

The Queensland Human Rights Act and environmental approvals: Impact on coal mining

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Climate change case law

- Significant development in *Gloucester Resources Ltd v Minister for Planning (2019)* where applicant for coal mine rejected
- Courts are not consistent on where climate change litigation is going
- Accountability model - holding government to account for climate change implications
- *Urgenda Foundation v Netherlands* – Dutch government held liable in negligence for not addressing threat of climate change



The human rights law continuum

- A new preparedness for courts to consider human rights arguments
- An argument accepted in Pakistan where failure to implement climate policy a breach of applicant's human rights – *Ashgar Leghari v Pakistan*
- Key issue – can human rights legislation be used to object to coal mining applications?
- The argument rest primarily on the right to life – the push for ‘climate justice’ because of real threats to human right to life
- Although multiple human rights infractions may be argued in addition to threat to human life





Human Rights Act 2019 (Qld) ('Act')

- ▶ The Act is expressly stated as derived from international laws – including *Universal Declaration of Human Rights*
- ▶ Judgements of other courts may be used in interpreting its provisions – s48 (3)
- ▶ Protections relevant to climate change include – right to life (s16), cultural rights (s27) including aboriginal and Torres Strait Islander peoples (s28)
- ▶ The Act requires new bills to have a statement of compatibility (s38 (1) – however a failure to comply does not affect validity (s42)
- ▶ Parliament may make an override declaration (s43 (1) – (2)) – probably only made in exceptional circumstances
- ▶ Courts have an obligation to interpret statutory provisions for compatibility to human rights ((48 (1))



Public entity

- ▶ Unlawful for a public entity to act or make a decision which is not compatible with human rights or give proper consideration to human rights in making a decision (58 (1))
 - ▶ However, contravention does not invalidate the decision (s58(6))
 - ▶ A decision is 'compatible' where it does not limit human rights or 'limits it to what is 'reasonable and demonstrably justifiable' (s8 (b))
 - ▶ Several factors may be considered here in determining what is 'reasonable and justifiable'
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- ✓ **Nature of human right**
 - ✓ **Nature of limitation**
 - ✓ **Whether there is any less restrictive option (s13 (2))**



What can be enforced?

- ▶ No direct way to enforce a bills compatibility with human rights and the Act contains no direct cause of action
- ▶ Questions of compatibility interpreted by courts (s48) may be referred to Supreme court for judgement (s49)
- ▶ This referral must be consented to by court in question (49 (2) (b)) – is this a problematic section? - Yes
- ▶ An alleged breach of s58 (1) by public entities - complainant may make a complaint under part 4 of the Act – to Human Rights Commissioner (64(1))
- ▶ Courts may consider breach by public entities, but the act does not provide for a specific cause of action for human rights violations
- ▶ The option is to use 'piggyback clause' where breach may be on the back of a primary claim (s59 (1) – (2))




Some key considerations - enforcement

- ▶ The litigation against Waratah Coal arguably must address:
 - ❖ **Climate change effects connected to an actionable human right under the Act i.e., right to life,**
 - ❖ **Decision of a public entity must be seen as incompatible with right to life,**
 - ❖ **This claim must ‘piggyback’ on separate cause of action relating to right to life – i.e., objection under Environment Protection Act 1994 (Qld)**




Interpretation of Right to Life

- ▶ Right to 'adequate conditions of life in an environment of a quality that permits a life of dignity and wellbeing' –*Stockholm Declaration Principle 1*
- ▶ Intensified push to interpret this as extending to a 'safe environment,'
- ▶ Interdependence between human rights and environmental protection – See: J. H. Knox and R. Pejan (eds)*The Human Right to a Healthy Environment*,
- ▶ This has evolved further to encompass rights connected to climate change – See: M. Limon' *Human Rights and Climate Change: Constructing a Case for Political Action*, (2009) and Stephen Humphreys (ed) *Human Rights and Climate Change* (2009)
- ▶ The General Comment by the Human Rights Committee of the *ICCPR* – Recognition of right to life includes measures to restrict climate change




Actions under s58 (1) – Chance of success (First requirement)

- ▶ No stand alone cause of action – must ‘piggyback’ on another primary cause of action – (s59 (1) –(2))
- ▶ This may arise in multiple contexts – e.g. objections process under *Environment Protection Act 1994* (Qld)
- ▶ Whilst climate change is not specifically part of an objection process - Scope 3 emissions is a relevant consideration covering coal burning
- ▶ There is some precedent case law for associating Scope 3 emissions and climate change
- ▶ This must overcome the ‘market substitution’ argument – is there a logical flaw in this defense?



Actions under s58 (1) – Chance of success (Second requirement)

- ▶ Must argue that public entity has made a decision not compatible to human right to life s58 (1)
- ▶ Argue that mine approval impacts climate change which impacts right to life enjoyed in Queensland
- ▶ Argue that the decision limits and is incompatible with the right to life
- ▶ Clear evidence that Queensland coal exports is a significant contributor to global climate change – based on export data
- ▶ There is also clear data on the adverse health impacts from climate change – i.e. heatwaves and their effects



Actions under s58 (1) – Chance of success (Third requirement)

- ▶ Must overcome argument that a limitation on human rights is ‘reasonably and demonstrably justifiable’
- ▶ Must address the nature of the right, nature of limitation and alternative ways to address the limitation
- ▶ In other words demonstrate that a mine approval is not reasonable and demonstrably justifiable
- ▶ Risk that economic interests may override human rights arguments, but this must weigh up relative economic arguments between coal development and renewables



Some final observations

- To successfully argue human rights violations based on mine approvals requires a broad definition of a right to life
- Also to argue the long term threat from climate change is actionable in asserting the right
- There is also an evidential issue of proving causation links between climate change and human rights infractions – problematic but in what way?
- It is difficult to demonstrate a link between a particular mine and climate change
- Must overcome the problem of proving impacts from a specific mine are not compatible with human right to life and that we are dealing with a projection of future impacts
- **Conclusions – lets consider them**