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IMPACT OF THE GERMAN FEDERAL CONSTITUTIONAL COURT'S DECISION ON THE GERMAN CLIMATE CHANGE ACT

Jeremy Schultz, Head of Finlaysons' Energy practice, will be discussing the constitutional dimensions of climate change and renewable energy in Australia in a webinar on 2 June 2021, hosted by the World Wind Energy Association (headquartered in Germany).

Speakers involved in the webinar also include the German Foundation for Environmental Law (Stiftung Umweltenergie recht) and the European Renewable Energies Federation (speaking about the European implications of the recent decision by the German Federal Constitutional Court regarding the perceived failings of Germany's climate legislation to protect future generations).

DECISION

In an 'historic' ruling, announced on 29 April 2021, the *German Federal Constitutional Court (GFCC)* found that the German government's current climate protection measures are insufficient to protect future generations, after a complaint brought by environmental groups.

The Court determined that the current version of the *Federal Climate Change Act (FCCA)* was partially unconstitutional because it did not specify greenhouse gas (GHG) emission reduction targets beyond the year 2030. In its ruling, the Court instructed the German legislator to revise the FCCA by the end of 2022.

COMMENT

Climate justice is a growing global movement based on the principle that people have a right to a stable climate and deserve protection from the growing dangers of climate change.

The 2020 Status Review of the UN Environment Programme's Global Climate Litigation Report identified a rapid recent increase in climate litigation. The number of cases in 2020 nearly doubled with at least 1,550 cases filed in 38 countries. One of the key emerging trends in these cases is the role of fundamental human rights connected to a safe climate. This momentum of increasing climate litigation is likely to continue in coming years.

There are currently [19 climate change litigation cases listed in the Federal Court of Australia](#) including *Sharma v Minister for the Environment*.

The *Sharma* case is the result of a class action by 8 Australian school students that was commenced in the Federal Court of Australia in September 2020, seeking an injunction to restrain the Commonwealth Minister for the Environment from approving Whitehaven's proposed Vickery coal mine extension project in New South Wales. When burned, the coal produced from the mine extension would generate approximately 100 million tonnes of carbon emissions over the next 25 years, potentially accelerating climate change. Since filed, over 1500 young people have asked to join the proceedings.'

The *Sharma* application contends that the Minister would be breaching a common law duty of care to protect younger people against future harm from climate change, arising from the new footprint of the coal mine, if she exercised her powers under the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)* to approve the mine expansion. The intention of the applicants is to set a precedent that would stop or reverse project approval of fossil fuel developments in Australia.

Sharma v Minister for the Environment will test the duty of care approach. For the claim to be successful, Court must find both that a duty of care is owed by the Minister to the applicants, and that approving the coal mine extension project is a breach of that duty.

There would be significant precedent implications for Australian climate litigation if the Court makes one or both of those findings. If the Court holds that the Minister owes such a duty of care, it could potentially create a risk of legal action in connection with the approval of any GHG-intensive projects.

Though the *Sharma* class action is an Australian first, the principles agitated across the five-day trial are similar to those put to the GFCC. The German decision may be evidence that the tide of judicial opinion is turning, and the principle of intergenerational equity is crystallising into an enforceable obligation. Nevertheless, even if it does not persuade the Federal Court of Australia in *Sharma*, it is likely that the German decision will be followed by a growing number of actions around the globe that aim to hold governments to account for inaction on climate change.

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