

A close-up photograph of a person's hand holding a small, vibrant green seedling with several leaves. The hand is positioned in the center-right of the frame, with the palm facing up. The background is a soft-focus field of similar green plants, illuminated by bright, warm sunlight that creates a lens flare effect in the upper right corner. The overall mood is one of care, growth, and environmental stewardship.

**2023 ACCEL
Distinguished Speaker
Address and Panel
Discussions: Legal
accelerants for climate
action: taking stock for
COP28**



Dominique Hogan-Doran SC

31 October 2023

Liability limited pursuant to a scheme approved under professional standards legislation

International Bar Association *Climate Crisis Statement (2020)*

- Legal profession “must be prepared to play a leading role in maintaining and strengthening the rule of law and supporting responsible, enlightened governance in an era marked by a climate crisis”.
- Lawyers urged, acting in accordance with their professional conduct rules and the rule of law, to “consider taking a climate-conscious approach to problems encountered in daily legal practices”.
- Urges lawyers to act “on a pro bono, volunteer, or reduced fee basis for those negatively affected by the climate crisis”.

‘We are all climate lawyers now’



Law Council of Australia

Climate Change Policy Statement (2021)



- “Lawyers should advise clients on the legal implications of climate change in accordance with professional standards and legal ethics”.
- “Lawyers should be alive to the unfolding legal implications of climate change and its consequences, and they should be informed, skilled and ready to assist clients on climate change-related legal matters, within their areas of skill and competence.”
- “Lawyers should be responsive to the broad spectrum of clients across the Australian community facing new legal risks, liabilities and challenges in light of the physical and transition risks of climate change.”



- “With respect to their ethical obligations in the context of climate change, lawyers should be aware that existing professional ethical standards, which set out the core standards to be observed, provide appropriate guidance as to the proper professional role of a legal practitioner.”
- “Lawyers should also be aware that advice regarding a legal problem should be provided in a manner which meaningfully addresses any identified climate change issues and related consequences, including the possible risks, liabilities and reputational damage which may flow from activity that has a negative impact on climate change. It is not suggested that lawyers should offer advice on matters unconnected to legal issues or outside the scope of their retainer, but rather, that legal advice should take into account the full range of contextual circumstances in which it is given, consistently with professional obligations.”

Legal context

- ‘Strategic’ climate litigation
 - distinguish between outcome and impact on policy, norms, or behaviour
 - part of broader advocacy strategy and ambition
 - aim to influence broader debate re decision-making
 - amplify perceptions and awareness of climate change risks
- Duty to plead recognised v novel claims with no reasonable prospects
- Competency of lawyers (including knowledge of climate risk science)
- Costs risks: adverse costs orders, litigation funding
- Constitutionally bounded
 - No constitutional recognition of right to healthy environment
 - Commonwealth v State distribution of powers
- Limited human rights legislation and domestic legal protections
- Justiciability issues: no domestic advisory jurisdiction

Pabai & Anor v Commonwealth of Australia (FCA VID 622 of 2021)

- Torres Strait Islanders class action
- Seeks declaration that Commonwealth breached duty of care owed to Islanders to take reasonable steps to protect them, their way of life and marine environment from current & projected impacts of climate change.
- Seeks injunction requiring Commonwealth to take action against climate change and greenhouse gas emissions, as well as damages.
- Lay evidence complete. Expert evidence commences 8 November 2023 with Professor David Karoly, internationally recognised expert on climate change and climate variability.
- Challenges include: duty of care; causation (scientific evidence); remedies.

Future claims

- Human rights formulated claims
- Project approval objections, fossil fuel exploration licence objections
- Financial institutions and superannuation trustees decision-making
- Climate washing – commitments, attributes, overstatements, taxonomy
- Corporate accountability – tracing via ownership structures, or via supply or value chains (eg deforestation free)
- Oceans focused – carbon sink, acidification, carbon dioxide removal
- Illegal trading – black carbon soot, hydrofluorocarbons
- Nuisance claims – methane gas
- Disaster litigation – failure to adapt, force majeure
- Investor-state claims – Energy Charter claims eg Kingdom of Spain HCA