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Trends in Australian Climate Litigation: 2019

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Headline findings

- Strategic climate cases were a small minority of all 2019 climate cases
- The vast majority of climate cases were more general cases, involving applications for projects under planning and environmental law provisions
- There were several notable examples of “Corporate Accountability” cases

Australian Climate Change Litigation

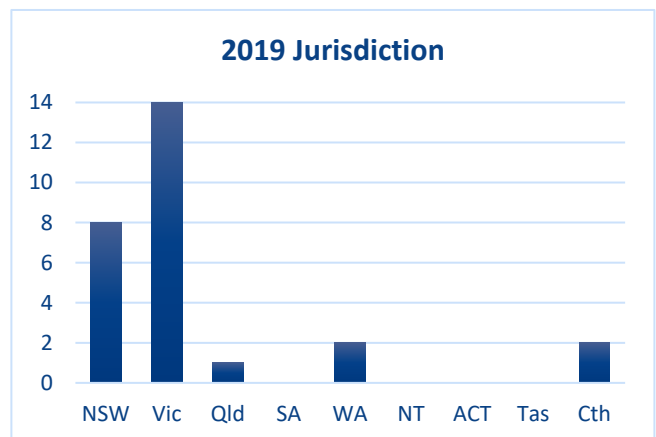
The Australian Climate Change Litigation database tracks cases on issues relating to climate change in Australia, the jurisdiction with the second largest number of climate cases globally. This snapshot provides insights into climate litigation developments over the period January 2019 to December 2019. Information on climate litigation from around the world can be found at the Sabin Center for Climate Law at Columbia University and the LSE Grantham Institute’s Climate Change Laws of the World database. For further information on the Australian cases, visit the database at: <https://law.app.unimelb.edu.au/climate-change/index.php>

1. New developments, 1 January 2019 to 31 December 2019

There were 27 climate change judgments or new proceedings between 1 January 2019 and 31 December 2019.

The State of Victoria had the highest number of cases (14), followed by NSW (8), WA (2), Cth (2) and Qld (1).

There were no new judgments or proceedings in the ACT, NT, SA or Tas.

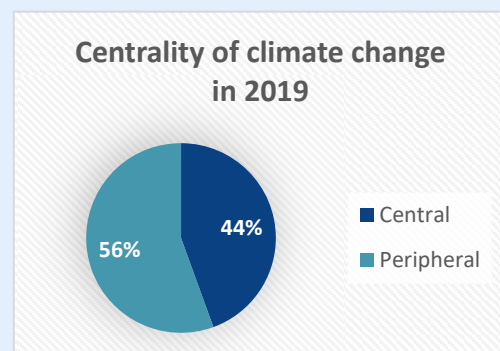


2. Classification of climate litigation

One way to classify climate cases is by litigants’ motivation. Claimants in “strategic cases” are motivated by concerns that go beyond the individual litigant(s) and aim to achieve broader outcomes e.g. advancing climate policies, driving behavioural shifts in key actors or raising awareness (Geneva Association 2021 p.6; Setzer & Higham 2021, pp.12-13). In contrast, more general cases are cases where the issues primarily relate to the parties involved.

The vast majority of climate change judgments handed down in 2019 were in more general cases, with only 2 clear “strategic” examples in the year (*McVeigh v Retail Employees Superannuation Pty Ltd* [2019] FCA 14 and *Australian Coal Alliance Incorporated v Wyong Coal Pty Ltd* [2019] NSWLEC 31).

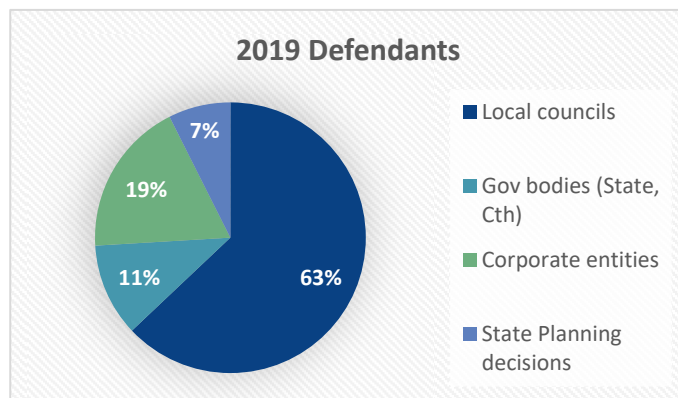
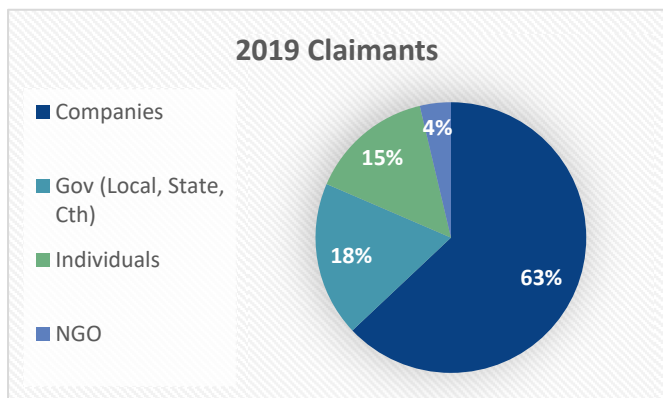
Climate cases can also be classified by the extent to which the case is about climate change: “central”, where climate is a significant issue in the dispute, or “peripheral”. In 2019, climate change was central in 44% (12) and peripheral in 56% (15) of the judgments or new proceedings.



3. Claimants and defendants

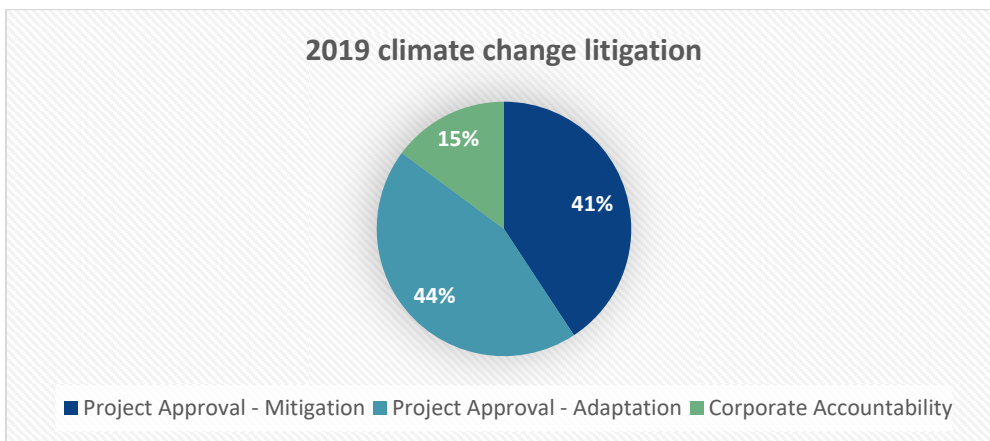
The majority of cases in 2019 were brought by companies seeking planning approval from local councils for projects where climate change was relevant (17 cases). Government bodies were claimants in 5 cases (Local, State, Cth), individuals were claimants in 4 cases (3 of these individuals were also seeking project approval), and an NGO was a claimant in 1 case.

On the other side, the majority of defendants were local councils (the body with the authority to approve proposed projects) (17 cases). Other government bodies were defendants in 3 cases (State, Cth), corporate entities were defendants in 5 cases, and 2 cases involved state planning decisions with no defendants.



4. Case characteristics

Climate change judgments or new proceedings in 2019 were categorised into 3 types: “Project Approval – Mitigation”, “Project Approval – Adaptation” and “Corporate Accountability”. However, the vast majority fell into the two Project Approval categories (85%), involving project applications under planning and environmental law provisions. This explains the distribution of claimants and defendants highlighted above.



“Project Approval – Mitigation” cases relate to efforts to improve the regulation of greenhouse gas emissions and promote clean energy outcomes, and in 2019, the 11 cases related to the following subject matter:

- Solar energy (3 cases) – project approval applications for solar energy facilities.
- Energy efficiency (1 case) – project approval application including a requirement for the building to achieve environmentally sustainable development outcomes.
- Coal mine (1 case) – judicial review of the Wallarah 2 Coal Project.
- Wind farm (1 case) – proposal for a wind energy facility.
- Other relating to landfills (2 cases), major road infrastructure (2 cases), and limestone extraction (1 case).

“Project Approval – Adaptation” cases relate to the process of adjustment to actual or expected climate change and its effects, and in 2019 the 12 cases were about the following subject matter:

- Flood risk (7 cases) – project approval applications where climate-related changes in flood risk were relevant.

- Land valuation (1 case) – Council acquisition of land for public purpose of drainage and public recreation.
- Bushfire risk (1 case) – planning application refused due to increased risk of bushfire because of climate change.
- Energy efficiency (1 case) – planning for sustainable cities was noted as a peripheral issue.
- Sea level rise / coastal hazard (1 case) – coastal foreshore planning in era of sea level rise and other coastal processes.
- Water scarcity (1 case) – concerned the future of a water bottling facility which was extracting groundwater.

Aside from Project Approval cases, “Corporate Accountability” cases involve decisions holding companies responsible for their contribution to climate change. Despite only 4 such judgments being handed down in 2019, each are worth further note:

Corporate Accountability in the spotlight

- Transparency/Disclosure – *McVeigh v Retail Employees Superannuation Pty Ltd* [2019] FCA 14: Mark McVeigh sued his superannuation fund trustee (REST) for alleged breaches of its statutory and equitable duties regarding climate change risks. This decision concerned an interlocutory application for a maximum costs order. The matter subsequently settled out of court in 2020 with REST acknowledging that “Climate change is a material, direct and current financial risk to the superannuation fund across many risk categories, including investment, market, reputational, strategic, governance and third-party risks”.
- Renewable Energy – *Roo Roofing Pty Ltd v Commonwealth* [2019] VSC 331: Businesses alleged that the Commonwealth Government owed a duty of care to avoid economic harm to them when designing, implementing or administering government economic policy. The relevant policy related to the Commonwealth Government’s policy response to the Global Financial Crisis which included the Home Insulation Scheme, a climate change measure. This decision could have potentially had anti-regulatory impacts if the novel duty was upheld and the Government was found to have breached its duty. However, the Court held that the Government did not owe the alleged duty.
- Environmental Harm – *Environment Protection Authority v GrainCorp Operations Limited* [2019] NSWLEC 143: Brought by the NSW environmental regulator, this case concerned the penalty to be imposed for an admitted criminal breach of an environmental protection license condition caused by incorrect calculation of emissions rate of methyl bromide and phosphine during fumigation. The judge recognised in assessing the seriousness of the offence: “Methyl bromide is an odourless, colourless gas which can pose a risk to human health above certain threshold concentrations through acute or chronic exposure. It is also an ozone depleting substance...Phosphine is an odorous air pollutant which can pose a risk to human health above certain threshold concentrations through acute or chronic exposure”.
- Consumer Protection – *Australian Competition and Consumer Commission v Volkswagen Aktiengesellschaft* [2019] FCA 2166: Brought by the Australian competition regulator, the case concerned admitted contraventions of the Australian Consumer Law by Volkswagen AG. Motor vehicles were fitted with a “defeat device” which resulted in affected diesel engines emitting significantly higher levels of nitrogen oxides when driven on the road than when tested in the laboratory (the ‘dieselgate’ scandal). The Court imposed a penalty of \$125 million after finding that the penalty proposed by the parties (\$75 million) was inadequate. This was in light of “the egregious nature of the consumer fraud perpetrated by VWAG, the calculated nature of that fraud, the fact that it was perpetrated by senior management personnel, the fact that it involved a very serious deception of Australian government regulatory authorities, the circumstance that its impact on consumers was very significant, the fact that excessive emissions of NOx are harmful to humans and to the environment, the fact that it has shown no contrition, the fact that the agreed penalty is not supported by any reasoning...or any justification other than it was arrived at as a compromise as part of an overall settlement, the fact that the potential maximum penalties (subject to the application of the course of conduct principle and the totality principle) is at least \$520 million and possibly much more, the fact that VWAG has conducted the litigation by taking every point possibly available to it and the fact that it has only adopted a different stance under the pressure of the imminent commencement of the Stage 2 Hearing. VWAG is more than capable of paying a much larger penalty, given its size and wealth, and has, of course, done exactly that in the US and in Europe”.

References: Geneva Association, *Climate Change Litigation: Insights into the evolving global landscape* (2021). Setzer, J. & Higham, C., *Global trends in climate change litigation: 2021 snapshot* (2021).