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# Climate Litigation Risk

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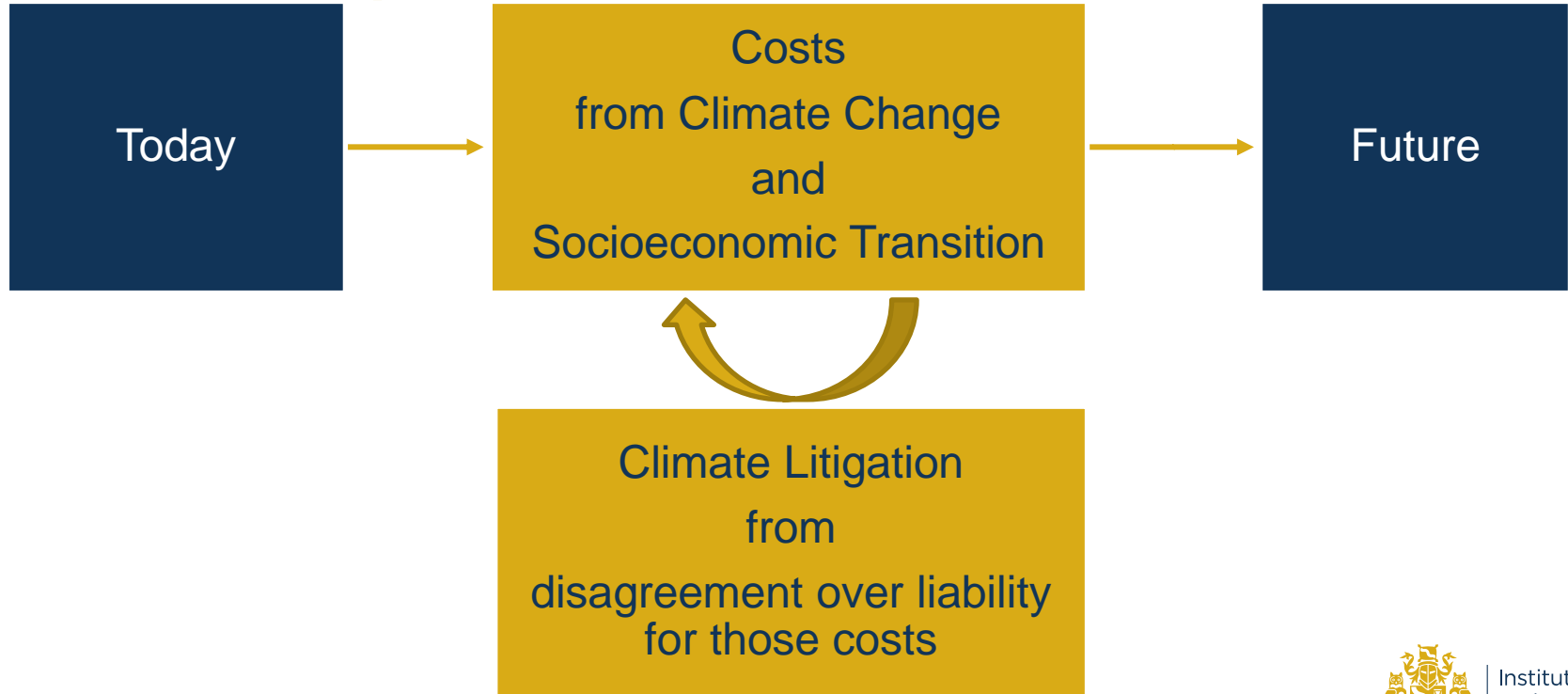


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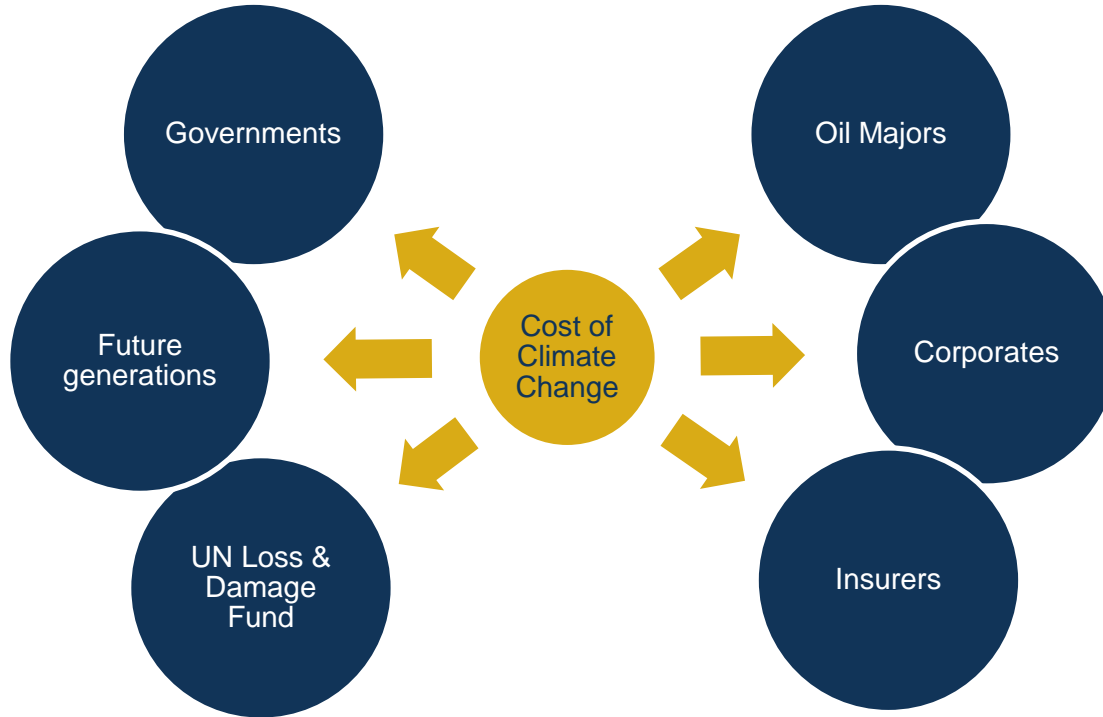
# Introduction

25 April 2023

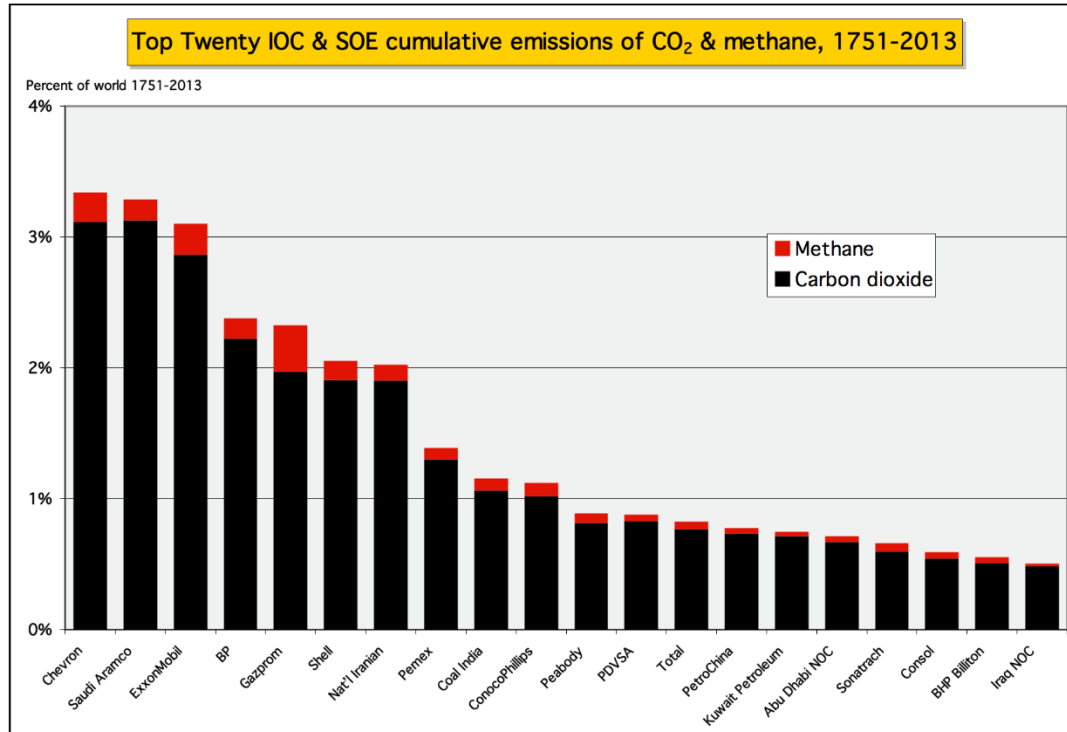
# Defining the problem



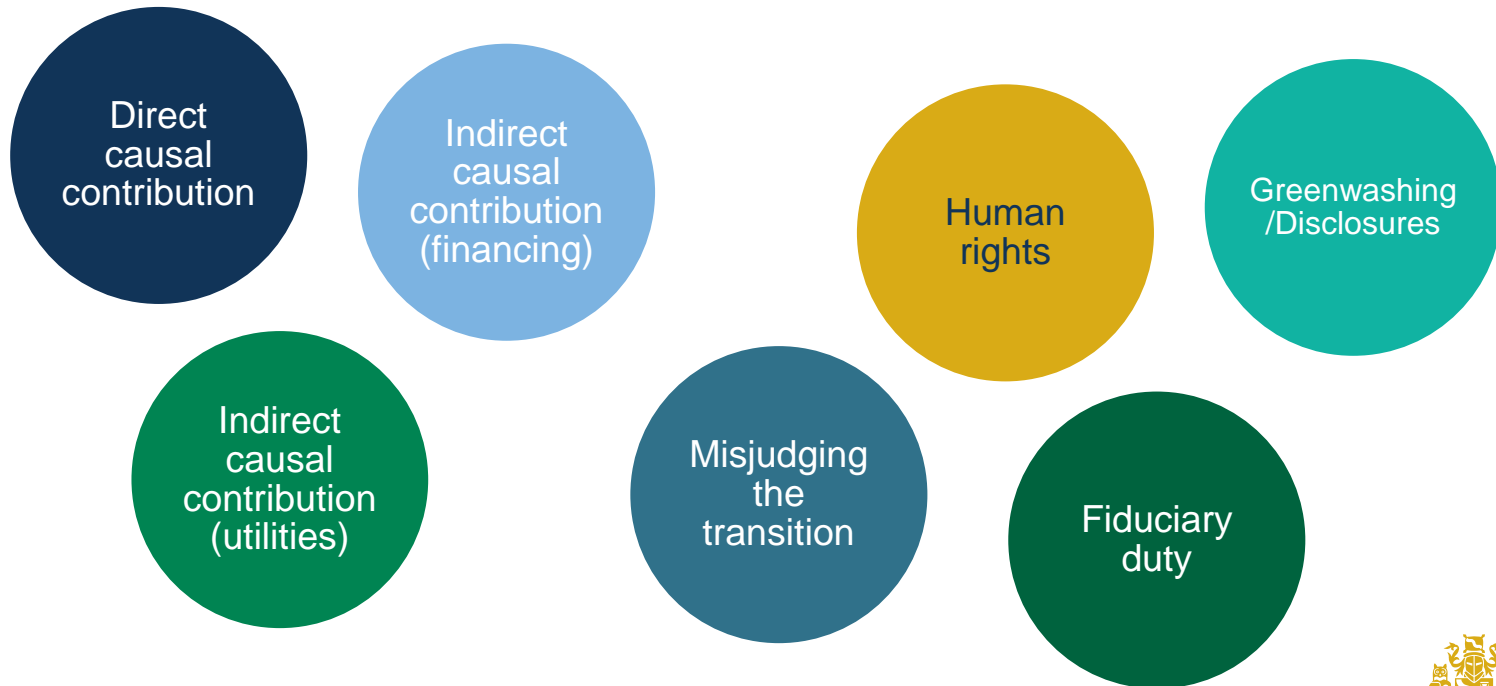
# Candidates to foot the bill



# “Carbon Majors” – main contributors to CO<sub>2</sub> and methane emissions since the industrial revolution



# Types of Climate Litigation



## Example cases against corporates (1 of 2)

Name	Jurisdiction	Remedy sought	Type of case	Status (Dec 22)
Milieudefensie v Royal Dutch Shell	Netherlands	Non-monetary; order that Shell reduce its GHG emissions	Direct causal contribution/ Human Rights	On appeal (initially successful)
City & County of Honolulu v. Sunoco LP	Hawaii, US	Monetary damages	Direct causal contribution/ Greenwashing	Initial stages
Ramirez v Exxon Mobil Corp	Texas, US	Monetary (damages and legal fees) and injunctive relief	Greenwashing	Seeking class action certification
Lliuya v RWE	Germany	Monetary: 0.47% of cost of protecting Huarez from flood	Direct causal contribution (extra-territorial)	Ongoing
Notre Affaire à Tous et al. v Total	France	Non-monetary; order that Total issue new corporate strategy	Duty of vigilance (French Law)	Initial stages
Trustee of PG&E Fire Victim Trust v Lewis Chew et al. (USA)	California, US	Monetary damages	Fiduciary duty / accountability of utilities company	Settled for \$117 million





## Example cases against corporates (2 of 2)

Name	Jurisdiction	Remedy sought	Type of case	Status (Dec 22)
Australian Conservation Foundation v Woodside Energy	Australia	Non-monetary; injunctive relief	Application of environmental legislation	Initial stages
ClientEarth v Shell	UK	A stronger climate plan	Fiduciary duty (of directors)	Initial stages
ClientEarth v KLM	Netherlands	An order that KLM stop advertising misleading claims	Greenwashing (by an airline)	Initial stages
Australasian Centre for Corporate Responsibility v Santos	Australia	Monetary (legal costs) and order that Santos cease misleading claims and issue corrective statements	Greenwashing (Disclosure-based claims)	Initial stages
Abrahams v Commonwealth Bank of Australia	Australia	An order that Bank makes certain documents available for inspection	Disclosure iro environmental policies	Disclosure order granted (rights reserved iro further requests)



# Timelines

## Litigation

Cases may take years to conclude but the law will likely adapt before the full extent of climate change is felt

## Disclosure rules

UK: Climate-related financial disclosures became mandatory for Britain's largest companies in April 2022

<https://www.gov.uk/government/news/uk-to-enshrine-mandatory-climate-disclosures-for-largest-companies-in-law>

EU: the Corporate Sustainability Reporting Directive came into force in January 2023

[https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting\\_en#:~:text=EU%20law%20requires%20all%20large,on%20people%20and%20the%20environment](https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en#:~:text=EU%20law%20requires%20all%20large,on%20people%20and%20the%20environment)

US: climate-related disclosure rules expected to be introduced this year

<https://www.reuters.com/legal/legalindustry/upcoming-sec-climate-disclosure-rules-bring-urgency-esg-data-strategy-planning-2023-01-30/>

**Annual COP summits** (and other catalysts of government action) may change the landscape

**Advances in attribution science** may accelerate the settlement of cases



# Classes of business impacted

Directors &  
Officers

Professional  
Indemnity

General Liability



# Examples of policy exclusions

LMA5570

**Pollution** (only losses from sudden and unintended pollution covered)



# Secondary litigation (of policy wordings)

As insured corporates seek to recover their losses arising from climate litigation, satellite cases arise to determine the application of policy wordings.

Recent or ongoing examples:

**Steadfast Insurance v AES** - defence costs not insured where there has been no “accident”

**Everest Premier Insurance v Gulf Oil** – insurer argued that defence costs not insured where there has been no “occurrence” but the insurer has withdrawn its case

**Aloha Petroleum v National Union Fire Insurance (AIG)** – insurer arguing that emissions are not sudden and unintended and therefore related defence costs are not covered (case ongoing)



# Known circumstances: “I’m worried our model is accurate!”

A Harvard study, published earlier this year, has concluded that projections of global warming made by Exxon Mobil scientists since the 1970s have proved consistent with actual temperature changes over time.

Question: for companies that have forecasted climate change in some way, or even the damage and financial loss arising from it, and the causal link with their own activities, would this count as “known circumstances” that should have been notified to their insurers?



# Assessing exposure – some initial thoughts

**Defence Costs** – if these are covered then they may be covered irrespective of the outcome of litigation, i.e. frequency of loss (through payment of defence costs) is perhaps similar to frequency of litigation, which at a market level is increasing

**Emissions** – the insured's measure and communication of its emissions (scope 1, 2 and 3).

**Complex supply chains** – exposure to emissions claims and human rights claims

**What is the nature of the litigation risk?** – greenwashing claims might be considered an extension of existing exposure, whereas a finding of liability for emissions may be a more significant shift

**What is the probability of success?** – against the insured (or a company similar to it). What other claims might flow from this? Can the likelihood of read-across to other insureds be quantified? Collaborate with Claims and Legal to understand this.

**Strategic (non-monetary) litigation** – while this is unlikely to generate an insured damages payment, it may result in a material change in the nature of the insured company's operations and the litigation itself would be an unwelcome distraction for senior management





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# How will insurers contribute to addressing climate change, and what part will litigation play in this?

25 April 2023



# Contract uncertainty

## **PRA Dear Chief Risk Officer letter, 13 November 2020**

*Covid has demonstrated that even those perils (eg pandemics) that are in many ways well identified can contain a severity potential that is not well understood. These events have the potential to expose insurers to unintended and unmonitored aggregations across several lines of business. They can give rise to disputes over interpretations of contract wordings, and in turn increase uncertainty to both insurer and policyholder.*

## **CBES Results, 24 May 2022**

*The Bank encourages all London Market insurers to develop appropriate data extraction and modelling techniques to enable regular scenario testing that test whether coverage intent (from the perspective of the policyholder and (re)insurer) is aligned to current contract wording.*



# Glossary of some useful terms

Term	Definition	Source
Carbon majors	The title of Richard Heede's 2014 study identifying companies accounting for carbon and methane emissions 1854-2010	<a href="https://link.springer.com/content/pdf/10.1007/s10584-013-0986-y.pdf">https://link.springer.com/content/pdf/10.1007/s10584-013-0986-y.pdf</a>
Dignity rights	Referred to in the context of Human Rights type cases; our inalienable rights as humans	various
Duty of vigilance	2017 French Law (see for example litigation against Total re East African Crude Oil Pipeline) and basis of various ESG-related cases	<a href="https://www.simmons-simmons.com/en/publications/clf2ktvec022iu7100myplatest-news-regarding-the-french-corporate-duty-of-vigilance-law">https://www.simmons-simmons.com/en/publications/clf2ktvec022iu7100myplatest-news-regarding-the-french-corporate-duty-of-vigilance-law</a>
Fiduciary duty	A legally enforceable duty arising from a relationship of trust and confidence; a duty of loyalty; a duty to act in good faith. Arises automatically in some relationships (e.g. solicitor and client) and is codified for Directors and their company in the Companies Act 2006 (UK)	<a href="https://www.lexisnexis.co.uk/legal/guidance/fiduciary-duties">https://www.lexisnexis.co.uk/legal/guidance/fiduciary-duties</a>
LMA5570	London Market Association model climate change exclusion for use on liability policies.	<a href="https://www.lmalloyds.com/LMA/News/LMA_bulletins/A_Bulletins/LMA21-041-DP.aspx">https://www.lmalloyds.com/LMA/News/LMA_bulletins/A_Bulletins/LMA21-041-DP.aspx</a>
Minsky moment (climate)	A sudden sharp downwards adjustment arising from financial markets historical failure to price climate risk adequately	<a href="https://www.bis.org/review/r201019h.pdf">https://www.bis.org/review/r201019h.pdf</a>
Net zero emissions (IPCC)	achieved when anthropogenic emissions of greenhouse gases to the atmosphere are balanced by anthropogenic removals over a specified period	<a href="https://www.ipcc.ch/sr15/chapter/glossary/">https://www.ipcc.ch/sr15/chapter/glossary/</a>
Extra-territorial	In the context of litigation, the effect of the decision of the court extends beyond the geographical boundaries of its jurisdiction. For example, where a claim arises from a subsidiary's activities in one country but is brought in the country of the parent company.	various

# Further reading

Climate Financial Risk Forum Guide 2022, Scenario Analysis Working Group:

Climate Litigation Risk Chapter

December 2022

<https://www.fca.org.uk/publication/corporate/cfrf-guide-2022-scenario-analysis-working-group-climate-litigation-risk-chapter.pdf>

Grantham Institute, Global Trends in Climate Change Litigation, 2022 Snapshot

<https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf>



# Learn more / get involved

Climate Change Reserving Working Party

Liability Exposure Management Working Party



# Questions

# Comments

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