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CLIMATE CHANGE LITIGATION: THE POTENTIAL RISK TO AUSTRALIAN BUSINESSES INTENSIFIES

Key messages

- Australian courts are increasingly acknowledging the potential catastrophic impacts of climate change, as evident by the increasing number and intensity of bushfires and extreme weather events in Australia.
- In that context, the courts have recognised the duties of the government and the public sector to protect against climate change.
- In particular, the courts have recognised the statutory duty of the NSW Environment Protection Authority to develop policies and instruments to ensure protection of the environment from climate change.
- Also, the courts have found that the Federal Minister for the Environment has a duty of care to protect Australian children from personal injury resulting from the effects of climate change.
- There is a real risk that a claimant may seek to extend the duty of care that has been recognised with respect to climate change in Australia and elsewhere to Australian businesses where their operations contribute to climate change.

Growth of climate change litigation

Climate change litigation continues to grow in many countries across the globe. Australia has the second largest number of climate change related cases in the world, after the United States.

In Australia, the nature and scope of climate change claims have recently increased. Two significant decisions have been handed down by the courts in the past few months. In both cases, the courts upheld the duties of the public sector to in effect protect against climate change.

In the Netherlands, the courts have already upheld the duty of the private sector to protect against climate change. In *Friends of the Earth v Royal Dutch Shell*, the court held that Royal Dutch Shell (**Shell**) has a duty of care to take action to reduce its greenhouse gas (**GHG**) emissions and ordered Shell to reduce its emissions by 45% as compared with 2019 levels by 2030.

In Australia, the potential expansion of the duty of care to the private sector in a manner similar to the Shell case is a real risk. Claims have already been brought against companies in relation to the statements and disclosures made about their operations, whether it be for failing to adequately disclose their assessment of climate risk in relation to investment companies or in relation to statements "greenwashing" their operations.

Most recently, the Australasian Centre for Corporate Responsibility (**ACCR**) commenced a class action against Santos claiming that statements relating to its net zero targets are misleading and deceptive (see previous alert here). In addition, a retail investor, Guy Abrahams, has commenced court proceedings against the Commonwealth Bank of Australia (**CBA**) requesting disclosure of documents relating to the financing of specific fossil fuel and gas projects on the basis that CBA may be in breach of their goals under the Paris Agreement. The same investor previously brought a claim against CBA on the basis that it had failed to disclose climate change related business risks in its 2016 annual report. That claim was withdrawn.

Duty of the NSW Environment Protection Authority

In *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority*,[1] the NSW Land and Environment Court ordered the Environment Protection Authority (**EPA**) to develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change pursuant to its duty under section 9(1)(a) of the *Protection of the Environment Administration Act 1991* (NSW) (the **POEA Act**).

Following the worst bushfire season in NSW history during the summer of 2019 and 2020, the Bushfire Survivors for Climate Action Incorporated (**BSCA**) commenced court proceedings against the EPA claiming that the EPA had failed in discharging its duty under section 9(1)(a) of the POEA Act to develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change. The BSCA argued, amongst other things, that the EPA had not developed policies or instruments to ensure the protection of the environment from climate change. The BSCA requested the court to issue an order to compel the EPA to perform its duty.

The EPA argued that it could not ensure the environment in NSW would be protected from climate change. It also argued that, in any event, it had a discretion as to the manner in which to discharge its duty. The EPA relied on seven documents that referred to climate change or GHG emissions to demonstrate that it had discharged its duties under section 9(1)(a) of the POEA Act: two of these documents were prepared by the NSW government and five of these documents were prepared by the EPA.

Four of the documents prepared by the EPA related to waste guidelines and policies.[2] The fifth document related to the EPA's regulatory policy and prosecution guidelines.[3]

The court reviewed and considered each of these documents and found that none of them met the description in section 9(1)(a) of being an instrument developed to ensure protection of the environment from climate change. On that basis, the court found that the EPA had not discharged its duty in section 9(1)(a) of the POEA Act and issued an order compelling the EPA to do so. The court acknowledged that the EPA retained a broad discretion as to the specific content of the instruments it developed to discharge this duty.

Duty of the Federal Minister for the Environment

In *Sharma v Ministry for the Environment*,[4] the Federal Court of Australia found that the Federal Minister for the Environment (**Minister**) has a duty to take reasonable care to avoid causing personal injury to Australian children when exercising certain statutory powers relating to the approval of resource projects that may have an environmental impact.

In this case, eight Australian children (**Children**), on their behalf and on behalf of all of the children in Australia, applied for a declaration that the Minister owed them a duty of care when exercising certain powers under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) to approve a proposal to extend the Vickery coal mine in NSW. The Children also applied for an injunction to prevent the Minister from granting approval under the EPBC Act. The court granted the declaration but did not grant the injunction.

The court found that the Minister owed a duty of care to protect Australian children from physical injury resulting from the effects of climate change. The duty of care was limited to personal injury and death. It did not extend to property damage or economic loss.

In finding that the Minister owed a duty of care to the Children, the court accepted that the risk of harm to the Children as a result of GHG emissions from the coal mine project was reasonably foreseeable. The Minister had a direct control over that risk as a result of her statutory powers to approve or not approve the project.

Recent cases in the Netherlands

Milieudefensie (Friends of the Earth, Netherlands) and Greenpeace together with other NGOs and individuals brought a claim in the Hague District Court against Shell. They claimed that Shell should be required to make further changes

[1] [2021] NSWLEC 92, Judgement, 26 August 2021.

[2] These documents were: NSW Changing Behaviour Together: Waste Less, Recycle More Education Strategy 2016-2021; Environmental Guidelines: Solid waste landfills (2nd edition, 2018); NSW Energy from Waste Policy Statement; and Methane fact sheet.

[3] EPA Regulatory Strategy 2021-2024 included its regulatory policy and its prosecution guidelines.

[4] [2021] FCA 560, Judgement, 27 May 2021. See also Sharma v Minister for the Environment (No 2) [2021] FCA 774, second Judgement, 8 July 2021.

to its existing group corporate policy to reduce GHG emissions of the entire group portfolio to achieve lower emission levels by the end of 2030.[5]

Having determined under EU law that Dutch law applied to the claim, the court found that under the Dutch Civil Code, Shell owed a duty of care to Dutch residents to take sufficient action to restrict its contributions to climate change. The court considered international treaties, including the Paris Agreement and human rights conventions, and internationally recognised guidelines, such as the UN Guiding Principles on Business and Human Rights.

The court considered the volume of Shell's emissions and ruled that Shell was "obliged to reduce the CO2 emissions of the Shell group's activities by net 45% at end 2030 relative to 2019 through the Shell group's corporate policy" to ensure that Shell's program was in line with the Paris Agreement.[6] A reduction of 45% will require Shell to accelerate its existing programs. Shell has appealed the decision.

This case followed shortly after *Urgenda Foundation v Netherlands* in which the Dutch District Court ordered the Dutch government to reduce emissions by the end of 2020 by at least 25% as compared to 1990. The decision was upheld by the Dutch Court of Appeal and Supreme Court. The Dutch government's duty to reduce emissions at this level was consistent with its obligations in the Paris Agreement.[7]

Notably, the Supreme Court confirmed that the Dutch government had a duty of care to protect its citizens from climate change in accordance with its obligations under the European Convention on Human Rights and Fundamental Freedoms.

Potential implications for Australian businesses

The *Shell* case was the first time that a national court has ordered a private company to reduce its emissions in line with the Paris Agreement. A variety of different claims, including negligence claims, have been brought against private companies in many different countries, including countries as diverse as the United States, the Philippines and Germany.

Notably, the *Shell* case followed in time the *Urgenda* decision where the Dutch courts had already upheld the obligations of the Dutch government to reduce emissions in line with the Paris Agreement.

Given the recent decisions in the Australian courts relating to the duties of the Australian government, including the Minister of the Environment and government environmental agencies, it may only be a matter of time before claimants become more creative in the types of claims brought against private companies and seek to bring a claim on the basis of a duty of care owed by Australian businesses to protect against climate change.

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[5] *Milieudefensie v Royal Dutch Shell PLC,* Judgement, 26 May 2021 https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339

[6] Ibid at [4.4.55].

[7] [2015] HAZA C/09/00456689 for decision of District Court; ECLI:NL:HR:2019:2007 for Supreme Court decision.