British Institute of
International and
Comparative Law

Global Perspectives on Corporate Climate Legal Tactics: Australia National Report

Professor Jacqueline Peel | Rebekkah Markey-Towler | Thea Shields

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British Institute of
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Comparative Law

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Table of Contents

Mission Statement ... 2
Vision ... 2
Executive Summary ... 5
Acknowledgements ... 6
Introduction ... 7
1. Defining corporate climate litigation ... 7
2. Legal interventions beyond the courtroom ... 8
1. Causes of Action ... 10
A. Climate Change Law/Environmental Law Statutory Provisions ... 10
B. Human Rights Law ... 12
C. Tort Law ... 13
D. Company and Financial Laws ... 14
E. Consumer Protection Laws ... 16
F. Fraud Laws ... 19
G. Contractual Obligations ... 19
H. Planning and Permitting Laws ... 20
I. Other Causes of Action ... 23
2. Procedures and Evidence ... 25
A. Actors Involved ... 25
i. Who is bringing climate litigation in Australia against corporations? ... 25
ii. Against whom has such litigation been brought? ... 28
iii. Who are/might be the third-party intervenors? ... 29
iv. Are there others who you could identify in Australia as potential claimants, defendants or third-party intervenors? ... 29
B. Approach of Australian courts to procedural issues in corporate climate litigation ... 30
i. Standing ... 30
ii. Costs ... 31
iii. Justiciability ... 32
iv. Jurisdiction ... 32

v. Group litigation / class actions 32
vi. Apportionment of liability 33
C. Types of Arguments and Defences, and court responses 34
i. First generation corporate climate litigation 35
i. Next generation corporate climate litigation 36
D. Relevant sources of evidence and tests of causation 37
E. Limitation Periods 39
F. Climate Science 39
3. Remedies 42
A. Pecuniary Remedies 42
B. Non-Pecuniary Remedies 42

Revision History

Version 1.1 includes some minor clarifications, and removal of some duplicated text in section 1D.

Executive Summary

This report provides an overview of corporate climate change litigation in Australia focusing on: (a) relevant causes of action for bringing these cases; (b) associated procedural and evidentiary issues; and (c) potential remedies. The key findings are summarised below and in Figure 1.

Corporate climate change litigation for the purposes of this report is defined as court action which raises climate issues brought: (a) against or involving a corporate defendant; and/or (b) utilising 'corporate' causes of action in company, commercial or financial law. We recognise, however, that climate legal disputes involving corporations extend beyond the courtroom to a range of other legal interventions with relevant examples highlighted throughout this report.

Australia has been a test bed for corporate climate change litigation, with a wide range of causes of action embraced in the bringing of these cases. Early litigation ('first-generation' cases) often involved claims under environmental planning and permitting laws challenging government approvals where corporations were involved as a project proponent. More recently, Australia has developed a body of 'next generation' cases that seek to ensure the direct accountability of defendants for their contribution to climate change, to challenge their environmental representations, or to drive corporate energy transition and adaptation. In these next generation cases, causes of action in company and financial law, and consumer law, are particularly coming to the fore. Human rights and causes of action in torts have also featured in Australian climate change litigation but less prominently than in other jurisdictions due to factors such as the lack of a national bill of rights and a generally conservative approach of Australian courts to recognising novel duty of care arguments.

In general, the procedural and evidentiary issues encountered in corporate climate litigation in Australia are similar to those experienced in other climate cases. However, litigants in these cases may face greater hurdles around aspects such as costs, tests of causation and justiciability if only because they are often higher stakes and brought against well-resourced defendants. As scrutiny of the implications of corporate action for climate increases, more complex evidentiary issues are coming to the fore that place new demands on scientific and other expert evidence. Remedies sought in corporate climate litigation cases have tended to be non-pecuniary reflecting the aims of litigants to shape law, policy and corporate behaviour.

Australian plaintiffs continue to innovate in the area of corporate climate change litigation. Disclosure and management of climate risk by financial institutions remains a particular focus, with an emerging trend towards consumer law-based greenwashing claims and the entry of corporate regulators as a prominent new actor bringing such cases.

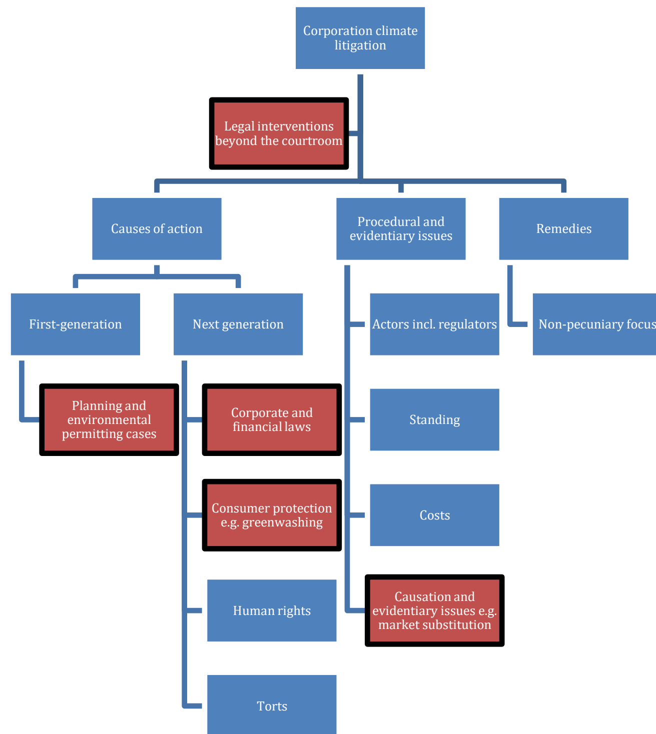

Figure 1: A typology of Australian corporate climate litigation showing 'hotspots' of activity

Acknowledgements

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Introduction

1. Defining corporate climate litigation

Climate change litigation describes actions before courts or other tribunals that raise climate change issues. Some climate change cases have such issues at their core, as for example, when a coal mine is challenged due to the contribution of its emissions to global warming. In other cases, climate change may be one of many issues raised in a dispute (i.e. climate issues are peripheral), for example, a planning case examining the suitability of a proposed development that may be impacted by various environmental factors including those which are climate change-related, such as sea level rise, bushfire risk or flooding.

In this report, our focus is on a subset of climate change litigation (whether core or peripheral cases), namely corporate climate change litigation. While climate change litigation broadly can have numerous indirect effects with implications for companies, corporate climate change litigation is distinguished by: (a) having/involving a corporation as the defendant of the claim; and/or (b) having a cause of action drawn from corporate, commercial, or financial law. A diagram of this distinction between climate litigation and corporate climate litigation is below in Figure 2.

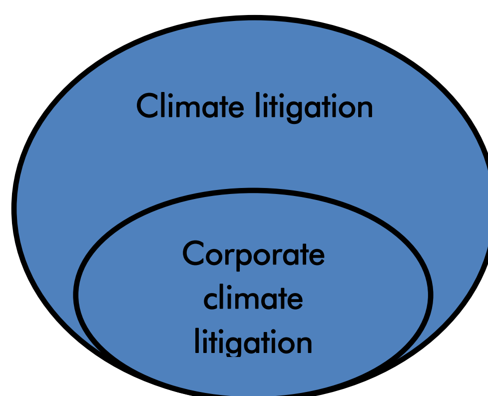

Figure 2: Relationship between climate litigation and corporate climate litigation

It is important to note at the outset that this is a very broad definition of corporate climate litigation. It also captures the large number of administrative and planning law cases that have formed part of the 'first-generation' of climate litigation in Australia. These first-generation cases are perhaps best characterised as public law cases where corporations have been called upon to defend the government's decision-making. While these cases have involved corporations as a project proponent, they might not be strictly thought of as 'corporate' climate disputes.

However, more recently, Australia has started to develop a body of 'next generation' cases. These cases are focused on ensuring the direct accountability of defendants for their contribution to climate change, to challenge their environmental representations, or to drive corporate energy transition and adaptation. While they constitute a smaller number of the climate disputes in Australia, they are thought of as having the potential to achieve important impacts.

We include both first-generation and next generation corporate climate litigation in this report, although we are aware that there may be particular interest in the next generation cases. We include first-generation cases to recognise the important foundational work that these cases have done in establishing the foundation for climate change litigation in this country. However, we endeavour to emphasise the next generation cases in the body of this report, as the area in which more recent litigation is heading.

2. Legal interventions beyond the courtroom

Section 1 above defines corporate climate litigation by reference to cases taking place in courtrooms and other tribunals. Indeed, this is the approach to defining climate litigation taken by many of the major database providers. For example, the Climate Change Laws of the World Database[1] provides that cases must "generally be brought before judicial bodies" and "climate change law, policy or science must be a material issue of law or fact in the case" to be included in the database.

However, we also recognise that there are legal interventions taking place outside the courtroom which may have relevance for understanding the broader direction of evolution of corporate climate litigation. These interventions range from legal letters written to regulators or companies, to shareholder resolutions lodged at annual company meetings, to disputes brought before third-party bodies or individuals. These interventions have achieved, are achieving and will continue to achieve important impacts.

[1] Sabin Center for Climate Change Law, *Climate Change Litigation Databases* <https://climatecasechart.com/about/>.

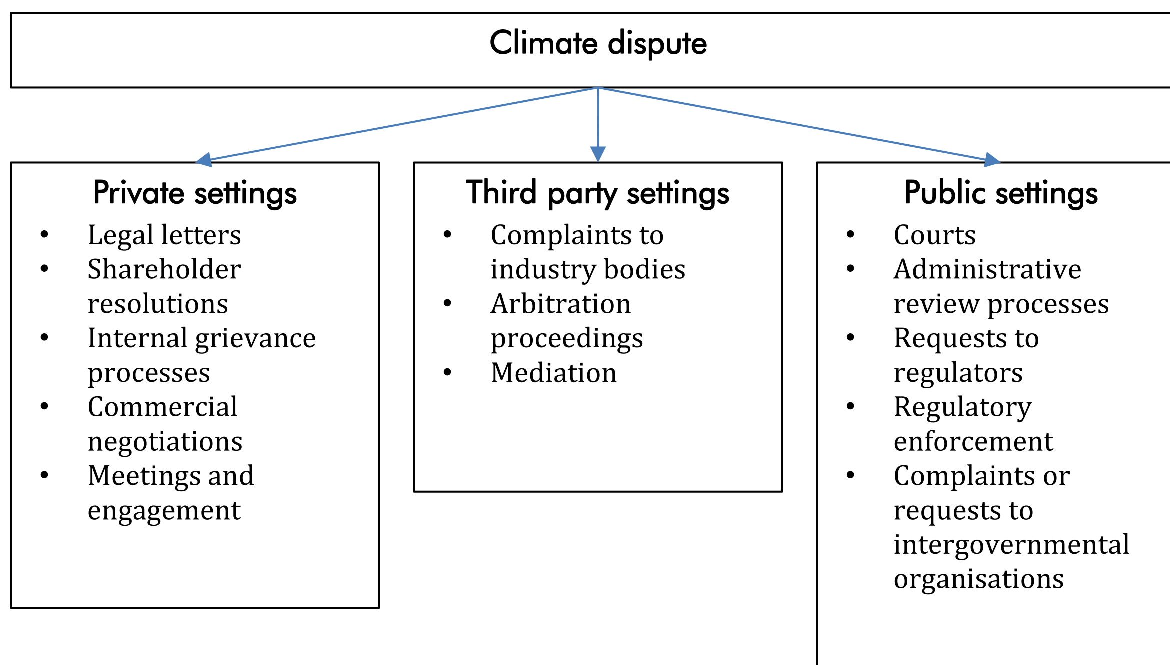

Figure 3: A broader approach to corporate climate disputes

As such, we adopt a broader approach that places the corporate climate dispute at the heart of analysis and distinguishes disputes brought in private, public, or third-party settings.[2] A diagram representing this is presented in Figure 3 above.

Hence, while the focus of this report is on corporate climate litigation, we also include broader examples of climate disputes beyond the courtroom. Where reference is made to legal interventions, as opposed to litigation, we try to make this explicit.

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[2] Rebekkah Markey-Towler, *Legal Interventions beyond the Courtroom* (Melbourne Climate Futures, April 2023) <https://www.unimelb.edu.au/__data/assets/pdf_file/0006/4609590/Legal-interventions-beyond-the-courtroom_13042023.pdf>.

1. Causes of Action

Various causes of action have been used to bring climate change litigation against corporations in Australia. Although cases based on planning and permitting laws have previously given rise to the greatest volume of cases ('first-generation' cases), there has increasingly been activity using financial/consumer laws, as well as emerging claims brought under human rights law and in tort.

Australia's first-generation cases typically had a public law focus, involving government bodies as the primary defendant in the dispute, rather than private companies. Adopting a narrow view, these cases might not be seen as 'true' examples of corporate climate litigation. However, we take a broader approach in this report to defining corporate climate litigation. We view these public law-focused cases as having played a significant role in shaping the Australian environmental legal landscape and by extension, corporate behaviour. The most important examples of such cases have therefore been included for this reason.

In addition, as noted in the introduction, litigants in Australia have also pursued a range of legal interventions as an alternative to, or in combination with, climate litigation. These are indicated where relevant under each subheading.

A. Climate Change Law/Environmental Law Statutory Provisions

To date, there have only been a limited number of cases that have arisen under specific climate change legislation in Australia.

Environment Victoria Inc v AGL Loy Yang Pty Ltd[3] was a first test case of the State of Victoria's climate change legislation, the *Climate Change Act 2017* (Vic). The applicant, Environment Victoria, argued that the Environment Protection Authority (EPA) was required to consider various factors when granting new licences to the State's three coal-fired power stations. In particular, Environment Victoria alleged that when reviewing the licence application, the EPA failed to consider the potential impacts of climate change relevant to the decision as well as the decision's potential contribution to the State's greenhouse gas emissions, contrary to its obligations under the Climate Change Act. This was also the first case challenging the regulation of air pollution from coal-burning power stations in Victoria.[4] However, the Court rejected Environment Victoria's arguments and found that the EPA was only required to consider climate

[3] [2022] VSC 814.

[4] Noting that while this may have been the first litigation, air pollution from coal-fired power has been extensively examined in parliament inquiries e.g., 'NSW Parliament, Inquiry into the Protection of the Environment Operations Amendment (Clean Air) Bill 2021' (PC 7 Report No. 12, November 2021); Parliament of Victoria Environment and Planning Committee, 'Inquiry into Health Impacts of Air Pollution in Victoria' (Report, November 2021).

impacts "relevant to" its decision, which in this instance was confined to regulating pollutants, rather than imposing limits on greenhouse gases as the applicant argued.

A small number of cases have been brought against companies for offences under environmental regulations more broadly, usually for acting without a permit. For example, the case of *Greentree v Minister for the Environment and Heritage*[5] was commenced under the national *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act)[6] and the *Crimes Act 1914 (*Cth*)*. The case was brought by the Australian Federal Government Department of Environment to restrain wheat farmers from clearing a wetland protected by the Convention on Wetlands of International Importance ('Ramsar Convention') in the State of New South Wales. The government sought and was granted an injunction against the farmers to restrain them from continuing to clear the wetland, citing concern for the harmful impacts to the wetland as reason to restrain further activity. Although not explicitly a climate case, *Greentree* established important principles for imposing fines for environmental offences committed for commercial gain.[7]

In addition, in the case of *Gray v Macquarie* Generation,[8] environmental activist group Rising Tide brought a claim against a state-owned power company, seeking a declaratory judgment that one of their power stations had been emitting carbon dioxide into the atmosphere in a manner that had harmed or is likely to harm the environment in contravention of s 115(1) of the *Protection of the Environment Operations Act 1997* (NSW). The court found that even if the company, Macquarie Generation, had an implied authority to emit some amount of carbon dioxide in generating electricity under its license, that authority is limited to an amount which has reasonable regard and care for people and the environment. The implicit conditions were based on common law principles that require prevention of emissions in excess of levels that could be achieved by exercising "reasonable regard and care for the interests of others and the environment". The Court of Appeal reversed the lower court's decision, reasoning that these common law principles only protected private rights (such as a nuisance claim) and were not applicable to a permit granted under a statute.

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[5] [2005] FCAFC 128.

[6] The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) is Australian Federal legislation and therefore applies to all states.

[7] Lee Godden, Jacqueline Peel and Jan McDonald, *Environmental Law* (Oxford University Press, 2nd ed, 2019) 228.

[8] [2010] NSWLEC 34; [2011] NSWCA 424.

B. Human Rights Law

Australia does not have a national bill of rights and, as such, human rights claims have so far played a smaller role in climate litigation compared to some other jurisdictions. However, State and Territory human rights legislation is providing new opportunities for corporate climate litigation. In particular, human rights have been used to advance First Nations' climate justice claims which recognise the disproportionate effects of climate change upon Aboriginal and Torres Strait Islander people in Australia.

For example, the case of Waratah Coal Pty Ltd v Youth Verdict Ltd[9] saw an organisation of First Nations-led young people launch a challenge against the Waratah Coal company's mining lease under the State of Queensland's *Human Rights Act 2019*. The Youth Verdict group argued that the impacts of a proposed mine project were incompatible with several protected rights, including children's rights and the cultural rights of First Nations peoples, both expressly provided for in that Act. As part of their case, the group argued that evidence relating to climate impacts should be delivered 'on Country' in parts of Queensland and the Torres Strait, and in a manner consistent with Indigenous law and practice. Youth Verdict was successful on all grounds, including to allow 'on Country evidence', and the Court recommended to the Minister that the mine be refused permission to proceed on the basis of its predicted climate and cultural impacts. In her reasoning, Justice Kingham also raised the issue of whether coal extraction can still be considered in the public good with her challenge to the mining company's reference to the coal to be extracted as "Waratah's coal" in the mining lease and environmental authority applications.[10]

Traditional Owners and their legal representatives are also bringing legal interventions to lodge human rights' complaints against corporations. For example, Traditional Owners have lodged human rights complaints to banks[11] over their involvement in Santos' Barossa gas project via the banks' internal human rights grievance processes. Traditional Owners have also sent human rights complaints[12] to Australia's largest superannuation funds in relation to their investments in Santos and its proposed Barossa and Narrabri gas projects.

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[9] [2020] QLC 33; [2022] QLC 21.

[10] See at [5]: 'In its submissions, Waratah refers to the coal in the area applied for as the 'Waratah coal'. While I do not take that to be an assertion of ownership, it prompts me to observe that the State is not regulating Waratah's use or enjoyment of its own private asset. This coal is a public resource, owned by the State, to be exploited, or not, for the public good. There is no default position in favour of or against exploitation'.

[11] *Traditional Owners' human rights grievance processes against banks* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=949&subjectID=55&id=3>.

[12] *Traditional Owners' human rights complaints against superannuation funds* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=957&subjectID=55&id=3>.

C. Tort Law

Negligence is the only tort that has been pursued within the context of corporate climate litigation in Australia, so far. Tort law has gained prominence as a potential cause of action for climate litigation following multiple high-profile climate cases in negligence.[13] However, the difficulty of establishing causation where the climate change impacts attributable to an individual company or project are considered "but a drop in the ocean" in the context of the global climate change problem remains a significant hurdle for litigants pursuing this cause of action.

For example, *Sharma v Minister for Environment*[14] was brought by eight Australian children who argued that the Federal Environment Minister owed them a novel duty of care when exercising her approval powers for a new coal mine. The trial Judge found that the Federal Environment Minister owed the children a duty of care on the basis that the risk of harm to Australian children from the mine emissions was reasonably foreseeable, that the Minister had control over the risk, that Australian children are vulnerable to the risk of harm from climate change, and that they are reliant on the Minister for assistance. Justice Bromberg made a declaration that this duty required the Minister to take reasonable care to avoid causing personal injury or death to Australian children arising from carbon emissions into the Earth's atmosphere. However, despite success at first instance, this ruling was unanimously overturned on appeal. All three judges on appeal provided different reasons for overturning the finding of a novel duty of care, including that there was an insufficient "closeness" between the Minister and the children, that harm to the children from the extension of the coal mine was not reasonably foreseeable, and that a novel duty of this kind would be inconsistent and incoherent with the purpose and duties in the EPBC Act, under which the Minister was required to make a decision. Despite reversal on appeal, the trial Judge's findings of fact about the risk of harm from climate change to young people were not overruled. The Court also recognised the complexity of the climate change policy debate given there were multiple layers of scientific, social and economic considerations inherent to national and State policy making in a framework of internationally agreed commitments.

Additional examples of Australian climate actions in tort (all using the tort of negligence) include *Pabai Pabai v Commonwealth*,[15] although this case does not qualify as corporate climate litigation as per the definition in this report, and *Sanda v PTTEP*

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[13] To date, other torts have not been raised in corporate climate cases.

[14] *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for Environment* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=682&browseChron=1>.

[15] *Pabai Pabai v Commonwealth* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=693&browseChron=1>.

Australasia,[16] that only has peripheral relevance to climate change. A class action in negligence (*Mathews v AusNet Electrical Services*)[17] was also launched in 2014 against an electricity provider in the wake of the 2009 'Black Saturday' bushfires. This case does not mention climate change directly but is an example of how similar claims could proceed in response to other extreme weather events.

D. Company and Financial Laws

Drawing upon Australia's company and financial laws, litigants are framing climate change as not only an environmental issue, but also as a financial and a reputational risk to companies. These cases have been informed by the release of influential legal opinions on the nexus between climate change and financial risks. In 2016, barristers Noel Hutley SC and Sebastian Hartford Davis, together with Sarah Barker, wrote that directors who fail to consider and disclose financial risks relating to climate change could be liable for breaching their duty of care and diligence under the *Corporations Act 2001* (Cth) (Corporations Act).[18] Supplementary opinions recognised that the standard for directors has continued to rise as global action on climate increases in line with the Paris Agreement targets, and that greenwashing is likely to be a key litigation risk for entities.[19] There is, however, likely to be a high bar to proving cases for breaches of directors duties, including the duty of care and diligence.

To elaborate on some examples, an early example of litigation using company and financial law tools is Abrahams v Commonwealth Bank of Australia,[20] where shareholders of the Commonwealth Bank of Australia (CBA) commenced proceedings against CBA. The Abrahams alleged that CBA had violated several provisions of the Corporations Act, Australia's principal company law statute, by failing to disclose climate-related financial risks in their annual reporting. Similarly, in McVeigh v REST,[21] proceedings were commenced against the superannuation fund trustee for allegedly failing to provide customers with information regarding the financial risks posed to their accounts, in breach of its legal duties pursuant to the Superannuation Industry (Supervision) Act 1993 (Cth) and the Corporations Act. McVeigh also sought to compel

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[16] *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=677&browseAlpha=1>.
[17] [2014] VSC 663.
[18] Noel Hutley and Sebastian Hartford-Davis, 'Climate Change and Directors' Duties: Memorandum of Opinion' 7 October 2016, The Centre for Policy Development and the Future Business Council; *Corporations Act 2001* (Cth), s 180(2).
[19] Noel Hutley and Sebastian Hartford-Davis, 'Climate Change and Directors' Duties: Further Supplementary Memorandum of Opinion' 23 April 2021, The Centre for Policy Development.
[20] *Guy Abrahams v Commonwealth Bank of Australia* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=571&browseChron=1>.
[21] *McVeigh v Retail Employees Superannuation Pty Ltd* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=621&browseChron=1>.

REST to act on these climate risks, rather than to merely disclose these. While both Abrahams and McVeigh settled prior to trial, they have been influential in, for example, ensuring the financial entities involved included climate considerations in their policies and reporting going forward.[22]

In addition, *Impiombato v BHP*,[23] although not itself a climate case, is also noteworthy as an example of how shareholders might bring similar claims for breach of continuous disclosure obligations in the climate case context in the future. Shareholders in that case commenced class action proceedings against BHP for their failure to disclose their knowledge of the risks of the collapse of the Fundão dam in Brazil, an environmental disaster that killed 19 people and has had an ongoing impact on the surrounding communities and environment. Shareholders allege that BHP's conduct caused its share price to be much higher than it ought to have been and shareholders who purchased shares during this time have suffered a loss due to this inflated share price. It is possible that climate-centric shareholder class actions could be brought pursuant to these causes of action under the Corporations Act in the future, such as continuous disclosure clauses or misleading and deceptive conduct.

Australian financial regulators are also using corporate and financial law, legal interventions and litigation to respond to climate change risks. For example, in 2022, the national corporate watchdog, the Australian Securities and Investments Commission (ASIC), released an updated information sheet on 'greenwashing', or misleading climate-related disclosures. ASIC has identified greenwashing as a key priority for supervision. They have announced that they will be focusing on greenwashing in relation to investment products, such as claims about sustainable superannuation funds and corporate net zero commitments to shareholders.[24]

In addition to issuing statements, ASIC has issued infringement notices in response to concerns about alleged greenwashing, which include Tlou Energy Limited, Vanguard Investments Australia, Diversa Trustees Limited and Black Mountain Energy.[25] Moreover, in February 2023, ASIC commenced its first court action against alleged greenwashing conduct. Civil penalty proceedings have been brought against Mercer Superannuation for allegedly making misleading statements about the sustainable

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[22] VID879/2017.

[23] *Vince Impiombato, and Klemweb Nominees Pty Ltd as trustee for the Klemweb Superannuation Fund v BHP Group Ltd* (VID649/2018) (Consolidated Proceeding).

[24] Australian Securities and Investments Commission '*How to Avoid Greenwashing When Offering or Promoting Sustainability-related Products*' (Media Release, June 2022) Information Sheet 271 [online] at: https://asic.gov.au/regulatory-resources/financial-services/how-to-avoid-greenwashing-when-offering-or-promoting-sustainability-related-products/.

[25] These fines are slight when compared to these companies' revenue, however. The infringement notices register is available here: <https://asic.gov.au/online-services/search-asic-s-registers/additional-searches/infringement-notices-register/>.

nature and characteristics of some of its superannuation investment options.[26] ASIC alleges that Mercer made statements on its website about seven 'Sustainable Plus' investment options offered by the Mercer Super Trust which were suitable for members who "are deeply committed to sustainability" because they excluded investments in companies involved in carbon intensive fossil fuels like thermal coal. However, ASIC alleges that the Sustainable Plus funds still had investments in companies involved in industries that the website statements said were excluded, including carbon intensive fossil fuels. ASIC hence alleges that Mercer made false and misleading statements and engaged in conduct that could mislead investors and potential investors.

Turning to legal interventions beyond the courtroom, drawing upon regulations against misleading and deceptive conduct, the Environmental Defenders Office (EDO) has also sent legal letters to superannuation funds (UniSuper and HESTA), claiming that their investments in fossil fuel companies Santos and Woodside amount to a breach of the superannuation company's obligations to manage climate risk and that they may therefore be liable.[27]

Finally, *Re AGL Ltd*[28] demonstrates an alternative strategy. Following a shareholder activist takeover by Mike Cannon-Brookes of AGL Energy, there was an application made by AGL to reorganise its corporate structure into two arms, with one remaining reliant on fossil fuels while the other arm pivoted to renewable sources. This was opposed by the climate-motivated Cannon-Brookes amongst others, who argued it was merely a tactic to allow AGL to continue emitting far into the future. Under the Corporations Act, companies are required to apply to the Federal Court for orders to approve the holding of a scheme detailing such arrangements. This application was heard and approved last year. Following its approval, the Board ultimately withdrew the proposal after it became clear they would not get the requisite shareholder support under the Corporations Act for the demerger to proceed.

E. Consumer Protection Laws

Australia's consumer protection scheme is increasingly being used to mount climate litigation and legal interventions against corporations. The key statutes in this field are the Corporations Act and the Australian Consumer Law (ACL), which is in a Schedule to the *Competition and Consumer Act 2010* (Cth).

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[26] *Australian Securities and Investments Commission v Mercer Superannuation (Australia) Limited* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=901&browseAlpha=1>.

[27] There are currently cases on foot that are based on similar principles but directed against sovereign bond issuers rather than superannuation companies, see e.g. *O'Donnell v Commonwealth*.

[28] [2022] NSWSC 576.

The Australian Competition and Consumer Commission (ACCC), Australia's competition and consumer regulator, has made it clear that greenwashing is a priority for its oversight going forwards. They have made a series of announcements warning companies against making environmental claims without proper backing. In March 2023, ACCC revealed in a media statement that it had conducted an internet sweep of potential greenwashing claims where 57% of the businesses surveyed had made concerning claims about their environmental credentials.[29] They have also issued a guide on making environmental claims.[30]

In terms of examples of litigation, the ACCC has previously commenced proceedings against Volkswagen for breaching s 29 of the ACL by making false representations about compliance with Australian diesel emissions standards.[31] Although this case is not necessarily focused on climate change impacts, it has implications for climate change as it relates to Volkswagen's conduct in relation to the emissions from motor vehicles. In addition, the ACCC also brought proceedings back in 2008 against Saab and V8, separately. In the former case, the Federal Court declared that GM Holden Ltd made false and misleading claims in its "Grrrrrreen" campaign which promoted the environmentally friendly nature of its Saab range of vehicles.[32] Before the latter case proceeded to court, V8 Supercars Australia Pty Ltd acknowledged the ACCC's concerns that its claim that carbon emissions would be entirely offset by the planting of trees may have been misleading or deceptive.[33]

Claims drawing upon the Corporations Act and the ACL have also been launched by non-government organisations. In 2021, the Australasian Centre for Corporate Responsibility (ACCR), filed a case against the large gas company, Santos, over its claims that natural gas is "clean fuel" and that it had a credible pathway to net zero emissions by 2040.[34] Both claims were announced in the company's 2020 Annual Report. In doing so, ACCR alleged that Santos had engaged in misleading or deceptive conduct under the Corporations Act and the ACL. The litigation is still ongoing, with

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[29] '*ACCC 'Greenwashing' Internet Sweep Unearths Widespread Concerning Claims*' (Media Release, 3 March 2023) [online] at: https://www.accc.gov.au/media-release/accc-%E2%80%98greenwashing%E2%80%99-internet-sweep-unearths-widespread-concerning-claims.

[30] ACCC, *Making environmental claims: A guide for business* (December 2023) <https://www.accc.gov.au/about-us/publications/making-environmental-claims-a-guide-for-business>.

[31] *Australian Competition and Consumer Commission v Volkswagen Aktiengesellschaft* [2019] FCA 2166; [2021] FCAFC 49.

[32] ACCC, 'Saab 'Grrrrrreen' Claims Declared Misleading by Federal Court' (media release, 18 September 2008) at: https://www.accc.gov.au/media-release/saab-grrrrrreen-claims-declared-misleading-by-federal-court.

[33] ACCC, V8 Supercars Australia Pty Ltd - s.87B Undertakinghttps (media release, 16 September 2008) at: <//www.accc.gov.au/public-registers/undertakings-registers/section-87b-undertakings-register/v8-supercars-australia-pty-ltd-s87b-undertaking>.

[34] *Australasian Centre for Corporate Responsibility v Santos Ltd* NSD858/2021.

the case set to focus on the meaning of the term 'clean', and what companies need to demonstrate to make a net zero claim.

Greenwashing claims have also been brought against the banking sector. In 2021, the Abrahams brought another case against CBA. They sought access to CBA's internal documents relating to funding of seven oil and gas projects and alleging instances of greenwashing in company documents.[35] The Federal Court ordered in favour of the Abrahams. This proceeding was finalised in 2023 with the plaintiffs being permitted to only use documents for the purposes of: "(a) commencing any further proceedings by the plaintiffs against the defendant; and (b) providing those documents to the: (i) Australian Prudential Regulatory Authority; and (ii) Australian Securities and Investments Commission".[36]

Another case against a motor vehicle company was *Mitsubishi Motors v Begovic*,[37] where a consumer issued proceedings against Mitsubishi and one of its dealers for alleged misleading and deceptive conduct in relation to a fuel efficiency sticker on a car's windshield. The consumer argued that the fuel consumption was far greater than advertised in the label. Although not a core climate case, it holds similar ongoing relevance to that of *ACCC v Volkswagen*[38] as it relates to companies making inaccurate environmental claims.

A case has also been brought *against* climate litigants by AGL Energy. AGL commenced proceedings against Greenpeace for allegedly breaching its intellectual property (trade mark and copyright) in using AGL's brand in Greenpeace's "AGL is Australia's biggest corporate climate polluter" and "Australian's Greatest Liability" campaigns.[39] AGL Energy failed in both its trademark infringement claim and its copyright infringement claim for all of the uses of the logo but succeeded in relation to its claims on three social media posts as well as some photographs and placards. Judge Burley of the Federal Court denied AGL's request for damages. This case potentially provides a precedent for charities to use the parody, satire and criticism defence in the *Trade Marks Act 1995* (Cth) in campaigns targeting climate inaction.

Finally, in terms of legal interventions beyond the judicial courtroom, there have been a recent suite of complaints lodged with Ad Standards by various individuals over alleged greenwashing advertisements from companies including Ampol[40] and

[35] *Abrahams v CBA (No 2)* NSD864/2021.
[36] <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=700&browseAlpha=1>.
[37] *Mitsubishi Motors Australia Ltd v Begovic* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=681&browseAlpha=1>.
[38] [2019] FCA 2166.
[39] *AGL Energy Limited v Greenpeace Australia Pacific Limited* [2021] FCA 625.
[40] *Complaint over Ampol's carbon-neutral fuel claims* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=890&browseAlpha=1>.

Glencore.[41] The Australian Communications and Media Authority (ACMA) has also found that episodes of the Outsiders program broadcast on Sky News Regional by Network Investments Pty Ltd over October to December 2021 breached the subscription TV code of practice requirements relating to accuracy and distinguishing factual information from commentary and analysis in their climate-related coverage.[42]

F. Fraud Laws

There have been no cases specifically brought under fraud laws in Australia to date. However, there have been several climate protest cases that may have some relevance to alleged aspects of government fraud in a broad sense. For example, in *Rolles v Commissioner of Police,*[43] a member of the Extinction Rebellion climate activist group (XR), Greg Rolles, participated in a blockage of a coal train railway for the given reason that climate change poses an imminent and ongoing threat to civilisation and successive governments have not been taking the threat seriously. Mr Rolles further argued that climate change consists of an 'extraordinary emergency' and therefore the defence of sudden or extraordinary emergency under s 25 of the Queensland Criminal Code 1899 ought to apply. This was rejected by the Magistrate and Rolles was convicted and fined.

Similarly, in *NSW Police v Coco,* another XR activist, Violet Coco, was arrested for her involvement in a two-vehicle convoy that parked on Sydney Harbour Bridge to call attention to government inaction on climate change. Ms Coco asserts that when a government has failed its duty to the people, for reasons of vested interests or political populism, it is the people's duty to rise up and rebel against that government to right the wrong that is happening. Ms Coco was sentenced to 15 months' imprisonment, with a non-parole period of eight months for her non-violent direct action. This jail sentence was later quashed and replaced with a 12-month conditional release order.

G. Contractual Obligations

Few cases using contractual obligations have been brought in Australia so far. These cases in the future may particularly relate to issues arising in the transition to a low-carbon economy, including contracts for carbon crediting and emissions reductions. As one existing example, *Shift2Neutral Pty Ltd v Fairfax Media Publications Pty Ltd*[44] involved a claim that the company had been issuing fake certificates regarding its carbon neutrality, thus deceiving its customers and investors who had signed contracts

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[41] *Complaints over Glencore's net zero by 2050 claims* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=945&browseAlpha=1>.

[42] *Investigations into climate-related coverage on the Outsiders program on Sky News Regional* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=958&browseChron=1>.

[43] [2020] QDC 331.

[44] [2014] NSWSC 86.

with Shift2Neutral for the purpose of achieving neutrality. The newspaper was sued for defamation, which the Judge agreed had occurred, but the court upheld the defence that the claims were substantially true. Although the case may have some relevance to the above section on fraud, it is also relevant to contractual obligations given that Shift Neutral was issuing and certifying carbon credits.

Beyond litigation, a legal letter was also issued by the Australia Institute, represented by the Environmental Defenders Office, requesting that the ACCC investigate whether the Climate Active trademark program[45] and its carbon neutral claims including its use by companies involved in the program, is misleading or deceptive. The Climate Active scheme certifies Australian businesses who have offset some of their emissions including fossil fuel retailers AGL, Energy Australia, Origin Energy, Ampol and the major telco company Telstra. This may have relevance to the underlying contracts involved in these transactions.

H. Planning and Permitting Laws

As mentioned at the outset of this report, there have been many climate-related planning and permitting cases brought over the past several decades in Australia. Some of these cases have been more relevant to the mitigation of climate change, with others primarily relevant to adaptation issues.

These cases are often brought against government decision-making for project applications. However, these are relevant to 'corporate' climate litigation as they have implications for corporate project proponents and sometimes corporations are joined as parties to the proceedings. For example, in *Anvil Hill Project Watch Association v Minister for the Environment*,[46] a community group commenced judicial review proceedings of the Minister's consideration of greenhouse gas emissions from a large coal mine. The mining company was joined to the proceeding. The group challenged the government's decision that the mine would not cause any significant impacts to important protected areas and species under the EPBC Act due to the greenhouse gas emissions from the burning of the coal. The Court dismissed the appeal and the mine commenced operation in 2010.

A more recent case brought under Australian planning and permitting laws was *Gloucester Resources Ltd v Minister for Planning*.[47] This case was the first time an Australian court had rejected a coal mine for reasons based, in part, on climate change. The case, also known as the 'Rocky Hill' decision, involved an appeal by a mining

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[45] *Complaint lodged on potential greenwashing by the Climate Active trademark program* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=947&browseChron=1>.

[46] [2007] FCA 1480.

[47] [2018] NSWLEC 1200.

company, Gloucester Resources, against refusal in 2017 by the State government of an application for a coal mine. The mine was proposed to be an open cut coal mine producing 21 million tonnes of coal over a period of 16 years. The impacts of the mine on climate change were only raised on appeal when a community group, Groundswell Gloucester Inc, was permitted to intervene. The Minister's refusal of the mine application was based on planning grounds and did not include climate change issues. The Court ultimately held that the mine should be refused due to its significant and unacceptable planning, visual and social impacts, which could not be satisfactorily mitigated. This was the principal reason for refusal, to which avoiding greenhouse gas emissions and their likely contribution to the adverse impacts of climate change added a further reason for refusal of the mine. Chief Justice Preston's reasoning on climate change, including his rejection of the 'market substitution argument' or the 'drug dealer's defence' regarding the mine's emissions (essentially that if the mine was refused another would be approved in other parts of the world with no net benefit for climate change mitigation) has been influential in subsequent cases such as *Sharma v Minister for Environment*.

A case brought on similar grounds was *Kepco v Independent Planning Commission; Bylong Valley Protection Alliance*.[48] KEPCO, a major Korean utility company, applied to build a large coal mine which was rejected by the Independent Planning Commission on several grounds, including its contribution to climate change. At issue was whether the planning commission's rejection of a coal mine on sustainability and climate grounds was lawful. The Commission's grounds of refusal outlined KEPCO's failure to develop a plan to manage the Scope 3 greenhouse gas emissions associated with the project and the fact that "the distribution of costs and benefits over and beyond the life of the mine [was] temporally inequitable in that the economic benefits accrue to the current generation and the environmental, agricultural and heritage costs are borne by future generations".[49] KEPCO appealed the decision several times, but the finding that the refusal was lawful remained upheld.[50]

Additional examples of cases that have been brought on planning grounds and that challenge mining project approvals issued to corporate proponents include *Bushfire Survivors for Climate Action Incorporated v Narrabri Coal Operations and Denman*,[51]

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[48] [2020] NSWLEC 38.

[49] *KEPCO Bylong Australia Pty Ltd v Independent Planning Commission (No 2)* [2020] NSWLEC 179 at 680.

[50] See also Hume Coal Project and Berrima Rail Project, SSD 7172, NSW Independent Planning Commission Instrument of Refusal (31 August 2021) and Statement of Reasons (31 August 2021) at [124]. Though it did not proceed to litigation, the Planning Commission adopted similar reasoning to the *Gloucester* case in its decision to refuse the Hume Coal Project in 2021.

[51] <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=899&browseAlpha=1>.

and *Aberdeen, Muswellbrook and Scone Healthy Environment Group Inc (DAMSHEG) v MACH Energy Australia*.[52]

Beyond coal projects, litigants have also used planning and permitting provisions to challenge gas projects. For example, in *Tipakalippa v NOPSEMA,*[53] Munupi Senior Lawman and Tiwi Traditional Owner Dennis Tipakalippa commenced an action against Santos and the Federal Government over the approval of plans to drill the Barossa gas field. This case was the first case in Australia brought by First Nations people challenging an offshore project approval on the basis of lack of consultation as mandated by planning laws. The Court found that Mr Tipakalippa had established that the drilling plans did not meet regulations and, in particular, that it could not be demonstrated that Santos had consulted with each person that it was required to. As a result, the acceptance (or permission) given was legally invalid and the decision to accept the drilling approval was set aside. This decision was upheld on appeal.

The Australian Conservation Foundation (ACF) has likewise brought a claim against Woodside Energy's proposed new gas project off the north-west coast of Western Australia that would cause an estimated 1.37 billion tonnes of greenhouse pollution over the next 25 years.[54] The claim has been brought on the grounds that it is likely to have a significant impact on the World or National Heritage values of the Great Barrier Reef, which is also protected by the EPBC Act. The applicants have asked the Court for an injunction against the project until objective scientific evidence has been considered regarding the project's greenhouse gas-related impacts on the Reef and a decision has been made under the EPBC Act.

Another Woodside gas project, the Pluto LNG project, has been challenged for similar reasons, with the applicant arguing that proposed changes to the project might have a significant detrimental effect on the environment even greater than the original proposal, from the increased greenhouse gas emissions it would generate.[55] As a result, the applicants submitted that the project ought to have triggered full consideration by the EPA, rather than being exempt from more stringent considerations. The Court rejected this claim and found that the decision-making process was not in error and the project should be allowed to proceed without more restrictions.

The case of *Santos v Gomeroi People*[56] was brought against Santos' proposed Narrabri Gas Project under the *Native Title Act 1993* (Cth). The Gomeroi people asserted that

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52 <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=900&browseAlpha=1>.

53 <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=884&browseAlpha=1>.

54 *Australian Conservation Foundation v Woodside Energy* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=805&browseAlpha=1>.

55 *Conservation Council of WA v Chairman, EPA* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=713&browseAlpha=1>.

56 <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=898&browseAlpha=1>.

the project would result in grave and irreversible consequences for their culture, lands and waters and would contribute to climate change. The Tribunal concluded that the Gomeroi applicants had failed to justify their assertions that the proposed grants would have the effects alleged and that any effects would be outweighed by the public benefit of the gas pipeline. This decision was successfully appealed to the Federal Court.

Beyond mitigation litigation seeking to challenge coal or gas projects, Australia has also seen many adaptation cases challenging approvals issued to corporate project proponents. These cases include those concerning coastal hazards,[57] sea level rise,[58] flood risks,[59] bushfire risks,[60] and threatened species.[61] They have generally drawn less public and academic attention compared with the mitigation-focused cases outlined above. However, they are important examples of how courts are considering the current and future impacts of climate change on development projects in terms of whether to allow the project to proceed and, if so, whether any additional conditions are warranted to manage these impacts.

I. Other Causes of Action

Other causes of action that have been used by litigants in Australia to bring climate change cases include the 'living wonders' intervention launched by Environmental Justice Australia, a public interest environmental legal organisation, on behalf of its client, the Environment Council of Central Queensland (ECoCeQ).[62] This legal intervention used provisions in the national EPBC Act in a novel way. Environmental Justice Australia submitted 19 requests to the Australian Federal Environment Minister to reconsider the majority of *all* pending coal and gas proposals and expansions in Australia that were before her, rather than contesting each one individually on particular grounds under the Act. ECoCeQ, provided the Minister with over 3000 documents and

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[57] For example, *Aldous v Greater Taree City Council* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=429&browseAlpha=1> and *Byron Shire Council v Vaughan* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=533&browseAlpha=1>.

[58] For example, *Able Lott Holdings Pty Ltd v City of Fremantle* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=461&browseAlpha=1> and *Lake Park Holdings Pty Ltd v East Gippsland SC)* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=737&browseAlpha=1>.

[59] For example, *Arora Construction Pty Ltd v Gold Coast City Council* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=468&browseAlpha=1> and *Bayport Enterprises Pty Ltd v Port Phillip CC)* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=656&browseAlpha=1>.

[60] For example, *Adamson v Yarra Ranges Shire Council* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=492&browseAlpha=1> and *Boynton and Western Australian Planning Commission)* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=602&browseAlpha=1>.

[61] For example, *Development Watch Inc & Anor v Sunshine Coast Regional Council & Anor* <> and *Environment East Gippsland Inc v VicForests)* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=652&browseAlpha=1>.

[62] Living wonders legal intervention (Environment Council of Central Queensland Inc v Minister for the Environment and Water) <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=885&browseChron=1>.

spreadsheets listing the direct and indirect impacts of climate change as found by research scientists. They also provided the Minister with continent-wide mapping evidence showing the impact of climate-fuelled bushfires on all of the species and places under national supervision. Following this, the Minister announced that she would reassess 18 of the 19 major coal and gas proposals, including Woodside's North-West Shelf and Whitehaven's Narrabri mine. The nineteenth project that was subject to a reconsideration request, a new Central Queensland Coal Project near Rockhampton, was separately rejected by the Minister on grounds unrelated to its climate impacts, with the Minister citing unacceptable risks to the Great Barrier Reef, freshwater creeks and groundwater as reasons for refusal. This was the first time a major new coal mine had been rejected under the EPBC Act.[63] Four more of the 19 projects that formed part of this legal intervention were withdrawn by the proponents or otherwise shelved by the Minister.[64] This demonstrates another form of legal intervention which has achieved successful outcomes so far.

In May 2023, the Environment Minister made the first three decisions directly engaging with the evidence of climate impacts and arguments made in the reconsideration requests. In each decision, the Minister confirmed the first stage assessment decisions made by previous environment ministers, in effect refusing to revoke those decisions and replace them with one that took account of the climate harms from the coal proposals.[65]

In June 2023, ECoCeQ commenced proceedings in the Federal Court in relation to two of those decisions, seeking judicial review of the Minister's decisions made in respect of the proposed Narrabri Underground Mine Stage 3 Extension project, and the Mount Pleasant Optimisation project, both in New South Wales.

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[63] Noting that the Galilee Coal Project, Galilee Basin and Shoalwater Bay, Queensland (EPBC 2008/4366) was refused under the Act in 2008 due to unacceptable likely impacts to protected environmental matters. However, a revised project which removed a Ramsar wetland from the scope of the project was still ultimately approved.

[64] In November 2022, the Spur Hill Underground Coking Coal Project proposal was withdrawn by the proponent. In December 2022, the Valeria Project proposal in Queensland was withdrawn by the proponent. In May 2023, the Minister declared the proposals in respect of the proposed Chine Stone Coal Mine and The Range projects, both in central Queensland, were lapsed.

[65] In respect of the proposed Ensham Coal Mine Life Extension Narrabri Underground Mine Stage 3 Extension project (Queensland), the Narrabri Underground Mine Stage 3 Extension project (New South Wales) and the Mount Pleasant Optimisation project (New South Wales).

2. Procedures and Evidence

A. Actors Involved

i. Who is bringing climate litigation in Australia against corporations?

A distinction is sometimes made in climate litigation literature between 'strategic' and 'non-strategic' cases (Figure 4 below). Claimants in strategic cases are motivated by concerns that go beyond the individual litigant(s) and aim to achieve broader outcomes, for example, advancing climate policies, driving behavioural shifts in key actors, or raising awareness.[66] This is to be distinguished from 'non-strategic' cases where the claimants are primarily acting in their own interests or to fulfil a regulatory mandate. Classification of a case as strategic or non-strategic "does not imply a judgement of one being better or more impactful than the other".[67] Rather, strategic cases are just a sub-set of climate change cases that are distinguished by the claimants' motivations. Due to this underlying motivation, strategic cases often garner more public and/or academic attention than non-strategic cases.

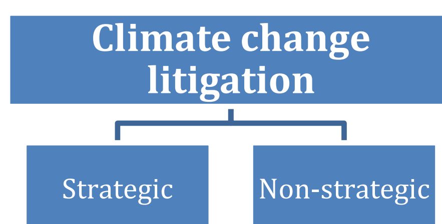

Figure 4: Distinction between strategic and non-strategic litigation

However, it is important to note that this distinction between strategic and non-strategic litigation is potentially limiting. In particular, regulators are, by definition, supposed to act in the public interest and to consider achieving regulatory objectives in deciding whether to take enforcement action in any particular case or not. It might therefore be expected that they would take into account strategic considerations in determining whether or not to act. Indeed, it is arguable that regulators should be encouraged to take on this strategic role. An alternative approach to classifying claimants could focus on whether the actors are private entities, individuals, members of civil society, or public sector actors.

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[66] Joana Setzer and Catherine Higham, *Global Trends in Climate Change Litigation: 2022 Snapshot* (Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, June 2022) 15 <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2022/>.
[67] Ibid 46.

Nevertheless, the distinction between strategic and non-strategic litigation might still have utility in trying to understand why individuals (private citizens) might commence proceedings against corporate entities. As such, the below distinguishes between strategic and non-strategic litigation when discussing the different types of actors who have brought litigation against corporates in Australia.

Various actors have been involved in bringing strategic litigation against corporations in Australia. In strategic cases, claimants are often non-governmental organisations such as conservation, activist and community groups. For example, the ACF launched proceedings challenging Woodside Energy's Scarborough Gas project due to the impact of greenhouse gas emissions on the Great Barrier Reef.[68] The Oakey Coal Action Alliance challenged the approval of a New Acland Coal Mine.[69] Claimants might also be activist shareholders such as the ACCR which has brought proceedings against both the CBA[70] and Santos.[71] The Santos case was also the first case globally to challenge the veracity of a company's net zero target and has inspired similar claims overseas.

In addition, claimants in strategic cases are often stakeholders particularly affected by or concerned about climate change. For example, Traditional Owners from the Tiwi Islands sued Santos and the Federal Government for failure to consult over plans to drill in the Barossa gas field.[72] Whilst they were not the original plaintiffs, Youth Verdict represented the interests of children as active objectors to Waratah Coal's application for a new thermal coal mine.[73] Longstanding shareholders Guy and Kim Abrahams have twice brought proceedings against the Commonwealth Bank of Australia.[74] Claimants in strategic cases in Australia are also often represented by public interest lawyers such as the Environmental Defenders Office, Environmental Justice Australia, and Equity Generation Lawyers.

Non-strategic cases against corporations are similarly brought by a range of actors. Corporate regulators in Australia have brought claims against corporations using corporate laws and consumer protection laws, especially in 2022 and 2023. For example, ASIC has issued a number of infringement notices for greenwashing against

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[68] *Australian Conservation Foundation Inc v Woodside Energy Ltd* VID345/2022.

[69] *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* [2021] HCA 2.

[70] *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* [2016] FCAFC 80.

[71] *Australasian Centre for Corporate Responsibility v Santos Ltd* NSD858/2021.

[72] *Tipakalippa v National Offshore Petroleum Safety and Environment Management Authority* VID306/2022.

[73] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21.

[74] *Guy Abrahams v Commonwealth Bank of Australia* VID879/2017; *Guy Abrahams v Commonwealth Bank of Australia* NSD864/2021.

corporations.[75] The ACCC has also made consumer and fair trading issues in relation to environmental claims and sustainability an enforcement priority, with a report on the results of their 'greenwashing' internet sweep released in March 2023[76] and an environmental guide on businesses making green claims released at the end of 2023.[77] In a more 'peripheral' climate case', the ACCC also instituted proceedings against Volkswagen for their installation of emissions defeat devices.[78]

Beyond regulators, claimants in non-strategic cases might be members of an injured class of persons like those in the common law negligence claim in the *Sanda v PTTEP Australasia* proceeding.[79] Class actions in the future might also involve shareholders suing corporations for financial losses (like, for example, the shareholder class action brought against BHP for the Fundão mine collapse) or by parties for breach of commercial contracts.

In addition, whilst not proceedings brought against corporations, non-strategic cases related to planning approval decisions are often brought by companies or individuals against the local planning authority. For example, proceedings brought by Two Rocks Investments Pty Ltd, and others related to coastal foreshore planning in light of climate change and associated sea level rise and other coastal changes.[80] XO Network Pty Ltd was refused planning permission in light of the bushfire risks associated with climate change.[81] The applicants in *Tasevski v Mornington Peninsula Shire Council*[82] were refused project approval due to failures to reflect sustainable development objectives.

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[75] For example, *ASIC issues infringement notices to Black Mountain Energy Limited for greenwashing* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=897&browseChron=1>, *ASIC issues infringement notice to Tlou Energy Limited for greenwashing* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=892&browseChron=1>, *ASIC issues infringement notice to Vanguard Investments Australia for greenwashing* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=894&browseChron=1> and *ASIC issues infringement notice to superannuation trustee Diversa Trustees Limited (Diversa) for greenwashing* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=896&browseChron=1>.

[76] Australian Competition and Consumer Commission, '*ACCC 'Greenwashing' Internet Sweep Unearths Widespread Concerning Claims*' (Media Release, 3 March 2023) [online] at: https://www.accc.gov.au/media-release/accc-%E2%80%98greenwashing%E2%80%99-internet-sweep-unearths-widespread-concerning-claims.

[77] ACCC, *Making environmental claims: A guide for business* (December 2023) <https://www.accc.gov.au/about-us/publications/making-environmental-claims-a-guide-for-business>.

[78] *Australian Competition and Consumer Commission v Volkswagen Aktiengesellschaft* [2021] FCAFC 49.

[79] [2021] FCA 237.

[80] *Two Rocks Investments Pty Ltd and Western Australian Planning Commission* [2019] WASAT 59.

[81] *XO Network Pty Ltd v South Gippsland SC* [2019] VCAT 1789.

[82] *Tasevski v Mornington Peninsula SC* [2021] VCAT 1183.

ii. Against whom has such litigation been brought?

Many corporate climate litigation cases in Australia have been brought against corporations associated with fossil fuels. However, often these cases have involved "administrative challenges to government decision-making under planning and environmental legislation" or 'first-generation' climate cases,[83] rather than being strictly corporate climate disputes. These government decisions relate to project approvals for coal mines and coal-fired power stations. For example, back in 2007, a community group challenged a decision made by a delegate of the Environment Minister that a large coal mine project (Anvil Hill Project) was not a decision that needed to be assessed under Australia's Federal environment legislation.[84]

Cases of this type involving government decision making but where corporations have been involved as project proponents are now being brought against fossil fuel projects involving gas such as proceedings against the Pluto LNG facility,[85] the Narrabri Gas Project,[86] and the Barossa gas field.[87]

Beyond first-generation climate change cases that relate to corporate entities, 'next generation' cases are now being brought against corporations. These are cases that are designed to hold corporations directly accountable for the climate change impacts associated with their actions, to challenge their environmental representations, or to drive corporate energy transition and adaptation. Initially financial institutions and investors in fossil fuel projects were the subject of climate litigation and only more recently have we seen fossil fuel companies directly targeted by this litigation. These cases include, for example, proceedings brought by *Environment Victoria against AGL Loy Yang Pty Ltd*[88] and by the ACCR against Santos.[89] In addition to litigation brought against fossil fuel related companies, cases in Australia are also being brought against other corporate actors such as financial sector entities like banks[90] or superannuation fund trustees.[91]

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[83] Jacqueline Peel, Hari Osofsky and Anita Foerster, 'Shaping the "Next Generation" of Climate Litigation in Australia' (2017) 41 *Melbourne University Law Review* 793, 795.

[84] *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2007] FCA 1480.

[85] [2022] WASC 202 and [2022] WASC 58.

[86] *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd* [2021] NSWLEC 110 and *Santos NSW Pty Ltd and Another v Gomeroi People and Another* [2022] NNTTA 74.

[87] *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121.

[88] *Environment Victoria Inc v AGL Loy Yang Pty Ltd & Ors* [2022] VSC 814.

[89] *Australasian Centre for Corporate Responsibility v Santos Ltd* NSD858/2021.

[90] *ACCR v CBA* NSD858/2021.

[91] *McVeigh v Retail Employees Superannuation Pty Ltd* [2019] FCA 14.

Cases are also being brought against corporations in other sectors such as transport,[92] electricity providers,[93] and forestry.[94]

iii. Who are/might be the third-party intervenors?

Community groups have sometimes sought to be joined as parties to proceedings involving corporations and government decision makers. For example, Groundswell Gloucester Inc, a non-profit community organisation concerned with the economic, social and environmental wellbeing of the Stroud Gloucester Valley, sought to be joined to proceedings brought by Gloucester Resources Limited against the Minister's refusal for a greenfield coal mine.[95] A similar application was successfully brought by Bylong Valley Protection Alliance Incorporated in proceedings involving KEPCO Bylong Australia Pty Ltd's application for judicial review of a determination by the Planning Commission to refuse a proposed coal mine.[96]

Third parties might also make strategic complaints to regulators like the ACCC and ASIC to ask those regulators to investigate company conduct and/or to take enforcement action. For example, complaints have been lodged asking the ACCC to investigate potentially misleading and deceptive conduct by Etihad Airways,[97] Toyota,[98] Glencore[99] and Tamboran.[100] Complaints have also been lodged with ASIC and the Australian Stock Exchange asking them to investigate potentially misleading and deceptive conduct by Glencore[101] and Santos.[102]

iv. Are there others, not mentioned in (i) and (ii) above, who you could identify in Australia as potential claimants, defendants or third-party intervenors?

The authors are not aware of any other potential claimants, defendants or third-party intervenors.

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[92] *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* [2021] FCAFC 49.

[93] *Greenpeace Australia v Redbank Power Company* [1994] NSWLEC 178.

[94] *VicForests v Friends of Leadbeater's Possum Inc* [2021] FCAFC 66.

[95] *Gloucester Resources Limited v Minister for Planning and Environment (No 2)* [2018] NSWLEC 1200.

[96] *Kepco Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Incorporated & Anor* [2022] HCASL 8.

[97] *Complaint lodged on potentially misleading and deceptive conduct by Etihad Airways* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=943&browseAlpha=1>.

[98] *Complaint lodged on potentially misleading and deceptive conduct by Toyota* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=950&browseAlpha=1>.

[99] *Complaint lodged on potentially misleading statements by Glencore* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=887&browseAlpha=1>.

[100] *Complaint lodged on potentially misleading statements by Tamboran* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=952&browseAlpha=1>.

[101] *Complaint lodged on potentially misleading statements by Glencore* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=887&browseAlpha=1>.

[102] *Complaint lodged on potentially misleading statements by Santos Ltd* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=886&browseAlpha=1>.

B. Approach of Australian courts to procedural issues in corporate climate litigation

Below details some of the most common hurdles and barriers encountered in corporate climate cases and examples of potential solutions.

i. Standing

In Australia, standing rules are specific to the courts and jurisdictions in which the claims are brought. This means that there are not special rules that apply to corporate climate litigation cases in particular. In any event, issues of standing have not proved to be a significant barrier in corporate climate litigation in Australia.[103]

For example, in the case of *Environment Victoria Inc v AGL Loy Yang Pty Ltd*,[104] Environment Victoria applied to the Supreme Court of Victoria pursuant to order 56 of the Supreme Court (General Civil Procedure) Rules 2015 (Vic) for declarations that licensing decisions made by the Victorian Government were invalid, orders in the nature of certiorari quashing the decisions, and an order of mandamus ordering the Environment Protection Authority to exercise the power in accordance with law. While Environment Victoria were ultimately unsuccessful in that case, there was no challenge as to their standing to bring the proceeding.

In the Federal Court case of *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority*,[105] Mr Tipakalippa's application for judicial review of the regulator's decision to accept an environmental plan for petroleum drilling was made pursuant to s 5(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and ss 39B(1) and (1A) of the *Judiciary Act 1903* (Cth). His standing to bring the proceeding was not challenged.

In addition, standing provisions in specific pieces of legislation like Australia's EPBC Act ss 475, 487 are also relatively open and allow interested parties to bring claims.

Claimants may also satisfy standing requirements if, for example, they are shareholders in the relevant company.[106] For example, under the Corporations Act in Australia,

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[103] While standing has not been a barrier in relation to corporate climate litigation, standing has previously been an issue of debate in relation to Australian climate litigation brought under environmental legislation. For example, the Australian Government introduced the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 following claims of vexatious and 'green lawfare' claims. Ultimately these reforms did not pass but the issue has continued to exist, most recently in the context of the Samuel Review of the EPBC Act.

[104] *Environment Victoria Inc v AGL Loy Yang Pty Ltd (No 2)* [2023] VSC 86.

[105] *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=884&browseChron=1>.

[106] See, for example, *Abrahams v Commonwealth Bank of Australia* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=700&browseChron=1> and *Guy Abrahams v Commonwealth Bank of Australia* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=571&browseChron=1>.

shareholders can be permitted to "bring proceedings on behalf of a company or intervene in any proceedings to which a company is a party for the purpose of taking responsibility on behalf of the company for those proceedings, or for a particular step in those proceedings": s 236(1). This might allow shareholders to enforce rights the company has against directors for breaches of their duties. An intervention of this type was filed in the United Kingdom against the directors of Shell.[107]

ii. Costs

Adverse cost orders are more likely to be a barrier to corporate climate litigation cases in Australia. In Australia, costs usually 'follow the event' i.e. the unsuccessful party pays the costs of the successful party. Adverse costs rulings may be particularly prohibitive in circumstances where, for example, non-profit organisations or vulnerable individuals or groups are bringing proceedings against well-resourced corporate litigants. As put by Peel and Osofsky, "the potential for an adverse ruling on costs can mean the difference between bringing a case to raise climate change issues in court and forgoing litigation all together".[108]

To alleviate this barrier, Australian courts will sometimes depart from the usual rule that costs follow the event where the climate concerned litigants have been unsuccessful, if the proceedings have been brought in the public interest. For example, in *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd*,[109] Preston CJ made no order as to costs despite the unsuccessful attempt by Mullaley Gas and Pipeline Accord Inc to judicially review a decision to grant development consent to the Narrabri Gas project.

However, potential adverse costs orders are a risk in corporate climate litigation in Australia. For example, in *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia*,[110] the Full Court of the Federal Court declined to depart from the usual rule as they held that the case did not raise any novel or difficult question of law and nor did it have the potential to have far-reaching impact on shareholder participation or corporate governance.

Pro bono legal assistance has been and is being provided in a number of corporate climate litigation matters to deal with this hurdle. Support is also being provided by foundations and funds such as the Urgenda Foundation (through its Climate Litigation Network), and strategic litigation incubator and funder, Grata Fund. There is also the provision of e-discovery technology support, such as Relativity's offer of its platform on

[107] https://climatecasechart.com/non-us-case/clientearth-v-shells-board-of-directors/.

[108] Jacqueline Peel and Hari M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015) 270.

[109] <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=678&subjectID=17&id=1>.

[110] <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=552&browseChron=1>.

a pro bono basis. The Global Pro Bono Climate Action Portal, established by the Australian Pro Bono Centre in partnership with PILnet, provides examples.[111]

iii. Justiciability

Issues of justiciability may arise in disputes that involve government decision makers and corporate entities. For example, plaintiffs in *Sharma* sought an injunction restraining the Federal Minister for the Environment from approving an extension to Whitehaven Coal's Vickery coal mine. They argued that the Minister owed them a novel duty of care in negligence when exercising her power to approve or not approve the coal mine under the EPBC Act. While a single judge of the Federal Court held that a duty existed, this finding was overturned on appeal. One judge on appeal, Allsop CJ, held, inter-alia, that the duty raised policy issues unsuitable for resolution by the judicial branch.[112] However, it is unclear whether issues of justiciability will arise in the future and pose a barrier to corporate climate litigation.

iv. Jurisdiction

Jurisdiction does not necessarily pose a significant barrier in corporate climate litigation in Australia. The choice of forum will be dictated by the causes of action brought. For example, litigation under the Corporations Act and the *Australian Securities and Investments Commission Act 2001* (Cth) will be heard in the Federal Court of Australia. By contrast, matters concerning State planning or environment legislation will be heard in State courts and tribunals such as the New South Wales Land and Environment Court, the Victorian Civil and Administrative Tribunal and Supreme Courts of Australia's States and Territories.

v. Group litigation / class actions

Australia's class action regime is relatively permissive in terms of how it might accommodate corporate climate litigation. Most class actions in Australia, not limited to corporate climate litigation, have been commenced under the representative proceeding regime in Part IVA of the *Federal Court of Australia Act 1976* (Cth), but there are equivalent regimes in Victoria, New South Wales, Queensland, Western Australia and Tasmania.

Section 33C(1) of the Federal regime provides that a representative proceeding can be commenced where there are: (a) seven or more people with claims against the same defendant; (b) their claims "are in respect of, or arise out of, the same, similar or related

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[111] *Climate Action Portal* <https://www.pilnet.org/our-work/case-studies/>.

[112] *Sharma v Minister for the Environment* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=682&browseChron=1>.

circumstances"; and (c) their claims "give rise to a substantial common issue of law or fact".

However, group litigants may face barriers in corporate climate litigation depending on the specific causes of action that the group members raise. For example, in the appeal decision in *Sharma v Minister for the Environment*,[113] Beach J concluded that there was insufficient closeness and directness, and indeterminacy, between the group member plaintiffs and the Minister's actions. As such, his Honour found that a new duty of care in negligence could not be established. These issues will be further tested in the non-corporate climate case of *Pabai Pabai v Commonwealth*.[114]

Another issue that may arise in future corporate climate litigation cases is the problem of causation. In shareholder class actions pursuant to causes of action under the Corporations Act, the loss or damage sustained by shareholders must result from, or be caused by the conduct contravening the relevant statutory provisions.[115] However, a difficulty that arises in shareholder class actions generally is "determining how causation should be established, in particular, where the loss is referable to 'inflation' in the price of a security which is publicly traded on a stock exchange".[116]

Various theories of causation have been proposed, including a market-based theory of causation. This provides that causation arises where there is non-disclosure of material information by the company to the market, the price for the security is inflated by the non-disclosure, and the investors then purchase the shares at this inflated price.[117] Market based causation was accepted in Australia by the Federal Court in *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Ltd*.[118] It is possible that issues around causation may arise in future non-strategic and strategic corporate climate litigation involving shareholder class actions.

vi. Apportionment of liability

This issue has not been considered in corporate climate litigation in Australia to date. More generally, the principles relating to apportionment of liability vary across causes of law and jurisdiction. However, it has been raised in an ancillary way in the context of assessing the contribution of 'small' fossil fuel projects to climate change. The issue has been whether comparably 'small' fossil fuel projects can be said to contribute to

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[113] <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=682&browseChron=1>.
[114] <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=693&browseChron=1>.
[115] Damian Bernard Grave, Jason Betts and Kenneth Alexander Adams, *Class Actions in Australia* (Thomson Reuters, 2022) 1311.
[116] Ibid.
[117] Ibid 1330.
[118] <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2019/2019fca1747>.

global temperature increase. Scientific evidence relating to the carbon budget and/or the risk of tipping points has been important here.

For example, in *Gloucester Resources Limited v Minister for Planning*,[119] Preston CJ rejected Gloucester Resources Ltd's argument that the Rocky Hill Coal Project was not inconsistent with the Paris Agreement's temperature targets of 1.5ºC or 2ºC. Gloucester Resources had argued that the Paris Agreement did not say "no new coal mines, anywhere", that scope 3 emissions were not relevant to the Court's assessment and that a carbon budget approach did not mean that the mine ought not to be approved as Australia could reach its nationally determined contribution (NDC) in a range of ways.

However, Preston CJ held that it did not matter that the aggregate scope 1, 2 and 3 emissions of the mine represented a "small fraction of the global total of [greenhouse gas] GHG emissions. The global problem of climate change needs to be addressed by multiple local actions to mitigate emissions by sources and remove GHGs by sinks": at [515].

As a further example, Kingham P in *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors*,[120] recommended that Waratah Coal's applications for a mining lease and environmental authority to mine thermal coal in the Galilee Basin be refused. In particular, her Honour held that the scope 3 emissions from the mine were "a meaningful contribution to the remaining carbon budget to meet the long-term temperature goal of the Paris Agreement. Making the coal available for combustion could limit the options for achieving that goal": at [35] and [1937].

C. Types of Arguments and Defences, and court responses

There is a distinction to be drawn between 'first-generation' and 'next generation' climate change litigation in Australia (Figure 5 below).[121] This distinction applies to climate change litigation generally as well as corporate climate litigation in particular. Figure 15 reflects the significant causes of action that have been raised to date in corporate climate litigation in Australia.

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[119] <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=610&browseChron=1>.

[120] <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=659&browseChron=1>.

[121] Peel, Osofsky and Foerster (n 83).

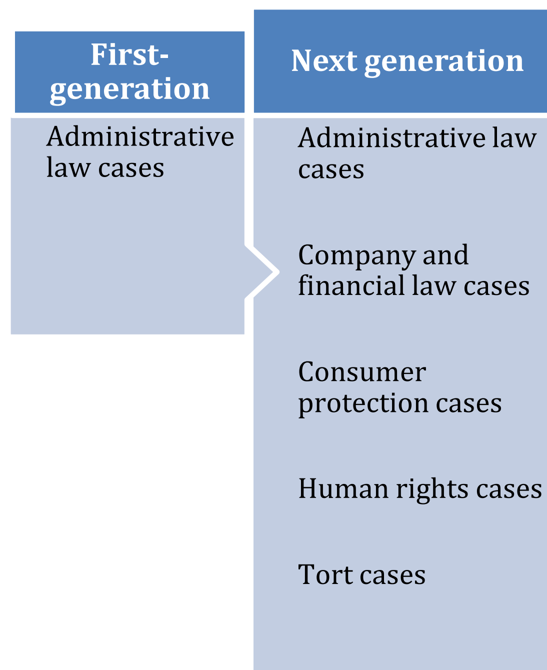

Figure 5: Difference between first-generation and next generation climate change cases

This distinction drawn between first and next generation cases does not imply that first-generation cases have achieved less impact than next generation cases. Indeed, first-generation climate change cases have arguably laid the foundation for climate change litigation in Australia by incrementally introducing and shaping the consideration of climate change in Australian courts. Moreover, whilst next generation cases have broadened the scope of potential causes of action, these cases are not without risk. For example, claimants in these cases may be reliant on the willingness of the Australian judiciary to adapt and evolve existing laws to changing circumstances. They are also open to potential adverse costs orders in the face of well-resourced defendants and the possibility of establishing negative precedents. Rather, the distinction between first and next generation cases merely demonstrates that the ambit of possible causes of action has expanded over the years and will likely continue to do so.

i. First generation corporate climate litigation

First-generation climate change cases in Australia have "largely concerned administrative challenges to government decision-making under planning and environmental legislation, seeking to incorporate climate change within the scope of decision-making on a project, generally as an aspect of ensuring the application of concepts or principles of ecologically sustainable development".[122] This has included both mitigation litigation challenging, in particular, coal mines and coal-fired power

[122] Ibid 795.

stations, and adaptation litigation focusing on the climate change impacts posed by developments such as coastal hazards or bushfire risks.[123]

However, claimants in first-generation corporate climate cases have faced challenges in Australia for several reasons. Climate change considerations are incidental to government project decision-making under Australia's Federal environmental legislation, rather than being an explicit and separate consideration. As such, litigants have had to raise climate change arguments in relation to one or more of the other 'matters of national environmental significance' in the Act.

Moreover, there has been scepticism in the Australian courts as to whether the scope 3 emissions are relevant to government decision-making. Despite this, scope 3 emissions have been found to be relevant in more recent cases such as *Sharma v Minister for the Environment*[124] at first instance and *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors*.[125]

A further barrier has been the development of jurisprudence that suggested a mine has no consequences for the environment because if it were refused another mine would just be approved elsewhere.[126] This 'market substitution' assumption has recently been questioned in Queensland following the decision in *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors*.[127] The argument raises the question of the effect of an increase in supply on the quantity of the relevant product (e.g., coal) demanded, which is mediated by the change in price and is a function of the elasticities of demand and supply in the relevant market. This requires the introduction of economic evidence (discussed below).

i. Next generation corporate climate litigation

Administrative challenges still form an important part of the 'next generation' corporate climate litigation landscape. Mitigation litigation has continued to focus on coal related entities.[128] But mitigation litigation involving administrative challenges has also broadened its scope to focus on other fossil fuel intensive projects like gas.[129] It remains to be seen how adaptation litigation involving administrative law challenges will evolve as part of next generation climate litigation, for example, if climate change appears

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[123] Ibid 795–796.

[124] <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=682&browseChron=1>.

[125] <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=659&browseChron=1>.

[126] Justine Bell-James and Briana Collins, '"If We Don't Mine Coal, Someone Else Will": Debunking the "Market Substitution Assumption" in Queensland Climate Change Litigation' (2020) 37(2) *Environmental and Planning Law Journal* 167.

[127] <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=659&browseChron=1>.

[128] For example, *Bushfire Survivors for Climate Action Incorporated (INC 1901160) v Narrabri Coal Operations Pty Ltd (ACN 129850139)* [2023] NSWLEC 69 and *Denman, Aberdeen, Muswellbrook and Scone Healthy Environment Group Inc (DAMSHEG) v MACH Energy Australia* [2022].

[129] For example, *Conservation Council of WA Inc v Chairman, Environmental Protection Authority* [2022] WASC 59 and *Australian Conservation Foundation v Woodside Energy* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=805&browseChron=1>.

less frequently in the courts as it becomes a mainstream and less contentious consideration in planning decisions in the future.

'Next generation' climate change cases are also now being brought against corporations that are designed to hold them *directly* accountable for the climate change impacts associated with their actions,[130] to challenge their misleading environmental representations or to drive corporate energy transition and adaptation.[131] Litigants in these cases are exploring causes of action under a much wider range of laws beyond environmental and planning law legislation. This includes cases brought pursuant to company and financial law provisions, consumer protection provisions, human rights cases and tort cases, as set out in the first part of this report.

As a particular example, litigants may pursue corporate law claims. These include claims brought against directors of companies for breaches of their legal duties. The Hutley opinions in 2016, 2019 and 2021[132] have been particularly influential in Australia for establishing this link between directors' duties and climate change. Such claims might also include using provisions to hold parties responsible for breaches of their disclosure obligations and misleading and deceptive conduct.

These cases are significant in that they broaden the scope of mechanisms intended to hold corporate entities accountable for their contribution to climate change and they represent the development of a 'all hands-on deck' approach to climate change mitigation and adaptation. However, many of these cases are at their early stages and their potential impact remains unknown. Moreover, there are questions around whether these cases will be effective at advancing climate action in Australia.

D. Relevant sources of evidence and tests of causation

In early climate change cases, litigants in Australia faced challenges relating to evidence and tests of causation in terms of linking individual mining projects to specific climate change impacts. Over time, there has been an incremental shift in the approach of Australian courts.

Through the gradual development of case law, the science of climate change has become accepted, scope 3 emissions have been seen as relevant to decision-making

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[130] Peel, Osofsky and Foerster (n 83) 803.

[131] Anita Foerster, 'Climate Justice and Corporations' (2019) 30(2) *King's Law Journal* 305, 307–308.

[132] The opinions are available here: https://cpd.org.au/wp-content/uploads/2019/03/Noel-Hutley-SC-and-Sebastian-Hartford-Davis-Opinion-2019-and-2016_pdf.pdf and https://cpd.org.au/wp-content/uploads/2021/04/Further-Supplementary-Opinion-2021-3.pdf.

and are linked to climate change impacts, single projects are seen as significant, and emissions need to be assessed on a cumulative basis.[133]

In the *Sharma* case, it was significant that there was no contest over the science of climate change. In that case[134] parties proceeded on the basis of a Statement of Agreed Facts. The reports of the Intergovernmental Panel on Climate Change (IPCC) have been particularly influential in solidifying the courts' acceptance of climate change.

However, despite these positive shifts in terms of recognising the science of climate change, legal causation tests may still pose a significant barrier in corporate climate litigation in Australia. It is arguable that legal concepts may no longer be fit for purpose. For example, as Beach J remarked in obiter in the appeal of *Sharma* in the Full Court of the Federal Court of Australia and after dismissing the finding of a novel duty of care, "it is for the High Court not us to engineer new seed varieties for sustainable duties of care, modifying concepts such as "sufficient closeness and directness" and indeterminacy to address the accelerating complexity, multiple links and cross-links of causal relations. Such concepts in their present form may have reached their shelf life, particularly where one is dealing with acts or omissions that have wide-scale consequences that transcend confined temporal boundaries and geographic ranges, and where more than direct mechanistic causal pathways are involved": at [754].

As well as evidence about the effect of greenhouse gas emissions on climate change, complex evidentiary questions arise when considering the effect of a particular decision on net greenhouse gas emissions. As noted above, one historical barrier to establishing the greenhouse gas emissions that would result from a new fossil fuel production project is the "market substitution" argument, which effectively claims that new projects would not result in net additional emissions due to market substitution effects. In other words, the argument asserts that "the rejection of a coal mine in a particular location will make no material difference to global greenhouse gas emissions and resulting climate change, because other coal mines resulting in equal emissions will be developed elsewhere in its stead to cater for global demand for coal".[135]

As noted earlier, if consideration of market substitution is deemed legally relevant, then evidence is needed to establish the likely extent of any such substitution and its implications for the net emissions resulting from the project. Historical elasticities of demand and supply are questions of fact amenable to empirical evidence, but the effect of any given approval decision on market prices, and hence quantity demanded, depends on future actions, and requires the use of economic modelling to derive

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[133] Justine Bell-James and Sean Ryan, 'Climate Change Litigation in Queensland: A Case Study in Incrementalism' (2016) 33 *Environmental and Planning Law Journal* 515, 515.

[134] *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for Environment* [2021] FCA 560.

[135] Bell-James and Collins (n 126) 169.

projections. This raises the question of how demand and supply curves for the relevant product are constructed, i.e. what assumptions are made.

There are indications, however, that this argument may no longer be as readily accepted by the courts in Australia. For example, in *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors*, Kingham P rejected the market substitution argument, as she could not find that "the same amount of coal will be combusted regardless of whether the mine proceeds": at [1026]. Although this is not a decision of a higher court, similar observations have been made in other cases including *Gloucester Resources Ltd v Minister for Planning*.

One possibility to address evidentiary challenges in climate cases could be to consider reversing the burden of proof. For example, rather than the onus being on claimants to show that they will be at risk of harm due to climate change, the onus could instead be placed on defendants (who have the most control in terms of addressing climate change) to show that their actions will not contribute to harm felt by claimants.

E. Limitation Periods

General limitation periods apply to corporate climate litigation cases.

In Australia, the statute of limitations varies depending on the type of legal action involved. These are not specific to climate litigation in particular. For civil cases, such as negligence and contract disputes, the limitation period is usually six years from the date the cause of action arises. However, there may be shorter limitation periods for certain claims such as property damage (three years) and defamation (one year).

F. Climate Science

From the perspective of sciences or expert witnesses, there have been great improvements in what the science can tell us over recent years. Nonetheless, challenges and gaps still remain. The below is a general discussion of these limitations that may be applicable in the Australian context and beyond.

The IPCC has now found that the warming of the planet is unequivocally anthropogenic in origin, based on a vast evidence base. This evidence base might allow us to attribute warming to individual projects, countries and organisations and could be helpful in loss and damage claims or assessments in the future. However, as put by King et al, "applying [extreme event attribution] methods to [loss and damage] in a way that is robust, fair and useful is not possible at the current time".[136]

[136] Andrew D King et al, 'Event Attribution Is Not Ready for a Major Role in Loss and Damage' (2023) 13(5) *Nature Climate Change* 415.

Some of the challenges here are that, while the science is relatively mature, the community has not coalesced on standardised methodologies for making such assessments. Moreover, even if it is known that climate change contributed to an event, it is still difficult to quantify how much of the damage can be attributed to climate change.[137]

Another challenge is that while attributing the impact on global warming to different actors is one thing, attributing the occurrence of an extreme event to different actors is another thing altogether.[138] The challenge comes because, for many extreme events, it is difficult to quantify the extent to which climate change changed the likelihood of the event. This likelihood is key if we are to link actors with the event.

To elaborate, if the event would have happened even in the absence of climate change, then the actor might not be held responsible. But if the event would not have happened without climate change, then arguably that actor is responsible for their share of the damage caused by the event. However, knowing where on the spectrum a case may lie is an ongoing challenge for climate science.[139]

For some extreme events, it may be easier to quantify the change in likelihood due to climate change with some certainty.[140] These events are mostly related to temperature themselves, such as extreme hot days and heat waves. For other events, it is much harder to determine exactly what role climate change played. In particular, rainfall attribution is an ongoing challenge, as our understanding of the interplay between long-term climate drivers and short-term variability is still relatively immature. For example, it is very hard to say, with any certainty, exactly how much climate change impacted the likelihood and size of the Lismore floods of 2022 (one of Australia's worst recorded flood disasters that affected South-East Queensland, the Wide Bay-Burnett and parts of coastal New South Wales).

Another question often asked is how much an entity (including a country) can emit.[141] In this area, the physical science has greatly improved over the last decade, with our

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[137] Hoesung Lee, Katherine Calvin, Dipak Dasgupta et al, '2023: Summary for Policymakers' in Hoesung Lee and José Romero (eds) *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC, 2022) 1, 30.
[138] Brenda Ekwurzel, J Boneham and M W Dalton et al, 'The Rise in Global Atmospheric CO_2, Surface Temperature, and Sea Level from Emissions Traced to Major Carbon Producers' (2017) 144 *Climatic Change* 579.
[139] F E L Otto, N Massey and G J van Oldenborgh et al, 'Reconciling Two Approaches to Attribution of the 2010 Russian Heat Wave' (2012) 39(4) *Geophysical Research Letters* 1.
[140] Ibid.
[141] Hoesung Lee, Katherine Calvin, Dipak Dasgupta et al, '2023: Summary for Policymakers' in Hoesung Lee and José Romero (eds) *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC, 2022) 1, 30.

understanding of the collective carbon budget now mature.[142] The carbon budget provides the needed starting point for asking these questions of allowable limits. However, what remains challenging is the question of equity, particularly how much of the globally available budget each entity should receive. This can vary by an order of magnitude depending on different ideas of equity. There is no objective answer on which is the appropriate understanding of equity to use but an area where the courts may provide guidance.

A further question arises in the area of offsets and plans for net zero. In this area the science is very clear and provides a robust benchmark against which any net zero claim can be made.[143] It also allows different offsets to be categorised to ensure that only like-with-like comparisons are made. The area of economics can complicate this area i.e. the question of what is helpful/required on the way to net zero (e.g. is using avoidance offsets a helpful way to get action going on the way towards a net zero world, even if avoidance offsets cannot actually be used to reach net zero).

[142] Robin D Lamboll, Zebedee R J Nicholls and Christopher J Smith et al, 'Assessing the Size and Uncertainty of Remaining Carbon Budgets' (2023) 13 *Nature Climate Change* 1360.

[143] Alexander Borowiak, Andrew King and Josephine Brown, 'Climate Stabilization Under Zero Emissions' (2023) *AGU23.*

3. Remedies

The following sections provide an overview of the remedies sought and accepted in Australia in corporate climate litigation.

A. Pecuniary Remedies

To date and in general, litigants in strategic corporate climate cases have not sought pecuniary remedies. Litigants in non-strategic corporate climate cases, however, have sometimes sought pecuniary remedies.

For example, in the negligence class action brought by seaweed farmers in Indonesia against PTTEP for an oil spill that caused the death of their crops, group members reached a pecuniary settlement with PTTEP.[144]

In addition, Australia's corporate regulator, ASIC, has issued a number of infringement notices to companies for greenwashing (see, for example, to Diversa Trustees Limited,[145] Tlou Energy Limited,[146] Vanguard Investments Australia,[147] and Black Mountain Energy Limited).[148]

It is possible that pecuniary remedies might be sought in future cases involving, for example, additional common law negligence claims or investor shareholder class actions.

B. Non-Pecuniary Remedies

Non-pecuniary remedies such as declarations and injunctions are often sought by claimants bringing strategic corporate climate litigation cases.

For example, claimants in *Australian Conservation Foundation Inc v Woodside Energy Ltd* are seeking declarations that the Scarborough Gas Project falls within the scope of the EPBC Act and that the respondents be restrained from acts in contravention of the EPBC Act.[149]

In *ACCR v Santos*, the ACCR are seeking declarations that Santos engaged in misleading and deceptive conduct, or conduct that is likely to mislead or deceive, an injunction preventing Santos from future misleading or deceptive conduct, and an

[144] *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=677&browseAlpha=1>.
[145] <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=896&subjectID=25&id=3>.
[146] <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=892&subjectID=25&id=3>.
[147] <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=894&subjectID=25&id=3>.
[148] <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=897&subjectID=25&id=3>.
[149] *Australian Conservation Foundation v Woodside Energy* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=805&browseChron=1>.

injunction requiring Santos to issue a corrective statement about the true environmental impact of its gas operations.[150]

In *KEPCO Bylong Australia Pty Ltd v Independent Planning Commission; Bylong Valley Protection Alliance Inc*, KEPCO unsuccessfully sought a declaration that the Independent Planning Commission's refusal to grant permission for the Bylong Coal Project was invalid and an order remitting the project back for re-determination in accordance with law.[151]

In addition to seeking remedies like declarations or injunctions, some cases have also settled or discontinued prior to determination of the matter at trial. Despite not going to trial, these cases might be considered to have successful outcomes as they have, for example, led to changes in corporate behaviour, set precedent for similarly placed corporate entities, and contributed to public awareness of the issues.

For example, Mr McVeigh reached a settlement with his superannuation trust fund, REST, after it recognised the importance of managing climate change as a "material, direct and current financial risk to the superannuation fund". Moreover, REST committed to align its portfolio to net zero by 2050 and report against the Task Force on Climate-related Financial Disclosures (TCFD) framework.[152]

As a further example, shareholders in the Commonwealth Bank of Australia discontinued proceedings against the Bank after it made changes to its annual report to disclose climate change risks.[153]

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[150] *Australasian Centre for Corporate Responsibility v Santos Ltd* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=701>.

[151] *KEPCO Bylong Australia Pty Ltd v Independent Planning Commission; Bylong Valley Protection Alliance Inc* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=649&browseChron=1>.

[152] *McVeigh v Retail Employees Superannuation Pty Ltd* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=621&keyWord=maximum>.

[153] *Guy Abrahams v Commonwealth Bank of Australia* <https://law.app.unimelb.edu.au/climate-change/case.php?CaseID=571>.

Charles Clore House
17 Russell Square
London WC1B 5JP

T 020 7862 5151
E info@biicl.org

www.biicl.org

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