

Climate change liability: a world first



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What is it?

In a world first, the Hague District Court (**Court**) has ordered the Netherlands government to take increased action to reduce greenhouse gas (**GHG**) emissions by reducing Dutch GHG emissions by 25% by 2020 (as compared to 1990 levels). The court considered whether there was a breach of duty of care for taking insufficient measures to prevent dangerous climate change? The answer from the Court was affirmative.

The action was brought by the Urgenda Foundation as a class action representing 886 individual co-plaintiffs. Urgenda – a contraction of Urgent Agenda – supports the transition to a sustainable society and asserted that the Dutch state should be held responsible for its role in causing dangerous climate change.

The Court:

- Followed the guidelines of the Intergovernmental Panel on Climate Change (**IPCC**) that developed countries should reduce their GHG emissions by 25-40% by 2020 (compared to 1990 levels); and
- Found that the government has a duty of care to the public to mitigate damage caused by climate change because of the severity of the consequences in failing to act and the degree of risk of hazardous climate change occurring; and
- Accepted the position that there is a class of anthropogenic GHG emissions, thus there was no dispute that human activity contributes to and causes a degree of climate change.

The finding marks the first time a court has ordered a state to limit GHG emissions without specifically relying on statute. The decision has potential for a significant ripple effect for establishing climate liability around the world and in Australia is broad.

Does the decision represent a ‘sea change’?²

After the decision was announced, Urgenda was inundated with requests for assistance in commencing like litigations around the globe. Urgenda has indicated through its lead attorney Roger Cox that their team is working with colleagues in Brazil, Austria, England, Ireland and Australia.

In Belgium, a similar non-government organisation (representing over 1,000 plaintiffs) filed a similar action against federal and particular regional governments. The Belgian challenge centres on ‘inadequate policies concerning climate change.’ A similar proceeding is afoot in Norway, and Greenpeace indicates that it aims to commence a similar action in the Philippines.

According to Urgenda’s director and co-founder Marjan Minnesma, the likelihood of many other European states bringing similar actions is low due to the majority of EU governments already complying with the IPCC guidelines for the reduction of GHG emissions.

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² As suggested by Columbia University’s Professor Michael Gerrard, Director of the Sabin Centre for Climate Change law.

What might it mean for Australia?

The legal landscapes of the Netherlands and Australia are different. The Netherlands has a civil legal system and a constitutional requirement to keep the country habitable and to protect and improve the environment. Australia has a common law legal system and any case must be founded first on an appropriate cause of action. There is no similar express constitutional requirement.

Despite this, the Dutch decision strikes a chord with current public debate in Australia. Urgenda has indicated that it is sharing its expertise with Australian counterparts and is presenting its research to the Environmental Defenders' Office (EDO) in Queensland. Both the Queensland EDO and the New South Wales EDO have revealed that they are setting up a fund with a view to working collaboratively to explore the possibilities of bringing climate change litigation on home soil. It remains to be seen whether there is scope to achieve this under existing laws, constitutional argument or whether there may be an attempt to change existing laws to enable action.

The Australian Government position

The Dutch decision suggested a federal government would need to consider emissions trading, relevant tax measures, or introduce renewable energy sources. The Australian government's push to retain and expand coal based energy stands in contrast to the principles of the Dutch Court view that the government (in this case the Netherland state) is obliged to reduce GHG emissions and work towards sustainable living utilising renewable energy sources.

Given the government's recent stance against the aesthetic of wind farming, it will be interesting to observe whether this momentum around climate change liability and renewables will result in further development of and Commonwealth investment in solar and wind power across Australia or an adjustment to Australia's targets for the reduction of GHG emissions.

The statistics

Netherlands	Australia
GHG emissions reduction target (pre-case): 17% by 2020 against 1990 levels	Current GHG emissions reduction target: 5% by 2020 against 2000 levels
% of CO2 emissions: 0.5	% of CO2 emissions: 1.5

Whilst Australia's current target is 5%, the Climate Change Authority has recommended in its final report dated 2 July 2015 that at the climate conference in Paris in December, Australia commits to a target of:

- 30% below 2000 levels by 2025; and
- 40-60% below 2000 levels by 2030.

Possible impact if an Australian court reaches the same decision

If climate change liability is established in Australia, or if an Australian court finds that anthropogenic climate change is a fact, the impact is likely to resonate at various levels, including local, state and territory and Commonwealth government. To use just one example, decisions by councils to approve development applications within coastal zones will need to be carefully considered in light of rising sea levels.

Insurers will also be concerned about their exposure and possible risk minimisation strategies, including possible legal actions.

As recently as 21 July 2015, the Queensland government has decided to redraw coastal zone boundaries in consideration of rising sea levels, which will increase the number of developments around coastlines that will require assessment under the local *Sustainable Planning Act 2009*, impacting on the workload and potential long term planning decisions of local governments.

Mining and resources

The Dutch decision may lend additional credence to raise objections to applications for mining leases on environmental and planning grounds. The decision may also inspire a spike in third party objections.

Legislation across Australian jurisdictions provides varying mechanisms for third parties to challenge mining and environmental approvals. Several jurisdictions provide third parties with objection avenues. Some third party objections are grounded in environmentalist groups' climate change concerns. The Queensland EDO objection to Adani's Carmichael Mine is a key example. In that six-week hearing, the EDO argued that Adani's proposed Galilee Basin mine is an unacceptable danger to climate change. The recommendation of the Land Court has not yet been handed down.

Where to from here?

The Court's decision does create fertile ground for creative minds seeking a cause of action to sue the Commonwealth, other governments and authorities for inaction on climate change. Areas of particular focus would be mining, resources and agriculture sectors - their regulatory and approval environments. Not to mention the politics and broader policy considerations across the country.