



cornerstone  
climate

Mishcon de Reya

# Climate Litigation Lessons from Around the Globe

Cornerstone Climate's Flagship 2025 Series

# Lessons from Australia

Lara Douvartzidis  
Nicole Sommer  
Stephanie Brenker  
Courtney Law  
Phoebe Roberts

27 March 2025



# Structure



- Background to Australian litigation landscape (Nicole)
- Unpacking *Sharma* (Stephanie)
- Grata Fund and *Pabai Pabai* (Courtney)
- Greenwashing and corporate liability (Phoebe)
- Q&A and discussion

# Overview of climate litigation in Australia

**Nicole Sommer – Environmental Defenders Office Ltd**

Legal Practice Director and Principal Lawyer



# Overview

01

## Evolution of climate litigation in Australia

- Context
- Evolution of climate case law

02

## Emergence of human rights focused litigation

- Enactment of sub-national Human Rights Statutes
- Case study: Waratah Coal decision of 2022

03

## Developments & what's next?

- New cases in Court
- Human rights & disasters



# The backdrop



# First generation of climate litigation

## Mitigation cases

### Judicial Review

- Gray v Minister for Planning (2006) 152 LGERA 258
- Barrington-Gloucester Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure (2012) 194 LGERA 113
- Wollar Progress Association Inc v Wilpinjong Coal Pty Ltd [2018] NSWLEC 92
- Australian Coal Alliance Incorporated v Wyong Coal Pty Ltd [2019] NSW LEC 31

### Merits Review

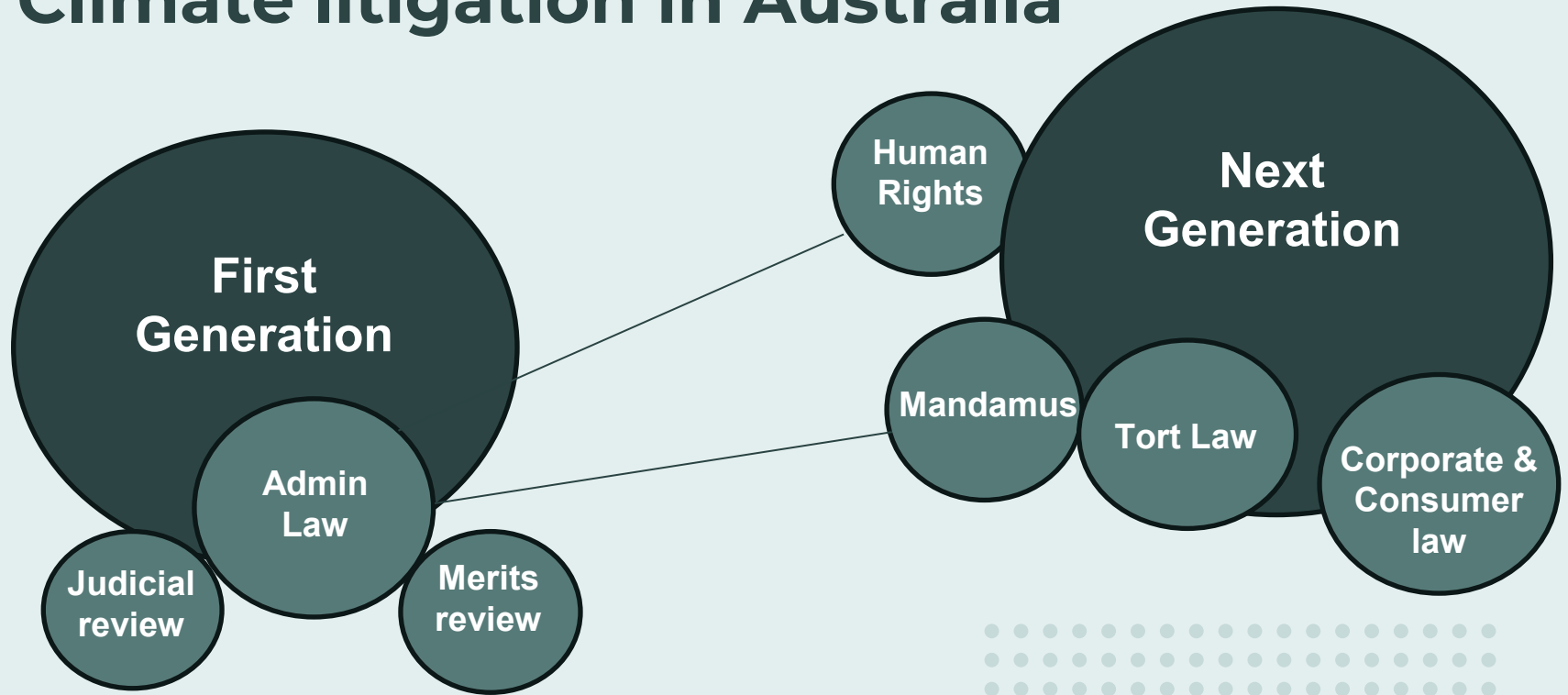
- Greenpeace Australia Ltd v Redbank Power Pty Ltd (1994) 86 LGERA 143
- Hunter Environment Lobby Inc v Minister for Planning [2011] NSWLEC 221
- Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure (2013) 194 LGERA 347
- Gloucester Resources Ltd v Minister for Planning (2019) 234 LGERA 257
- Xstrata Coal Queensland Pty Ltd & Ors v Friends of the Earth – Brisbane Co-Op Ltd & Ors and Department of Environment and Resource Management [2012] QLC 013
- Hancock Coal Pty Ltd v Kelly & Ors and DEHP (No.4) [2014] QLC 12
- Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors [2015] QLC 48.

## Adaption cases

### Judicial Review

- Walker v Minister for Planning (2007) 157 LGERA 124;
- Minister for Planning v Walker (2007) 157 LGERA 124
- Aldous v Greater Taree City Council (2009) 167 LGERA 13

# Climate litigation in Australia





# Waratah Coal 2022

*(Waratah Coal Pty Ltd v Youth Verdict & Ors (No.6) [2022] QLC 21)*



# The climate and human rights objections



“Our communities are on the frontlines of fossil fuel extraction and on the frontlines of climate change impacts.” – Youth Verdict First Nations Lead and co-director Murrawah Johnson



## Florence Gutchen, Poruma and Erub, Torres Strait Islands

"When I was young and living on Poruma I had never heard of global warming or climate change. Now, I think about climate change all the time."

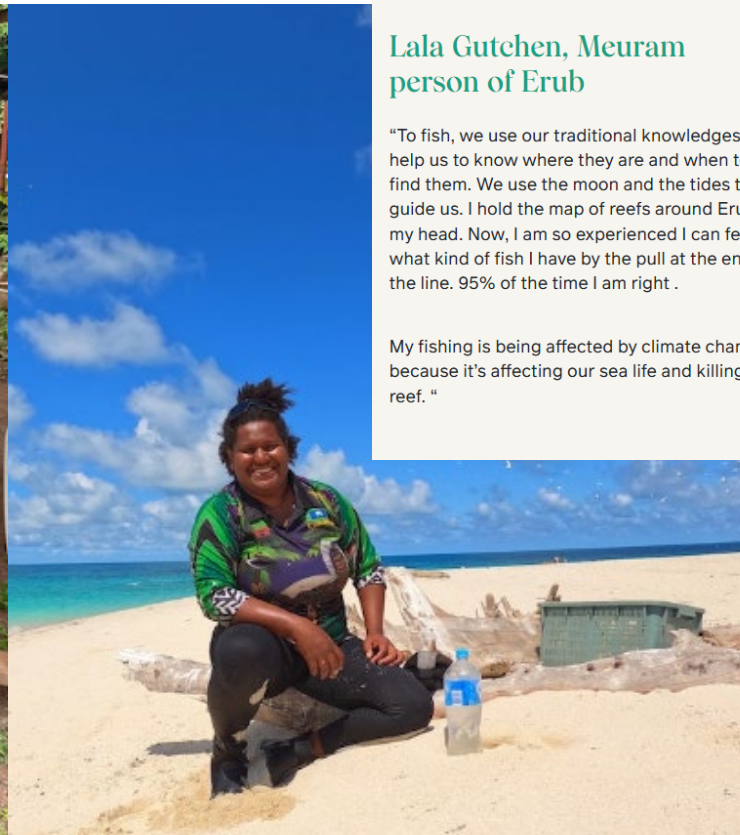
"I did not have the knowledge that our island was being eaten away. Now, the island is very different from when we were young. There is no way we were expecting these changes. When part of my island is taken away by the sea, part of me is taken away too."



## Lala Gutchen, Meuram person of Erub

"To fish, we use our traditional knowledges to help us to know where they are and when to find them. We use the moon and the tides to guide us. I hold the map of reefs around Erub in my head. Now, I am so experienced I can feel what kind of fish I have by the pull at the end of the line. 95% of the time I am right .

My fishing is being affected by climate change because it's affecting our sea life and killing our reef. "



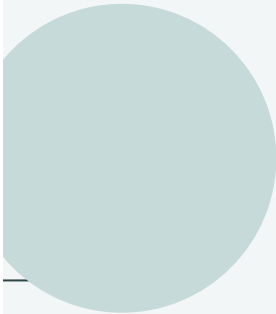


---

# Findings on Rights of the Child:

*Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6) [2022] QLC 21 at 1603*

The intergenerational aspect of climate change risks makes the rights of children paramount. The year 2100 is the reference point for the Paris Agreement long-term temperature goal. My generation of decision makers will be long gone, but a child born this year will be 78 years old in 2100. The principle of intergenerational equity places responsibility with today's decision makers to make wise choices for future generations. The children of today and of the future will bear both the more extreme effects of climate change and the burden of adaptation and mitigation in the second half of this century. Their best interests are not served by actions that narrow the options for achieving the Paris Agreement temperature goal. This weighs the balance against approving the applications.

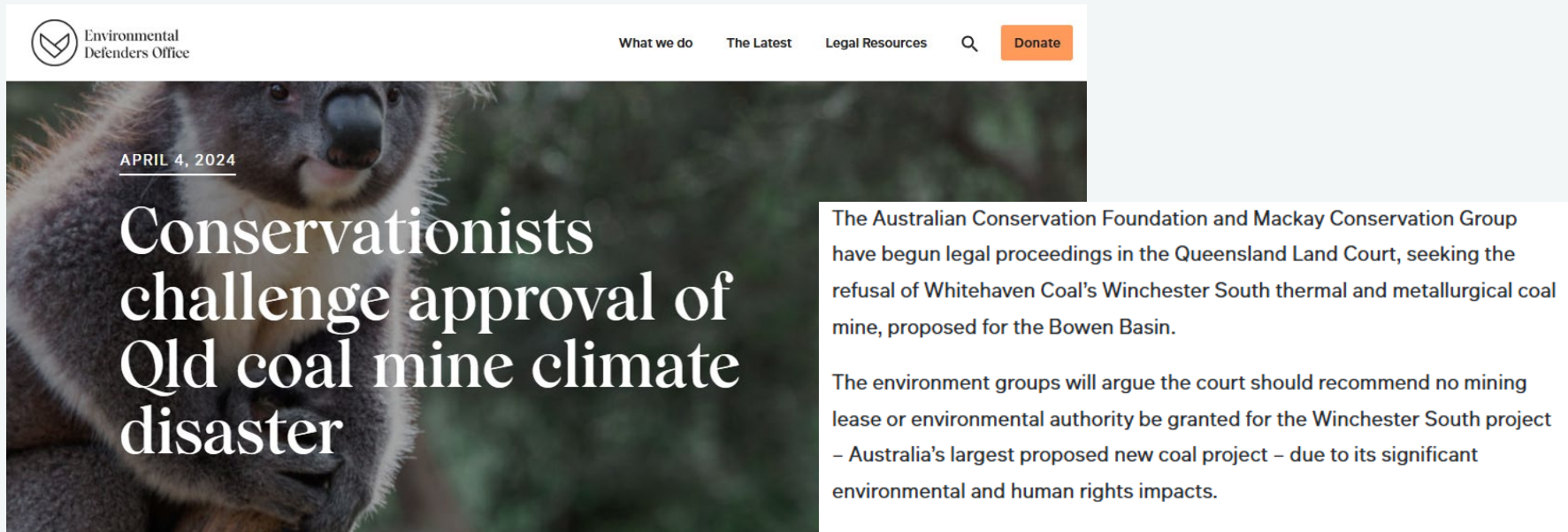


# Findings on Rights of First Nations Peoples:

*Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6) [2022] QLC 21 at 1568*

The First Nations right is about the survival of culture. The Torres Strait Island peoples face an existential risk from sea level rise. Already First Nations peoples in the north of Australia are experiencing the effects of climate change impacts on their ability to enjoy, maintain, control, and develop culture. More severe impacts mean greater interference with cultural rights. Displacement has the potential to destroy culture. Something that cannot be measured in monetary terms, is at odds with the purpose of s 28 and, set against the history of dispossession of First Nations peoples in this country, counts against the Project being approved.

## Latest Developments/what's next?



The screenshot shows the Environmental Defenders Office website. The header includes the logo, navigation links for 'What we do', 'The Latest', 'Legal Resources', a search icon, and a 'Donate' button. The main content area features a large image of a koala with the headline 'Conservationists challenge approval of Qld coal mine climate disaster' and the date 'APRIL 4, 2024'. To the right of the image, there is a text box containing two paragraphs of text.

Environmental Defenders Office

What we do The Latest Legal Resources Q Donate

APRIL 4, 2024

# Conservationists challenge approval of Qld coal mine climate disaster

The Australian Conservation Foundation and Mackay Conservation Group have begun legal proceedings in the Queensland Land Court, seeking the refusal of Whitehaven Coal's Winchester South thermal and metallurgical coal mine, proposed for the Bowen Basin.

The environment groups will argue the court should recommend no mining lease or environmental authority be granted for the Winchester South project – Australia's largest proposed new coal project – due to its significant environmental and human rights impacts.



# Unpacking *Sharma*



**Stephanie Brenker, Vic Bar**

*[293] It is difficult to characterise in a single phrase the devastation that the plausible evidence presented in this proceeding forecasts for the Children. As Australian adults know their country, Australia will be lost and the World as we know it gone as well. The physical environment will be harsher, far more extreme and devastatingly brutal when angry. As for the human experience – quality of life, opportunities to partake in nature’s treasures, the capacity to grow and prosper – all will be greatly diminished. Lives will be cut short. Trauma will be far more common and good health harder to hold and maintain. None of this will be the fault of nature itself. It will largely be inflicted by the inaction of this generation of adults, in what might fairly be described as the greatest inter-generational injustice ever inflicted by one generation of humans upon the next.*

**Sharma v Minister for the Environment  
[2021] FCA 560 per Bromberg J**



## THE COURT DECLARES THAT:

1. The first respondent has a duty to take reasonable care, in the exercise of her powers under s 130 and s 133 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) in respect of referral EPBC No. 2016/7649, to avoid causing personal injury or death to persons who were under 18 years of age and ordinarily resident in Australia at the time of the commencement of this proceeding arising from emissions of carbon dioxide into the Earth's atmosphere.

**Sharma v v Minister for the Environment (No 2)**  
**[2021] FCA 774 per Bromberg J**



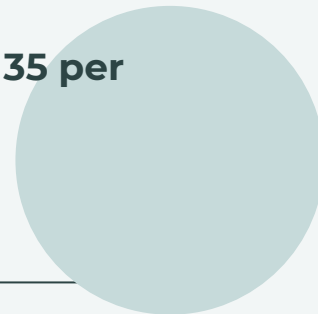
*[15] ... The duty here, however, is framed by reference to contributing to carbon dioxide emissions into the atmosphere by the combustion of the coal mined. That duty throws up for consideration at the point of assessing breach the question of the proper policy response to climate change and considerations unsuitable for resolution by the Judicial branch of government ...*

**Sharma [2022] FCAFC 35 per Allsop CJ**



*[580] ... Assume everything the Minister says about statutory function and purpose is correct. Is it seriously suggested that a duty to take reasonable care to avoid injury, say to those in the physical vicinity of a project, could not sit by side with the function of deciding whether to approve a project for asbestos mining or chemical manufacture? That is not our case of course. But this hypothetical example points out a flaw in the Minister's analysis on this aspect.*

**Sharma [2022] FCAFC 35 per Beach J**



# Grata Fund & *Pabai Pabai*



Courtney Law, Grata Fund



Wadhuam (Maternal Uncle) Pabai Pabai

"We are born to these islands, they are our mothers, our identities, who we are. For thousands of years, our warrior families fought off anyone who tried to take our homelands from us. But now we could lose the fight to climate change."

Wadhuam (Maternal Uncle) Paul Kabai

"Weather patterns have changed, seasons have changed. It's affecting everything – our homes, our gardens, our sacred sites, our reefs. If something doesn't change quick then we'll be environmental refugees on our own islands."



Language  
Kala Lagaw Ya

Kalaw Kawaw Ya dialect

BOIGU  
(Telbot Is.)

TOP WESTERN - Gudaw Maluligal Nation

DAUAN  
(ML Cornwallis Is.)

SAIBAI

Language  
Miriam Mir/Mer

Erub/Ugar dialect

UGAR  
(Stephen Is.)

ERUB  
(Darnley Is.)

EASTERN - Kemer Kemer Meriam Nation

MER  
(Murray Is.)

Mer dialect

CENTRAL - Kulkaigal Nation

IAMA  
(Yam Is.)

PORUMA  
(Coconut Is.)

WARRABER  
(Sue Is.)

Kulkaigau Ya dialect

WESTERN - Maluligal Nation

MABUIAG  
(Jervis Is.)

BADU  
(Mulgrave Is.)

MUA Island

WUG  
(St Pauls Community)

ARKAI  
(Kubin Community)

Mabuyag dialect

INNER - Kaiwalagal Kaurareg Aboriginal Nation

KIRIRRI  
(Hammond Is.)

Waibene  
(Thursday Is.)

Kaurareg dialect



Cape York Peninsula













# Corporate liability & Greenwashing



**Phoebe Roberts, Executive Director  
Pollination Law**



Pollination has world-leading expertise in decarbonisation, strategy design and transition finance, backed by groundbreaking partnerships.

POLLINATION GROUP  
CLIMATE, NATURE AND  
INVESTMENT EXPERTS ACROSS A  
GLOBAL TEAM OF

180+

POLLINATION LAW  
CHAMBERS BAND 1 PRACTICE

25+



COVERAGE ACROSS AMERICAS,  
EMEA, ASIA & OCEANIA

8 offices

6 countries with  
Pollination presence

25+ languages  
spoken

#### JOINT VENTURE



HSBC



HSBC Pollination Climate Asset Management joint venture established to create the world's largest Natural Capital asset manager, with Natural-based Carbon and Natural Capital funds in market and >\$700m AUM.

AUG 2020

#### STRATEGIC PARTNERSHIP



ANZ strategic partnership secured, underpinned by a US\$50m investment for a minority equity stake.

FEB 2022

#### OUR TEAM'S THOUGHT LEADERSHIP – ADVICE THAT SHAPES CORPORATE CLIMATE LAW



At our previous firm, we were the instructing solicitors on three briefs to Noel Hutley SC (2016, 2019 and 2021) known as **'the Hutley Opinions'** (recognised as the seminal authority on directors' duties with regard to climate change). In 2023, Pollination Law commissioned and instructed a subsequent legal opinion on directors' duties with regard to nature.



#### OUR TEAM'S POSITIONS



#### INTERNATIONAL STRATEGIC PARTNERSHIP



Mizuho international strategic partnership secured, underpinned by a US\$20m investment for a minority equity stake.

NOV 2024

‘Greenwashing’ = overstatement of sustainability-related credentials or strategies (or understatement of risks) – of a company or its products/services.

- No separate legal prohibition
- Misleading disclosure laws:
  - Australian Consumer Law, section 18 general prohibition and Part 3.1 specific prohibitions.
  - Corporations Act, sections 1041H and 1041E.
  - Australian Securities and Investments Commission Act, section 12DA.

#### FOUR COMMON CONTEXTS:



Truth to label –  
consumer  
products and  
financial  
services



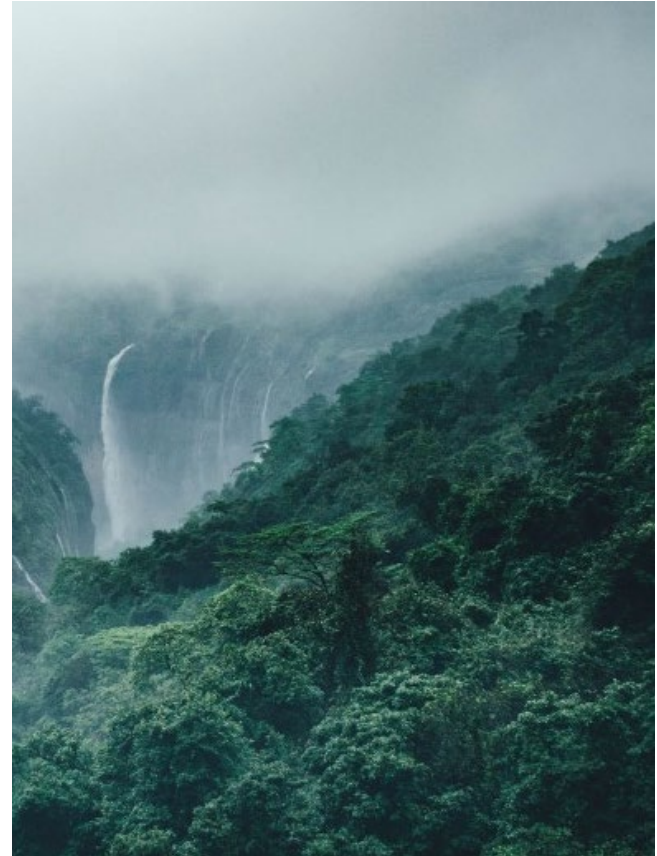
Corporate  
branding



Sustainability  
targets



Financial and  
sustainability  
reporting



# What is the test for misleading or deceptive conduct in Australia?

Question of fact in each case, based on the overall impression conveyed to a reasonable member of the audience

Misleading or deceptive or *likely* to mislead or deceive.

*Real or sensible (not remote) possibility that a reasonable person in the audience would be led into error by the impression conveyed.*

...an 'ordinary and reasonable' person might not know much about sustainability

Intention is irrelevant to breach

*Although can compound liability*

There is no need to prove loss or damage

*Unless compensation is being sought*

**Forward looking statements** (eg, climate and nature targets, transition plans and statements about the financial impact of climate and nature risk)

- Must be making representations based on "reasonable grounds" which are tested at the time the statement is made.
- Onus on the business making the representation to demonstrate reasonable grounds.

Mercer to pay \$11.3m penalty in landmark 'greenwashing' case brought by ASIC

MEDIA RELEASE (24-213MR)

**ASIC's Vanguard greenwashing action results in record \$12.9 million penalty**

## REGULATORY ENFORCEMENT

- Maximum penalty for contravening the specific prohibitions in Part 3.1 of the ACL increased significantly in 2022. For each contravention, a max corporate penalty of *the greater of*:
  - **\$50 million;**
  - **three times the benefit obtained from the contravention;** or
  - **if the Court cannot establish the value of the benefit, 30% of the company's adjusted turnover during the period of the contravention.**

# The risk environment is high

Investors, consumers and lawmakers are demanding that business communicate more about sustainability

- **AASB S2 (mandatory climate reporting)** came into effect on 1 January 2025.
- **Commercial partners are increasingly requesting information** about sustainability to inform their own risk assessments, strategies, reporting and marketing.
- **Investors are seeking information** to manage exposure to climate risk in portfolios.
- **Consumers** are demanding more information to inform their purchasing decisions.

...and in this environment of greater communication, the risks are no longer hypothetical

- **ASIC and ACCC** both focused on greenwashing.
- ASIC has had **three successful Australian court outcomes** and made **82 greenwashing interventions** since 2022.
- **ACCC** has established **Sustainability Taskforce**.
- **Strategic litigants** focus on greenwashing due to ease of establishing liability.
- **47** greenwashing court cases filed globally in 2023.
- **70%** of total global greenwashing cases filed have been successful.

## Gas giant Santos accused of 'greenwashing' clean energy claims, in Federal Court case

— Opinion

### Why we have launched a greenwashing complaint about Qantas

Taking a more scientific approach to carbon targets is a once-in-a-generation opportunity for Qantas to serve its customers and rebuild trust in its brand.

## Court finds Active Super made misleading ESG claims in a greenwashing action brought by ASIC



# Questions?

- Lara Douvartzidis [Lara.Douvartzidis@netzerolawyers.com](mailto:Lara.Douvartzidis@netzerolawyers.com)
- Nicole Sommer [nicole.sommer@edo.org.au](mailto:nicole.sommer@edo.org.au)
- Stephanie Brenker [stephanie.brenker@vicbar.com.au](mailto:stephanie.brenker@vicbar.com.au)
- Courtney Law [courtney@gratafund.org.au](mailto:courtney@gratafund.org.au)
- Phoebe Roberts [phoebe.roberts@pollinationlaw.com](mailto:phoebe.roberts@pollinationlaw.com)

## Climate Litigation Questions? Email us:

[events@cornerstonebarristers.com](mailto:events@cornerstonebarristers.com)