



THE UNIVERSITY OF  
MELBOURNE

# Trends in Australian Climate Litigation: 2020

Rebekkah Markey-Towler & Jacqueline Peel, Melbourne Climate Futures, © The authors, February 2021. The views expressed in this paper represent those of the authors and do not necessarily represent those of the host institution.

## In this issue

- (1) New developments
- (2) Classification of climate litigation
- (3) Claimants & defendants
- (4) Case characteristics

## Headline findings

- There was an increase in the number of “strategic” climate cases in 2020
- More cases were examples of “next generation” climate litigation, holding governments and corporations directly accountable for their contribution to climate change
- “First generation” (Project Approval) cases remain the majority of climate cases

## Australian Climate Change Litigation

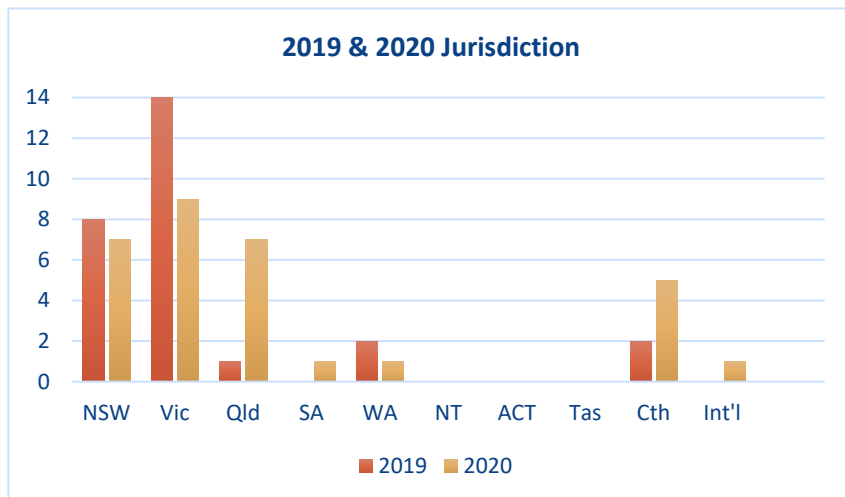
The Australian Climate Change Litigation database tracks cases on issues relating to climate change in Australia, the jurisdiction with the second largest number of climate cases globally. This snapshot provides an insight into climate litigation developments over the period January 2020 to December 2020. 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 2020 to 31 December 2020

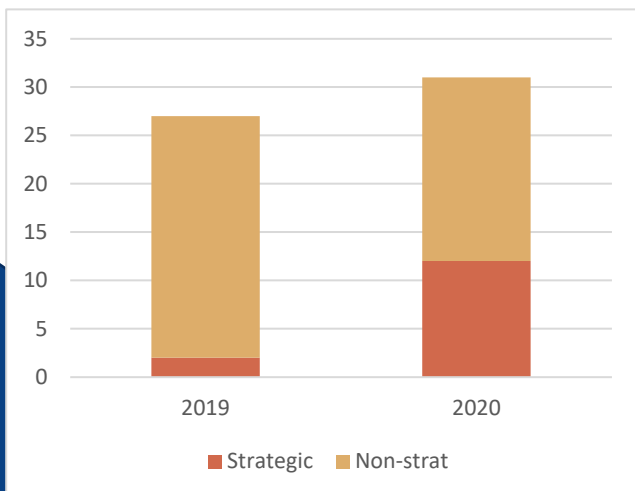
There were 31 climate change judgments or new proceedings filed between 1 January 2020 and 31 December 2020.

The State of Victoria had the highest number (9) followed by Qld (7), NSW (7), Cth (5), WA (1), SA (1) and Int’l (1). There were no new judgments or proceedings in the ACT, NT or Tas.

This is a slight increase in the number from 2019, with more even distribution of judgments/new proceedings across jurisdictions (see graph for comparison).



### 2. Classification of climate litigation

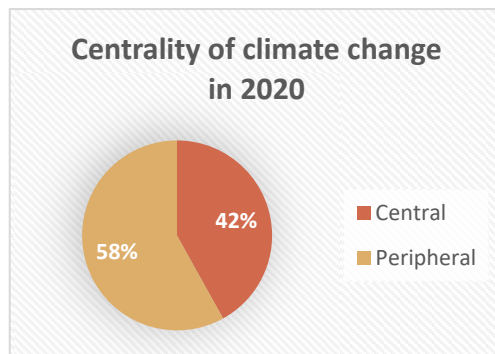
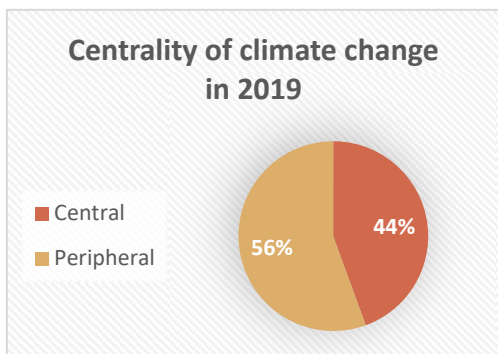


In 2020, there was an increase in the number of strategic climate judgments or new proceedings, with these accounting for 39% of 2020 climate judgments or new proceedings in Australia (12 cases out of 31) compared to 7% in 2019 (2 cases out of 27).<sup>i</sup>

“Strategic cases” can be distinguished from general cases by the 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.

Some of the 2020 strategic cases are summarised in Section 4.

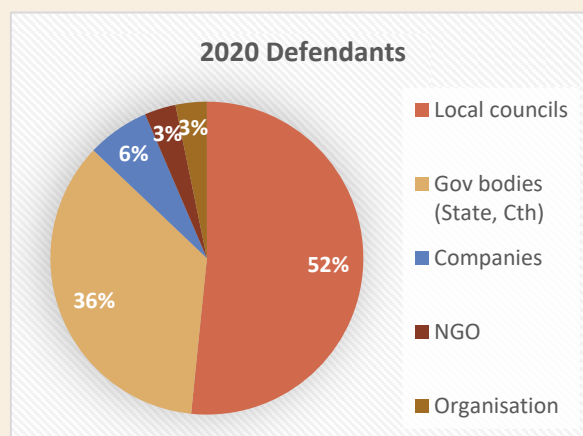
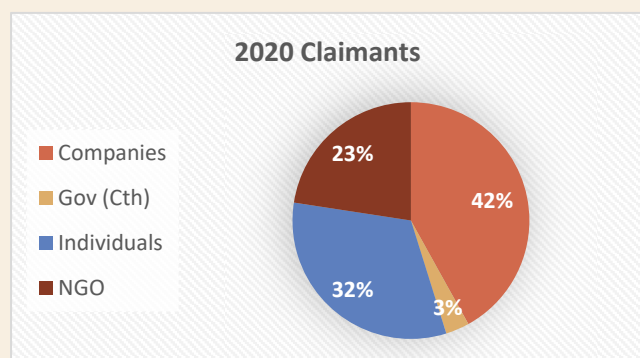
Another way climate cases can be classified is the extent to which they are about climate change: “central”, where climate is a significant issue in the case, or “peripheral”. In 2020, climate change was a central issue in 42% (13) and a peripheral issue in 58% (18) of the judgments or new proceedings. This is fairly comparable to the split between central and peripheral in 2019 climate litigation, with 44% (12) and 56% (15) respectively.



### 3. Claimants and defendants

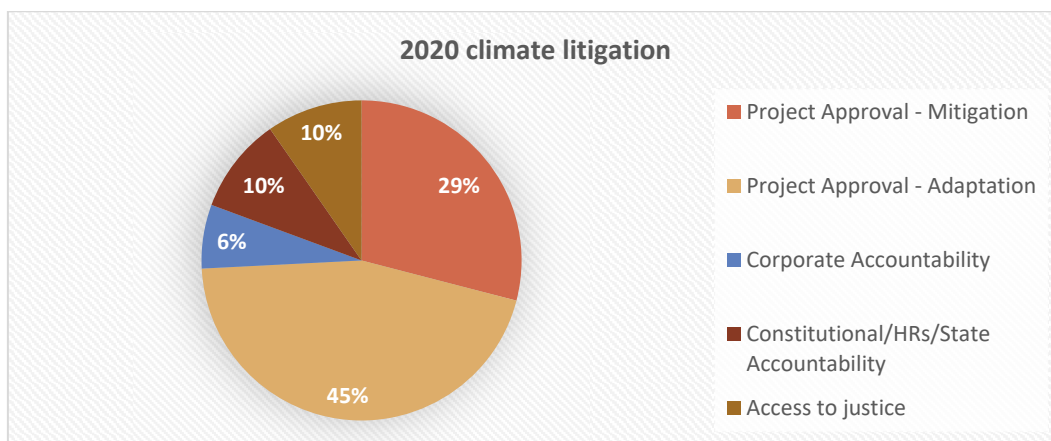
In 2020, claimants were split relatively evenly between companies (42% or 13 cases), individuals (32% or 10 cases), and NGOs (23% or 7 cases), and the Commonwealth was the claimant in the remaining 1 case. However, the majority of cases were still brought by claimants in relation to project approval applications (all of the 13 cases involving companies, and 7 of the 10 individuals).

On the other side, the majority of defendants were local councils (52% or 16 cases), followed by other government bodies (35% or 11 cases). Companies were defendants in 2 cases, an NGO in 1 case and an organisation in 1 case.



### 4. Case characteristics

2020 climate change judgments or new proceedings were categorised into 5 types: ‘Project Approval – Mitigation’, ‘Project Approval – Adaptation’, ‘Corporate Accountability’, ‘Access to justice’, ‘Constitutional and Human Rights / State Accountability’. The distribution of cases across categories is set out in the following chart:



While similar to 2019, the majority of cases fell into the two Project Approval categories (74%), in 2020, there were more judgments or new proceedings in the other categories of Corporate Accountability, State Accountability and Access to Justice. These might be considered part of the “next generation” climate litigation in Australia, going beyond administrative challenges to projects under environmental laws (as first characterised by Peel, Osofsky & Foerster 2017).

## “Next generation” climate judgments or new proceedings

### ‘Corporate Accountability’:

- Environmental Harm – *Minister for the Environment v ACN 089 171 415 Pty Ltd* [2020] FCA 1557: Concerned the appropriate penalty to be imposed for importing HFC-227ea from China to Australia. This was the first case brought under s 13 of the Ozone Protection and Synthetic Greenhouse Gas Management Act.
- Transparency / Disclosure – *Friends of the Earth Australia and others, against Australia and New Zealand Banking Group Limited*: Complaint to the Australian National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises alleging that ANZ had not adhered to OECD Guidelines in its lack of climate-related disclosure and due diligence, inadequate environmental policies and management, and disregard for consumer interests. In an Initial Assessment, the NCP found that the complaint warranted further consideration. It confirmed that: “Issues of climate change, fossil fuels (and associated GHG) are sufficiently material to responsible business conduct understood by the OECD Guidelines”.

### ‘Constitutional and Human Rights / State Accountability’:

- Transparency/Disclosure – *O’Donnell v Commonwealth* (22 July 2020, VID482/2020): A new proceeding was filed alleging that the Federal Government had failed to disclose climate change risks to sovereign bonds.
- Human Rights – *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33: This case involves an objection to a new thermal coal mine on the basis of human rights violations. Here, an interlocutory application to strike out objections relying on human rights legislation or to declare the Court had no jurisdiction was dismissed.
- Duty of care – *Bushfire Survivors for Climate Action Inc v Environment Protection Authority* [2020] NSWLEC 152: Concerned a claim brought alleging the EPA failed to perform its statutory duty in relation to climate change. This interlocutory judgment allowed an application to adduce further expert evidence from a climate scientist.

### ‘Access to Justice’:

- Protest activities – *EH v Queensland Police Services* [2020] QDC 205: A successful appeal against sentence brought by two youthful appellants charged for protesting the expansion of a mine in the Bowen Basin. The judge noted: “There is no dispute that a significant number of people, including the appellants, have sincere and strongly held views that new coal mines ought not be approved by governments because of the impact of burning coal on carbon dioxide emissions and climate change. Those issues are global, rather than merely local. There was no dispute that the motive for the commission of the offences was to seek to persuade government to change its policy on these issues. ... It is also common ground that the appellants, like everyone else, have the right to express their views and to protest against an activity to which they object subject only to such restrictions as are prescribed by law and are necessary in a democratic society for (amongst other legitimate aims) the prevention of disorder or crime or the protection of the rights and freedoms of others. ... My respectful view in this case is that the political motivation of the appellants was relevant to lessen their moral culpability in a way that reduced the need to focus on denunciation and rehabilitation as sentencing considerations.”
- Protest activities – *Rolles v Commissioner of Police* [2020] QDC 331: An appeal against conviction and sentence by a recidivist protestor against climate change. The appeal against conviction was unsuccessful with the court finding that the appellant was unable to rely on, inter-alia, the defence of “extraordinary emergency”. The judge noted: “Whilst some may argue climate change is an extraordinary emergency, I note an emergency for the purposes of s 25 must require immediate action. On the Appellant’s own submission he has been aware of the threat of climate change for more than 30 years”. However, the appeal against sentence was upheld.
- Other – *Wollongong Coal Limited v Construction, Forestry, Maritime, Mining and Energy Union* [2020] FWCFB 3676: This case only had peripheral relevance to climate change. A coal company applied to terminate an Enterprise Agreement with its workers. The Fair Work Commission must terminate the agreement if the FWC is satisfied that it is not contrary to the public interest to do so (climate change was raised as a matter of public interest, amongst other things) and it was appropriate to terminate the agreement in all the circumstances.

Notwithstanding the increase in “next generation” climate cases, “first generation” climate cases remain a key feature of the Australian climate change litigation landscape. Cases falling into the two Project Approval categories made up 74% of all judgments or new proceedings filed in 2020. These were distributed across the following sub-categories as follows:

### **Project Approval cases: “First-generation” climate judgments or new proceedings**

‘Project Approval – Mitigation’ cases relate to efforts to improve the regulation of greenhouse gas emissions and promote clean energy outcomes. In 2020, there were 9 judgments or new proceedings in the Project Approval – Mitigation category relating to:

- Solar energy (3 cases) – project approval applications for solar energy facilities/solar panels.
- Coal mine (2 cases) – two decisions relating to the refusal of the KEPCO Bylong Valley coal project.
- Gas / Oil (2 cases) – challenge to Woodside’s Scarborough gas development and to the Equinor Stromlo-1 project deep water drilling for oil exploration of the Bight.
- Wind farm (1 case) – judicial review of decision to approve wind farm.
- Other (1 case) – development application to remove significant tree.
- Threatened species (1 case) – forestry operations impacting the Greater Glider and Leadbeater’s Possum.

‘Project Approval – Adaptation’ cases relate to the process of adjustment to actual or expected climate change and its effects. In 2020, there were 14 judgments or new proceedings in the Project Approval – Adaptation category relating to:

- Flood risk (7 cases) – project approval applications where climate-related changes in flood risk were relevant.
- Threatened species (3 cases) – project applications where species were threatened by climate change.
- Other (2 cases) – project applications for development/vegetation clearing referring to urban climate impacts.
- Sea level rise (1 case) – refusal of development consent for coastal protection works.
- Water scarcity (1 case) – project proposal that would negatively impact groundwater.

**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); Peel, J., Osofsky, H. & Foerster, A., “Shaping the Next Generation of Climate Litigation in Australia” (2017) 41 MULR 792.

<sup>1</sup> Strategic cases were: *EH v Queensland Police Services* [2020] QDC 205; *Rolles v Commissioner of Police* [2020] QDC 331; *O’Donnell v Commonwealth* (22 July 2020, VID482/2020); *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33; *Bushfire Survivors for Climate Action Inc v Environment Protection Authority* [2020] NSWLEC 152; *Friends of the Earth Complaint against ANZ*; *WOTCH v VicForests (No 2)* [2020] VSC 99; *KEPCO Bylong Australia Pty Ltd v Independent Planning Commission* [2020] NSWLEC 38; *KEPCO Bylong Australia Pty Ltd v Independent Planning Commission (No 2)* [2020] NSWLEC 179; *Friends of Leadbeater’s Possum Inc v VicForests (No 4)* [2020] FCA 704; *Conservation Council of Western Australia v Hatton*; *The Wilderness Society (South Australia) Inc v National Offshore Petroleum Safety and Environmental Management Authority* SAD10/2020. It is arguable whether *EH* and *Rolles* are ‘strategic’ cases. However, the claimants in both cases were motivated by climate concerns.