

LANDMARK UNHRC DECISION FINDS AUSTRALIA'S CLIMATE CHANGE MITIGATION POLICY VIOLATES HUMAN RIGHTS

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INTRODUCTION

"People's right to culture is at risk from the effects of climate change."

On 23 September 2022, the United Nations Human Rights Committee ("UNHRC") found that Australia's failure to take action to mitigate the adverse effects of climate change on eight Torres Strait islanders resulted in a violation of their human rights. This is the first time an international tribunal has found a state party to have violated human rights through inadequate climate change policy and found that a people's right to culture is at risk from the effects of climate change. Although decisions by the UNHRC are not binding in Australia, it is likely to add to the moral and legal

incentives to accelerate decarbonisation. Governments will likely begin to reconsider their climate change policies and look to increase regulation aimed at reducing emissions and otherwise mitigating the effects of climate change. States will also need to consider how to fund necessary mitigating actions, which could also lead to a rise in carbon taxes.

COMPLAINT TO THE UNHRC BY EIGHT TORRES STRAIT ISLANDERS AGAINST AUSTRALIA

In 2019, a group of eight Torres Strait islanders from four Torres Strait islands brought a complaint to the UNHRC against Australia alleging that, by failing to take adequate steps to reduce emissions and build adaption measures in the Torres Strait islands, it was violating their rights to culture, family and life under Articles 27, 17 and 6 respectively of the International Covenant on Civil and Political Rights.

"Australia had failed to discharge its positive obligation to implement adequate adaption measures."

The UNHRC considered the impact climate change has had on the Torres Strait islands, in particular the environmental degradation of traditional lands, and found that Australia had failed to discharge its positive obligation to implement adequate adaption measures, such as building appropriate infrastructure, to protect the complainants.

The UNHRC as a whole did not conclude that there had already been a breach of Article 6 (right to life) by Australia. Although the complainants asserted that the islands will be uninhabitable in 10 to 15 years, the UNHRC considered that this was enough time for Australia to intervene and take affirmative measures to protect and, if necessary, relocate alleged victims.

However, the decision was not unanimous. The dissenting committee members found that on the facts as presented to them, the indigenous Torres Strait islanders' right to life will continue to be violated and their lives endangered.

The UNHRC has asked Australia to compensate the complainants for harm suffered and to take steps to secure their communities' safe existence. Australia is now expected to report back to the UNHRC within 180 days on how it plans to comply with the decision, although UNHRC decisions are not enshrined in legislation and therefore not binding. The Australian Attorney-General is currently considering the UNHRC's views.

"Climate change is a matter for policy makers."

RECENT CLIMATE CHANGE CASE LAW IN AUSTRALASIA AND EUROPE

This decision increases the pressure on policy makers in Australasia. Recent case law in Australia and New Zealand has suggested that climate change is a matter for policy makers and defers to government to address the issues and take adequate preventative measures to mitigate the adverse effects of climate change, including

by regulating companies.

In *Smith v Fonterra* [2021] NZCA 552, the appellant was seeking a declaration that seven New Zealand companies had unlawfully contributed to the effects of climate change and that each respondent should produce net zero emissions from their respective activities by 2030. The New Zealand Court of Appeal found that he was seeking "a court-designed and court-supervised regulatory regime" but that the courts "do not have the expertise to address the social, economic and distributional implications or different regulatory design choice".

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In *Sharma v Minister for the Environment* [2022] FCAFC 35, the court also considered whether matters of policy were justiciable by their nature. The Full Federal Court of Australia overturned the initial Federal Court's decision on the basis that the Minister's decision to approve a coal mine was a policy issue and therefore not justiciable.

This is a contrasting response to the position in Europe where the courts, subject to outstanding appeals, have been directing companies to take responsibility for their impact on climate change. In the case of *Luciano Lliuya v RWE AG* [Case No. 2 O 285/15 *Essen Regional Court*], a Peruvian farmer brought a complaint against Germany's largest electricity producer for damages due to it emitting substantial

volumes of greenhouse gases which bore some responsibility for the melting of mountain glaciers near his town. The appeals court in Germany found the claim to be admissible. On 26 May 2021, the District Court in the Hague delivered its ruling in *Milieudefensie et al. v Royal Dutch Shell plc* ECLI:NL:RBDHA:2021:5339, in which Shell has been ordered to reduce its global net carbon emissions by 45% by 2030 compared to 2019 levels. Shell appealed the decision on 20 July 2022.

WHAT DOES THIS MEAN FOR BUSINESSES?

We have already seen an increase in regulation aimed at decreasing carbon emissions and managing climate change across Europe and the recent change of federal government in Australia resulted in a prompt change in federal government policy on climate change. In advance of the COP27 UN summit approaching in November, there have been specific calls for the establishment of a Loss and Damage Finance Facility, funded by developed nations, to help those in developing nations recover from the physical effects of climate change, such as worsening floods, wildfires and rising seas. The rising cost of mitigating actions which, as confirmed by this UNHRC decision, will need to be taken by all states may well also trigger more regulation of carbon emissions and a need to increase tax revenues. This is likely to affect many areas of corporate life including planning and regulation of activities across value chains and forms yet another aspect of climate risk planning which needs to be taken into account.

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