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The Asia-Pacific Arbitration Review

2025

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The future of disputes in the Australian energy transition

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Summary

IN SUMMARY

In this year's article, we explore developments over the past year that have been reshaping the Australian energy transition landscape. The topics discussed include the enhanced focus on big battery and offshore wind projects as well as notable regulatory changes, such as the proposed Climate Disclosure Bill and the Distributed Energy Resources legislation. We also provide an update on new and ongoing energy transition disputes, including recent greenwashing and misleading and deceptive conduct claims, disputes relating to the commencement of new projects and the growth in global climate change litigation.

DISCUSSION POINTS

- Development of renewable energy projects in Australia
- Review of gas policies in the Australian market to address domestic supply shortages
- Greater enforcement action from regulators to spread awareness and minimise the incidence of greenwashing and misleading and deceptive conduct claims in respect of ethical investments
- Claims have been brought in an attempt to prevent the commencement stage of energy projects, including renewables projects
- The increase in climate change litigation in Australia and globally is resulting from various types of claims being brought

REFERENCED IN THIS ARTICLE

- United Nations Climate Change Conference
- Australasian Centre for Corporate Responsibility
- Australian Consumer and Competition Commission
- Australian Energy Market Commission
- Australian Energy Market Operator
- Australian Security and Investments Commission
- Mandatory Gas Code of Conduct
- National Energy Objectives contained in the National Electricity Law, National Energy Retail Law and National Gas Law
- Treasury Laws Amendment Bill 2024: Climate-related financial disclosure
- Electricity Industry Amendment (Distributed Energy Resources) Bill 2023
- Western Australian Domestic Gas Policy

INTRODUCTION

The year 2023 concluded with the United Nations Climate Change Conference (COP28) in Dubai. COP28 was the biggest climate change conference held to date in terms of

attendance from across the globe. One of the key outcomes of COP28 was the call to countries to 'transition away' from fossil fuels.[1]

COP28 marked the first 'global stocktake' of the progress made to address climate change under the Paris Agreement. The global stocktake is a 'critical opportunity for nations to "course correct" climate action', particularly as 'global emissions continue to rise by 1.5% a year, when they need to reduce by 7% annually to 2030 to keep the goal of 1.5ºC alive'.[2] It was concluded that:

- 'There is an urgent need to set the world on appropriate pathways to deliver deep, rapid and sustained reductions in global greenhouse gas emissions, as reflected by science. Transitions should be just and equitable and fast tracked, including through decarbonizing industry using all available technologies, decarbonizing transport, and halting deforestation.'
- 'Just energy transitions, with a focus on the global tripling of renewable energy capacity and doubling of energy efficiency by 2030 with adequate means of implementation, would also contribute significantly to achieving the Paris Agreement temperature goal.'
- 'Just transitions offer opportunities for job creation, enterprise and growth. Urgent actions are needed to reduce methane and non-CO2 gas emissions and to phase out of unabated fossil fuels in particular coal, as well as inefficient fossil fuel subsidies, with developed countries taking the lead.'
- 'Preserving and restoring natural ecosystems and carbon sinks, in particular forests and oceans, play a critical role in limiting the temperature increase.'[3]

It is expected that an estimated total investment of US$4.5 trillion is required by 2030 to build the new energy infrastructure needed to meet global energy transition goals, and the ultimate objective of limiting climate change to a maximum increase of 1.5ºC above pre-industrial levels under the Paris Agreement.[4] At COP28, 117 countries agreed to triple global renewable energy capacity to more than 11,000GW and to double the annual rate of energy efficiency requirements by 2030.[5]

A month or so before COP28, Australia issued its second Annual Climate Change Statement as required by the Climate Change Act 2022 (Cth) (the Climate Change Act).[6] The Climate Change Act legislated Australia's emissions reduction target of 43 per cent below 2005 levels by 2030 and net zero by 2050.

As part of Australia's ambition to become a 'renewable energy superpower', it has committed to increase renewable electricity by 82 per cent by 2030.[7] The government has prioritised transmission projects under the A$20 billion 'Rewiring the Nation' programme, this being essential to connecting renewable projects in remote areas to the electricity grid network. However, as Australia transitions its fossil-fuel dependent electricity network to a renewables-based network, the Australian government has indicated gas remains part of its energy mix in this transition.[8]

At the same time, Australia is well placed to take advantage of the opportunities arising from the global energy transition to renewable power and the reduction of greenhouse gas emissions. In addition to being a nation blessed with sunshine, Australia has vast natural resources. In particular, Australia has many critical minerals that are vital for the energy transition, such as lithium, nickel cobalt and manganese. Australia's renewable hydrogen

industry is seeking to assist with decarbonising steel, aluminium, ammonia, chemicals production and heavy industry. Australia's skilled and innovative workforce as well as the generation and storage technologies it has developed will be useful for other countries looking to accelerate their energy transition. Australia also has favourable geology for cross-border carbon capture and storage projects.

During the energy transition, many challenges have arisen, and will continue to arise, as government bodies, commercial entities and individuals seek to make the changes vital to reduce carbon emissions. In previous articles we have described the challenges with constructing and connecting solar and wind farms to the national electricity grid, commercialising new and untested renewable energy technologies (RETs) and managing operational risks as renewable energy projects come online. These challenges and risks often result in disputes between the various parties involved in the renewable energy project, some of which may be referred to litigation or arbitration.

In this year's article we provide an update on recent developments in the Australian energy landscape, including the focus on big battery projects and the growing interest and development of offshore wind projects. We also briefly describe some of the regulatory changes that have been enacted by the government or government bodies to improve and support the energy transition.

We then provide an update on the disputes related to the energy transition that have been prevalent in Australia during the past year, including climate change litigation. These disputes include:

- greenwashing claims: claims for greenwashing brought by the Australian Securities and Investment Commission (ASIC);
- misleading claims: claims for misleading or deceptive conduct under the Australian Consumer Law (ACL)[9] as a result of misleading statements made by companies about their energy transition or climate change actions or policies;
- new projects: actions seeking to prevent the commencement of new fossil fuel projects as well as renewable energy projects; and
- climate change litigation: a growing number of claims being brought against companies in other jurisdictions which are likely to be replicated in Australia.

Disputes relating to the construction, connection and operation of renewable projects continue to grow. As we have discussed many of the issues that arise in these types of projects in detail in our 2023 article,[10] we have not repeated those issues here.

RECENT DEVELOPMENTS IN THE AUSTRALIAN ENERGY LANDSCAPE

Battery Projects

The year 2024 is emerging as the year of the big battery. As the roll-out of renewable solar and wind projects continues, they are variable resources and need to be firmed through stored energy. It is reported that by FY26/27 the aggregate capacity of existing, under construction or at the pre-construction stage big batteries will exceed 10GW.[11] That amount of storage exceeds the aggregate storage capacity of roughly 8.5GW predicted in the draft 2024 Integrated System Plan for the National Electricity Market (ISP).[12] We are already seeing the market capitalise on this opportunity with major battery storage players, such as Neoen, developing multiple big batteries across Australia. As the production price of

big batteries drops and new technologies such as sodium-ion and vanadium flow batteries emerge, we expect to see the storage industry continue growing.

Offshore Wind Projects

Interest in Australia's offshore wind industry is also growing with the government announcing six priority areas located across Victoria, New South Wales, Tasmania and Western Australia. The case for wind projects in Australia has not been an easy one, with fierce community opposition in some areas and states like NSW facing average approval time frames of nearly 3,500 days for major wind projects across the past five years.[13] However, this has not stopped industry from investing in this form of renewable energy, and there are currently 26 offshore wind farms proposed for Australia.[14]

Fast-track Planning Approvals For Renewable Energy Projects

Further, states are currently considering options for fast-tracking planning and environmental approvals processes for energy transition projects, including major wind projects. This includes Victoria announcing in March 2024, that new and existing renewable energy projects will be designated as 'significant economic development' and therefore eligible for fast-tracked planning approvals.[15] Similar moves are being planned in Western Australia, with the government considering designating renewables as 'projects of State significance', which must be assessed by the Environmental Protection Authority within a strict statutory time frame.[16]

Domestic Gas And LNG

During 2023, work was completed to bring new fields online, the gas from which is earmarked for export as liquefied natural gas (LNG). No new liquefaction facilities are planned: the gas will be used to expand or backfill the existing facilities. For example, in the Northern Territory, the Santos-operated Barossa project will backfill the Darwin LNG facility (which currently processes Bayu-Undan gas). In Western Australia, the Woodside-operated Scarborough project will be processed by a new second LNG train at the Pluto LNG facility. Also in Western Australia, the Mitsui-operated Waitsia 2 project will be used to backfill an LNG train at the Karratha gas plant (which currently processes North-West Shelf gas). If history repeats (see- the long-running Gorgon and Ichthys LNG project disputes), the expansion of the Pluto LNG facility will likely lead to some form of construction dispute. There is also the likelihood of disputes between the participants of the various LNG projects, particularly where there is a misalignment of interests between the owners of the liquefaction facilities and the fields producing the gas to backfill those plants.

The development of fields for domestic gas sales has been less enthusiastic, which potentially compounds declining domestic supply. However, there are examples, such as Beach Energy connecting new Geographe 4 & 5 production wells and progressing the Enterprise project, both in the Otway basin and processed via its Otway gas plant. The lack of enthusiasm for domestic projects has led to government action of both sides of the country, discussed below. Furthermore, claims in respect of the role gas is to play in Australia's energy transition is also being tested in alleged greenwashing proceedings discussed further in this article. Once determined, the litigation proceedings may have broader implications for the market than just the express statements made in respect of gas which are the subject of the proceedings.

With respect to domestic gas prices and pricing disputes, Australia should soon see its first LNG import terminals, including Venice Energy's Outer Harbour project in Port Adelaide and Squadron Energy's Port Kembla terminal in New South Wales. Via LNG imports through these terminals, domestic gas users may be able to secure domestic gas at prevailing LNG export prices. Domestic suppliers therefore need to compete with LNG importers on price if they wish to retain or secure customers. Whether this has an inflationary or deflationary impact on price remains to be seen.

Some of the new projects, Barossa and Scarborough in particular, are also the subject of disputes on social and environmental grounds. These disputes are discussed further below.

Regulatory Changes

Regulatory and legislative changes are essential to underpin and accelerate the energy transition. Pro-climate regulatory changes not only make the Australian landscape more attractive for energy transition projects, but also set expectations for those wanting to participate in the transition. Recent regulatory changes include the updating of the National Energy Objectives to refer to the required reduction of greenhouse gas emissions, the release of exposure draft legislation requiring large entities to disclose their climate risks and opportunities, and the passing of distributed energy legislation in Western Australia.

NATIONAL ENERGY OBJECTIVES

Recently, the Australian Energy Market Commission (AEMC) updated the National Energy Objectives in the National Electricity Law, the National Energy Retail Law and the National Gas Law to include the need to reduce Australia's greenhouse gas emissions.

The current objective is:

> to promote efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of electricity with respect to—
>
> 1. price, quality, safety, reliability and security of supply of electricity; and
> 2. the reliability, safety and security of the national electricity system; and
> 3. the achievement of targets set by a participating jurisdiction—
>
>   1. for reducing Australia's greenhouse gas emissions; or
>   2. that are likely to contribute to reducing Australia's greenhouse gas emissions.[17]

The updated objectives highlight that the achievement of targets for reducing greenhouse gas emissions as a key objective for participating jurisdictions.

DRAFT 2024 INTEGRATED SYSTEMS PLAN

On 15 December 2023, the Australian Energy Market Operator (AEMO) released the draft Integrated Systems Plan (ISP) for 2024, which outlined a roadmap for the energy transition.-[18]

In the ISP, AEMO seeks to deliver a clear message that urgent action is needed to achieve Australia's planned net zero target by 2050.[19] As stated in the overview of the draft ISP:

> "Australia's coal-fired generators are closing. The lowest-cost pathway for secure and reliable electricity is from renewable energy, connected by transmission, supported by batteries and pumped hydro, and backed up by flexible gas-powered generation.
>
> Urgent investment is needed so that Australian homes and businesses can continue to enjoy a reliable supply of electricity."[20]

The ISP provides a clear plan for essential infrastructure to meet future energy needs, including the need for approximately 10,000km of transmission by 2050, a seven-fold increase in grid-scale wind and solar farms, significant increase in storage capacity and an increase in gas-powered generation.[21]

The government released a similar plan for the Western Australian electricity grid in the form of the South West Interconnected System Demand Assessment (SWISDA). The SWISDA predicts that Western Australia's main grid may need around 4,000km of new transmission and around 50GW of new renewable electricity and storage infrastructure to support increased demand in the next two decades.[22]

The ISP and SWISDA create significant opportunities for contractors and developers. The need for essential infrastructure creates opportunities for Australian contractors and developers as well as opportunities for overseas contractors and developers in the Australian market.

Climate Disclosure Bill

In January 2023, the Treasury released an exposure draft of the Treasury Laws Amendment Bill 2024: Climate-related financial disclosure (the Climate Disclosure Bill). The Climate Disclosure Bill seeks to introduce mandatory climate-related financial disclosure requirements for large businesses and financial institutions under the existing financial reporting regime in Chapter 2M of the Corporations Act 2001 (Cth) (the Corporations Act). Applicable entities meeting certain threshold requirements will be required to disclose climate-related risks and opportunities in a new 'sustainability report', which will be prepared in addition to existing annual financial reporting requirements. Importantly, the disclosure requirements are broad and extend to the inclusion of Scope 3 emissions under the Paris Agreement, which captures indirect emissions generated in the wider economy (other than Scope 2 emissions from the indirect consumption of fossil fuel generated electricity).[23]

However, companies still face a number of uncertainties in discharging their reporting obligations particularly in respect of Scope 3 GHG emissions data and scenario analysis, which is compounded by the risk of litigious action being brought against the company in respect of the veracity of its disclosures. In recognition of this, the Treasury has proposed a three-year period, from the start date, in which only regulators such as ASIC will be able to commence action relating to Scope 3 disclosures. This litigation freeze has been criticised by the New South Wales (NSW) Bar Association and the Environmental Defenders Office who cite concerns regarding access to justice and meeting Australia's emission reduction requirements.[24] This effective moratorium may prevent greenwashing claims being brought in the Australian courts during this period. In any event, reporting companies will only be

protected from civil claims commenced by private litigants, and will not be protected against any criminal action.

Distributed Energy Resources Legislation

In late February 2024, the Electricity Industry Amendment (Distributed Energy Resources) Bill 2023(the DER Bill) passed in Parliament.[25] Marking the most significant reform to energy laws in Western Australia in 20 years, the DER Bill will facilitate the uptake of new power system technologies, and streamline the raft of subordinate legislation into one consolidated, fit-for-purpose set of rules to govern the power system. The DER Bill will also introduce the State Electricity Objective, bringing in an environmental consideration to allow greenhouse gases to be factored into decision-making alongside price, security, reliability and quality of supply and safety. Consultation will continue as the WA state government amends regulations and rules facilitated by the DER Bill.

Domestic Gas And LNG

With respect to domestic gas and LNG, there were a number of policy and regulatory changes during 2023.

In June 2023, owing to rising domestic gas prices and a predicted shortfall in required domestic supply in coming years, a Western Australian parliamentary committee was tasked with inquiring into the much-vaunted WA Domestic Gas Policy. Among other things, the policy requires LNG producers to reserve gas equivalent to 15 per cent of LNG production from each project for domestic consumption. The concern was that a number of LNG producers were not hitting that domestic supply target. The committee produced an interim report in early 2024, noting that it was considering a range of market interventions to force an increase in domestic supply. Those interventions ranged from clarifying the thoughts and intents of the policy in legislation to a formal 'use it or lose it' regime for undeveloped fields. The final report is due in the first half of 2024.

The East Coast of Australia has similarly experienced high prices and predicted shortfalls in domestic supply. To combat this, in July 2023, the federal government introduced the Mandatory Gas Code of Conduct (the Code). The Code contains a price cap, initially set at A$12/GJ, designed to anchor negotiations for new gas supplies. It also contains transparency obligations to increase visibility of the amount of uncontracted gas available for sale and obligations to deal in good faith. However, the Code also contains a number of exemptions (including for large gas retailers), which large commercial and industrial buyers have complained reduces its effectiveness. Unfortunately, the Code has had the effect of stalling new sources of domestic gas supply while the impacts of the government intervention are assessed. This results in a heavier reliance on gas earmarked for export as LNG to fill supply shortfalls in the East Coast market, particularly as production from fields that only produce gas for domestic consumption continue to decline.

Finally, in late 2023, the federal government sought feedback on a Future Gas Strategy. The strategy's key objectives are to:

- support decarbonisation of the Australian economy;
- promote Australia's energy security and affordability;
- enhance Australia's reputation as an attractive trade and investment destination; and
- help Australia's trade partners on their own paths to net zero.

The feedback process is under way and the government expects to release the strategy in mid-2024.

RECENT DISPUTES RELATING TO THE ENERGY TRANSITION

In this section we summarise some of the recent disputes relating to the energy transition that have arisen in Australia during the past year. We also highlight a few recent cases brought against multinational companies overseas which may be replicated in Australia.

Greenwashing Enforcement Actions By ASIC

Recent years have seen a growing number of claims being brought by government agencies and private entities and individuals against companies in relation to the statements and disclosures made about their operations, including statements 'greenwashing' their operations.

In May 2023, ASIC published a report, 'ASIC's recent greenwashing interventions' (Report 763), which outlines ASIC's regulatory interventions in relation to greenwashing concerns between 1 July 2022 and 31 March 2023.[26] During this time, ASIC issued 11 infringement notices and achieved 23 corrective disclosure outcomes.[27]

The report identifies four main themes for greenwashing concerns in product disclosure statements, advertisements, websites and other market disclosures for managed funds, which are:

> "net zero statements and targets;
>
> use of terms such as 'carbon neutral', 'clean'; or 'green';
>
> fund labels; and
>
> scope and application of investment exclusions and screens."

During 2023, ASIC commenced a number of enforcement actions in respect of allegations of greenwashing, this being one of its enforcement priorities for 2023 and it continues to be a 2024 priority for ASIC.[28] The enforcement actions were primarily in the context of certain managed funds promoting 'sustainable finance' products, which involve incorporating environmental, social and governance (ESG) factors into financial decision-making.

In 2023's article, we briefly described the first greenwashing proceeding commenced by ASIC in the Federal Court of Australia (FCA) against Mercer Superannuation (Australia) Limited (Mercer). The hearing concluded on 7 December 2023 and the judgment has been reserved. However, the court is considering a settlement proposal for Mercer to pay a penalty of A$11.3 million in the proceedings.[29]

ASIC commenced two further greenwashing proceedings: one against Vanguard Investments Australia (Vanguard) and one against LGSS Pty Ltd (Active Super).

In July 2023, ASIC commenced civil penalty proceedings in the FCA against Vanguard for misleading statements about a particular Vanguard fund.[30] Vanguard had made statements that it had applied ESG exclusionary screens to the fund as well as the index on which the relevant fund was based. The effect of the exclusionary screen was to ensure the index and the fund excluded issuers with significant business activities in a range of areas, including

fossil fuels. However, ASIC's investigations suggested that both the fund and the index exposed investors to investments which had ties to fossil fuels and activities linked to oil and gas exploration. During the hearing in March 2024, Vanguard admitted that it had engaged in conduct that was likely to mislead the public and that it had made representations that were false or misleading. The court found that Vanguard contravened the Australian Securities and Investment Commission Act 2001 (Cth) by making misleading statements about certain ESG exclusionary screens applied to investments in a Vanguard fund. The statements were made in product disclosure statements, media releases, statements on the website, an interview and a presentation published online. The court is considering the civil penalty to impose.[31]

In August 2023, ASIC commenced a civil penalty proceeding in the FCA against Active Super for alleged misleading ESG statements on its website, disclosure documents and social media, that it was an ethical and responsible superannuation fund.[32] The representations made by Active Super related to restricted or eliminated investments. These included investments relating to tobacco manufacturing, nuclear weapons, oil tar sands and gambling, as well as investments relating to Russian entities following the invasion of Ukraine. ASIC's investigations indicated that between 1 February 2021 and 30 June 2023, Active Super had either directly or indirectly, through 28 holdings, exposed their members to the investments it claimed to restrict or eliminate. ASIC also alleges that Active Super continued to maintain holdings in Russian securities as at 30 June 2023.

Most recently, ASIC also issued an infringement notice in the amount of A$13,320 to Melbourne Securities Corporation Limited (Melbourne Securities) in its capacity as the trustee and responsible entity for the Bloom Climate Impact Fund (Bloom Fund).[33] Melbourne Securities had made statements in the product disclosure statement for Bloom Fund to the effect that it would avoid any investments of the fund's assets in a range of excluded activities. This included fossil fuels. However, Bloom Fund had revenue thresholds, which were not disclosed to consumers, which allowed it to derive 33 per cent of its revenue from excluded activities, such as fossil fuels. ASIC alleged that Bloom Fund made a direct investment in General Electric Co, an entity that derived 16 per cent of its revenue from fossil fuels in the 2022 financial year.

Whilst ASIC has been proactive in bringing these enforcement actions, other government agencies, such as the Australian Competition and Consumer Commission (ACCC), have also been investigating greenwashing and environmental claims. In March 2023, the ACCC issued a report entited 'Greenwashing by businesses in Australia: Findings of the ACCC's internet sweep of environmental claims'.[34] The ACCC carried out a sweep of websites of 247 companies and/or brands across eight industry sectors in October 2022 to identify sustainability and environmental claims and whether these may mislead consumers. The key issues found by the ACCC included that: many claims were very vague and unqualified; there was unsubstantiated information for some claims; many claims were absolute such as 100 per cent plastic free or 100 per cent recyclable; some businesses used comparisons with other businesses that may not be useful (eg, the product produces less waste or has less environmental impact); some claims were exaggerated or omitted information; some claims were aspirational (such as to reduce packaging); some businesses used third-party certifications that are difficult to verify; and some businesses used trust marks that were not linked with third-party certifications.[35]

In March 2024, the ACCC announced as part of its compliance and enforcement priorities for 2024/25 that it would continue to prioritise issues relating to environmental claims

and sustainability.[36] In December 2023, the ACCC issued guidance to assist businesses in making clear and accurate environmental claims.[37] It is anticipated that the ACCC will continue its greenwashing investigations in the energy and consumer products sectors with a view to commencing enforcement action if required.

Misleading Claims Under The Australian Consumer Law

Greenwashing claims have also been brought by private entities and persons and non-governmental organisations (NGOs) against companies for conduct and statements made about their climate change or net zero activities and policies. These claims are mostly brought as misleading or deceptive conduct claims in breach of section 18 of the ACL.

In last year's article, we described the proceedings commenced by the Australasian Centre for Corporate Responsibility (ACCR), a shareholder advocacy and research organisation, against Santos Limited (Santos), Australia's second largest publicly listed oil and gas company. These proceedings relate to misleading and deceptive conduct claims under the ACL in respect of statements made by Santos in its 2020 Annual Report that natural gas provides 'clean energy' and that Santos has a 'clear and credible' plan to achieve net zero scope 1 and 2 emissions by 2040. These proceedings remain ongoing.[38]

In August 2023, an NGO, Australian Parents for Climate Action (AP4CA) commenced proceedings in the FCA against EnergyAustralia for misleading or deceptive conduct in breach of section 18 of the ACL.[39] AP4CA claim that EnergyAustralia has made misleading statements about its 'carbon neutral' energy products, including its Go Neutral Electricity and Go Neutral Gas products. EnergyAustralia claims that while Go Neutral customers purchase energy that is mainly sourced from fossil fuels, it promises to purchase carbon credits to 'offset' the emissions from these fossil fuels. AP4CA argue that the carbon offsets do not 'cancel out' or 'neutralise' the emissions generated and the Go Neutral products do not have a positive impact on the environment. The proceedings are ongoing.

Disputes Relating To The Commencement Of New Projects

In recent years, cases have been brought which result in new fossil fuel projects or the expansion of fossil fuel projects not receiving the necessary planning or environmental approval to proceed. Some of those cases have been successful, such as ***Gloucester Resources Limited v Minister for Planning*** (the ***Rocky Hill*** case) where the NSW Land and Environment Court (LEC) refused a development application for a coal mine including because of the adverse impact of the coal mine on the climate and the need to protect the environment from climate change.[40]

Other cases have ultimately been unsuccessful, such as ***Minister for the Environment v Sharma***. In that case, the Full Federal Court found on appeal that the Commonwealth Minister did not owe a duty of care to Australian children when exercising her discretion to approve or disapprove projects, such as a specific coal mine project under the Commonwealth Environment Protection and Biodiversity Conservations Act 1999 (Cth) (the EPBC Act).-[41] This challenge was specific to the legislative framework under which Commonwealth environmental approvals are granted. Approval was given for the project.

While reforms to the EPBC Act are still in the process of development, as at the date of this article the current reform priorities do not appear to expressly address questions of climate risk underlying the ***Sharma*** proceedings.

During the past year, cases have been brought to prevent fossil fuel projects, including gas projects, on the basis of the need to protect the environment against climate change or to protect cultural heritage. Cases have also been brought to prevent the construction of renewable energy projects in areas where the project is alleged to adversely impact the environment or the natural beauty of the landscape or nearby regional towns.

For example, a number of cases have been brought by Traditional Owners in relation to various gas projects in Australia, including the Barossa and Scarborough gas projects in the north of Australia and the Narrabri gas project in NSW.

In *Munkara v Santos NA Barossa Pty Ltd (No 3),* the First Nations people from the Tiwi Islands applied for a permanent injunction to prevent Santos NA Barossa Pty Ltd (No 3) (Santos NA) from constructing a 262km gas pipeline as part of Santos NA's Barossa Project.[42] The gas pipeline would pass through the Tiwi Islands. The applicants submitted that they have a cultural and spiritual connection to the sea that forms part of the clan country and that there was a significant risk that the construction of the pipeline and its existence on the seabed would impact their cultural heritage.

The court was required to consider Dreamtime stories that were said to form part of the applicants' cultural heritage, including a story about a rainbow serpent(s) known as Ampiji and the Crocodile Man known as Jirakupai. The court found that although these cultural features formed a part of the applicants' individual beliefs, the evidence was 'insufficient to prove that the accounts given by the applicants' witnesses are broadly representative of a belief held by the Jikilaruwu, Munupi and Malawu people'.[43]

The court dismissed the applicants' claim and lifted a temporary injunction that had been issued to prevent Santos NA from beginning construction work in the area on the pipeline.

In August 2023, Raelene Cooper, a Mardudhunera Traditional Custodian, commenced proceedings in the FCA against the National Offshore Petroleum Safety and Environmental Management Authority (NOPESMA).[44] Ms Cooper sought judicial review of NOPESMA's decision to approve seismic blasting in the Scarborough offshore gas project in Western Australia. The court set aside the seismic blasting plan on the basis that NOPESMA was not lawfully satisfied that the seismic blasting plan had met the criteria required in the regulations as the Traditional Owners had not been properly consulted.

The court's approach was similar to the decision in *Tipakalippa v NOPESMA*, where the court had found that NOPESMA was not lawfully satisfied that the drilling plan met the necessary criteria in the regulations because consultation of the Traditional Owners in relation to an environmental plan by Santos for the Barossa gas plant was insufficient.[45]

In March 2024, the Full Federal Court upheld an appeal by the Gomeroi people of NSW of a decision of the National Native Title Tribunal (NNTT) in relation to Santos' Narrabri gas project.[46] The Gomeroi people had argued that the project would contribute to climate change and have material consequences for their culture, land and waters. The Court held that the NNTT should have considered the public interest in the mitigation of climate change and its impact on native title when making its decision.

Cases have also been brought in relation to renewable energy projects. In *IT Power (Australia) Pty Ltd v Mid-Western Regional Council*, the LEC upheld on appeal a refusal of a development application for the construction of a 10MW solar farm and associated infrastructure in a town called Burrundulla, which is near the regional city of Mudgee in NSW.[47] The respondent

council argued that the construction site was identified in the local area environmental plan as being 'visually sensitive land' and the proposed visual impacts of the development at the 'main entrance corridor' to Mudgee would be contrary to the applicable planning provisions. The developer argued that the amended development proposal satisfied the relevant environmental and planning requirements and had the broader public benefit of 'supplying electricity in an environmentally sustainable manner on the land'. The LEC acknowledged the broader public benefits of the proposal but ultimately agreed with the Council that (at [126]):

> "The development does not provide adequate separation and visual relief to residential dwellings on adjoining lots from adjoining driveways and dwellings and to the main entrance corridor to Mudgee. The design, setbacks and siting of the development does not sympathetically respond to the landform of the site and surrounding rural and landscape character. The mitigation measures proposed in the DA being large, grassed earthwork mounds of uniform height and alignment, as well as significant bulk and scale will themselves have a significant adverse impact on the scenic quality and landscape character of the regional city."

The decision contrasts to an earlier decision in 2022 that one of the authors of this article ran for the applicant in ***NSW Community Renewables (Gunnedah) Pty Ltd v Gunnedah Shire Council.***[48] This was the first proceeding before the LEC on the question of whether a solar farm development should proceed on the merits. In the ***Gunnedah*** proceedings, the appeal against an earlier refusal of the development application was upheld by the LEC and development consent was granted. While the public interest of small-scale renewable development in regional areas of NSW was raised in the proceedings, the decision to grant development consent was ultimately made on other specific planning grounds.

A key theme in disputes regarding renewables projects is the importance of early site suitability analysis and due diligence on whether the proposed project on the particular development site meets the applicable environmental and planning controls. By way of further example, a Victorian proposal to expand the Port of Hastings to provide for an offshore wind farm hub was refused in early 2024 because of the impacts to the environment, including to the Western Port Ramsar Wetland protected under the EPBC Act. Media coverage at the time noted the fossil fuel projects that are approved under the EPBC Act in contrast to the renewables projects refused under the EPBC Act.[49]

Climate Change Litigation

In 2023, the United Nations Environmental Programme's (UNEP) Global Climate Litigation Report listed Australia as the second most litigious jurisdiction in the world for hearing climate change disputes.[50] From 1990, 127 climate change-related cases have been filed, second only to the United States with 1,522. The growth in total number of cases from 884 in 2017 to 2,180 in 2023 has undoubtedly been influenced by the adoption of the Paris Agreement in December 2015, which aims to limit the global temperature increase to 1.5ºC above pre-industrial levels and 'holding the increase in global average temperature to well below 2ºC above pre-industrial levels'.[51]

According to the UNEP, claims are arising which seek to question consistency with the Paris Agreement or government net-zero commitments, or environmental impact

assessment requirements, among other claims.[52] Evidently, climate change litigation is a tool being increasingly utilised by impacted activists, shareholders and investors to prompt governments and companies within the private sector to respond to the climate crisis.

Climate change litigation is not constrained to an individual jurisdiction as the response to the climate crisis is a global issue. Indeed, the creative endeavours pursued by litigants to address potential climate inaction in one jurisdiction may result in a similar pursuit in other countries. For this reason, it is important to keep abreast of recent cases brought against companies in other international jurisdictions and consider the implications in domestic jurisdictions, including in traditionally non-litigious jurisdictions.

Notably, on 7 February 2024, the Supreme Court of New Zealand handed down its judgment in ***Smith v Fonterra Co-Operative Group Limited*** allowing Mr Smith, a Maori elder and climate change spokesperson to proceed with climate change claims.[53] Mr Smith had brought a claim in tort against seven New Zealand companies, Fonterra, Genesis Energy, Z Energy, NZ Steel, BT Mining, Channel Infrastructure and Dairy Holdings, said to be involved in greenhouse gas-emitting industries. Mr Smith alleged that these companies had contributed materially to the climate crisis and damaged, and will continue to damage, places of significance. The respondent companies sought to have the claims struck out on the basis that Mr Smith did not have a reasonably arguable cause of action and that the claim was bound to fail. The claims had been struck out by lower courts.

Interestingly, the causes of action in tort included public nuisance and negligence, and a new tort involving a 'duty, cognisable at law, to cease materially contributing to: damage to the climate system; dangerous anthropogenic interference with the climate system; and the adverse effects of climate change'.[54]

In its judgment, the Supreme Court acknowledged that it was common ground that 'climate change threatens human well-being and planetary health'.[55] The Court found that 'the evidence is "unequivocal" that humans have warmed the atmosphere, ocean and land through the emission of GHGs' and that many of these changes are 'irreversible for centuries to millennia'.[56] The Supreme Court held that the statutory regime in New Zealand has not displaced the law of torts in response to climate change and that the common law was able to operate and develop in the same space.[57]

The court then considered whether the public nuisance claim was bound to fail and found that it was not. The court stated that they 'were not convinced, at this stage of the proceedings, addressing only strike out, that the common law is incapable of addressing tortious aspects of climate change'.[58] The court stated:[59]

> "How the law of torts should respond to cumulative causation in a public nuisance case involving newer technologies and newer harms (GHGs, rather than sewage and other water pollution) is a matter that should not be answered pre-emptively, without evidence and policy analysis exceeding that available on a strike out application."

The court acknowledged that it will be necessary for the court to consider during the trial 'whether the respondents' actions amount to a substantial and unreasonable interference with public rights'.[60] The court also acknowledged that Mr Smith may face obstacles with various aspects of his claim, including the remedies sought. As the primary cause of action

was not struck out, it was not necessary for the court to consider the remaining causes of action. The proceedings commenced by Mr Smith have not been struck out and will now proceed to address the merits of the claims brought.

The successfulness of applicants who bring claims relating to climate change are relatively diverse, and outcomes will have a strong influence across multiple jurisdictions. The urgency of the climate crisis has driven applicants to utilise the courts as a means of pressing action on climate change. Newly implemented regulations will also contribute to the unpredictability of the type of claims brought. The absence or gaps in regulation, particularly in the context of greenwashing, mean that certain issues will be tested in the courts unless further legislation is introduced.

Conclusion

With the increasing pressure on Australia to meet its 2030 emission reduction targets under the Paris Agreement and Australia's commitment to triple its renewable energy capacity by that time, the energy transition will and must substantially accelerate its pace. AEMO Services have reported the need for an 'unprecedented level of investment' to improve the sustainability and security of Australia's electricity supply.[61] This also reinforces the need for addressing the barriers to renewable and other energy transition projects, including potential fast tracking of approvals for projects that adequately address any environmental impacts of the proposal and importantly, Traditional Owners' views on the proposal.

With the development of new projects it is inevitable that there will be variety of disputes relating to planning and approvals, commercial, construction, connection and operation issues. There are mitigants available to seek to minimise the risk of dispute including during the early project planning and development stage.

At the same time, we are seeing increasing pressure on companies to develop, implement and comply with strategies for their operations to address climate change. This is not only for companies operating in the energy sector, such as companies involved with oil, gas and renewable projects, or banks, superannuation funds and other companies that finance and invest in energy and other types of projects. It extends to all companies whose operations impact the environment. As commercial entities are being held accountable by the regulators, shareholders and investors, more greenwashing claims are likely to arise. We may also see claims based on directors' duties, a duty of care or other innovative claims relating to climate change being brought.

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