# *Challenges for the Courts in Environmental Litigation – Reflections on the Situation in Australia and PNG*

**Sir Buri Kidu Lecture 2023**

Speech delivered by **the Honourable Chief Justice Debra Mortimer** of the Federal Court of Australia on 24 October 2023 at The University of Papua New Guinea[1]

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Shortly after I was appointed Chief Justice of the Federal Court of Australia, I was most pleased to receive an invitation from Chief Justice Salika to visit **P**apua **N**ew **G**uinea, and then very honoured to be asked to give this lecture. This is my first official overseas visit as Chief Justice and it recognises the strong bonds between the Federal Court and the Courts of PNG. It is fitting that the lecture series is named after the first Chief Justice of PNG.

As Sir Buri Kidu himself observed in 1993, each country develops its own legal systems, no matter what colonial heritage they may have had.[2] That observation is as true for Australia as it is for PNG. But in contemporary times, the domestic legal systems of every country in the world are being compelled to confront the challenges of a damaged environment, and of climate change.

Whereas there may have been times in the past where development and economic imperatives could be carried out in fairly loosely regulated ways, because our natural environment seemed so expansive and endless, so strong and so resilient, as science advances we are now aware that our natural environment is unable to withstand ever increasing human activity and demands for the exploitation of its resources. Science has led us to better understand that we depend on a healthy and balanced natural environment, as much as we depend on the more obvious and tangible material supports of our existence, like our buildings, our transport, and our shops and markets.

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1 I thank my Associate Michael McArdle for his assistance in the preparation and finalisation of this paper.

2 Sir Buri Kidu, 'Foreword' in Michael A Ntumy (ed.), *South Pacific Islands Legal Systems* (University of Hawaii Press, 1993).

But I am not a politician, so this is not a lecture about the correct or desirable policy approach to environmental protection. It is about some of the issues faced by courts when disputes about environmental protection arise.

In reading on this topic, it became apparent that not only do the Courts of PNG and Australia face the same kinds of challenges in environmental cases, but the same kinds of issues arise and some of the approaches taken are also similar. Of particular interest to me were first, the approaches on the issue of standing in environmental cases, and second, the need for appropriate consultation with those who hold customary or traditional rights in land or waters potentially affected by development activity.

There is always a sense of trepidation when one comes to another country and starts talking about cases in the host country. I can recall sometimes listening with a mixture of amusement and mild outrage when foreigners have come to Australia and given such talks. I hope to avoid you being either amused or outraged, and I approach my descriptions of the two PNG cases I've selected with great respect, and in the knowledge that I am unfamiliar with the broader legal, factual and political context. However, each of them assist in my reflections on the role of courts.

**Laloki Bridge case**

The first case concerns the re-development and construction of the Laloki Bridge. I am sure many of you know the bridge, and the area around it. I have only seen photographs. I am conscious the litigation over the works on this bridge is ongoing. For the purposes of my remarks, I want to focus on the 2020 decision of the National Court about the standing of the plaintiff Mr Morua to bring such a claim on his own behalf and on behalf of 79 others.[3] The National Court's decision on standing has not been challenged. I won't spend long on the facts as I am sure they are familiar to many of you. To remind you, 'standing' is the legal description of what kind of interest a plaintiff or applicant must have to bring a legal proceeding.

Mr Morua claimed to be a joint tenant of land affected by the bridge construction works, and claimed he and his other family members lived on that land, had erected buildings and other

[3] ***Morua v China Harbour Engineering Company (PNG) Limited*** [2020] PGNC 16 (Kandakasi DCJ).

structures and used the land for gardens, raising animals and other sustenance activities.[4] The State contracted the re-development of the bridge to a private corporation.[5] The evidence suggested, and the Court found, that the corporation did not apply for any of the applicable environmental permits for the works under the ***Environment Act*** *2000*, but nevertheless commenced and completed the works.[6] The corporation was alleged not to have remediated the land, in part because the absence of a permit did not compel it to do so.

The plaintiffs claimed the corporation used part of their occupied land as a dumping or disposal site for waste materials, established a quarry on the land (to extract gravel, sand and rock for use in the Laloki Bridge works) and caused environmental damage, including releasing dust, chemicals, waste and other pollutants into the air. The State and the corporation applied for the claim to be summarily dismissed and also contended the plaintiffs did not have standing to bring the claim because title to the land was vested in persons other than the plaintiffs, although they did not seem to dispute that the plaintiffs occupied the land.

The National Court rejected the defendants' arguments. I found, with respect, its decision to be of great interest. The concept of "sufficient interest" applied by the National Court has parallels with the approach of Australian Courts to the question of standing in environmental litigation. The quotation from the decision of *Mondiai v Wawoi Guavi Timber Co Ltd* (2007) PGSC 886 that it is not appropriate to "narrow the opportunities for interest groups to come to the court to point out what they consider is going wrong, that is unlawful conduct, in government departments and statutory authorities" and that there "are very few individuals in the groups directly affected by legal actions, particularly concerning customary land, who have the resources to be able to come to the higher courts to get illegal conduct stopped and wrongs righted", are both statements that resonate with Australian authorities.[7]

However, the constitutional overlay of s 57 of the PNG *Constitution*, and reliance on the right to a healthy environment, have no parallels in Australia.[8] That is because Australia has no

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4 See *Morua v CHECL* [2020] PGNC 16 at [4], [12]. See also *Morua Aloysius v China Harbour Engineer Company (PNG) Limited* [2023] PGNC 203 (Linge AJ) at [3].

5 *Morua v CHECL* [2020] PGNC 16 at [4].

6 Ibid at [6].

7 See *Morua v CHECL* [2020] PGNC 16 at [19], quoting *Mondiai v Wawoi Guavi Timber Co Ltd* (2007) PGSC 886 (Kapi CJ, Davani and Lay JJ) at [79].

8 The concept of an own motion power in s 57 to grant relief under the *Constitution* also travels beyond what is likely to be considered in regular legal discourse to be available in courts such as the Federal Court. That said, the Federal Court has very wide statutory powers, which can be exercised of the Court's own motion subject to considerations of procedural fairness and appropriateness, to grant such

rights-based constitutional framework, and at federal level, no overall statutory human rights-based framework.

The National Court's resolution of the standing issue by reference to the distinction between "busy bodies",[9] and persons whose interests are affected, is one which echoes consistently with Australian law.

**Australian approaches to standing**

At the federal level, conduct that is likely to have a significant impact on matters of national environmental significance must be approved under a complex federal regime set out in the ***E**nvironment and **P**rotection and **B**iodiversity **C**onservation **Act*** 1999 (Cth). That legislation itself grants standing to persons who have, in the previous two years, engaged in activities for protection or conservation of, or research into, the environment.[10] Occasionally respondents might test whether the applicant or plaintiff meets this test, but it is a sufficiently wide test that generally standing is not an issue in current federal environmental litigation under the EPBC Act.

At the State level, there are sometimes still standing challenges. In Victoria, where I am from, there has been a lot of litigation about logging activities said to endanger threatened species living in the forests. Australia, as you may know, has a lot of marsupials and birds that depend on the hollows of old growth trees for roosting and nesting, so logging is one of the main threats to their survival. As recently as two years ago, the Victorian government logging agency was still trying to challenge the standing of local environmental groups who sought injunctions to stop logging.[11] The Victorian Court of Appeal applied the "special interest" test to an unincorporated association of local people who had started a group called "Friends of Kinglake Forest". The Court of Appeal noted that most exercises of public power affect a wide range of

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relief as it considers appropriate and is necessary finally to resolve the issues in dispute between the parties. These are, however, statutory and not constitutional powers.

Even more so the proposition that s 57 of the PNG *Constitution* authorises a Court to *initiate* a proceeding to secure the protection of one or more human rights conferred by the PNG *Constitution*, although I note as the National Court did that the Supreme Court of India considers it has such a power to initiate proceedings: see *Morua v CHECL* [2020] PGNC 16 at [54]. I note there is some judicial debate about whether s 57 extends this far. I say no more, except that powers of this kind obviously have significant ramifications in several areas of public law, including environmental law.

9 *Morua v CHECL* [2020] PGNC 16 at [48].

10 EPBC Act s 487.

11 *VicForests v Kinglake Friends of the Forest Inc* [2021] VSCA 195; 66 VR 143.

members of the community,[12] and that governments exercising that power can be held accountable in ways other than through litigation – notably through the parliamentary process and through elections. As the PNG Courts have done, the Victorian Court of Appeal emphasised the need for a relationship between the person and the subject matter of the litigation.[13] The Court of Appeal confirmed, as earlier cases had done, that a special interest is not confined to peak or national environmental bodies, but can extend to local environmental groups.[14] The Court of Appeal looked at the wide range of activities that the Kinglake group had engaged in, such as organising multiple public events and meetings, forest habitat tree surveys, maintaining social media and other media coverage of logging activities in their area, arranging for expert reports about threatened species in the forests and petitioning government to stop logging in the area. The Court of Appeal concluded the group had a special interest because:

> Kinglake FF is an active user of the Central Highlands forests in that it seeks not only to agitate to preserve them, but to foster the understanding and enjoyment of them by its members and by the local and wider community … The forests of the Central Highlands are a locus of scientific investigation and the development of knowledge about the natural world, and for the enjoyment of nature, which is a fundamental human impulse. In this sense, they are a resource for Kinglake FF as much as they are for VicForests. A breach of the regulatory controls designed to balance the competing demands on the forests can therefore be said to involve a disadvantage to Kinglake FF that gives rise to more than a sense of grievance.[15]

Litigation by local community groups to protect forests, rivers and wild areas is clearly on the increase in Australia. These groups fundraise publicly to fund the litigation and sometimes also to put aside money to pay the costs of the other side if they lose. Sometimes these groups ask the Court to impose cost capping orders, which are a newly developing mechanism to limit costs exposure in public interest litigation.

Presently there are an increasing number of cases brought by Indigenous traditional owners contesting developments they say affect their traditional country. These cases are sometimes brought under the EPBC Act, but now Indigenous traditional owners are exploring other avenues for litigation as well, especially in relation to oil and gas exploration, which has a quite

12 Ibid at [29].
13 Ibid at [60].
14 Ibid at [64].
15 Ibid at [75].

distinct regulatory structure in Australia. A recent example is a decision of one of my Federal Court colleagues in Western Australia, about the activities of a large Australian oil and gas company, Woodside Energy, to undertake seismic surveys in waters off the coast of the Pilbara region in Western Australia.[16] A traditional owner of the land and waters in which the seismic surveys were to be conducted sought injunctions to prevent the surveys, resting part of her claim on the cultural significance of the whales, turtles and dugongs in the waters where the surveys were to occur, and of traditional song lines for that area, including a whale Dreaming story. The traditional owner was successful, despite a challenge to her standing by Woodside. Woodside contended the traditional owner had no standing because there was a regulator, and only the regulator could bring proceedings. The Court did not accept that contention and found in favour of the traditional owner's arguments, granting an injunction against the seismic surveys and overturning the regulator's decision that allowed the surveys to proceed, on the basis there had not been proper consultation with traditional owners. I return to the issue of consultation with customary landholders in the next section.

**Customary landowners and consultation**

This category of cases is another with parallels between PNG and Australia.

First, let me go to a decision of the PNG National Court,[17] and then of the Supreme Court on appeal.[18] Again, I do so with some trepidation, knowing the experts on this are in my audience here, rather than me. I will call these the ***Maniwa*** **proceedings**, after the plaintiff in the National Court proceeding. Some academic commentators have described these as landmark decisions, others have queried whether the decisions have been implemented. I leave such comments to others.

Mr Leo Maniwa, and those he represented, are customary owners of an area of land in East Sepik Province, in the north of PNG. They claimed their customary land had been acquired by the State which then granted a Special Agricultural and Business Lease over the land to a corporation that sought to develop a palm oil plantation on the land. The plaintiffs sought orders quashing the decision to grant the lease and declarations with respect to environmental damage,

16 *Cooper v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2023] FCA 1158.

17 *Maniwa v Malijiwi* [2014] PGNC 25 (Gavara-Nanu J).

18 *Lau v Maniwa* [2016] PGSC 47 (Lenalia, Higgins and Kangwia JJ).

and the validity of agreements for the developer to clear forests, harvest logs and plant oil palm on the land. One of the issues in the case was whether the customary landowners had consented to the lease being granted and had been properly and adequately consulted. The defendants relied on a public meeting at a primary school in east Sepik province as the principal evidence of consultation.

Both at first instance and on appeal the Courts held the purported consent was invalid and of no effect.[19] Some of the critical findings were that consent by four individuals did not represent the wishes of the majority of the landowners, that the meeting at the primary school was insufficient consultation, both in terms of the length and content of the meeting and the fact there was only one meeting, as well as issues about whether affected landowners could even understand the language being used.[20]

The National Court held that more in-depth awareness meetings should have been conducted, by Government officers travelling to the lease areas and talking to landowners in their villages, and that the consultation process should have been conducted over a period of time, for example 6 or 12 months.[21] The National Court also referred to s 5 of the *Constitution*, and indicated that the way in which the purported consultation had been undertaken was "not … in the Papua New Guinean way".[22]

The Supreme Court dismissed an appeal by the corporation. I found the Court's reasons, with respect, of great interest. The Court commenced its reasons with the following statement:

> Of fundamental importance is respect for and support of the rights conferred under the customary system of land ownership.[23]

This proposition resonates with the values at least *beginning* to be articulated in Australia about traditional land ownership, and resonates more strongly in circumstances where there is recognition of native title under the *Native Title Act 1993* (Cth). Of course, and if I might diverge to something very topical, in PNG, customary rights are entrenched in your *Constitution*. Australia has not reached that point and after the referendum result a few weeks

19 *Maniwa v Malijiwi* [2014] PGNC 25 at [37]; *Lau v Maniwa* [2016] PGSC 47 at [9], [36].
20 *Maniwa v Malijiwi* [2014] PGNC 25 at [17], [21], [22]; *Lau v Maniwa* [2016] PGSC 47 at [27].
21 *Morua v Malijiwi* [2014] PGNC 25 at [23].
22 Ibid at [24].
23 *Lau v Maniwa* [2016] PGSC 47 at [10].

ago regarding an Aboriginal and Torres Strait Islander Voice, the possibility of meaningful constitutional recognition of any kind for Australia's Indigenous people seems further away than ever.

Returning to the *Maniwa* proceedings, the Supreme Court recognised the "extraordinary" form of the lease granted to the corporation, in terms of the alienation of the plaintiffs' customary land for 99 years without reservation of customary rights.[24] That is, the nature of the property interest granted to the corporation was of significance to the nature and extent of consultation required. That is an approach reflected to some extent in the Australian cases as well. Another feature noted by the Supreme Court which finds parallels in the Australian situation, is the collective nature of customary rights.[25] So it is, generally, with native title in Australia. That has particular effects where there are legal obligations of consultation and consent.

The Supreme Court emphasised the need for those engaging in projects such as this, under regulatory control, to obtain "free and informed consent" from customary landowners, saying the:

> environmental issues must be properly explored and explained.[26]

The Supreme Court also referred to the terms of s 255 of the *Constitution*, which provides that where a law provides for consultation between persons or bodies, or persons and bodies, the consultation must be meaningful and allow for a genuine interchange and consideration of views.[27] If you will permit the impressions of an outsider to be given, this is a strong constitutional provision.

The Supreme Court endorsed the words of the trial judge in the National Court, where his Honour said that where proposed projects were going to interfere with and affect landowners' traditional lifestyle, their customary rights to land, rivers, the sea and forests, there was a need for the project proponents to:

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24 Ibid at [28].
25 Ibid at [18].
26 Ibid at [30].
27 Ibid at [33].

> go to the villages … and talk to the landowners, in their families, clans and tribes, in the languages they could understand. If they did [not] understand English, Pidgin or Motu, then use interpreters to interpret things in their own languages.[28]

This approach resonates with the approach taken by a Full Court of the Federal Court, of which I was a member, in a decision handed down last year about proposed gas exploration projects in the Timor Sea, in and adjacent to the sea country of the people of the Tiwi Islands.[29]

Santos sought to conduct exploratory drilling, in a huge offshore gas project in the Timor Sea north of the Tiwi Islands. The Australian regulatory agency responsible for assessing and permitting oil and gas exploration, the National Offshore Petroleum Safety and Environmental Management Authority, had granted Santos a permit. To grant a permit, the regulator had to be reasonably satisfied that Santos had demonstrated the consultation required under the regulatory scheme had occurred. The regulator had to be satisfied of a number of other environmental matters, including that if the project went ahead the environmental risks and impacts had been demonstrated to reduce to as low as reasonably practicable and were at an "acceptable level".[30]

Santos had to consult with *persons whose interests or activities might be affected by what it proposed to do*. It had consulted with the Tiwi Land Council, but not with individual Tiwi Islander traditional owners, nor with them collectively. Santos and the regulator said under the legislation what had been done was enough. The Full Court held that there was no real doubt that the material given to the regulator by Santos acknowledged the traditional connection of Tiwi Islanders to at least part of the sea in the drilling area and to its marine resources.[31] There was also no real doubt that this material also acknowledged the potential environmental risks to, and impacts on, marine resources closer to the Tiwi Islands, and recognised those resources were integral to Tiwi Islanders' traditional culture and customs.

The Full Court found Santos was obliged to consult the Tiwi Islanders as a group, given the traditional ownership they held was held collectively. Despite the arguments of the regulator and Santos, the Court found this obligation was not an onerous one. We described consultation

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28 Ibid at [31], quoting *Maniwa v Malijiwi* [2014] PGNC 25 at [24]. Amendment to text in original.

29 See ***Santos*** *NA Barossa Pty Ltd* ***v Tipakalippa*** [2022] FCAFC 193; 296 FCR 124.

30 Ibid at [12], citing *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) at reg 10A.

31 *Santos v Tipakalippa* [2022] FCAFC 193; 296 FCR 124 at [42].

as a "real world" activity, with specific purposes.[32] Here, those purposes were not so much to obtain free and informed consent because, unlike the *Maniwa* proceedings, the Tiwi Islanders' consent was not a precondition to the permit being granted. Here, the purpose of consultation was so that the proponent of the project could properly appreciate the environmental impacts and risks of what they were proposing to do and communicate those to the regulator, as they were obliged to do, so the regulator could assess whether the project should go ahead. Contrary to the submissions of the regulator and Santos, the Full Court found there was generally no difficulty identifying a group of landholding traditional owners in contemporary Australia, and no difficulty in identifying who should be consulted, especially since the applicant and his group lived on the Tiwi Islands, which are neither large nor highly populated. While there are Tiwi Islanders with traditional ownership rights who live in other parts of Australia, the Court found there were well-established methods of communications through regional and local Indigenous organisations, with all Indigenous groups having an intramural structure generally based around elders and family groups.[33]

The Full Court's decision has resulted in the regulator promulgating new guidelines for oil and gas proponents who need to consult with Indigenous traditional owners or native title holders.[34] That is an example of a concrete wider reform coming out of a court decision, which is a rare occurrence.

**Third category: climate change cases**

Time does not permit me to elaborate on this category of cases, but no presentation about environmental litigation in 2023 can be complete without reference to the growing number of climate change cases. From what I have been able to find, how Courts can consider government approaches to climate change in environmental cases that come before the Courts is a developing field in PNG as it is in Australia.

I refer to one case here in PNG, and to three cases in Australia.

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32 Ibid at [89].

33 Ibid at [92].

34 NOPSEMA, 'Consultation in the Course of Preparing an Environment Plan' (Guideline, Document No N-04750-GL2086 A900179, 12 May 2023) available at <https://www.nopsema.gov.au/blogs/consultation-course-preparing-environment-plan-guideline-published>.

The PNG case concerned a proposed copper mine, about 64 km southwest of Lae, which had been through an environmental assessment process under the Environment Act, and an environmental permit had been approved, clearing the way for the mine to go ahead.[35] The local government in the area of the proposed mine, the Morobe Provincial government on its own behalf and on behalf of the people of Morobe challenged the approval of the environmental permit on judicial review. There were many grounds, including reliance on the consultation requirement in s 255 of the *Constitution*. The case is ongoing, and the reported decision I have read concerned whether a stay on the permit should be granted. In the course of granting a stay on the permit, the Court referred to the objects of the Environment Act and the matters of national importance that it lists. These are somewhat similar to the matters of national environmental significance in Australia's EPBC Act.[36] The Court referred in its reasoning to threats posed by climate change and the need to take mitigation and adaptation measures "in earnest".[37] The Court explained why, in light of the international developments around climate change, it was necessary to take a purposive approach consistent with these developments to the objects of the Environment Act. While this was not a judicial review that involved the risks from climate change as a ground of review, it was notable to see these matters referred to. In their respective spheres, Courts cannot ignore the phenomenon of climate change any more than governments can.

In Australia, there have been several large pieces of litigation seeking to develop the law in relation to how governments must take into account the risks and likely consequences of climate change, and act to protect the community from them. Several have been in the Federal Court. I mention three.

The first was a claim under the EPBC Act, which I have mentioned is Australia's federal environmental regulation legislation, and it concerned a request to expand an existing approval granted by the federal Minister for a coal mine in northern New South Wales.[38] There was no dispute that expanding the existing approval would have greenhouse gas emission consequences. A group of children brought a proceeding on their own behalf and on behalf of other children in Australia. They sought a declaration that a duty of care was owed to them by

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35 ***Saonu v Mori*** [2021] PGNC 384 at [10].

36 See EPBC Act at Pt C, Div 1.

37 *Saonu v Mori* at [69].

38 See *Sharma v Minister for the Environment* [2021] FCA 560; *Minister for the Environment v Sharma* [2022] FCAFC 35 (***Sharma Full Court***).

the Minister to exercise her powers under the EPBC Act with reasonable care so as not to cause them harm. They claimed the harm was personal injury and economic and property loss, arising from an increase in global temperatures that has not been sufficiently controlled by humans, and which will in the foreseeable future become uncontrollable leading to a world in which global surface temperatures will have increased so much that the world in which the children must live will be irrevocably altered for the worse, causing catastrophic sea level rise and subsequent declines in fisheries, increase in invasive species, increased extinctions, reduction in food harvests, longer and more intense fire seasons, increased heavy and damaging rainfall and floods, and many more enumerated harms.[39] Although the Minister did not challenge the scientific evidence, the Minister strongly contested the existence of the duty of care proposed. At trial the children succeeded.[40] On appeal, they lost and the Full Court of our court found no duty of care was owed.[41] It is not possible to do justice to the Court's reasoning in the time I have, but in substance the reasoning proceeded from a view that this was a kind of duty of care that, for policy reasons, should be found *not* to exist. That is because it would involve the Court, at the breach stage, in examining the merits of the policy settings of the government on climate change, which was not an appropriate function for a court.[42] Some of the judges described the central problem with the argument as being that the duty of care was too indeterminate, and the class of people to whom it was owed was not ascertainable, questioning why the duty would only be owed to children, for example, or why it would only be owed to living people and not future generations.[43] The Court also pointed to difficulties in proving causation because of the difficulties in establishing what proportion of increases in emissions could be attributed to the coal mine. This was an ambitious case – it did not succeed, but I am sure it will not be the last of this kind.

Currently before the Federal Court is a differently framed case, brought by two Torres Strait Island men from the islands of Sabai and Boigu, just to south of PNG.[44] In that case, the claim focuses on a narrower duty of care being owed by the Australian Commonwealth to Torres Strait Islanders, to take reasonable care to adopt and apply best available science to avoid the effects of climate change on their home islands, especially sea level rise, which has, they claim,

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39 See *Sharma v Minister for the Environment* [2021] FCA 560 at [10]-[11].
40 Ibid.
41 *Sharma Full Court* [2022] FCAFC 35.
42 Ibid at [7] (Allsop CJ).
43 See Ibid at [742]-[747] (Beach J).
44 Proceeding VID 622 of 2021 (*Pabai & Anor v Commonwealth of Australia*).

a direct and foreseeable impact on their home islands, their sea country, their lives, their connection to their country and the maintenance and practice of their culture. There are also challenges to what is said to be government failures to provide adequate physical protection from sea level rise, by building adequate sea walls and the like. That proceeding is still in the trial phase.

The third case I want to briefly mention is an appeal involving a group of native title claimants, the Gomeroi People, and a proposed gas extraction project on their country in New South Wales.[45] The project had already received development approval under the New South Wales State government processes. Under Australia's native title legislation, the Gomeroi People have a right to negotiate with mining companies such as the one proposing this gas extraction project, to try to agree on a settlement for the use of their country and the potential effects on their native title rights from such a project. They do not have a right of veto, but a federal tribunal, called the National Native Title Tribunal, can in certain circumstances refuse approval for a project like this if, amongst other matters, it is satisfied that it is not in the public interest that the project should proceed. The Gomeroi People contended that because of the adverse effects emissions from the gas project would have, and their contribution to worsening climate change outcomes, including the effect on the ability of the Gomeroi People to protect their country and to practice and preserve their cultural practices on their country, the National Native Title Tribunal should not have approved the gas project. The Tribunal did not accept this argument,[46] and the Gomeroi People have appealed to our Court. We have heard argument on the appeal and a decision is reserved.

So from the brief descriptions of these three cases, you can see the potential for the Courts to become deeply involved in the contended effects of climate change on the way that governments make decisions about the environment.

**Conclusion**

It seems inevitable to me that Courts in all countries will become more closely involved in reviewing and pronouncing upon the legality of government and private action which is claimed to have adverse environmental effects. There is now no real debate that the natural

45 Proceeding QUD 13 of 2023 (*Gomeroi People v Santos NSW Pty Ltd & Ors*).
46 *Santos NSW Pty Ltd v Gomeroi People* [2022] NNTTA 74.

environment is under significant threat. The interests of customary and traditional landholders in preserving and protecting their country and their culture, perhaps pushed aside in the past, are now being better recognised. Reconciling protection of the natural environment with economic and development goals is a matter for government, but the role of the Courts in ensuring that government, and private corporations and individuals, comply with the protections that have been imposed by the law will take the Courts, I am sure, into new and somewhat controversial territory.