Melbourne Climate Futures

Law & Litigation research theme
Law and regulation at multiple levels of governance play a central role in addressing the climate crisis. Climate litigation has emerged as a major site for climate governance and law-making in countries around the world.

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Legal interventions beyond the courtroom

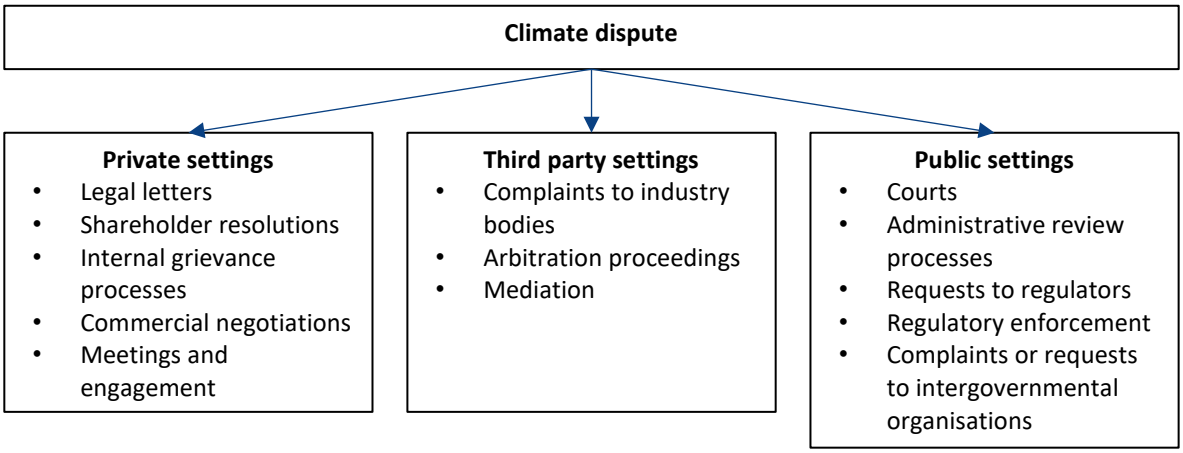
Climate litigation brings to mind cases brought before judges in courtrooms. The *Sharma* case is a clear example of this, where eight children sued the Australian Government over an alleged duty of care for climate harms, as was the Tiwi Island Traditional Owners' case brought against Santos for failure to consult on plans to drill in the Barossa gas field.

Indeed, defining climate litigation by reference to a courtroom is a common approach. For example, the Climate Change Laws of the World Database 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, this approach neglects the range of legal interventions that are taking place *outside* courtrooms. 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. While these cases are not heard before judicial bodies, they have achieved, are achieving and will achieve important impacts.

As such, this short paper argues that these legal interventions might be included in a broader definition of 'climate litigation'. This is the approach generally taken by the Australian and Pacific Climate Litigation database. However, while a broad approach may capture important impacts beyond the courtroom, this raises the question of how to define 'climate litigation', if a judicial body is not the centre of analysis.

This paper proposes a way forward that places the legal climate *dispute*, rather than the judge and courtroom, at the heart of analysis. Legal interventions can then be classified based on whether the dispute is brought in a private, public or third-party setting. A visual representation of this is below.



This paper will briefly sketch the types of interventions that fall under each category. It will do so with reference to some of the climate disputes currently recorded in the Australian and Pacific Climate Litigation database, as well as other examples.

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Private settings

Definition:

By 'private setting', this paper refers to climate disputes that are raised directly between private parties. Several interventions might fall under this type of climate dispute.

Parties may raise a direct complaint with the company via legal letters. For example, the Environmental Defenders Office, on behalf of superannuation fund members and in conjunction with Market Forces, sent a legal letter to HESTA saying that its investments in Woodside and Santos may amount to a breach of their obligations to manage climate risks and not engage in misleading or deceptive conduct. A similar letter was sent to UniSuper by the Environmental Defenders Office, on behalf of a member, in relation to its investments in Santos.

Parties might also file shareholder resolutions at company's annual general meetings requesting climate action. In Australia, resolutions have been filed at annual general meetings of mining and energy companies (including Rio, Woodside, Santos, BHP, Origin, AGL, and Whitehaven), banks (including NAB, CBA, Westpac and ANZ), and insurance companies (including QBE and IAG). These have included resolutions, for example, calling upon the company to cease their support for coal lobby groups or to disclose information on how their activities are aligned with a pathway to net zero.

Some parties may seek to resolve a dispute through a company's internal grievance processes. For example, Traditional Owners, represented by Equity Generation lawyers, have lodged human rights complaints to 12 banks over their involvement in Santos' $4.7 billion Barossa gas project through internal human rights grievance processes. Traditional Owners are asking the banks to withdraw their $1.5 billion loan to Santos for the Barossa project and proposed lending for the Darwin LNG project.

Finally, climate disputes might also occur in the ordinary conduct of business and, by and large, behind closed doors. For example, parties may raise climate issues during commercial contractual negotiations or through informal meetings and engagement. It might be possible to obtain some information about what is happening in practice, for example, through speaking with legal practitioners and commercial parties or through the publication of model clauses. However, much of this work might be conducted in private and/or made confidential.

Third party settings

Definition:

By 'third party setting', this paper refers to climate disputes brought to third party bodies that are not state-affiliated. Several interventions might fall under this type of climate dispute.

Parties may make complaints to industry-affiliated bodies. This includes, for example, complaints made to Ad Standards, the body that administers a national system of advertising self-regulation in Australia. To date, several complaints have been lodged over Shell's net zero by 2050 claims, Glencore's net zero by 2050 claims and Ampol's carbon neutral fuel claims in relation to their advertising activities.

Disputes may also be brought in arbitral tribunals (noting, here, that there is potential for overlap with the public settings category if the tribunal is state-affiliated). For example, Zeph Investments has commenced arbitration proceedings against the Commonwealth of Australia for breaches of the ASEAN-Australia-New Zealand Free Trade Area agreement.

Parties may also settle after proceeding to mediation. For example, Mark McVeigh and his superannuation fund trustee REST attended mediation to resolve their dispute over the trustees' alleged failure to adequately manage climate risks. While the case did not settle at mediation, it did settle just prior trial.

Public settings

Definition:

By 'public setting', this paper refers to climate disputes brought to or by public bodies. This includes litigation brought before the courts but also includes other state-affiliated forums.

Climate disputes might arise during administrative review processes. This includes planning decisions at the local government level or impact assessment processes. Climate issues might also be raised where government departments call for submissions to enquiries. For example, many parties put forward submissions to the Independent Review of the EPBC Act and Australia's climate change legislation.

In addition, some parties have written legal letters to regulators asking them to investigate or reconsider certain conduct. For example, complaints have been lodged asking the Australian Competition and Consumer Commission to investigate potentially misleading and deceptive conduct by Etihad Airways, the Climate Active trademark program,

Toyota, Glencore and Tamboran. Complaints have also been lodged with the Australian Securities and Investments Commission and/or the Australian Stock Exchange asking them to investigate potentially misleading and deceptive conduct by Glencore and Santos (here and here). In addition, in the Living Wonders legal intervention, Environmental Justice Australia, on behalf of their client ECoCeQ, submitted 19 requests to the Australian Federal Environment minister to reconsider first stage of the assessment of pending coal and gas proposals and expansions in Australia.

Regulators themselves have taken enforcement action in relation to climate disputes. For example the Australian Securities and Investments Commission has issued infringement notices to Black Mountain Energy Limited, Tlou Energy Limited, Vanguard Investments Australia and Diversa Trustees Limited for alleged greenwashing.

At the international level, parties (individuals, companies, and states) might also lodge complaints or requests to intergovernmental organisations. This includes disputes raised through multilateral development banks' processes (like Requests for Inspection with the World Bank or the International Centre for Settlement of Investment Disputes), disputes in the World Trade Organisation, and United Nations affiliated bodies (like UNCLOS or the ICJ).

In terms of some of the specific examples in the Australian and Pacific Climate Litigation database, these international cases include the Torres Strait Islanders' complaint to the UN Human Rights Committee against Australia for breaches of their rights to enjoy their culture and be free from arbitrary interferences with their private life, family and home. Youth complainants have also filed requests to the UN Special Rapporteurs for Human Rights and Environment, Rights of Indigenous People, and Rights of Persons with Disabilities. In addition, Friends of the Earth Australia and others also lodged a complaint to the Australian National Contact Point for the OECD Guidelines for Multinational Enterprises for conduct by ANZ.

Impacts beyond the courtroom

These legal interventions beyond the courtroom can achieve important impacts. This includes not only directly changing the behaviour of the parties involved in the dispute, but also influencing the behaviour of third parties indirectly.

However, further research might be pursued to understand the nature of these impacts. For example, there is scope to explore the reasons why parties choose to pursue these alternative legal interventions, the benefits and disadvantages of different interventions, and whether certain interventions may result in particular outcomes.

Overall, climate litigation has played an important role in climate governance around the world, but it is not the only setting in which climate claims may be made and vindicated. Indeed, litigation might be described as the "failure end of the law", as put by outgoing Chief Justice Allsop of the Federal Court of Australia.

It is therefore important to capture the range of avenues parties may pursue to seek outcomes in climate disputes. This paper has attempted to provide the first step towards this endeavour.