate Law Review* 278–290

Joanna Kyriakakis, 'Ecocide, Evil and the Corporation' in Penny Crofts (ed), *Evil Corporations: Law, Culpability and Regulation* (Routledge, 2024 (forthcoming)).

Carole Gibbs et al, 'Routine Activities Analysis of White Collar Crime in Carbon Markets' (2013) 35(4) *Law & Policy* 341–274

Anastacia Greene, 'The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative' (2019) 30(3) *Fordham Environmental Law Review* 1–48

Sharon Mascher, 'Climate Change Justice and Corporate Responsibility: Commentary on the International Bar Association Recommendations' (2016) 34(1) *Journal of Energy and Natural Resources Law* 57–69

Jamie Walvisch, 'Lone Anarchists and Peace Pilgrims: The Relevance of Political Motivations to Sentencing' (2018) 44(2) *Monash University Law Review* 428–457

Websites

Environmental Defenders Office: Global warning report: the threat to climate defenders in Australia (prepared in collaboration with the Human Rights Law Centre and Greenpeace 2021)

Disrupt Burrup Hub

Extinction Rebellion

Environmental Defenders Office: Defending the defenders

Stop Ecocide International

ABC News: Escalation: Climate, protest and the fight for the future (video, 2023)

Versioning History

This page provides a record of changes made to this textbook. Each set of edits is acknowledged with a 0.01 increase in the version number. The exported files for this toolkit reflect the most recent version.

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Review Statement

La Trobe eBureau open publications rely on mechanisms to ensure that they are high quality, and meet the needs of all students and educators. This takes the form of both editing and double peer review.

Copyediting

This publication has been reviewed by an IPED accredited editor to improve the clarity, consistency, organization structure flow, and any grammatical errors.

Peer review

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The peer review was structured around considerations of the intended audience of the book, and examined the comprehensiveness, accuracy, and relevance of content, as well as longevity and cultural relevance.

Changes suggested by the editor and reviewers were incorporated by the author in consultation with the publisher.

The Editors would like to thank the reviewers for the time, care, and commitment they contributed to the project. We recognise that peer reviewing is a generous act of service on their part. This book would not be the robust, valuable resource that it is were it not for their feedback and input.

Glossary

Actus reus

Latin for ‘a guilty act’; the physical or external element(s) that need to be proved for the accused to be found guilty of criminal offence; usually some form of conduct (act or omission), circumstance in which the conduct occurred, or the result of the conduct. See also *mens rea*.

Adaptation

The process of adjustment to actual or expected climate and its effects (IPCC, Climate Change 2022: Impacts, Adaptation and Vulnerability).

Bail

A form of conditional liberty; person arrested for a criminal offence may be released from custody on the condition that they undertake to appear in court at a specified future time and potentially subject to other conditions.

Civil disobedience

Breaking the law with the aim of persuading the authorities to change the law or government policy; the ‘civility’ of such law-breaking is usually seen as requiring that it be done in public, in good conscience, with a preparedness to be arrested, and without violence.

Climate litigation

Cases where climate change is a central issue in the dispute, climate change is raised as a peripheral issue, climate change is one motivation behind the case, or where the case has implications for mitigation or adaptation (Jacqueline Peel and Hari Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*, Cambridge University Press, 2015, p. 8).

Ecocide

‘unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts’ (Independent Expert Panel for the Legal Definition of Ecocide).

Emergency, defence of

A statutory defence to a criminal charge, whereby an accused person is not guilty if they

reasonably believe that 'circumstances of sudden or extraordinary emergency exists, committing the offence is the only reasonable way to deal with the emergency, and the conduct is a reasonable response to the emergency' (Commonwealth *Criminal Code 1995*, s 10.3); the wording of the defence differs across the jurisdictions; based upon the common law defence of necessity, which still applies in New South Wales, South Australia and Tasmania.

greenhouse gas(es)

Gases that trap heat in the atmosphere.

Intergovernmental Panel on Climate Change

The United Nations body for assessing the science related to climate change.

Judicial review

Examination by a court of the legality (rather than the substantive merits) of an administrative decision.

Law reform

Changing laws, or law reform, involves processes and practices that might involve government institutions and non-government agencies, protests, court decisions and elections.

Loss and damage

The negative impacts of climate change that occur despite, or in the absence of, mitigation and adaptation.

Mandamus

An order issued by a superior court compelling a body exercising public authority to fulfil a public duty that remains unperformed.

Mens rea

Latin for 'a guilty mind'; the state(s) of mind or fault element(s) that need to be proved for the accused to be found guilty of criminal offence, i.e. intention, knowledge, recklessness, dishonesty. See also *actus reus.*

Merits review

Review of the correctness of an administrative decision, taking into account issues of law, fact, policy and discretion. Merits review is generally undertaken by an administrative tribunal rather than a court.

Mitigation

A human intervention to reduce emissions or enhance the sinks of greenhouse gases (IPCC, Climate Change 2022: Mitigation of Climate Change).

Priestly 11

The 11 law subjects required to be successfully completed for candidate status for admission into practice as a legal practitioner in Australia.

Scope 1 emissions

'Direct GHG emissions occur from sources that are owned or controlled by the company, for example, emissions from combustion in owned or controlled boilers, furnaces, vehicles, etc.; emissions from chemical production in owned or controlled process equipment' (*The Greenhouse Gas Protocol: A Corporate Accounting and Reporting Standard*, 2004).

Scope 2 emissions

'GHG emissions from the generation of purchased electricity … Scope 2 emissions physically occur at the facility where electricity is generated' (*The Greenhouse Gas Protocol: A Corporate Accounting and Reporting Standard*, 2004).

Scope 3 emissions

'Scope 3 emissions are a consequence of the activities of the company, but occur from sources not owned or controlled by the company. Some examples of scope 3 activities are extraction and production of purchased materials; transportation of purchased fuels; and use of sold products and services' (*The Greenhouse Gas Protocol: A Corporate Accounting and Reporting Standard*, 2004).

Separation of powers

The division of government responsibilities between the legislature, which makes the law, the executive, which administers and enforces the law, and the judiciary, which interprets and adjudicates disputes about the law.

Sink

Any process, activity or mechanism which removes a greenhouse gas … from the atmosphere (IPCC, Climate Change 2022: Mitigation of Climate Change).