Legislative Chickens or Litigation Eggs: Which Comes First in the Fight Against Climate Change?[1]

Law or Litigation?

In the chicken and egg causality dilemma the commonly stated question posed is, "which came first, the chicken or the egg?". It was the philosopher Plutarch who initially raised the philosophical conundrum in the first century in his essay *The Symposiacs*. The paradox describes situations where it is not clear which of two events may be considered to be the cause and which may be considered to be the effect.

A similar debate lies at the core of many of the climate changes cases being litigated today.

Since 1986, almost 2,000 climate change cases directed to mitigation and adaptation have been launched against public and private bodies in more than 40 countries and nine international tribunals.[2] In tandem, every country in the world now has at least one law addressing climate change or the transition to a low-carbon economy.[3]

Yet governments and corporations continue to engage in high emitting activities inconsistent with the Paris Agreement objectives of limiting the global temperature rise to no more two degrees.[4] In response, recourse to the courts has become increasingly ubiquitous either as a means of filling the lacuna in the regulatory response to climate change, or in order to uphold rights and obligations arising out of existing legislation.

But is this litigious wave (or waves) symptom or cure?

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[1] Paper delivered at *Climate Litigation in Comparative Contexts* conference, Auckland Law School, University of Auckland, webinar, 11 May 2023. I gratefully acknowledge the considerable assistance given to me by my tipstaff, Vivienne Davies, in the preparation of this paper. All errors are, however, mine.

[2] Malcolm Langford, 'Climate Change in Courts: A Responsive Approach', Annual Lecture, Centre for Environmental Law, Macquarie University, 6 April 2023, 2.

[3] Kim Bouwer and Joana Setzer, 'Climate Litigation as Climate Activism: What Works?' (British Academy 2020), 5.

[4] Paris Agreement, opened for signature 22 April 2016, 2156 UNTS (entered into force 4 November 2016) Art 2.

Put another way, what is the true value of climate change litigation? Is it as agent of change or is it as activist's fool's errand of limited legacy and enormous expense?

The central thesis of this presentation is that in the absence of robust laws enacted across all levels of government and industry dealing with climate change, litigation is unlikely to be transformational in and of itself.

How Wide is the Scope of Climate Change Litigation?

A necessary starting point is to define what is encompassed by the concept 'climate change litigation'. The *United Nations 2020 Global Climate Litigation Report Status Review* uses the term to denote cases that raise material issues of law or fact relating to climate change mitigation, adaptation, or the science of the phenomenon, whether those actions are before administrative, judicial, or other adjudicatory bodies.[5]

The definition matters because the scope of what is considered to be climate change litigation demarcates the boundary of any discussion with respect to its utility.

Academics typically describe climate change litigation in terms of three 'waves'. The first wave concerned litigation brought under environmental and planning legislation seeking to challenge executive action or in tort. The second wave comprised actions alleging infringement of constitutional or human rights. And the third wave seeks curial intervention by the application of corporate, consumer and commercial law.[6]

A number of climate change cases falling within the rubric of the second wave have recently attracted substantial media attention and scholarship. This is so-called "holy grail litigation" because of its aspirational nature; cases that are heroic in their scope and vision, that typically seek relief against the institutional failure of

[5] United Nations Environment Programme and Sabin Center for Climate Change Law, *Global Climate Litigation Report: 2020 Status Review* (No DEL/2333/NA, 2020).
[6] Rachel Pepper, 'Turning a Ripple into a Torrent: Riding the Waves of Climate Change Litigation', paper presented at Clayton Utz seminar, *Climate Change Litigation,* Sydney, 16 March 2021, 2.

governments and large corporations to deal with wicked problem of climate change.[7]

The focus on high-profile cases, however, crowds out other aspects of the climate change response and obscures the potential of much less visible forms of litigation. This has a tendency to distort any measure of the overall assessment of the efficacy of climate change litigation as a response to climate change.

In addition to "holy grail" cases, climate change litigation also operates at a more localised level, including cases which do not directly frame arguments in terms of climate change, but nevertheless contribute to an overarching attempt at reducing emissions. Cases involving the preservation of green spaces in a village[8] or concerning vehicle pollutants also have a material impact on climate change regulation.[9]

Measuring Success in Climate Change Litigation

That litigation is utilised strategically as a catalyst for social or political change is hardly a new phenomenon and climate change litigation is no different in this regard.[10]

In the case of public law litigation against a government, one objective is to force regulators to enact, strengthen or enforce domestic law. By contrast, private law litigation, typically launched against large-scale emitters, seeks to alter current and future corporate behaviour. This occurs because financial and reputational risks generated by successful litigation against third parties are likely to cause

[7] Kim Bouwer, 'Lessons from a Distorted Metaphor: The Holy Grail of Climate Litigation' (2020) 9(2) *Transnational Environmental Law* 347. Examples include *Urgenda Foundation v State of the Netherlands* [2015] HAZA C/09/00456689; *Minister for the Environment v Sharma* [2022] FCAFC 35; (2022) 291 FCR 311; *Juliana v United States* 947 F.3d 1159 (9th Cir. 2020); *R (on the application of Plan B Earth) v Prime Minister* [2021] EWHC 3469 (Admin).

[8] For example, see *R (on the application of Barkas) v North Yorkshire County Council* [2014] UKSC 31; [2015] AC 195; *R (on the application of Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11; [2010] 2 AC 70.

[9] Kim Bouwer, 'The Unsexy Future of Climate Change Litigation' (2018) 30(3) *Journal of Environmental Law* 483, 502;

[10] Ben Batros and Tessa Khan, 'Thinking Strategically About Climate Litigation' in Rodriguez-Garavito, C (ed), *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action (Globalisation and Human Rights)* (Cambridge University Press, 2022) 97, 106.

corporations to change their behaviour and act to disincentivise investment in polluting projects.[11]

One immediate measure of the benefit of climate change litigation is the success that it enjoys – did the plaintiffs win? Notwithstanding the recent tsunami of climate change litigation, the overall success rate remains low. Only 54% of the cases determined in 2022 resulted in success for the party bringing the litigation.[12]

It could therefore be argued that *Minister for the Environment v Sharma* (an Australian appellate case that rejected the imposition of a duty of care on the Australian government to avoid or mitigate the harm to children in Australia caused by climate change) was of no value.[13] But this would be overly simplistic.

By contrast, the applicants in *Bushfire Survivors for Climate Action v Environment Protection Authority* enjoyed considerable success when the Land and Environment Court of NSW held that the NSW Environment Protection Authority had a statutory duty to develop environmental policies to protect the environment from climate change.[14]

How ought success be measured? Not by victory alone.

In *Urgenda Foundation v The Netherlands,* where the Court of Appeal found that the Dutch Government was required to change domestic policy to achieve a 25% emissions reduction by 2020 compared with 1990 levels,[15] the case was celebrated as a landmark decision.

But its effect on Dutch climate change policy has been more muted. One study indicates that of the measures that the Dutch government implemented to reduce its emissions as a consequence of the decision, few have achieved any meaningful mitigation outcomes. Some measures merely displaced emissions elsewhere, and

[11] Joana Setzer and Lisa Vanhala, 'Climate change litigation: A review of research on courts and litigants in climate governance' (2019) 10(3) *Wiley Interdisciplinary Reviews Climate Change* 1, 12; Ryan Gunderson and Claiton Fyock, 'The Political Economy of Climate Change Litigation: Is There a Point to Suing Fossil Fuel Companies?' (2022) 27(3) *New Political Economy* 441, 448.
[12] Joana Setzer and Catherine Higham, 'Global trends in climate change litigation: 2022 snapshot', Grantham Research Institute on Climate Change and the Environment, June 2022, 3.
[13] *Minister for the Environment v Sharma* [2022] FCAFC 35; (2022) 291 FCR 311.
[14] *Bushfire Survivors for Climate Action v Environment Protection Authority* [2021] NSWLEC 92; (2021) 250 LGERA 1.
[15] *State of the Netherlands v Urgenda Foundation* ECLI:NL:HR:2019:2007.

others led to an increase of global emissions, such as a tax on the importation of waste for incineration which resulted in more methane emitting landfill in the UK.[16] The 25% emissions reduction target was also less onerous than it initially appeared, with one projection suggesting that existing measures would have achieved a 23% emissions reduction.[17]

The decision has been criticised as resulting in a "business-as-usual" approach to emissions reduction. Its initial success is evident of a "job done" mentality that has crowded out meaningful conversations surrounding the inadequacy of the reduction prescribed by the Court and efficacy of the judgment in reducing greenhouse gas emissions in the Netherlands.[18]

There are many reasons why climate change cases fail. Often it is because applicants seek relief that invites the court to trespass into the policy arena in a manner that the court deems inappropriate.[19] These cases are apt to be rejected on the basis that they challenge the institutional legitimacy of the judiciary.

In *Juliana v United States,* although the plaintiff was seeking a declaration that the government's climate change mitigation measures were inadequate and not a determination of what *would* be sufficient, Hurwitz J suggested that plaintiffs present their case to the "political branches of government" rather than to judges.[20]

In *Sharma* the Court held that to impose a duty of care on the government to mitigate the effects of climate change would require consideration of matters that are "core policy questions unsuitable…for judicial determination".[21]

And in the UK, in *R (Plan B Earth) v Prime Minister* the High Court denied an application for judicial review of the government's alleged failure to take measures to align its greenhouse gas emissions to the Paris Agreement temperature limits, citing "high level economic and social measures" which would require it to "venture

[16] Benoit Mayer, 'The Contribution of *Urgenda* to the Mitigation of Climate Change' (2022) *Journal of Environmental Law* 1, 8.
[17] Benoit Mayer, 'Prompting Climate Change Mitigation Through Litigation' (2022) 72(1) *International & Comparative Law Quarterly* 233, 238; The Netherlands, *Third Biennial Report under the UNFCCC* (29 December 2017) <https:// unfccc.int/documents/198882> 10, 37.
[18] Kim Bouwer, 'Lessons from a Distorted Metaphor: The Holy Grail of Climate Litigation' (2020) 9(2) *Transnational Environmental Law* 347, 368.
[19] Benoit Mayer, 'Prompting Climate Change Mitigation Through Litigation' (2022) 72(1) *International & Comparative Law Quarterly* 233, 234.
[20] *Juliana v United States* 947 F.3d 1159 (9th Cir., 17 January 2020), 1165.
[21] *Minister for the Environment v Sharma* [2022] FCAFC 35; (2022) 291 FCR 311, [7].

beyond its sphere of competence" and to "infringe the constitutional separation between Courts, Parliament and the Executive".[22]

More importantly, bringing proceedings against subsets of emitters is an inherently inefficient and somewhat ad hoc way of addressing climate change.[23] Research interrogating the role of litigation against major emitters as a driver of climate change legislation has demonstrated that it is not likely to induce carbon majors to enact pre-emptive emissions targets as a means of risk mitigation.[24]

Furthermore, there exist many barriers to commencing and continuing litigation. Access to justice is not always available by recourse to the courts because of issues relating to standing, justiciability and costs - both financial and emotional.

So if the "regulation through litigation" is not a panacea, what is?[25]

Why Did the Chicken Cross the Road? Because It Was Legally Encouraged to Do So

In the absence of a demonstrably efficacious body of climate change litigation, commentators have increasingly argued for improved legislation. What is required to avoid costly litigation with its inherent risks and, paradoxically, to facilitate litigation where appropriate, especially against private actors, is a coordinated aggregation of regulation with overall policy coherence designed to reduce emissions.

Effective climate governance requires clear and enforceable legislation enacted at both the national and local level.[26]

Having better legislation is important for three reasons. First, it allows judges, who are usually unelected, to maintain their status as an independent arbiter. Rather than wade into the turbid and often treacherous waters of government policy,

[22] *R (on the application of Plan B Earth) v Prime Minister* [2021] EWHC 3469 (Admin); [2021] 12 WLUK 285, [3(1)], [50], [51], [54].
[23] Bret Walker, 'Why Not Litigate Climate Change Responses' (speech, Mahla Pearlman Oration, 2022), 9-10.
[24] Juscelino Colares and Kosta Ristovski, 'Pleading patterns and the role of litigation as a driver of federal climate change legislation' (2014) 54(4) *Jurimetrics Journal of Law, Science and Technology* 329.
[25] Joana Setzer and Lisa Vanhala, 'Climate change litigation: A review of research on courts and litigants in climate governance' (2019) 10(3) *Wiley Interdisciplinary Reviews Climate Change* 1, 8.
[26] Kim Bouwer, 'The Unsexy Future of Climate Change Litigation' (2018) 30(3) *Journal of Environmental Law* 483, 495-496; *Smith v Fonterra* [2021] NZCA 552; (2021) 23 ELRNZ 191, [28].

legislation provides the necessary anchor for legitimate judicial scrutiny of executive decision-making and the activities of the corporate sector. Litigation that enforces legislation that controls governmental action is an essential function of the judicial arm of government.[27]

For example, in 2022 the UK High Court held in *Friends of the Earth v Secretary of State for Business* that a decarbonisation strategy published by the relevant Minister pursuant to a statutory requirement to do so under the *Climate Change Act* was unlawful because the government had failed to meet the detailed statutory requirements for reporting to Parliament.[28] The adoption of the Net Zero Strategy was invalid because it did not allow for proper Parliamentary and public scrutiny due to its lack of detail. An analysis of the reasons reveals that it was the strength of the statutory framework that compelled this conclusion.[29]

Similarly, when a group of bushfire survivors and firefighters compelled the NSW EPA to develop policies that measure and regulate greenhouse gas emissions in *Bushfire Survivors*,[30] their success was founded upon the Court's construction of a duty enshrined in legislation that mandated the EPA to develop environmental quality objectives, guidelines and policies to ensure environment protection.[31] This was construed as a duty that evolved over time, and consequently, included the protection of the environment from climate change.[32]

Sharma[33] also demonstrates the need for good laws. The incoherence of the generalised common law duty of care in tort and the Minister's consent function in respect of fossil fuel development under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) could not be reconciled by the Court.[34]

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[27] Bret Walker, 'Why Not Litigate Climate Change Responses' (speech, Mahla Pearlman Oration, 2022), 8.
[28] *R (on the application of Friends of the Earth Ltd) v Secretary of State for Business* [2022] EWHC 1841 (Admin); [2023] 1 WLR 225; *Climate Change Act 2008* (UK) ss 13, 14.
[29] Bret Walker, 'Why Not Litigate Climate Change Responses' (speech, Mahla Pearlman Oration, 2022), 9-10.
[30] *Bushfire Survivors for Climate Action v Environment Protection* Authority [2021] NSWLEC 92; (2021) 250 LGERA 1.
[31] *Protection of the Environment Administration Act 1991* (NSW) s 9(1).
[32] *Bushfire Survivors for Climate Action v Environment Protection* Authority [2021] NSWLEC 92; (2021) 250 LGERA 1, [61], [68]-[69].
[33] *Minister for the Environment v Sharma* [2022] FCAFC 35; (2022) 291 FCR 311.
[34] Bret Walker, 'Why Not Litigate Climate Change Responses' (speech, Mahla Pearlman Oration, 2022); *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 130, 133.

However, the decision in *Bushfire Survivors* also serves as a demonstration of the limits of the judiciary. Under the relevant legislation, the Court could not prescribe the particular content of the EPA's policies and guidelines.[35] Nor could it require the EPA to align its policies with a maximum 1.5 degree global temperature rise as sought by the applicants.[36]

Thus, in the Belgian case of *Klimaatzaak,* the Brussels Court of First Instance found that Belgium's current mitigation policies were inadequate to adequately address climate change but it refused to indicate what they should be.[37] The victory was therefore pyrrhic allowing the Belgium government to assert that the decision was "without financial or legal consequences".[38]

And in *Friends of the Earth Ltd v Heathrow Airport* the UK Supreme Court held that the government's Airport National Policy Statement promulgated under the *Planning Act 2008*, was lawful because the Secretary held a broad statutory discretion as to what was necessary to take into account to mitigate the effects of climate change under s 10 of that Act.[39]

If a law does not mandate particular environmental outcomes, the courts cannot fill the void.[40]

Second, research indicates that a comprehensive suite of climate change laws enacted across the whole of government is likely to encourage a state to comply with any climate change obligations that it has agreed to internationally.[41] Litigation under this legislative framework is more likely to result in the implementation of

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[35] *Bushfire Survivors for Climate Action v Environment Protection* Authority [2021] NSWLEC 92; (2021) 250 LGERA 1, [8], [16].
[36] *Bushfire Survivors for Climate Action v Environment Protection* Authority [2021] NSWLEC 92; (2021) 250 LGERA 1, [16], [96].
[37] *Klimaatzaak v Belgium* Case 2015/4585/A (French-Speaking Tribunal of First Instance of Brussels, 17 June 2021).
[38] Jennifer Rankin, 'Belgium's Climate Failures Violate Human Rights, Court Rules' *The Guardian* (Brussels, 18 June 2021). See also Charlotte Renglet and Stefaan Smis, 'The Belgian Climate Case: A Step Forward in Invoking Human Rights Standards in Climate Litigation?' (2021) 25(21) *American Society of International Law Insights* 1, 4.
[39] *R (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52; [2021] 2 All ER 967, appealed from *Friends of the Earth v Secretary of State for Transport* [2020] EWCA Civ 214 where the Airport National Policy Statement was held to be unlawful.
[40] Laura Schuijers, 'Compelled by the Court to Act on Climate Change: *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* [2021] NSWLEC 92' (2022) 34(1) *Journal of Environmental Law* 223, 227.
[41] Benoit Mayer, 'Prompting Climate Change Mitigation Through Litigation' (2022) 72(1) *International & Comparative Law Quarterly* 233, 248.

tangible long term climate change mitigation strategies in a way that a single sexy case cannot.

Targeted locally enacted legislation can often facilitate public and private actors to engage in activity that combats climate change.[42] There is a growing body of planning law cases directed to ensuring that climate change must be considered when approving proposed development. Courts have ordered authorities to assess the emissions of proposed developments in conformity with domestic planning law (for example, in *Gloucester Resources Limited v Minister for Planning*).[43]

Third, comprehensive climate change legislation allows for the cases determined pursuant to it to have greater normative effect.[44] The plethora of cases challenging the emission reduction targets of national government since *Urgenda* nicely illustrates the point.[45]

The Benefits of Climate Change Litigation

This is not to say that climate change litigation cannot, even in the absence of a robust statutory framework, serve a useful purpose. The attention given to *Urgenda* had the very real effect of raising the public consciousness of the adequacy of domestic climate change policies both in the Neverlands and elsewhere.[46] Even when a case fails, there may be considerable value in the ensuing public discussion that it generates as a means of raising consciousness about climate change related issues (see, for example, the discussion in the public domain following the handing down of the decisions in *Sharma by her litigation*

[42] Benoit Mayer, 'Prompting Climate Change Mitigation Through Litigation' (2022) 72(1) *International & Comparative Law Quarterly* 233, 248.
[43] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7; (2019) 234 LGERA 257. Another example is *Center for Biological Diversity v California Department of Fish and Wildlife,* (Cal. 2015) 62 Cal.4th 220-21, where the Court found the Environment Impact Statement and Environment Impact Report for a development project was insufficient and thus unlawful as a matter of statutory interpretation.
[44] Benoit Mayer, 'Prompting Climate Change Mitigation Through Litigation' (2022) 72(1) *International & Comparative Law Quarterly* 233, 249.
[45] For example, *Milieudefensie v Royal Dutch Shell* ECLI:NL:RBDHA:2021:5337 (DC The Hague, 26 May 2021); *Grande-Synthe v France* (Conseil d'Etat, 1 July 2021), ECLI:FR:CECHR:2021:427301.20210701.
[46] Anke Wonneberger and Rens Vliegenthart, 'Agenda-Setting Effects of Climate Change Litigation: Interrelations Across Issue Levels, Media and Politics in the Case of *Urgenda* Against the Dutch Government' (2021) 15(5) *environmental Communication* 699, 710.

representative Sister Marie Brigid Arthur v Minister for the Environment[47] at first instance and *Sharma* on appeal.[48]

The benefits of climate change litigation are not limited to achieving a favourable decision. Its contribution may include obtaining information through the discovery process, forcing defendants to take a formal position on the public record, or obtaining legal or factual findings from the Court. In *Sharma*, for example, the findings about the highly deleterious effects of not keeping global temperatures below 1.5 degrees Celsius made by the trial judge were not overturned on appeal.[49]

Climate change litigation can also possess a "long tail" with the real value of the proceedings manifesting itself in the future, irrespective of the immediate outcome of the litigation.[50] It plays an important role in shaping the narrative around climate change.[51] Strategic climate litigation against major carbon emitters has unquestionably reframed the public's conception about energy production and the consequences of global warming.

A loss can also have a normative effect by highlighting deficiencies in governmental policy and by defining benchmarks in order to assess whether an entity is taking appropriate measures consistent with its obligations in respect of climate change mitigation.[52]

In *R (Plan B Earth) v Secretary of State for Business, Energy and Industrial Strategy,* the English Court of Appeal upheld an earlier decision refusing a claim alleging that the Secretary of State for Business, Energy and Industrial Strategy had violated the *Climate Change Act* by failing to revise a 2050 carbon target to lower emissions by 80% compared to 1990 levels in light of recent scientific

[47] *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560; (2021) 248 LGERA 330.
[48] Geetanjali Ganguly, Joana Setzer and Veerie Heyvaert 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38(4) *Oxford Journal of Legal Studies,* 841, 866; *Minister for the Environment v Sharma* [2022] FCAFC 35; (2022) 291 FCR 311.
[49] Ben Batros and Tessa Khan, 'Thinking Strategically about Climate Litigation' in Rodriguez-Garavito, C (ed), *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action (Globalisation and Human Rights)* (Cambridge University Press, 2022) 97, 109; *Minister for the Environment v Sharma (No 2)* [2022] FCAFC 65; (2022) 401 ALR 108, [11].
[50] Kim Bouwer, 'Lessons from a Distorted Metaphor: The Holy Grail of Climate Litigation' (2020) 9(2) *Transnational Environmental Law* 347, 356.
[51] Kim Bouwer and Joana Setzer, 'Climate Litigation as Climate Activism: What Works?' (British Academy 2020), 12.
[52] Kim Bouwer and Joana Setzer, 'Climate Litigation as Climate Activism: What Works?' (British Academy 2020), 5.

developments.[53] The litigation attracted considerable interest and attention, which caused the UK prime minister at the time, the Rt Hon Theresa May MP, to promise to revisit the targets.[54] This eventually led to an adjustment to 'net zero'.

Action against corporate entities, superannuation funds, and banks is increasingly commonplace because climate change is now, through the vehicle of litigation, recognised as a financial risk.[55] This is so notwithstanding that there are to date few successful cases where corporate Australia has been held to account in this context.[56] Potential liability alone has been sufficient.

The risk has resulted in action being taken in Australia by corporate regulators to combat 'greenwashing'. Companies must now disclose climate related risks and cannot mislead consumers with claims of 'net zero commitments' that are unsustainable.[57] The Australian competition and consumer watchdog, the ACCC, and the Australian corporate watchdog, ASIC, have made false environmental claims a compliance and enforcement priority for 2022 and 2023.[58]

Both Come First

Litigation is an effective means of raising climate change awareness, but as an instrument of change it can be cumbersome, incremental and replete with barriers to justice. Nonetheless, it continues to play a critical role in combating climate change.

Having said this, because judicial decision-making remains a responsive mechanism to an increasingly complex and urgent problem, the enactment of better laws is needed to provide courts with the tools with which to articulate and

[53] *R (Plan B Earth) v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWHC 1892 (Admin).; *Climate Change Act 2008* (UK) s 1.
[54] Kim Bouwer and Joana Setzer, 'Climate Litigation as Climate Activism: What Works?' (British Academy 2020), 11.
[55] Joana Setzer and Lisa Vanhala, 'Climate change litigation: A review of research on courts and litigants in climate governance' (2019) 10(3) *Wiley Interdisciplinary Reviews Climate Change* 1, 7.
[56] See *Abrahams v Commonwealth Bank of Australia* NSD864/2021; *O'Donnell v Commonwealth of Australia* [2021] FCA 1223.
[57] Prafula Pearce, 'Duty to Address Climate Change Litigation Risks for Australian Energy Companies – Policy and Governance Issues' (2021) 14(23) *Energies* 7838, 7842; Noel Hutley SC and Sebastian Hardford Davis, 'Climate Change and Directors' Duties', *Further Supplementary Memorandum of Opinion,* The Centre for Policy Development, 23 April 2021, 2-3. In the US, see *Delaware v BP America In* No. 22-821 (US), where the Supreme Court has permitted over twenty cases against major oil companies to proceed in State courts on claims of misrepresentation and concealment of climate hazards associated with production and use of fossil fuel products.
[58] ACCC, 'Compliance and enforcement priorities for 2022/23' (Media Release 26/22, 3 March 2022).

enforce climate change obligations. Litigation is not a substitute for legislation; it can only be a secondary, complementary mechanism. The most impactful litigation depends on Parliament having enacted appropriate laws designed to achieve the desired outcome of reducing harmful emissions.[59] Legislation and litigation must work simultaneously in order to avert dangerous global temperature rise.[60]

Therefore, to answer the question of which should come first, the legislative chicken or the litigation egg, when it comes to dealing with catastrophic climate change the answer is that it does not matter provided that they both cross the road at the same time.

[59] Bret Walker, 'Why Not Litigate Climate Change Responses' (speech, Mahla Pearlman Oration, 2022), 8-9.
[60] Kim Bouwer, 'The Unsexy Future of Climate Change Litigation' (2018) 30(3) *Journal of Environmental Law* 483, 496.