



THE UNIVERSITY OF
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Trends in Australian Climate Litigation: 2021

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Headline findings

- Climate change issues are a growing presence in Australian courts
- An increasing number of “strategic” climate cases are being brought, as well as cases that are examples of “next generation” climate litigation
- Understanding and assessing the impact of climate change cases in terms of their contribution to positive climate action is an area for future research

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 2021 to December 2021. 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>

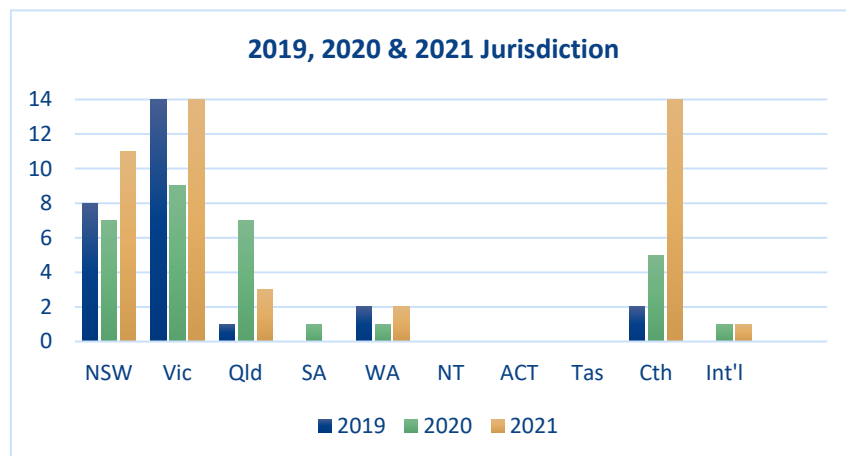
1. New developments, 1 January 2021 to 31 December 2021

There were 46 climate change judgments or new proceedings filed between 1 January 2021 and 31 December 2021, an increase on the number in previous years 2020 (31) and 2019 (27).ⁱ

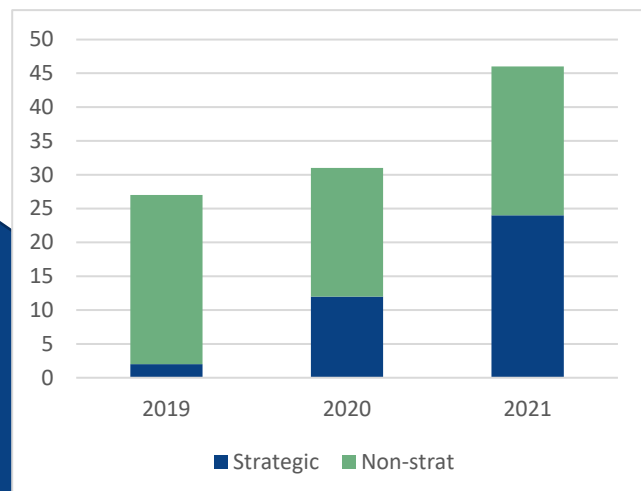
This increase suggests a growing presence of climate change issues in the courts.

The Commonwealth had the highest number (15) followed by Vic (14), NSW (11), Qld (3), WA (2) and Int’l (1). There were no new cases in SA, ACT, NT or Tas.

Over the past three years, Commonwealth jurisdictions have seen the greatest annual change in the number of cases filed/heard (see graph across). This may suggest growing discontent with the lack of Federal action on climate change in Australia (see e.g. Crowley 2021).



2. Classification of climate litigation

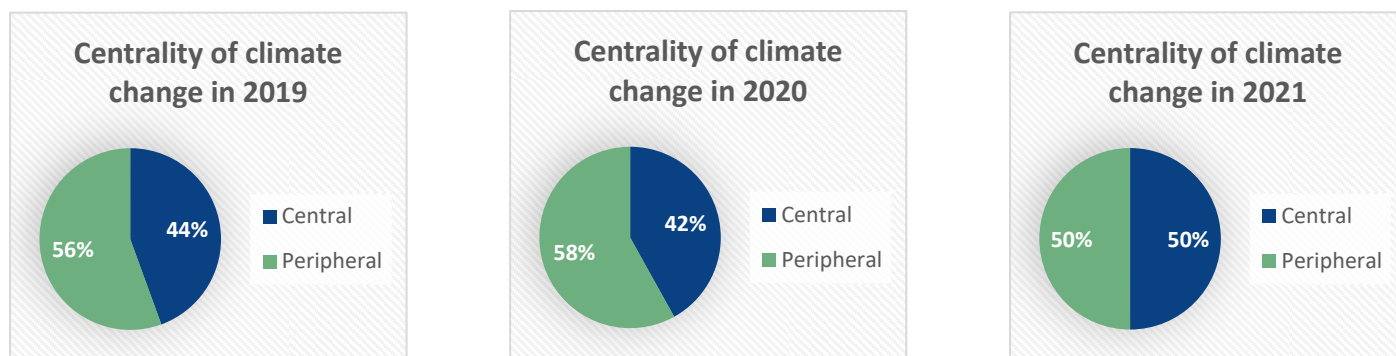


Over the last three years, there has been an increase in the number and overall proportion of strategic climate judgments or new proceedings in Australia.

In “strategic” cases, litigants 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). This can be contrasted with more general cases, where the issues primarily relate to the parties involved.

In 2021, there were 24 judgments in strategic cases or new strategic cases filed, accounting for 52% of all climate cases for the year (compared to 7% and 39% in 2019 and 2020 respectively).ⁱⁱ

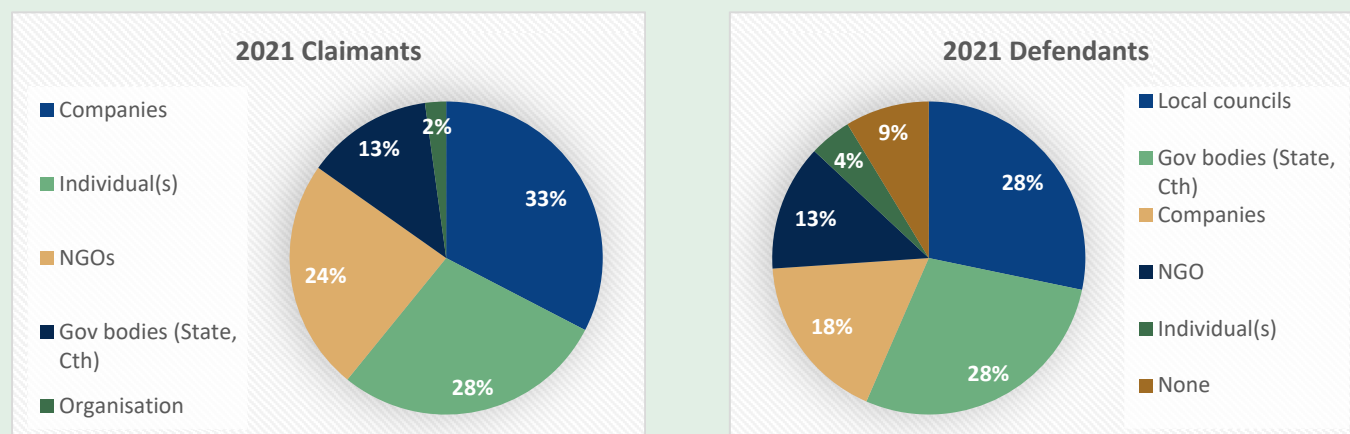
Another way climate cases can be classified is the extent to which they are about climate change: ‘central’, where climate is a significant issue in the case, or ‘peripheral’. In this regard, in 2021, climate change was a central issue in 50% (23) and a peripheral issue in 50% (23) of the judgments or new proceedings. This is fairly comparable to the split in previous years, with a potential trend towards a growing centrality of climate change in judgments or new proceedings.



3. Claimants and defendants

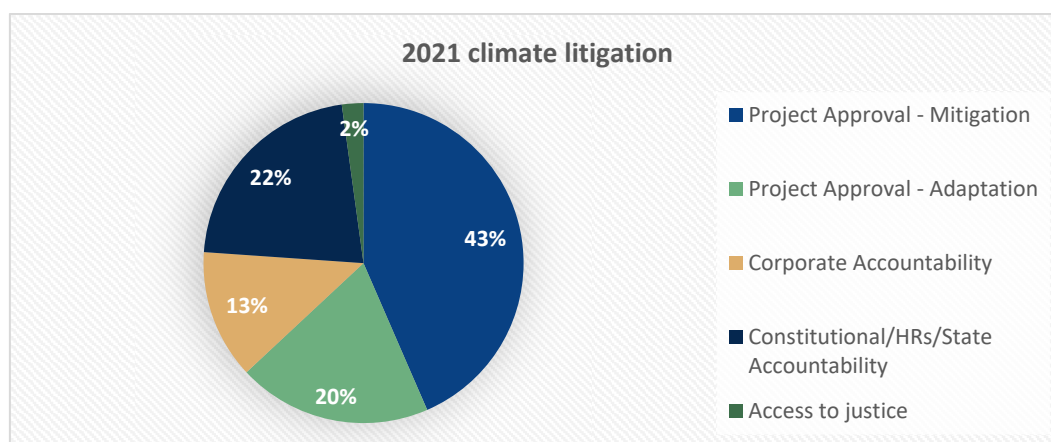
In 2021, claimants were split relatively evenly between companies (33% or 15 cases), individual(s) (28% or 13 cases), and NGOs (24% or 11 cases). The remaining claimants were government (State, Cth) in 6 cases, an NGO in 1 case and an organisation in 1 case.

On the other side, the majority of defendants were local councils (28% or 13 cases) and other government bodies (28% or 13 cases), followed by companies (18% or 8 cases), NGOs (13% or 6 cases), individual(s) (4% or 2 cases) and no defendants in State Planning decisions (9% or 4 cases).



4. Case characteristics

Beyond general characteristics across climate litigation, it is worth digging deeper to look at the different legal arguments and issues being raised in these cases. In the Australian Climate Change Litigation database, climate change judgments or new proceedings are categorised into 5 types: “Project Approval – Mitigation”, “Project Approval – Adaptation”, “Corporate Accountability”, “Access to justice”, “Constitutional and Human Rights / State Accountability”. The 2021 distribution of cases across these categories is set out in the following chart, with the majority falling into the two Project Approval categories (63%):



2021 judgments or new proceedings were further categorised into the following sub-themes:

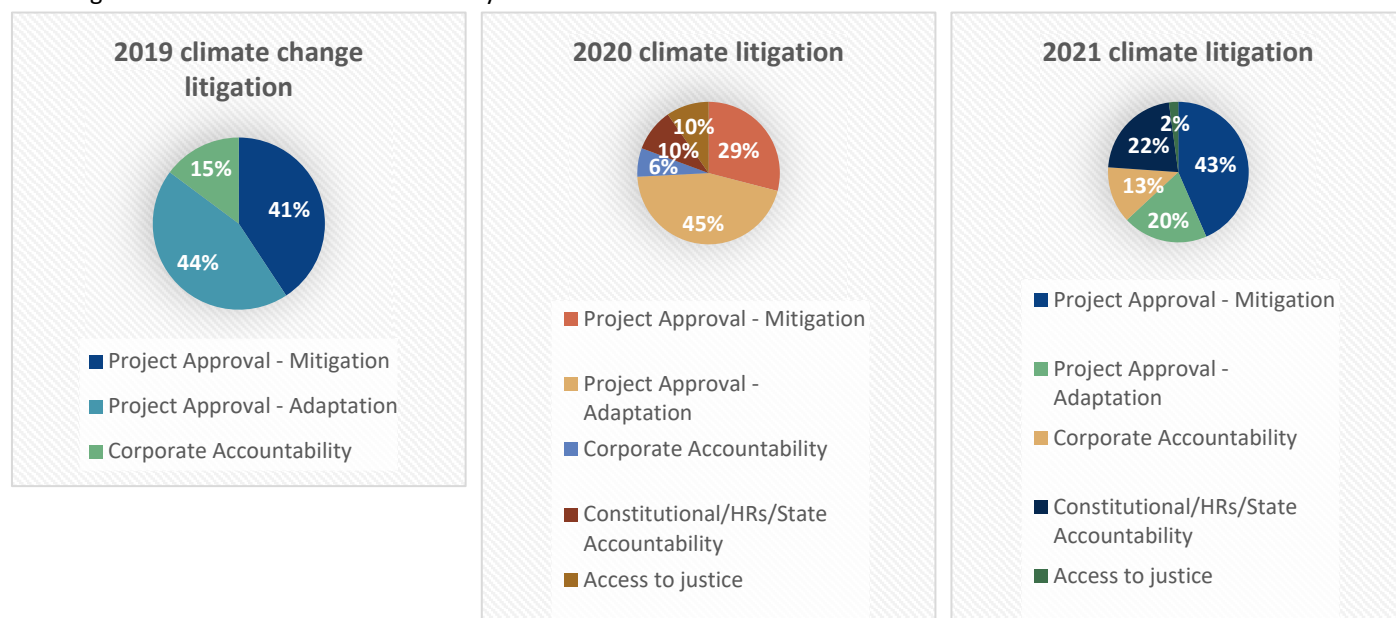
Project Approval – Mitigation (20 cases)	Project Approval – Adaptation (9 cases)	Corp. Acct. (6 cases)	Const. / HRs / State Acct. (10 cases)	Access to justice (1 case)
Oil / Gas – 7 cases	Flood risk – 6 cases	Duty of care – 1 case	Duty of care – 3 cases	Other – 1 case
Coal mine – 4 cases	Other – 3 cases	Consumer protection – 4 cases	Statutory duty – 3 cases	
Energy efficiency – 3 cases		Transparency / Disclosure – 1 case	Transparency / Disclosure – 1 case	
Threatened species – 2 cases			Human rights – 2 cases	
Other – 4 cases			Constitutional – 1 case	

First and next generation climate litigation?

Building on the above information, cases falling into the Project Approval categories might be characterised as examples of “first generation” climate litigation in Australia (as first characterised by Peel, Osofsky & Peel 2017). These Australian “first generation” cases consider climate change impacts largely in the context of administrative challenges to projects under environmental laws. These cases have played, and will continue to play, an important role in shaping climate change jurisprudence in Australia. Indeed, they have resulted in significant outcomes in many cases (Peel, Osofsky & Foester 2017).

In addition, a smaller but growing number of cases can be characterised as examples of “next generation” climate change litigation and fall into other categories of Corporate Accountability, State Accountability and Access to Justice. These cases (both strategic and general) ⁱⁱⁱ raise climate change issues in “novel” contexts beyond administrative law challenges to projects under environmental laws. In particular, they seek to hold governments and corporations directly accountable for the climate change implications of their actions (Peel, Osofsky & Foester 2017). While many of these cases are still pending, some early “wins” have been achieved e.g. *Sharma v Minister for the Environment*, *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority*.

The changing distribution between “first” and “next” generation litigation can be seen in the charts below, with notable growth in next generation cases over the last three years:



Understanding and assessing the impact of climate litigation?

Despite an increasing number of climate change judgments and new proceedings, “far less attention has been directed towards the question of whether the outcomes in these cases actually help to address the problem of climate change in a meaningful way” (Peel & Osofsky 2020). This is an area for further research, including comparing the impact of first and next generation litigation.

Here, a broad approach to understanding and assessing climate litigation’s impact might be adopted that embraces both the direct effects of cases (for example, where cases lead to changes in law/policy, or change defendants’ conduct) and indirect effects of cases (for example, shifting corporate or government attitudes and behaviour, increasing pressure/risk, raising public awareness and inspiring social change) (Peel & Osofsky 2020). The Tables on the following pages illustrate many of the judgments handed down or new proceedings filed in 2021 that could be monitored for their impact over time.

Category	"First Generation" cases: Name & Summary	Case outcome
Project Approval – Mitigation Gas / Oil Strategic litigation	<p><i>Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd; Independent Planning Commission</i></p> <p>Mullaley Gas and Pipeline Accord Inc (MGPA), a community action group, brought judicial review proceedings challenging the decision of the Independent Planning Commission to grant development consent to the Narrabri Gas Project which proposed development of a new coal seam gas field and associated infrastructure in New South Wales.</p> <p>On 22 March 2021, Pain J handed down a decision allowing the MGPA to submit limited additional expert evidence of the climate scientist Dr Sackett in the judicial review proceedings: [2021] NSWLEC 24.</p> <p>On 18 October 2021, Preston CJ dismissed the application for judicial review finding, inter-alia, that the IPC had not asked itself the wrong question or failed to consider a relevant matter of the likely impacts of greenhouse gases (GHG) emissions of project; that the decision was reasonably open and did not involve any misconstruction or misunderstanding of the task required by legislation; and that the question of whether or not consent should be issued subject to conditions ensuring scope 3 emissions were minimised to the greatest extent practicable was one about which reasonable minds might differ (and therefore the decision was not legally unreasonable): [2021] NSWLEC 110.</p> <p>On 16 December 2021, Preston CJ made no order as to costs, even though MGPA was unsuccessful in the proceedings. This was because MGPA had brought the proceedings in the public interest, and there were no countervailing considerations regarding MGPA's conduct of the proceedings.</p>	Lost but with some benefits
Project Approval – Mitigation Gas / Oil Strategic litigation	<p><i>The Environment Centre NT Inc v Minister for Resources and Water (No 2)</i></p> <p>The Environment Centre NT Inc, a community-sector organisation, brought judicial review proceedings challenging a legislative instrument and several decisions arising from the Government's strategic plan titled "Unlocking Beetaloo: The Beetaloo Strategic Basin Plan", aiming to produce additional gas from and accelerate development in the Beetaloo sub-basin in the Northern Territory.</p> <p>On 23 December 2021, the court set aside the Government's decision to enter into contracts with Imperial Oil & Gas to approve approximately \$21 million in funding in respect of three new exploration wells as it was legally unreasonable to enter into such grants while they were the subject of court proceedings. However, despite accepting the science of climate change, the court found that the Minister did not need to consider the risks of climate change when awarding these grants to Imperial to pursue limited exploration in the Beetaloo Basin: [2021] FCA 1635.</p>	Win but not on climate grounds
Project Approval – Mitigation Gas / Oil General	<p><i>Conservation Council of Western Australia v CEO of the Department of Water and Environmental Regulation</i></p> <p>On 30 November 2021, the Conservation Council of WA launched a second Supreme Court challenge relating to the Scarborough gas proposal. The challenge relates to a decision by the WA government to issue a Works Approval for the expansion of the Pluto LNG development on the Burrup Peninsula to allow processing of gas from the Scarborough field.</p>	Case in progress
Project Approval – Mitigation Gas / Oil General	<p><i>Crib Point Project Inquiry (EES)</i></p> <p>On 31 March 2021, an Independent Inquiry, Advisory Committee and Panel (IAC) handed down its findings in relation to a proposal to develop a Gas Import Jetty Facility at Crib Point and 57 kilometre gas transmission pipeline in Victoria. While the IAC concluded that most of the Project's environmental effects could be acceptably managed (including its greenhouse gas emissions and climate change impacts), the Project would have unacceptable effects on the marine environment within an area of high conservation value and should not proceed. If the Project was instead approved, the IAC set out a list of recommendations: [2021] PPV 11.</p>	Win but not on climate grounds
Project Approval – Mitigation Gas / Oil General	<p><i>Golden Beach EES Project Inquiry (EES)</i></p> <p>On 2 March 2021, an Inquiry handed down its findings in relation to a proposal to construct and operate facilities to extract gas from the Golden Beach gas field for provision to the Victorian Transmission System. The Inquiry was troubled, in particular, by the consistency between the Project and Victoria's net zero emissions target by 2050. Nevertheless, the Inquiry concluded that the Project was capable of contributing to a safe, reliable and environmentally acceptable energy supply for Victoria over the short to medium term, with environmental effects capable of being managed subject to the recommendations in the report: [2021] PPV 13.</p>	Lost but with some benefits
Project Approval – Mitigation Coal mine	<p><i>KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc</i></p>	Win (but appeal to High Court pending)

Strategic litigation	<p>The appellant, KEPCO, sought development consent to construct and operate a thermal coal mine in the Bylong Valley, New South Wales to export coal to electricity generators in South Korea. Consent was refused by the Independent Planning Commission, including on climate change grounds. KEPCO applied for judicial review of the decision in the Land and Environment Court, and the Bylong Valley Protection Alliance Inc was the active respondent in the proceedings. The appeal was dismissed.</p> <p>KEPCO again appealed the decision to the New South Wales Court of Appeal arguing there were several errors of law and challenging the Commission's view that there were not adequate conditions minimising scope 3 greenhouse gas emissions, and protecting and replenishing groundwater resources. On 14 September 2021, the Court of Appeal dismissed the application for judicial review: [2021] NSWCA 216.</p> <p>KEPCO have appealed the decision to the High Court of Australia.</p>	
Project Approval – Mitigation Coal mine Strategic litigation	<p><i>Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd</i></p> <p>New Acland Coal Pty Ltd had applied for additional mining leases to expand its open-cut coal mine in Queensland. There were numerous objections to these applications, including from Oakey Coal Action Alliance, including on climate change grounds. Following a complicated procedural history with decisions in the Queensland Land Court, Supreme Court and Court of Appeal, on 3 February 2021, the High Court determined that the matter ought to be referred back to the Land Court for full re-consideration: (2021) 386 ALR 212; [2021] HCA 2.</p> <p>On 17 December 2021, following remittal from the High Court, the Land Court recommended the grant of both mining leases, subject to conditions particularly to monitor the company's compliance with conditions and to minimise air, noise and vibration impacts. The decision did not consider the climate change impacts of the mine: [2021] QLC 44.</p>	Lost with almost no discussion of climate impacts
Project Approval – Mitigation Energy efficiency General	<p><i>Lardieri v Monash CC</i></p> <p>Dwelling development application was refused for reasons including that the proposal had not provided for realistic or reasonable solar access. The Tribunal found that “where effects of climate change are becoming a serious issue, together with the need to encourage energy efficiency, to allow development that is clearly not a form of sustainable development fails to satisfy a key policy under Clause 71.02 of the planning scheme. I am required to determine and balance conflicting objectives in favour of not only net community benefit but also sustainable development for the benefit of present and future generations. I find the proposal does not achieve these aspirations”: [2021] VCAT 1513.</p>	Win in general case
Project Approval – Mitigation Energy efficiency General	<p><i>Tasevski v Mornington Peninsula SC</i></p> <p>Dwelling development application was refused for reasons including that solar access would be limited. The Tribunal found that “where effects of climate change are becoming a serious issue, together with the need to encourage energy efficiency, to allow development that is clearly not a form of sustainable development fails to satisfy a key policy under Clause 71.02 of the Mornington Peninsula Planning Scheme. I am required to determine and balance conflicting objectives in favour of not only net community benefit but also sustainable development for the benefit of present and future generations. I find the proposal does not achieve these aspirations”: [2021] VCAT 1183.</p>	Win in general case

Category	“Next Generation” cases: Name & Summary	Direct Outcome
Corporate Acct. Duty of care General	<p><i>Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 7)</i></p> <p>This case concerns a common law negligence claim brought by seaweed farmers in relation to the death and loss of seaweed crops resulting from an oil spill from an oil well operated by the company. The court was satisfied that the company owed and breached its duty of care, that the oil spill caused harm and the farmers were entitled to damages: [2021] FCA 237.</p>	Win in general case
Corporate Acct. Consumer protection General	<p><i>Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission</i></p> <p>This case concerned civil penalty proceedings for the Dieselgate scandal. Volkswagen had appealed the primary judge's judgment imposing a higher penalty than the agreed pecuniary penalty between the parties. The Full Court of the Federal Court dismissed the appeal: [2021] FCAFC 49.</p>	Win in general case

Corporate Acct. Consumer protection General	<i>Mitsubishi Motors Australia Ltd v Begovic</i> An individual argued that the Fuel Consumption Label attached to the windscreen of his Mitsubishi Triton vehicle misled him as to how much fuel the vehicle would consume. The court held that Mitsubishi had contravened Australian Consumer Law: [2021] VSC 252.	Win in general case
Corporate Acct. Consumer protection Strategic	<i>AGL Energy Limited v Greenpeace Australia Pacific Limited</i> Greenpeace launched a media campaign using AGL's logo (Australia's largest electricity generator), describing the company as the nation's "biggest climate polluter". In this case, AGL largely failed in its attempt to secure declarations of infringement, injunctions to restrain Greenpeace's use of modified logo, and damages including additional damages in respect of infringements: [2021] FCA 625.	Loss in anti-regulatory case
Corporate Acct. Consumer protection Strategic	<i>Australasian Centre for Corporate Responsibility v Santos Ltd</i> A new proceeding filed against gas company Santos over its claims that natural gas is "clean fuel" and that it has a credible pathway to net zero emissions by 2040. It is argued that the claims in the company's 2020 Annual Report constitute misleading or deceptive conduct under corporate law and consumer law: NSD858/2021.	Case in progress
Corporate Acct. Transparency / disclosure Strategic	<i>Abrahams v Commonwealth Bank of Australia</i> Shareholders in the Commonwealth Bank of Australia sought access to internal company documents in the context of the bank's 2019 Environmental and Social Framework and Environmental and Social Policy. Orders were made authorising the plaintiffs to inspect documents, with the matter listed for a further case management hearing in 2022: NSD864/2021.	Case in progress
State Acct. Duty of care Strategic	<i>Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for Environment</i> Finding that the Federal Environment Minister owes Australian children a duty of care to avoid harm when approving or refusing a coal mine under the relevant legislation: [2021] FCA 560. The Federal Environment Minister appealed the first instance decision above. The appeal was heard by the Full Court of the Federal Court in October 2021. The judgment currently reserved.	Win but appeal pending
State Acct. Duty of care Strategic	<i>Pabai v Commonwealth</i> A new proceeding filed by First Nations' leaders from the Torres Strait Islands challenging the Australian government's failure to reduce its greenhouse gas emissions, thereby breaching an alleged duty of care: VID622/2021.	Case in progress
State Acct. Statutory duty Strategic	<i>Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority</i> Finding that the New South Wales Environment Protection Authority had failed to perform its statutory duty to develop environmental quality objectives, guidelines and policies to ensure protection of environment from climate change: [2021] NSWLEC 92.	Win on climate grounds
State Acct. Statutory duty Strategic	<i>Environment Victoria Inc v AGL Loy Yang Pty Ltd</i> A new proceeding filed challenging the Environment Protection Authority's decision about pollution licences for three coal power stations in the Latrobe Valley, arguing that the EPA failed to require best practice management of greenhouse gas emissions, take proper account of the environmental principles in the Environment Protection Act and consider key sections of the Climate Change Act.	Case in progress
State Acct. Statutory duty Strategic	<i>Nature Conservation Council of New South Wales v Minister for Water, Property and Housing</i> A new proceeding challenging a plan for sharing water in the northern Murray-Darling Basin over climate change (the Border Rivers Water Sharing Plan (WSP)), arguing that the NSW Government failed to properly consider future climate change when making the plan: 2021/00282599.	Case in progress
State Acct. Human Rights Strategic	<i>Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 2)</i> Youth complainants argue that granting Waratah Coal Pty Ltd a mining lease and an environmental authority to mine thermal coal in the Galilee Basin in Queensland would be contrary to human rights under Queensland legislation.	Case in progress

	On 8 February 2021, an interlocutory application filed by the coal company seeking further and better particulars from the applicants in relation to their claim challenging a coal mine on human rights grounds, which was largely refused: [2021] QLC 4. The complaint is proceeding.	
State Acct. Human Rights Strategic	<i>Youth complaints filed to UN Special Rapporteurs for Human Rights and Environment, the rights of Indigenous people, and the rights of persons with disabilities</i> Three complaints filed on behalf of five young people living in Australia to UN Special Rapporteurs relating to the ‘Human rights harms of the Australian government’s Nationally Determined Contribution and inaction on climate change’.	Case in progress
State Acct. Human Rights Strategic	<i>Vanderstock v Victoria</i> A new proceeding was filed challenging the constitutional validity of the legislation requiring drivers of electric vehicle drivers to pay an annual charge to the Victorian Government based on the number of kilometres driven in the prior 12 months: Case M61/2021.	Case in progress
State Acct. Transparency / disclosure Strategic	<i>O’Donnell v Commonwealth of Australia</i> The complainants allege that the Federal Government has failed to disclose climate change risks to sovereign bonds. On 8 October 2021, an interlocutory application brought by the Commonwealth to strike out the applicant’s statement of claim, which was allowed in part but refused in relation to the misleading and deceptive conduct claims. A further order sought by the Commonwealth to discontinue the proceeding as a class action was refused: [2021] FCA 1223. The complaint is proceeding.	Case in progress

References: Crowley, K., “Climate wars, carbon taxes and toppled leaders: the 30-year history of Australia’s climate response, in brief”, October 15, 2021, *The Conversation*; 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; Peel, J. & Osofsky, H., “Climate Change Litigation” (2020) 16 Annual Review of Law and Social Science 21.

ⁱ It is noted that the number is inflated, in part, by counting multiple judgments in one case and counting when a new proceeding is filed. While efforts were made to adopt a similar approach for previous years, this is a general caveat to the findings.

ⁱⁱ These strategic cases were as follows: *Abrahams v Commonwealth Bank of Australia* (NSD864/2021); *AGL Energy Limited v Greenpeace Australia Pacific Limited* [2021] FCA 625; *Australasian Centre for Corporate Responsibility v Santos Ltd* (NSD858/2021); *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* [2021] NSWLEC 92; *Conservation Council of Western Australia v CEO of the Department of Water and Environmental Regulation*; *Environment East Gippsland Inc. v VicForests (No 2)* [2021] VSC 869; *Environment Victoria Inc v AGL Loy Yang Pty Ltd* (S ECI 2021 03415); *Five young Australians’ UN human rights complaint*; *KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc* [2021] NSWCA 216; *KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc* (S168/2021); *Minister for the Environment v Sharma* (VID389/2021); *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd*; *Independent Planning Commission* [2021] NSWLEC 24; *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd* [2021] NSWLEC 110; *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd (No 2)* [2021] NSWLEC 147; *Nature Conservation Council of New South Wales v Minister for Water, Property and Housing* (2021/00282599); *New Acland Coal Pty Ltd v Oakey Coal Action Alliance Inc. & Ors (No 2)* [2021] QLC 44; *O’Donnell v Commonwealth of Australia* [2021] FCA 1223; *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 386 ALR 212; [2021] HCA 2; *Pabai v Commonwealth* (VID622/2021); *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for Environment* [2021] FCA 560; *The Environment Centre NT Inc v Minister for Resources and Water (No 2)* [2021] FCA 1635; *Vanderstock v Victoria* (Case M61/2021); *VicForests v Friends of Leadbeater’s Possum Inc* [2021] FCAFC 66; *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 2)* [2021] QLC 4.

ⁱⁱⁱ It is noted that there is overlap between “general/strategic” and “first/next generation” cases. It is also noted that in their original 2017 paper proposing the “first/next generation” characterisation, Peel, Osofsky and Foerster focused on strategic cases. However, there is not complete overlap between the two characterisations. For example, Bylong Valley Protection Alliance Inc case against KEPCO’s Bylong coal mine is a “strategic” case but it is also an example of “first generation” climate litigation. As a further example, the *ACCC v Volkswagen* case is a “general” case (because the ACCC was fulfilling its function as a regulator, rather than being motivated particularly by climate concerns) and an example of “next generation” climate litigation.