

**IMPLICATIONS OF THE INTERNATIONAL COURT OF
JUSTICE'S ADVISORY OPINION ON THE
OBLIGATIONS OF STATES IN RESPECT OF CLIMATE
CHANGE FOR DIRECTORS' DUTIES IN RELATION TO
CLIMATE-RELATED RISKS**

JOINT OPINION

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A. INTRODUCTION

1. We are asked to provide our opinion on the implications, if any, of the International Court of Justice's (ICJ) Advisory **Opinion** on the Obligations of States in respect of Climate Change for directors' duties in relation to climate-related risks, by reference to a director's duty of care and diligence under s 180(1) of the *Corporations Act 2001* (Cth) (**Act**).¹
2. The Opinion has two salient features that inform an answer to that question.
3. The first feature is that the Opinion is a unanimous decision of a 15-member Court, articulated in unequivocal terms. The ICJ described climate change as an "urgent and existential threat",² and opined that States owe a duty under customary international law to prevent significant harm to the climate system.³ In order to discharge that duty, the Opinion expresses the view that States must use all means at their disposal to prevent activities carried out within their jurisdiction or control from causing said harm.⁴ That will include regulating the conduct of private operators within a State's jurisdiction or control so as to achieve deep, rapid, and sustained reductions of greenhouse gas emissions.⁵ So too, the ICJ opined that a breach of the duty under customary international law to prevent significant harm to the climate system — or any other duty identified in the Opinion — constitutes an internationally wrongful act that could attract consequences, such as an obligation to cease the act (or omission) or pay full reparation to injured States.⁶ The ICJ emphasised fossil fuel production and consumption, the granting of fossil fuel exploration licences, and the provision of fossil fuel subsidies as conduct that may breach those obligations.⁷
4. The second feature is that advisory opinions of the ICJ are not binding pursuant to Art 59 of the ICJ Statute or Art 94(1) of the United Nations Charter.⁸ Further, Australia is generally regarded as having a "dualist" approach to international law, such that its norms ordinarily

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² ICJ, *Obligations of States in Respect of Climate Change* (Advisory Opinion, 23 July 2025) <available at: <https://icj-web.lemman.un-icc.cloud/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf>> (**Opinion**) at [73]

³ Opinion at [134], [457].

⁴ Opinion at [135]-[138], [457].

⁵ Opinion at [281]-[282].

⁶ Opinion at [457]. See also [445].

⁷ Opinion at [427].

⁸ ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Advisory Opinion, 30 March 1950, 1950 I.C.J 65) p 71.

only apply domestically if adopted or “transformed” into domestic law. Accordingly, the Opinion is a non-binding statement of States’ international law obligations in respect of climate change, with no immediate domestic effect and, initially, only an indirect effect upon corporations.

5. These combined features entail that the implications of the Opinion for an Australian director’s duty of care under s 180(1) of the Act, will, at least in the first instance, flow through either informal or international mechanisms, and are likely to manifest principally through more stringent State regulation in respect of fossil fuels and other emissions-intensive activities.
6. However, adopting the language of the Climate Change Authority,⁹ while the Opinion is non-binding, it carries “significant weight and can be expected to influence future climate litigation, international negotiations, and national climate policies”.¹⁰ As we develop herein, that prediction is already being fulfilled.
7. Since the Opinion was published, 80 countries, including Australia, have signed the Bélem Declaration on the Transition Away from Fossil Fuels, which calls for a “just, orderly and equitable” transition away from fossil fuels. In March 2026, the New South Wales (NSW) Government announced that it will no longer consider applications for new “greenfield” coal mines.¹¹ That announcement followed a report by the NSW Net Zero Commission that cited the Opinion in support of the conclusion that expanding coal production is not consistent with meeting climate commitments and could expose the Commonwealth government to liability under international law.¹²
8. If Australia — or other States connected with Australian corporations’ business operations — were to take more stringent regulatory action in fulfilment of their international law obligations, that may well restrict, or at least increase the costs of, emissions-intensive activities presently important to profit generation by Australian corporations. That could

⁹ Constituted under the *Climate Change Act 2022* (Cth) as an independent statutory body to provide expert advice to the Australian Government on climate change policy.

¹⁰ Climate Change Authority, *2035 Targets Advice* (12 September 2025) p 28.

¹¹ NSW Government, *NSW Coal Industry 2026-50* (March 2026) p 7.

¹² NSW Net Zero Commission, *Coal Mining Emissions: Spotlight Report* (December 2025) pp 45-46.

present a risk of harm to Australian corporations that engage in, or otherwise derive revenue from, such activities.

9. Beyond the risk of more stringent regulation, the risks associated with litigation — including reputational risk, share price risk, the diversion of resources, time and costs, the risk of remedies being successfully obtained — may also arise. The Opinion could precipitate litigation in various ways, including the following. *First*, the Opinion could inform inter-State disputes in which emitting States are sought to be held accountable for their failure to comply with the duties set out in the Opinion (with remedies including cessation, restitution and reparation). *Second*, in investor-State disputes, investors may seek to rely on the Opinion in arguing that States' non-compliance with their international climate change obligations constitutes a breach of investment protections. States may rely upon the Opinion if defending claims by foreign investors for damage caused to their investments by regulatory action taken by that State in compliance with international obligations. *Third*, the Opinion is already being cited in domestic courts, including in Australia. Depending upon the reception into local law of aspects of the Opinion, it could have implications for whether emissions-intensive projects can obtain necessary regulatory approvals, as well as for corporations' liability for climate-related harms.
10. Against that background, our views can be summarised as follows.
11. *First*, it is now well-established that climate change poses foreseeable risks of harm to most, if not all, Australian corporations. That is the premise of the sustainability reporting obligations now contained in Pt 2M.3 of the Act.
12. *Second*, a number of developments independent of the Opinion suggest that the standard of care expected of directors in respect of climate-related risks continues to rise. That is particularly true of directors of corporations that are, or will soon be, subject to sustainability reporting obligations under Pt 2M.3 of the Act, which require disclosure of a corporation's

material financial climate-related risks¹³ (amongst other matters) and impose ultimate responsibility for those disclosures upon directors.¹⁴

13. *Third*, in that context, the Opinion is likely to inform legal and regulatory developments that amplify the climate-related risks to which some Australian corporations, particularly those in high-emitting sectors, are exposed. As the magnitude of those risks or the probability of their occurrence rises, so too may the standard of care expected of directors of those corporations.
14. *Fourth*, it is not possible to provide uniform guidance as to how directors, occupying that role in varying sectors at varying times, would discharge their duty of care in relation to climate-related risks. That will depend on circumstances particular to the corporation and the director. However, in general, a director will minimise the risk of being found liable for breaching her or his duty of care under s 180(1) if:
 - a. a director is sufficiently apprised of the corporation's climate-related risks;
 - b. a director takes a diligent and intelligent interest in information about the corporation's climate-related risks, ensures she or he understands that information, and applies an enquiring mind to her or his responsibilities;
 - c. having considered and sought advice on a corporation's climate related risks, a director decides to act or declines to act based upon a rational and informed assessment of the corporation's best interests;
 - d. a director takes all reasonable steps to ensure a corporation's material climate-related risks are disclosed in accordance with the corporation's disclosure obligations, particularly those imposed by Pt 2M.3 of the Act; and
 - e. a director takes all reasonable steps to ensure that statements she or he approves, especially statements contained in annual sustainability reports under Pt 2M.3 of the Act, are accurate and do not omit any material climate-related risks.

¹³ Act ss 296A(1), 296D. Australian Accounting Standards Board, Australian Sustainability Reporting Standard AASB S2 *Climate-related Disclosures* (20 September 2024) (**AASB S2**), [10]-[11], [15]-[16]. AASB2 is the sustainability standard applicable to annual sustainability reporting obligations under ss 296A-296D of the Act: Act s 336A.

¹⁴ Act s 296A.

15. In **Section B**, we explain the concept of climate-related risks and how those risks inform a director’s duty of care under s 180(1) of the Act. In **Section C**, we consider how the Opinion may inform the climate-related risks to which Australian corporations are exposed. We first summarise the findings of the Opinion before detailing the regulatory and policy developments and litigation risks arising from the Opinion that may be pertinent to Australian corporations. In **Section D**, we address how directors ought respond to the risks identified in Section C.

B. CLIMATE-RELATED RISKS AND DIRECTORS’ DUTIES

16. In this section, we explain how climate-related risks relate to and inform a director’s duty of care under s 180(1). We begin by explaining the concept of climate-related risks and outlining the principles that govern the duty owed by directors under s 180, before considering the particular application of those principles in this context.

B.1 Climate-related risks

17. The sustainability reporting obligations under Pt 2M.3 of the Act recognise that climate change may present risks *and* opportunities for Australian corporations.¹⁵ The potential for liability under s 180(1) arises only if a director’s act or omission exposes the corporation to a foreseeable risk of harm.¹⁶ We therefore approach this topic from the perspective of risk, which is more likely to be the focus of litigation against a director for an alleged breach of her or his duty under s 180(1).
18. We adopt the definition of “climate-related risks” that applies to sustainability reporting obligations under Pt 2M.3 of the Act, namely: the potential negative effects of climate change on a corporation.¹⁷ Those risks are categorised as:
- a. **Climate-related physical risks**, which risks can be event-driven (acute physical risk) or arise from longer-term shifts in climatic patterns (chronic physical risk). Acute physical risks arise from weather-related events such as storms, floods, drought or heatwaves, which are increasing in severity and frequency. Chronic physical risks

¹⁵ See, for example, Act s 296D(1)(a).

¹⁶ *Vrisakis v ASIC* (1993) 9 WAR 395 at 449 (Ipp J, Malcolm CJ agreeing).

¹⁷ AASB S2, Appendix A, definition of “climate-related risks and opportunities”. AASB2 is the sustainability standard applicable to annual sustainability reporting obligations under ss 296A-296D of the Act: Act s 336A.

arise from longer-term shifts in climatic patterns including changes in precipitation and temperature which could lead to sea level rise, reduced water availability, biodiversity loss and changes in soil productivity.¹⁸

- b. **Climate-related transition risks**, which are risks that arise from efforts to transition to a lower-carbon economy. Transition risks include policy, legal, technological, market and reputational risks.¹⁹

19. The standards that apply to sustainability reporting under Pt 2M.3 of the Act entail that both categories of risk could have financial implications for a corporation.
20. Climate-related physical risks could give rise to costs resulting from direct damage to assets or indirect effects from supply-chain disruptions. A corporation's financial performance could also be affected by changes in water availability, sourcing and quality, and extreme temperature changes affecting the corporation's premises, operations, supply chains, transportation needs and employee health and safety.²⁰
21. Climate-related transition risks could result in increased operating costs or asset impairment due to new or amended climate-related regulations. A corporation's financial performance could be further affected by shifting consumer demands and the development and deployment of new technology.²¹
22. The sustainability reporting obligations in Pt 2M.3 of the Act are primarily concerned with the impact of climate-related risks on a corporation's *financial* interests. Climate-related risks may pose risks of harm to other interests of a corporation, including its reputation. As explained below, all of those interests will be relevant in determining whether a director has breached her or his duty under s 180(1).

B.2 The duty under s 180

23. Section 180(1) of the Act is concerned with ensuring that directors and other officers exercise their powers and discharge their duties with the requisite degree of care and diligence. That duty is owed in addition to directors' general law duty, recognised by both common law

¹⁸ AASB S2, Appendix A, definition of "climate-related physical risks".

¹⁹ AASB S2, Appendix A, definition of "climate-related transition risks".

²⁰ AASB S2, Appendix A, definition of "climate-related physical risks".

²¹ AASB S2, Appendix A, definition of "climate-related transition risks".

and equity, to take reasonable care.²² However, the duty in s 180(1) has been described as “essentially the same” as that general law duty.²³

24. Section 180(1) imposes an objective standard of care identified by reference to the matters in sub-paragraphs (a) and (b), namely, the corporation’s circumstances and the director’s office and responsibilities within the corporation.²⁴
25. The phrase “corporation’s circumstances” has been interpreted expansively and includes the type of corporation, the provisions of its constitution, the size and nature of the corporation’s business, the composition of the board, the competence of the corporation’s management and advisers, and the distribution of work and responsibilities as between the board and other officers.²⁵ In the case of a parent corporation, it will include the size and nature of the business of its subsidiaries if they are under that parent corporation’s supervision.²⁶ The “corporation’s circumstances” also necessarily include, if it be relevant to the particular case, any breach or potential breach of the law by the corporation.²⁷
26. A director’s responsibilities within the corporation include any responsibility that is imposed on a director by legislation, but also encompass “whatever responsibilities the [director] concerned had within the corporation, regardless of how or why those responsibilities came to be imposed” on that director (emphasis in original).²⁸ Accordingly, a director’s responsibilities will include arrangements flowing from the experience and skills the director brought to her or his office, and also any arrangements within the board or between the board and management.²⁹ As a result, a more exacting standard of care may be expected of a director with respect to climate-related risks if she or he has particular responsibilities, experience or skills in relation to sustainability-related matters.
27. In determining whether a director has breached her or his duty under s 180(1), a court will balance “the foreseeable risk of harm against the potential benefits that could reasonably

²² Act s 185. As to directors owing a single general law duty to take reasonable care: *ASIC v Cassimatis (No 8)* (2016) 336 ALR 209; [2016] FCA 1023 at [427] and the authorities cited therein.

²³ *ASIC v Adler* (2002) 168 FLR 253; [2002] NSWSC 171 at [372] and the authorities cited therein.

²⁴ *Shafron v ASIC* (2012) 247 CLR 465; [2012] HCA 18 at [18] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

²⁵ *ASIC v Bekier (Liability Judgment)* [2026] FCA 196 at [354].

²⁶ *Bekier* at [355], citing *ASIC v Rich* (2009) 236 FLR 1; [2009] NSWSC 1229 at [7201(a)].

²⁷ *Bekier* at [355], citing *Cassimatis v ASIC* (2020) 275 FCR 533; [2020] FCAFC 52 at [456] (Thawley J).

²⁸ *Shafron v ASIC* (2012) 247 CLR 465; [2012] HCA 18 at [18] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

²⁹ *ASIC v Rich* (2003) 174 FLR 128; [2003] NSWSC 85 at [49].

have been expected to accrue to the corporation from the conduct in question”.³⁰ As stated by Beach J (emphasis in original):³¹

Not only must the Court consider the nature and magnitude of the foreseeable risk of harm and degree of probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action, but the Court must balance the foreseeable risk of harm against the potential benefits that could reasonably be expected to accrue from the conduct in question.

After all, one expects management including the directors to take *calculated* risks. The very nature of commercial activity necessarily involves uncertainty and risk taking. The pursuit of an activity that might entail a foreseeable risk of harm does not of itself establish a contravention of s 180. Moreover, a failed activity pursued by the directors which causes loss to the corporation does not of itself establish a contravention of s 180.

28. The balancing exercise is forward-looking to what a reasonable person would have done and must be undertaken without the benefit of hindsight.³²
29. As noted above, the potential for liability under s 180(1) arises only if a director’s act or omission exposes *the corporation* to a foreseeable risk of harm.³³ However, the balancing exercise is not necessarily confined to commercial considerations or to a comparison of monetary consequences. It extends to considering all the interests of the corporation, including its reputation and interest in pursuing lawful activity.³⁴ That is significant in the context of climate-related risks. Even if a corporation’s contributions to climate change do not pose foreseeable risks of harm to the corporation’s *financial* interests, they may pose risks of harm to its other interests, particularly as the regulation of emissions-intensive activities tighten and societal and market expectations evolve.

B.3 The duty of care in relation to climate-related risks

30. What emerges from the preceding analysis is that the inquiry as to whether a director has failed to meet the objective standard required by s 180(1) is “fact-intensive”.³⁵ The fact-intensive nature of the inquiry precludes any general conclusion as to a director’s duty in relation to climate-related risks. We nonetheless make the following general observations.

³⁰ *Vrisakis v ASIC* (1993) 9 WAR 395 at 449-450 (Ipp J, Malcom CJ agreeing).

³¹ *ASIC v Mariner Corporation Ltd & Ors* (2015) 241 FCR 502; [2015] FCA 589 at [451]-[452].

³² *Bekier* at [359] and the authorities cited therein.

³³ *Vrisakis v ASIC* (1993) 9 WAR 395 at 449 (Ipp J, Malcolm CJ agreeing).

³⁴ *ASIC v Cassimatis (No 8)* (2016) 336 ALR 209; [2016] FCA 1023 at [479]-[483]; *Cassimatis* at [459] (Thawley J).

³⁵ *Cassimatis* at [24] (Greenwood J).

31. *First*, it is now well-established that climate change poses foreseeable risks of harm to most, if not all, Australian corporations. That is the premise of the sustainability reporting obligations now contained in Pt 2M.3 of the Act, which we discuss further below.³⁶

32. In a claim brought against the directors of **Shell** Plc in the UK, the Court accepted that the claimants had established a *prima facie* case that Shell was exposed to material and foreseeable climate-related risks.³⁷ Whether a court would make similar findings in a claim against directors of an Australian corporation would depend on the particular circumstances of the corporation, including the sector in which it operates.

33. *Second*, it has been said that s 180(1) (emphasis in original):³⁸

... is *normative* and its burden is a matter of *public concern* not just *private rights*. It is an expression of the Parliament's intention to establish an objective normative standard of the *degree* of care and diligence directors *must* attain or discharge in exercising a power conferred on them or in discharging a duty to be discharged by them.

34. What that normative standard requires is not static, but evolves with the complexity of the times.³⁹ In 1991, Tadgell J observed:⁴⁰

As the complexity of commerce has gradually intensified (for better or for worse) the community has of necessity come to expect more than formerly from directors whose task it is to govern the affairs of companies to which large sums of money are committed by way of equity capital or loan. In response, the parliaments and the courts have found it necessary in legislation and litigation to refer to the demands made on directors in more exacting terms than formerly; and the standard of capability required of them has correspondingly increased. In particular, the stage has been reached when a director is expected to be capable of understanding his corporation's affairs to the extent of actually reaching a reasonably informed opinion of its financial capacity. Moreover, he is under a statutory obligation to express such an opinion annually. I think it follows that he is required by law to be capable of keeping abreast of the corporation's affairs, and sufficiently abreast of them to act appropriately if there are reasonable grounds to expect that the corporation will not be able to pay all its debts in due course and he has reasonable cause to expect it.

35. At least two salient developments indicate that a similar shift is affecting the standard of care expected of directors in relation to climate-related risks.

³⁶ See, in particular, s 296D(1)(a)(i) of the Act. See also ASIC, *Regulatory Guide 280: Sustainability Reporting* (March 2025) and AASB S2.

³⁷ *ClientEarth v Shell Plc & Ors* [2023] EWHC 1897 (Ch) at [45].

³⁸ *Cassimatis* at [27] (Greenwood J). See also [449] (Thawley J).

³⁹ *Cassimatis* at [451] (Thawley J), citing *Daniels v Anderson* (1995) 37 NSWLR 438 at 499 (Clarke JA and Sheller JA), quoting *Commonwealth Bank of Australia v Friedrich & Ors* (1991) 5 ACSR 115 at 126.

⁴⁰ *Commonwealth Bank of Australia v Friedrich & Ors* (1991) 5 ACSR 115 at 126.

36. The first is that, from 1 January 2025, Australia’s largest emitters and corporations (known as “Group 1” entities)⁴¹ must publish annual sustainability reports in accordance with ss 296A to 296D of the Act. Smaller Group 2 and Group 3 entities will be phased in from 1 July 2026 and 1 July 2027, respectively.⁴²
37. Annual sustainability reports must generally disclose the following information:⁴³
- a. any material financial climate-related risks or opportunities for the entity that are required to be disclosed by AASB S2;
 - b. any climate-related metrics and targets that are required to be disclosed by AASB S2, including metrics and targets relating to Scope 1, 2 and 3 greenhouse gas emissions; and
 - c. any information about the governance, or strategy of, or risk management by, the entity in relation to the risks, opportunities, metrics and targets mentioned in paragraphs (a) and (b) above that is required to be disclosed by AASB S2.
38. Importantly, annual sustainability reports must contain a declaration by the directors as to whether, in their opinion, the substantive provisions of the sustainability report are in accordance with the Act.⁴⁴ That declaration must be made in accordance with a resolution of the directors.⁴⁵ Further, a director is required to take all reasonable steps to comply with, or secure compliance with, the sustainability reporting obligations in Pt 2M.3.⁴⁶
39. As Tadgell J articulated, such statutory obligations inform the standard of care expected of directors. That is because the obligations imposed on directors by the Act form part of their

⁴¹ Being entities to which sub-sections (2) or (4) of s 1707B of the Act apply for the 2025-26 financial year: Act s 1707B(1)(a). See Climate Governance Initiative Australia, *A director’s guide to mandatory climate reporting* (Version 2, September 2024) p 18.

⁴² Act s 1707B(1)(b) and (c), respectively. See Climate Governance Initiative Australia, *A director’s guide to mandatory climate reporting* (Version 2, September 2024) p 18.

⁴³ Act ss 296A(1), 296D.

⁴⁴ Act s 296A(1)(e) and (6). For the first three years of the reporting regime, directors are required to provide a more qualified declaration, namely, that, in their opinion, the entity has taken reasonable steps to ensure the substantive provisions of the sustainability report are in accordance with the Act: s 1707C.

⁴⁵ Act s 296A(7)(a).

⁴⁶ Act s 344(1).

responsibilities within the corporation for the purposes of s 180(1)(b), which in turn informs the standard of care.⁴⁷

40. That much is apparent in the decision of *ASIC v Healey* (2011) 196 FCR 291; [2011] FCA 717. In that case, directors were found to have breached their duty under s 180(1) by approving consolidated financial statements that failed to disclose significant liabilities. Justice Middleton considered that s 295(4) of the Act, which required directors to make certain declarations as to financial statements in accordance with a resolution of the directors, was “of significance” in a consideration of the scope of a director’s responsibilities.⁴⁸ His Honour reasoned:⁴⁹

In my view, the objective duty of competence requires that the directors have the ability to read and understand the financial statements... Equally, a director should have an understanding of the need to disclose certain events post balance sheet date. It would not be possible for a director to form the opinion required by s 295(4)(d) without such an understanding. It is not suggested that a director could vote in favour of a resolution in support of the required directors’ statements when he did not hold the opinions referred to at all.

The Act explicitly requires that the declaration required by s 295(4) and the annual directors’ report must be made in accordance with a resolution of the directors. In that manner the Act imposes ultimate responsibility for those matters upon the directors in a way that they cannot delegate. They must themselves determine to adopt the required resolution.

41. Accordingly, Middleton J concluded that s 295(4) required directors themselves to form an opinion, which must be done with all due care and diligence. At a minimum, the directors had to inform themselves as to the financial affairs of the corporation to the extent necessary to form, each year, the opinion required.⁵⁰ We explain below the implications of that analysis for a director’s duty in relation to climate-related risks.
42. The *second* salient development is the emergence of claims in various jurisdictions for alleged breaches of directors’ duties as a result of directors’ management of climate-related risks.

⁴⁷ *Shafron v ASIC* (2012) 247 CLR 465; [2012] HCA 18 at [18] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁴⁸ *Healey* at [264].

⁴⁹ *Healey* at [124]-[125].

⁵⁰ *Healey* at [146].

43. There have now been at least two such claims under the *Corporations Act 2006* (UK).⁵¹ While both claims were denied permission to continue for failing to establish a *prima facie* case,⁵² that does not foreclose the prospects of a successful climate-related directors' duties claim for at least two reasons.
44. The first is that a lack of evidence was fatal to both cases.⁵³ As noted in extrajudicial commentary by Lord Sales, that suggests that a claim may be more likely to succeed if claimants adduce stronger evidence.⁵⁴ The second is the ambitious nature of those claims. In each case, the corporation had adopted emissions reduction targets and had plans to achieve those targets. The directors were said to have breached their duties because the claimants considered those targets and plans were inadequate. As explained below, a director will not breach her or his duty of care merely because she or he took a course of action that claimants or a court do not consider ideal.⁵⁵ Issues of breach are more likely to arise where a director approves misleading statements about a corporation's climate-related risks (including statements that are misleading by omission), fails to consider climate-related risks at all, or approves a course of action so unreasonable that no reasonable director would have approved it.
45. To date, no climate-related claim has been brought against an Australian corporation director. However, claims have been brought in respect of alleged breaches of analogous duties owed by corporate trustees of registrable superannuation entities and responsible entities of registered management investment schemes.⁵⁶

⁵¹ *McGaughey & Anor v Universities Superannuation Scheme Ltd & Ors* [2023] EWCA Civ 873; *ClientEarth v Shell Plc & Ors* [2023] EWHC 1897 (Ch).

⁵² As required by s 261 of the *Corporations Act 2006* (UK).

⁵³ *McGaughey & Anor v Universities Superannuation Scheme Ltd & Ors* [2023] EWCA Civ 873 at [172], [174] (Asplin LJ, Snowden LJ and Sir Julian Flaux C agreeing); *ClientEarth v Shell Plc & Ors* [2023] EWHC 1897 (Ch) at [59]-[64], [66].

⁵⁴ Lord Sales, 'Directors' duties and climate change: navigating the shifting landscape of corporate environmental responsibility' (Speech given at Durham Law School Institute of Commercial and Corporate Law Annual Lecture, 27 February 2025) p 10.

⁵⁵ *ASIC v Rich* (2009) 236 FLR 1; [2009] NSWSC 1229 at [7242].

⁵⁶ See, for example, *ASIC v Fiducian Investment Management Services Limited* (Supreme Court of New South Wales, Case No. 379274/2025); *McVeigh v Retail Employees Superannuation Pty Ltd* (Federal Court of Australia, NSD133/2018). The latter case settled in November 2020, with the respondent issuing a media release acknowledging that climate change was a "material, direct and current financial risk to the superannuation fund across many risk categories". The respondent committed to taking "further steps to ensure that investment managers take active steps to consider, measure and manage financial risks posed by climate change and other relevant ESG risks": Rest, 'Statement from Rest' (Media Release, 2 November 2020).

46. For example, in October 2025, ASIC commenced proceedings against **Fiducian** Investment Management Services Limited for representing that its Diversified Social Aspirations Fund (DSAF) would only invest in corporations that were considered to be positive for society and the environment, when in fact the fund invested in two underlying funds which did not exclude investments in shares or corporations that derived revenue from fossil fuels.⁵⁷ ASIC alleges that, among other things, Fiducian breached its duty of care and diligence under s 601FC(1)(b) of the Act by failing adequately to monitor and manage the fund, including:⁵⁸
- a. failing to monitor or review the alignment of investments made by the investment managers of the underlying funds with the objectives of the DSAF;
 - b. failing to review, amend or appropriately qualify the Product Disclosure Statement for the DSAF so that it was not false, misleading or deceptive;
 - c. failing to identify environmental, social and governance risks and have adequate controls; and
 - d. failing to comply with its own risk management and compliance procedures.
47. That case is ongoing. Nonetheless, it illustrates that the risk of domestic litigation is not merely theoretical. Nor is that risk driven solely by civil society organisations; it is now attracting the attention of regulators and aggrieved members.
48. *Third*, the steps that a director should take to discharge her or his duty under s 180(1) will be informed by the following overarching principles.
49. It has been observed that the days of the sleeping, or passive, director are well and truly over.⁵⁹ It is a “core, irreducible requirement” that directors take all reasonable steps to be in a position to guide and monitor the management of the corporation.⁶⁰ Directors must be familiar with the fundamentals of the business in which the corporation is engaged and are

⁵⁷ *ASIC v Fiducian Investment Management Services Limited* (Originating Process, Case No. 379274/2025, 2 October 2025) at [1] and [2]; *ASIC v Fiducian Investment Management Services Limited* (Statement of Claim, Case No. 379274/2025, 2 October 2025) at B-C.

⁵⁸ *ASIC v Fiducian Investment Management Services Limited* (Originating Process, Case No. 379274/2025, 2 October 2025) at [3]; *ASIC v Fiducian Investment Management Services Limited* (Statement of Claim, Case No. 379274/2025, 2 October 2025) at G.

⁵⁹ *Daniels v Anderson* (1995) 37 NSWLR 438 at 500E, 505C (Clarke JA and Sheller JA), quoting *Morley v Statewide Tobacco Services Ltd* [1993] 1 VR 423 at 465 (the Court).

⁶⁰ *Healey* at [16].

under a continuing obligation to keep informed about its activities and “the effect that a changing economy may have on [its] business”.⁶¹ Directors, whether executive or non-executive, are expected to take a diligent and intelligent interest in the information available to them, understand that information, and apply an enquiring mind to their responsibilities.⁶² Directors cannot eschew those expectations due to an inability to cope with the volume of information they receive.⁶³

50. Directors are, however, entitled to rely without verification on the judgment, information and advice of management and other officers.⁶⁴ That is particularly true of non-executive directors, who may rely on management and other officers to a greater extent than an executive director.⁶⁵ The degree of permissible delegation or reliance will depend on matters such as: whether the function that has been delegated is one that may properly be left to others; the extent to which a director is or should have been put on inquiry; the honesty and competence of the delegate, and whether the position of the director is executive or non-executive.⁶⁶ If facts have come to the director’s attention that have awoken suspicion that something is amiss, or would have awoken the suspicion of a prudent director, then the director has a duty to enquire into the matter.⁶⁷ As noted above, directors *cannot* delegate responsibilities imposed directly on them by statute, such as the responsibility to approve sustainability reports under Pt 2M.3 of the Act.⁶⁸
51. Section 180(1) does not impose a standard of perfection.⁶⁹ The issue is not whether a director made a mere mistake or error of judgement. Nor is the issue whether a director took the *ideal* course of action.⁷⁰ Courts recognise that the management and direction of corporations involves “taking decisions and embarking upon action which may promise much, on the one hand, but which are, at the same time, fraught with risk on the other”.⁷¹ The duty is not

⁶¹ *AWA Ltd v Daniels (t/a Deloitte Haskins & Sells) & Ors* (1992) 7 ACSR 759 at 864; *Healey* at [166].

⁶² *Bekier* at [395].

⁶³ *Bekier* at [380]-[385], [395].

⁶⁴ *Bekier* at [363].

⁶⁵ *Bekier* at [370], citing *Morley v ASIC* (2010) 274 ALR 205; [2010] NSWCA 331 at [807] (the Court).

⁶⁶ *ASIC v Adler* (2002) 168 FLR 253; [2002] NSWSC 171 at [372(11)]. See also ss 189 and 190 of the Act.

⁶⁷ *Bekier* at [365].

⁶⁸ Act s 296A(6) and (7); *Healey* at [125].

⁶⁹ *Bekier* at [360].

⁷⁰ *ASIC v Rich* (2009) 236 FLR 1; [2009] NSWSC 1229 at [7242].

⁷¹ *Vrisakis v ASIC* (1993) 9 WAR 395 at 449 (Ipp J, Malcolm CJ agreeing).

intended to “dampen business enterprise and penalise legitimate but unsuccessful entrepreneurial activity”.⁷²

52. That much is recognised by the “business judgment rule” in s 180(2). That statutory defence⁷³ protects decisions “to take or not take action in respect of a matter relevant to the business operations” of a corporation if certain preconditions are satisfied. One precondition is that the director informed herself or himself about the subject matter of the decision, to the extent she or he reasonably believed appropriate. Other preconditions are that a director: was acting in good faith and for a proper purpose; had no material personal interest in the subject matter of the judgment; and rationally believed the judgment was in the best interests of the corporation. The latter precondition will be satisfied if the evidence demonstrates that a director believed her or his judgment was in the best interests of the corporation and that belief was supported by a reasoning process sufficient to warrant describing it as a rational belief, whether or not the reasoning process is objectively convincing.⁷⁴ Importantly, the defence will not capture the discharge of directors’ monitoring and oversight duties or decisions not to comply with the requirements of the Act.⁷⁵ It also will not protect directors who are uninformed, who make no conscious decision, or who exercise no judgment.⁷⁶
53. A common feature of cases in which directors have been found to breach their duty of care is that they caused or permitted the corporation to make statements that contravened statutory disclosure obligations and/or prohibitions on misleading or deceptive conduct or otherwise failed to disclose significant matters.⁷⁷ The potential for liability is most pronounced in the context of statements that directors have a statutory obligation to approve, such as statements in the substantive provisions of annual sustainability reports. Directors of corporations required to prepare such reports must themselves form the opinion that the substantive provisions of the report are in accordance with the Act,⁷⁸ and must take

⁷² *Vrisakis v ASIC* (1993) 9 WAR 395 at 449 (Ipp J, Malcolm CJ agreeing).

⁷³ There is a debate as to whether s 180(2) operates as a defence or rebuttable presumption. The weight of authority prefers the former view, which was the basis on which Lee J proceeded in *Bekier*: see [410]-[418].

⁷⁴ *Bekier* at [423].

⁷⁵ *Bekier* at [420]-[421].

⁷⁶ *ASIC v Rich* (2009) 236 FLR 1; [2009] NSWSC 1229 at [7277].

⁷⁷ See, for example, *ASIC v Hellicar* (2012) 247 CLR 345; [2012] HCA 17; *ASIC v Big Star Energy Ltd (No 3)* (2020) 389 ALR 17; [2020] FCA 1442; *ASIC v Vocation Ltd (in liq)* (2019) 371 ALR 155; [2019] FCA 807; *ASIC v Sino Australia Oil and Gas Ltd (in liq)* (2016) 115 ACSR 437; [2016] FCA 934; *Healey*; *ASIC v Citrofresh International Ltd* (2010) 77 ACSR 69; [2010] FCA 27; *Re One.Tel Ltd (in liq)*; *ASIC v Rich* (2003) 44 ACSR 682; [2003] NSWSC 186.

⁷⁸ Act s 296A(6) and (7); *Healey* at [125].

all reasonable steps to comply, or secure compliance, with, those reporting obligations.⁷⁹ In order to discharge that responsibility, directors will likely be expected to take a diligent and intelligent interest in the information available, to understand that information, and, if necessary, make further inquiries if matters revealed in annual sustainability reports call for such inquiries.⁸⁰

54. The following points of general application distil from the above analysis:
- a. it is likely that a baseline level of knowledge of a corporation's climate-related risks is now expected of directors, particularly if that corporation has annual sustainability reporting obligations under Pt 2M.3 of the Act;
 - b. directors should ensure that there are systems and processes in place for them to remain abreast of developments that pose or exacerbate foreseeable climate-related risks to the corporation, particularly in the context of considering and approving annual sustainability reports under Pt 2M.3 of the Act;
 - c. directors should take a diligent and intelligent interest in the information available to them about the corporation's climate-related risks, ensure they understand that information, and apply an enquiring mind to their responsibilities;
 - d. a director who considers, and takes advice on, a corporation's climate-related risks is in a far better position than one who does nothing at all;
 - e. it will typically be more difficult to establish that a director has breached her or his duty under s 180(1) if, having considered and sought advice on a corporation's climate-related risks, she or he decides to act or declines to act based upon a rational and informed assessment of the corporation's best interests; and
 - f. directors should take all reasonable steps to ensure a corporation's material climate-related risks are disclosed in accordance with the corporation's disclosure obligations, particularly those imposed by Pt 2M.3 of the Act;

⁷⁹ Act s 344(1).

⁸⁰ *Healey* at [20].

- g. directors should take all reasonable steps to ensure that statements they approve, especially statements contained in annual sustainability reports under Pt 2M.3 of the Act, are accurate and do not omit any material climate-related risks.

C. HOW, IF AT ALL, DOES THE OPINION INFORM CLIMATE-RELATED RISKS FOR AUSTRALIAN CORPORATIONS?

- 55. A natural response on the part of Australian directors may be to conceive of the Opinion as being far removed from their domestic legal duties. The Opinion is concerned with the obligations of States rather than corporations. It is not formally binding as a matter of international law.⁸¹ And, given that Australia is generally regarded as having a “dualist” approach to international law, its norms can ordinarily only apply domestically if adopted or “transformed” into domestic law.⁸²
- 56. Such a response may, however, underestimate the potential for the Opinion to generate legal and regulatory developments that raise risks of harm for Australian corporations. It can be recalled that an ICJ advisory opinion in part prompted the High Court’s recognition of native title in *Mabo v Queensland (No 2)*.⁸³
- 57. We seek to identify below the aspects of the Opinion likely to be most germane to Australian corporations, before considering how the Opinion has begun to influence regulatory and legal developments relevant to Australian corporations.
- 58. While we focus primarily on domestic developments, developments in other jurisdictions may inform the climate-related risks that Australian corporations are exposed to. That is particularly true of corporations that sell their products or services into export markets, are

⁸¹ Advisory opinions of the ICJ are not binding pursuant to Art 59 of the ICJ Statute or Art 94(1) of the United Nations Charter: ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Advisory Opinion, 30 March 1950, 1950 I.C.J 65) p 71.

⁸² Gillian D Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, Second Edition, 2011) at [4.45]-[4.46]; *Victoria v Commonwealth* (1996) 187 CLR 416 at 480-481 (Brennan CJ, Toohey, Gaudron, McHugh, Gummow JJ); *Nulyarimma & Ors v Thompson & Ors* (1999) 96 FCR 153 at [22]-[29] (Wilcox J), [57] (Whitlam J).

⁸³ (1992) 175 CLR 1; [1992] HCA 23, CLR at 41-42 (Brennan J, Mason CJ and McHugh J agreeing). Referring to the *Advisory Opinion on Western Sahara* [1975] I.C.J. 12, Brennan J concluded that, if the international law notion that inhabited land may be classified as terra nullius no longer commanded general support, the doctrines of the common law that depended on the same notion could “hardly be retained”.

related to a foreign corporation or corporations, or have activities or projects in foreign jurisdictions.

C.1 Summary of the Opinion

59. In 2023, the United Nations General Assembly requested from the ICJ an advisory opinion on two questions:⁸⁴

- a. What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations?
- b. What are the legal consequences for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, either with respect to:
 - i. States injured, specially affected, or particularly vulnerable to the adverse effects of climate change, or
 - ii. peoples and individuals of the present and future generations affected by the adverse effects of climate change?

60. The Opinion comprises a unanimous answer to both questions from the 15-member court. In addition, various members published separate opinions and declarations.⁸⁵

61. The Opinion spans States' obligations under the three climate change treaties (the United Nations Framework Convention on Climate Change, the Kyoto Protocol, and the Paris Agreement), customary international law, international human rights law, other environmental treaties and the law of the sea. A comprehensive summary of the ICJ's

⁸⁴ The request was made pursuant to Resolution 77/276 adopted by the United Nations General Assembly on 29 March 2023. The Secretary-General of the United Nations officially communicated to the ICJ the terms of the Resolution by letter dated 12 April 2023: Opinion at [1].

⁸⁵ Separate Opinion of Vice President Sebutinde; Declaration of Judge Tomka; Separate Opinion of Judge Yusuf; Separate Opinion of Judge Xue; Separate Opinion of Judge Bhandari; Joint Declaration of Judges Bhandari and Cleveland; Declaration of Judge Nolte; Separate Opinion of Judge Charlesworth; Joint Declaration of Judges Charlesworth, Brant, Cleveland and Aurescu; Declaration of Judge Cleveland; Separate Opinion of Judge Aurescu; Declaration of Judge Tladi.

reasoning is beyond the scope of this opinion.⁸⁶ However, five aspects are particularly relevant to Australian corporations.

62. *First*, the ICJ recognised that States are subject to a duty under customary international law to prevent significant harm to the climate system.⁸⁷ The duty is an obligation to act with due diligence, meaning that States are obliged to employ all means reasonably available to them, so as to prevent harm so far as possible.⁸⁸ The standard of due diligence is stringent given that climate change poses a universal risk to all States, and the risk is of a general and urgent character.⁸⁹
63. *Second*, the ICJ clarified the mitigation obligations of parties to the three climate change treaties, being the United Nations Framework Convention on Climate Change, the Kyoto Protocol, and the Paris Agreement. The ICJ concluded that limiting warming to 1.5°C above pre-industrial levels is the agreed primary temperature goal.⁹⁰ The nationally determined contributions (NDCs) prepared, communicated, and maintained by parties under the Paris Agreement must, when taken together, be capable of achieving the 1.5°C temperature goal.⁹¹ Each party must do its utmost to ensure that the NDCs it puts forward represent its highest possible ambition in order to realise that goal,⁹² and must make its best efforts to achieve its communicated NDCs.⁹³ It would be necessary also to consider whether Australia may be subject to a higher standard regarding its NDCs by virtue of its historical contributions to cumulative greenhouse gas emissions and level of development and national circumstances.⁹⁴

⁸⁶ For a more comprehensive analysis, see Caroline Foster, 'The 2025 International Court of Justice Advisory Opinion on Obligations of States in respect of Climate Change' (2025) 74(4) *International and Comparative Law Quarterly* 775 <accessible at: <https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/2025-international-court-of-justice-advisory-opinion-on-obligations-of-states-in-respect-of-climate-change/DED109CE194CB420EA6C911F1005E620>>.

⁸⁷ Opinion at [134].

⁸⁸ Opinion at [135].

⁸⁹ Opinion at [137]-[138].

⁹⁰ Opinion at [224]-[225].

⁹¹ Opinion at [245], [249], [270]. The obligation applies to all parties to the Paris Agreement. However, the adequacy of parties' NDCs will be assessed having regard to, amongst other things, historical contributions to cumulative greenhouse gas emissions and the level of development and national circumstances of the party in question: [247]-[248].

⁹² Opinion at [246], [270].

⁹³ Opinion at [253], [270].

⁹⁴ Opinion at [247].

64. *Third*, the ICJ took an expansive view of the conduct covered by States' treaty obligations and the customary duty to prevent significant harm to the climate system. Such conduct is not limited to that which directly results in greenhouse gas emissions. It includes all actions or omissions of States that result in the climate system being adversely affected by greenhouse gas emissions.⁹⁵
65. In respect of private emitters, this entails that States put in place a national system, including legislation, administrative processes and an enforcement mechanism, designed to achieve deep, rapid and sustained reductions of greenhouse gas emissions that are necessary for the prevention of significant harm to the climate system. Those rules and measures must regulate the conduct of private operators within a State's jurisdiction or control and be accompanied by effective enforcement and monitoring mechanisms to ensure their implementation.⁹⁶
66. The ICJ identified fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licences, and the provision of fossil fuel subsidies as conduct that may breach States' international law obligations and constitute an internationally wrongful act.⁹⁷ Judges Bhandari and Cleveland went further, considering it "unimaginable" that States could comply with their treaty and customary obligations without a rapid and drastic reduction in – and the phasing out of – fossil fuel production and dependency.⁹⁸
67. The ICJ also referred to the need for States to undertake environmental impact assessments (EIAs) in the context of States' due diligence obligation to prevent significant harm to the climate system and proposed activities in a transboundary context. In particular, EIAs must assess possible specific climate-related effects of proposed activities, including for the purpose of "assessing their possible downstream effects".⁹⁹ The ICJ recognised that, while "the cumulative and diffuse nature of GHG emissions may involve some difficulty in risk assessment", it is "important that all States provide for and conduct EIAs with respect to

⁹⁵ Opinion at [94]-[95].

⁹⁶ Opinion at [281]-[282], see also [428].

⁹⁷ Opinion at [427].

⁹⁸ Joint Declaration of Judges Bhandari and Cleveland at [1].

⁹⁹ Opinion at [298].

particularly significant proposed individual activities contributing to GHG emissions to be undertaken within their jurisdiction or control, on the basis of the best available science.”¹⁰⁰

68. In their Joint Declaration, Judges Bhandari and Cleveland stated their view that the practical effect of this aspect of the Opinion is that States, in conducting EIAs for fossil fuel projects, “must take into account the cumulative effect of all relevant activities occurring within a State’s jurisdiction or control, including risks resulting from fossil fuel production, licensing and subsidies” as well as “the foreseeable “downstream” consequences of such activities in other jurisdictions”¹⁰¹ (i.e., the greenhouse gas emissions associated with end users combusting fossil fuels, a category of Scope 3 emissions, even if those emissions take place in other jurisdictions). This approach could have potentially significant ramifications for States that are fossil fuel exporters. It remains to be seen how this will be interpreted and applied in any future inter-State disputes on States’ due diligence obligations. However, the direction of the ICJ’s reasoning is clear: States must undertake EIAs that take into account the downstream *and* cumulative effects of proposed fossil fuel projects within their jurisdiction.
69. *Fourth*, the ICJ concluded that the “right to a clean, healthy and sustainable environment is ...inherent in the enjoyment of other human rights [and] essential for the enjoyment of other human rights”.¹⁰² The Opinion does not explicitly state that the right to a clean, healthy and sustainable environment is part of customary international law. However, several of the Separate Opinions do conclude that the right has achieved customary international law status.¹⁰³
70. *Fifth*, the ICJ concluded that the rules of state responsibility under customary international law apply in the context of climate change.¹⁰⁴ Therefore, the breach of a State’s obligations to protect the climate system — whether under treaty or customary international law — will amount to the commission of an internationally wrongful act and can give rise to the “entire

¹⁰⁰ Opinion at [298]; Joint Declaration of Judges Bhandari and Cleveland at [12]-[13].

¹⁰¹ Joint Declaration of Judges Bhandari and Cleveland at [12]-[17].

¹⁰² Opinion at [393].

¹⁰³ This was an issue the subject of further comment in various Declarations and Separate Opinions. Judges Tladi, Aurescu and Bhandari concluded in terms that the right has achieved the status of custom: Declaration of Judge Tladi at [29]-[33]; Separate Opinion of Judge Aurescu at [28]-[46]; Separate Opinion of Judge Bhandari at [3]. Judge Charlesworth elaborated on the procedural and substantive content of the right: Separate Opinion of Judge Charlesworth at [9]-[12].

¹⁰⁴ Opinion [405]-[438].

panoply” of legal consequences.¹⁰⁵ Internationally wrongful acts in this context could “range from breaches of treaty obligations, such as the procedural obligation of a State to prepare, communicate or implement NDCs under Article 4 of the Paris Agreement, to breaches of obligations under customary international law, such as the failure of a State to regulate emissions of GHGs under its duty to exercise due diligence to prevent significant harm, or its failure to conduct EIAs.”¹⁰⁶

71. The legal consequences will depend on the specific breach in question and the nature of harm, but could include obligations of cessation and non-repetition (which apply irrespective of the existence of harm) as well as consequences requiring full reparation (including restitution, compensation and/or satisfaction).¹⁰⁷
72. Importantly, a State responsible for an internationally wrongful act is under an obligation to cease that act if it is continuing and if the breached obligation is still in force. The ICJ considered that this may require a State to revoke all administrative, legislative and other measures that constitute an internationally wrongful act, and to employ all means at its disposal to reduce its greenhouse gas emissions and take other measures in a manner, and to the extent, that ensures compliance with its obligations.¹⁰⁸ In his Separate Opinion, Judge Bhandari expressed the view that the ICJ could have declared that cessation would probably have to take the form of discontinuing practices that contribute directly to greenhouse gas emissions, such as fossil fuel extraction, emission-intensive industrial processes, and subsidies for fossil fuel production and consumption.¹⁰⁹

C.2 Regulatory developments

73. The Opinion has already influenced international and domestic regulatory and policy developments, at both federal and state level. While we focus primarily on domestic developments herein, developments in other jurisdictions may also inform the climate-related risks to which Australian corporations are exposed. That is particularly so in

¹⁰⁵ Opinion at [444]-[445].

¹⁰⁶ Opinion at [444].

¹⁰⁷ Opinion at [445]. Judge Nolte expressed concerns that the ICJ had created “false expectations” by merely hinting at the possible legal limits of, and difficulties for, the legal consequences of climate-related harms. He illustrated those difficulties primarily by reference to establishing causation for the purposes of reparation: Declaration of Judge Nolte at [14], [18]-[30].

¹⁰⁸ Opinion at [447]-[448].

¹⁰⁹ Separate Opinion of Judge Bhandari at [4]-[5].

respect of corporations that sell their products or services into export markets, are related to a foreign corporation or corporations, or have activities or projects in foreign jurisdictions.

74. Since the Opinion was published, the Australian Government has communicated its updated NDC under Art 4 of the Paris Agreement. The NDC reaffirmed Australia’s existing commitment to reduce its net greenhouse gas emissions to 43% below 2005 levels by 2030 and to zero by 2050. It also set a new target of a 62-70% reduction by 2035.¹¹⁰
75. The 2035 target was set on the advice of the Climate Change Authority,¹¹¹ which cited the Opinion. In particular, the Authority noted that the ICJ considered: 1.5°C to be the primary temperature goal of the Paris Agreement; that a breach of international law obligations in respect of climate change is an internationally wrongful act, and that States harmed by climate change may seek restitution or compensation from States that breach those obligations. The Authority stated that, while the Opinion is non-binding, it carries “significant weight and can be expected to influence future climate litigation, international negotiations, and national climate policies”.¹¹² It ultimately recommended the 2035 target on the basis that, amongst other things, it meaningfully contributed to the goal of limiting warming to 1.5°C and represented Australia’s highest possible ambition taking account of its historic responsibility for greenhouse gas emissions, capabilities, and national circumstances.¹¹³
76. The potential impacts of the 2035 target, and any implementing actions, are likely to depend upon the sector in which a corporation operates and other circumstances unique to the corporation. Corporations in high-emitting sectors may experience reduced demand for their products or services and/or be exposed to legislative or regulatory action that increases the costs of business or limits or even prohibits certain profit-generating activities. Conversely, corporations with business activities that facilitate greenhouse gas emissions reductions may experience increased demand for their products or services. To the extent that the 2035 target and implementing actions materially reduce greenhouse gas emissions and thereby limit global temperature increase, that would reduce the climate-related physical risks that *all* corporations are exposed to.

¹¹⁰ Australian Government, *Australia’s 2035 Nationally Determined Contribution* (September 2025) p 3.

¹¹¹ As required by *Climate Change Act 2022* (Cth) s 15.

¹¹² Climate Change Authority, *2035 Targets Advice* (12 September 2025) p 28.

¹¹³ Climate Change Authority, *2035 Targets Advice* (12 September 2025) pp 30-33, 38-39.

77. Corporations in the fossil fuel sector are perhaps most exposed to the potential for the Opinion to drive regulatory developments adverse to their interests, given that the ICJ emphasises fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licences, and the provision of fossil fuel subsidies as conduct that may constitute an internationally wrongful act.
78. That has already translated to increased political pressure on Australia not to approve new fossil fuel projects. In September 2025, Vanuatu’s Minister for Climate Change — the country that led the campaign for an advisory opinion from the ICJ in relation to climate change — warned Australia that approving an extension to the North West Shelf gas project would constitute an internationally wrongful act.¹¹⁴ The Commonwealth Minister for the Environment and Water ultimately conditionally approved the extension.¹¹⁵ The incident nonetheless illustrates how States are using the Opinion to seek to influence decision makers to limit or prohibit the production of fossil fuels.
79. At COP30 in November 2025, Australia was one of 80 countries to sign the Bélem Declaration on the Transition Away from Fossil Fuels.¹¹⁶ The Declaration calls for a “just, orderly and equitable” transition away from fossil fuels consistent with achieving the 1.5°C temperature goal and supports the development of a roadmap to give effect to that commitment. The details of that roadmap will be developed at the First International Conference on the Just Transition Away from Fossil Fuels in Colombia in April 2026.¹¹⁷
80. In the same month as COP30, the UK Government announced its commitment not to issue licences to explore new offshore oil and gas fields.¹¹⁸ That is in addition to the moratorium

¹¹⁴ Naveen Razik, “‘Wrongful act’: Vanuatu warns Australia may break international law if gas project goes ahead” (SBS, 11 September 2025) <available at: <https://www.sbs.com.au/news/article/wrongful-act-vanuatu-warns-australia-may-break-international-law-if-gas-project-goes-ahead/gk5isms7e>>.

¹¹⁵ Australian Government, ‘North West Shelf Project Extension final decision’ (Media statement, 12 September 2025).

¹¹⁶ Australian Government, Department of Climate Change, Energy, the Environment and Water, ‘Australia’s participation at COP30’ (Website, 5 December 2025) <available at: <https://www.dcceew.gov.au/about/news/australias-participation-cop30>>.

¹¹⁷ IPI Global Observatory, ‘The Path to Transitioning away from Fossil Fuels after COP30’ (Website, 5 December 2025) <available at: <https://theglobalobservatory.org/2025/12/the-path-to-transitioning-away-from-fossil-fuels-after-cop30/>>.

¹¹⁸ UK Government, *North Sea Future Plan* (Report, 26 November 2025) pp 6, 17, 35, 37.

on high volume hydraulic fracturing for shale gas extraction, known as “fracking”, which the UK Government intends to permanently ban via legislation.¹¹⁹

81. Similar developments have since occurred domestically. In March 2026, the NSW Government announced that it will no longer consider applications for new “greenfield” coal mines.¹²⁰ The announcement followed the Spotlight Report on Coal Mining Emissions by the Net Zero Commission of NSW, an independent NSW Government agency,¹²¹ which concluded that, due to “factors beyond the NSW Government’s or industry’s control, global thermal coal demand is projected to decline”, exposing the coal mining industry to economic risks.¹²² The Commission relevantly found:¹²³
- a. continued extensions or expansions to coal mining in NSW are not consistent with the emissions reduction targets in the *Climate Change (Net Zero Future) Act 2023* (NSW) or the Paris Agreement temperature goals that legislation gives effect to; and
 - b. the NSW Government will need to prioritise its consideration of policies that systemically prepare for the decline of coal extraction.
82. In making those findings, the Commission noted the Opinion, and concluded that the ICJ’s findings should inform both the regulation of emissions from existing coal mines and NSW’s planning and assessment framework for coal mine expansions and extensions. It stated that continued subsidies, funding and other financial incentives from the NSW Government for unabated coal industry projects could expose the Commonwealth Government to liability under international law.¹²⁴
83. The phase out of fossil fuels poses a clear risk of harm to Australian corporations that derive revenue from fossil fuel-based activities. A corporation that generates revenue from the production and/or supply of fossil fuels is exposed to the risk that those profit-generating activities may be limited, prohibited or rendered financially unviable. A corporation with assets associated with fossil fuel extraction, production and/or supply is exposed to the risk that those assets will become stranded and give rise to significant decommissioning

¹¹⁹ Joshua Nevett, ‘Labour plans new law to ban fracking permanently’ (BBC, 1 October 2025) <available at: <https://www.bbc.com/news/articles/cjedpl9kpv2o>>.

¹²⁰ NSW Government, *NSW Coal Industry 2026-50* (March 2026) p 7.

¹²¹ *Climate Change (Net Zero Future) Act 2023* (NSW) s 12.

¹²² NSW Net Zero Commission, *Coal Mining Emissions: Spotlight Report* (December 2025) pp i, v.

¹²³ NSW Net Zero Commission, *Coal Mining Emissions: Spotlight Report* (December 2025) pp iv-v, 43-54.

¹²⁴ NSW Net Zero Commission, *Coal Mining Emissions: Spotlight Report* (December 2025) pp 45-46.

liabilities. In our view, directors of such corporations would be required in their decision-making processes to at least *consider* such risks.

C.3 Litigation risks

84. As an opinion in the ICJ's advisory jurisdiction, the Opinion does not make specific findings about the liability of any particular State or group of States or of any private actor, such as corporations. However, the Opinion opens the way for further international litigation, including contentious disputes before the ICJ and the International Tribunal for the Law of the Sea, as well as before human rights courts and treaty bodies, trade panels and courts, arbitral tribunals and domestic courts, which will render enforceable decisions against States, foreign investors and corporations. The Opinion therefore gives rise to litigation risk (and the attendant reputational risk, share price risk, diversion of resources, time and costs, and risk of remedies being successfully obtained) for States, foreign investors and corporations. We set out here a few examples that carry risk for Australian corporation directors.

Inter-State disputes

85. The Opinion and its findings in relation to States' obligations and State responsibility introduce the possibility of contentious disputes to hold States accountable for breaching their obligation to protect the climate system. It is possible that this risk of litigation — and potential cost consequences — will encourage States to take more stringent regulatory action to comply with their international obligations set out in the Opinion, including to regulate private actors and reduce emissions to protect against harm to the climate system, in order to mitigate their potential liability in any future inter-State claim.

86. Australia has accepted the compulsory jurisdiction of the ICJ.¹²⁵ As a result, another State which has also accepted the compulsory jurisdiction of the ICJ, and has been adversely affected by climate change, could bring a case against Australia for breach of its international climate obligations and claim the full range of remedies under the law of State responsibility

¹²⁵ ICJ, 'Declarations recognising the jurisdiction of the Court as compulsory: Australia' (Website, 22 March 2022) <available at: <https://www.icj-cij.org/declarations/au>>.

(including cessation, restitution and reparation, which could potentially include significant financial compensation).¹²⁶

87. Further, the Opinion confirms that a non-injured State can bring a claim in connection with climate change for the breach of an *erga omnes* obligation (i.e., an obligation which is owed to the international community as a whole).¹²⁷ Accordingly, any State that has accepted the compulsory jurisdiction of the ICJ can bring a claim against Australia in respect of Australia's violation of any obligation owed *erga omnes*, such as the obligation to prevent significant transboundary harm.¹²⁸ The Opinion also confirmed that obligations under the climate treaties are *erga omnes partes*, which means Australia can face a claim from any State party to those treaties over non-compliance with the treaty, even if not directly affected by the violation.¹²⁹

Investor-State disputes

88. A focal consideration for Australian corporations with foreign investments is likely to be how the Opinion could shape potential investor-State disputes under investment treaties (whether bilateral or multilateral) and affect the protections historically enjoyed by their investments abroad. Investment treaties offer foreign investors protection against sovereign risk, including changes in government regulations that may affect the viability of foreign investments. The Opinion may provide governments with important defences against claims from foreign investors seeking to challenge and seek compensation for regulations designed to comply with States' international obligations to protect the climate system.

¹²⁶ ICJ, 'Declarations recognising the jurisdiction of the Court as compulsory: Australia' (Website, 22 March 2022) <available at: <https://www.icj-cij.org/declarations/au>>. Australia's declaration carves out the compulsory jurisdiction in respect of: "(a) any dispute in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement" or "(c) any dispute in respect of which any other party to the dispute has accepted the compulsory jurisdiction of the Court only in relation to or for the purpose of the dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other party to the dispute was deposited less than 12 months prior to the filing of the application bringing the dispute before the Court."

¹²⁷ Opinion at [439]-[443].

¹²⁸ Opinion at [440].

¹²⁹ Opinion at [440].

89. In recent decades, the investor-State dispute settlement regime has limited States' efforts to enact environmental regulation, including in connection with climate change, and protected foreign investors from the cost consequences of such regulation.¹³⁰
90. Italy faced an International Centre for Settlement of Investment Disputes (ICSID) claim after introducing a ban on oil and gas exploration within 12 miles of its coastline, and was ordered to pay €190 million in compensation.¹³¹ Approximately one third of all investor-State cases involve energy supply and extractive industries¹³² and the size of potential awards for damages has had a chilling effect on environmental regulation.¹³³
91. In October 2012, Ecuador was ordered to pay US\$2.3 billion to US-based Occidental Petroleum in an ICSID Arbitral Award, which was at the time the largest sum a State had been ordered to pay in an investor-State tribunal. That figure represented 59% of Ecuador's annual budget for education and 135% of its annual healthcare budget for the year 2012.¹³⁴ The prospect of such significant damages awards has deterred many States from regulating the fossil fuel industry.¹³⁵
92. Investors have likewise sued States for introducing policies to give effect to their climate targets. In December 2019, the Dutch government passed legislation to phase out coal-fired electricity production by 2030.¹³⁶ This policy had been announced by the incoming government in October 2017, a time at which the Netherlands' neighbour, Belgium, had

¹³⁰ United Nations Special Rapporteur on the human right to a clean, health and sustainable environment, *Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights* (Report, 13 July 2023), A/78/168, [49]-[52].

¹³¹ *Rockhopper v Italy* (ICSID Case No. ARB/17/14), Award of 23 August 2023. It should be noted that this decision was annulled after one of the arbitrators failed to disclose a historic criminal conviction which had been quashed, see *ad hoc* Committee's Decision on Annulment, 2 June 2025. The claim will be resubmitted: Toby Fisher, 'Rockhopper turns to A&O Shearman for refiled claim against Italy' (Global Arbitration Review, 22 September 2025) <available at: <https://globalarbitrationreview.com/article/rockhopper-turns-ao-shearman-refiled-claim-against-italy>>.

¹³² UN Trade and Development, 'Facts and figures on investor-State dispute settlement cases' (IIA Issues Note No. 3 2024, 26 November 2024), UNCTAD/DIAE/PCB/INF/2024/5, p 1 <available at: <https://unctad.org/publication/facts-and-figures-investor-state-dispute-settlement-cases>>.

¹³³ Phoebe Weston and Patrick Greenfield, 'Why fear of billion-dollar lawsuits stops countries passing green laws', (The Guardian, 6 March 2025) <available at: <https://www.theguardian.com/environment/2025/mar/06/isds-fear-of-billion-dollar-lawsuits-stops-countries-phasing-out-fossil-fuels-aoe>>.

¹³⁴ Cecilia Olivet, 'Why did Ecuador terminate all its Bilateral investment treaties?' (The Transnational Institute, 25 May 2017) <available at: <https://www.tni.org/en/article/why-did-ecuador-terminate-all-its-bilateral-investment-treaties>>.

¹³⁵ Phoebe Weston and Patrick Greenfield, 'Why fear of billion-dollar lawsuits stops countries passing green laws' (The Guardian, 6 March 2025) <available at: <https://www.theguardian.com/environment/2025/mar/06/isds-fear-of-billion-dollar-lawsuits-stops-countries-phasing-out-fossil-fuels-aoe>>.

¹³⁶ Wet verbod op kolen bij elektriciteitsproductie ('Law banning coal in electricity production'), 11 December 2019.

closed its last coal plant, and similar announcements or commitments had been made by France, Austria, Finland, Sweden, Italy, Denmark and Portugal.¹³⁷ In 2021, two energy corporations brought ICSID claims against the Netherlands in respect of that policy, under the Energy Charter Treaty.¹³⁸ One corporation, RWE, claimed €1.4 billion in compensation and the other, Uniper, claimed €1 billion in compensation.¹³⁹ Both ICSID claims were ultimately discontinued, but only after the German government bailed out Uniper (at a cost of €34.5 billion): one of the conditions of the deal was that the corporation agreed to withdraw the ICSID claim.¹⁴⁰ In a separate set of proceedings, the Hague District Court found that the energy corporations could not claim financial compensation, on the basis that the infringement of the companies' property rights was not unlawful, because the measures the government had taken to reduce carbon emissions were proportionate, the interests of the corporations had been sufficiently considered, the ban itself was foreseeable, and the transition period entailed that both corporations could still generate income and look into other potential uses for their power stations.¹⁴¹

93. In her separate Declaration to the Opinion, Judge Cleveland acknowledged that this “regulatory chill” posed by international investment agreements may lead to delay or even a failure to adopt mitigation efforts by States¹⁴² and stressed that “the interpretation of investment instruments must be informed by States’ obligations in respect of climate change under international law, including the stringent due diligence standard to which States are bound in implementing such obligations.”¹⁴³ This may affect the interpretation of investment treaties in the context of regulatory changes implemented for the purposes of meeting a

¹³⁷ Europe Beyond Coal, ‘Overview: National coal phase-out announcements in Europe’ (Europe Beyond Coal, February 2021) p 10 <available at: <https://beyondfossilfuels.org/wp-content/uploads/2021/02/Overview-of-national-coal-phase-out-announcements-Europe-Beyond-Coal-February-2021-CZ-2038-version1.pdf>>.

¹³⁸ *RWE v Netherlands* (ICSID Case No. ARB/21/4); *Uniper v the Netherlands* (ICSID Case No. ARB/21/22). Note that the Netherlands brought its own proceedings against the companies in their home state of Germany, successfully arguing that the arbitration clause under the Energy Charter Treaty was incompatible with EU law: see Sabin Center for Climate Change Law, ‘The Netherlands v. RWE and Uniper (Anti-Arbitration Injunctions)’, <available at: https://www.climatecasechart.com/document/the-netherlands-v-rwe-and-uniper-anti-arbitration-injunctions_5140>.

¹³⁹ Bart-Jaap Verbeek, ‘Dutch court dismisses damage claims by RWE and Uniper’ (Somo, 30 November 2022) <available at: <https://www.somo.nl/dutch-court-dismisses-damage-claims-by-rwe-and-uniper/>>.

¹⁴⁰ Jack Ballantyne, ‘Uniper withdraws ECT claim’ (Global Arbitration Review, 21 March 2023) <available at: <https://globalarbitrationreview.com/article/uniper-withdraws-ect-claim>>.

¹⁴¹ *RWE Generation NL B.V. v the Netherlands (Ministry of Climate and Energy)*, C-09-608588/HA ZA 21-245, 30 November 2022.

¹⁴² Declaration of Judge Cleveland at [21].

¹⁴³ Declaration of Judge Cleveland at [22].

State's international climate change obligations, and should that occur, it would have real implications for future foreign investment claims.

94. The international law obligations set out in the Opinion may be relevant to investor-State disputes, as applicable law or as an aid to interpretation.¹⁴⁴ Many investment treaties specify that rules and principles of international law are directly applicable in the resolution of investor disputes.¹⁴⁵ For example, the Energy Charter Treaty — under which at least 150 cases have been instituted¹⁴⁶ — provides that disputes between parties shall be settled by the tribunal “in accordance with this Treaty and applicable rules and principles of international law.”¹⁴⁷
95. The Opinion may affect the protections historically afforded to investors in various ways:
 - a. ***Fair and equitable treatment claims:*** Investment treaties require foreign investors to receive fair and equitable treatment. What this means will depend on the specific terms of the treaty and how they are interpreted by an arbitral tribunal, but it could include: (1) protection of legitimate expectations; (2) protection against arbitrary, unreasonable, disproportionate conduct lacking good faith; (3) due process and transparency; (4) protection against denials of justice. This is the most common — and most frequently successful — type of claim against States by foreign investors.¹⁴⁸ A number of these elements are likely to be affected by the Opinion. For example:
 - i. In relation to *legitimate expectations*, the Opinion foreshadows the possibility of more stringent environmental regulations, and the reduction or phase out of fossil fuels. All new investors should be aware of this in respect of future investments, and a question may arise as to how far back legitimate expectations will be affected. Certain investors may also have potential claims against States for failing to comply with their obligations under the Opinion.

¹⁴⁴ Vienna Convention on the Law of Treaties, Art 31(3)(c).

¹⁴⁵ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Art 42(1).

¹⁴⁶ International Energy Charter, ‘List of Cases’ (Website, 1 June 2022) <available at: <https://www.energychartertreaty.org/cases/list-of-cases/>>.

¹⁴⁷ Energy Charter Treaty, Art 27(3)(g).

¹⁴⁸ UN Trade and Development, ‘Recent trends in investor-State arbitration cases’ (IIA Issues Note No. 2 2025, 22 September 2025) UNCTAD/DIAE/PCB/INF/2025/4, p 9 <available at: <https://unctad.org/publication/recent-trends-investor-state-arbitration-cases>>.

- ii. In relation to *proportionality*, States' regulatory action may be assessed against the obligation of stringent due diligence set out in the Opinion and the ICJ's characterisation of climate change as an "existential problem of planetary proportions that imperils all forms of life and the very health of our planet."¹⁴⁹ More stringent regulatory action, including moratoriums on new fossil fuel projects or regulations affecting existing projects, could be considered proportionate to — and even required by — the scale of threat posed by climate change. The Opinion states that a State's failure "to take appropriate action to protect the climate system from GHG emissions— including through fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licenses or the provision of fossil fuel subsidies—may constitute an internationally wrongful act."¹⁵⁰ Judges Bhandari and Cleveland expressed the view that, in order to avoid breach, States are required rapidly to reduce and phase out fossil fuel dependency.¹⁵¹
- iii. In relation to *arbitrariness*, the Opinion will allow States to argue that regulatory measures which are grounded in other international obligations are made in good faith and are not arbitrary.

b. ***Expropriation claims***: The implementation of environmental regulations can trigger "indirect expropriation" claims. For example, in *Uniper* (cited above), the Netherlands faced an indirect expropriation claim after passing legislation to phase out coal-fired electricity production to meet its climate obligations. States can lawfully expropriate when acting in accordance with due process, pursuing a public purpose, acting in good faith, without nationality-based discrimination, and providing appropriate compensation. The Opinion is likely to be raised by States in response to expropriation claims: for example, States could argue that the Opinion should inform the assessment of the fair market value of the asset and affect the compensation States will be required to pay.

¹⁴⁹ Opinion at [456].

¹⁵⁰ Opinion at [427].

¹⁵¹ Joint Declaration of Judges Bhandari and Cleveland at [1]-[4].

96. Australian corporations with foreign investments in fossil fuels should consider the prospect that their ability to protect their investments from more stringent environmental regulations by bringing claims under international investment agreements may be curtailed by the Opinion.

Domestic litigation

97. The domestic legal effects of the Opinion will be the most pronounced in jurisdictions that have a “monist” approach to international law, under which international law automatically forms part of their domestic law.
98. On 28 January 2026, the Hague District Court cited the Opinion when it concluded that the Netherlands had breached the human rights of citizens living in Bonaire, which is experiencing harmful climate impacts such as rising sea levels and extreme weather events, by failing to take sufficient action to protect against climate change, as required by its obligations under European Union and Dutch law.¹⁵² The Court ordered the Netherlands to reduce its greenhouse gas emissions in accordance with its international obligations, which requires the State to go beyond its current policy for emission reductions by 2030.¹⁵³ The Court also ordered the State to take concrete and timely measures for climate adaptation for the people of Bonaire.¹⁵⁴ This demonstrates how the Opinion is likely to be cited and applied in monist jurisdictions, which will affect Australian corporations operating in those jurisdictions.
99. Australia is not a monist jurisdiction; it is generally regarded as having a “dualist” approach to international law. International law nonetheless informs the interpretation and content of domestic law in various ways. Three examples suffice. Legislation is to be “interpreted and applied as far as [its] language admits as not to be inconsistent with the comity of nations or with the established rules of international law”.¹⁵⁵ The presumption applies both to rules of

¹⁵² *Greenpeace Netherlands v the Netherlands* (Ministry of Climate Policy and Green Growth, Ministry of Infrastructure and Water Management and Ministry of the Interior and Kingdom Relations), C-09-659832/HA ZA 24-53, 28 January 2026.

¹⁵³ *Greenpeace Netherlands v the Netherlands* at [12.2].

¹⁵⁴ *Greenpeace Netherlands v the Netherlands* at [12.4].

¹⁵⁵ *Kingdom of Spain v Infrastructure Services Luxembourg Sarl* (2023) 275 CLR 292; [2023] HCA 11 at [16] (the Court). That proposition is subject to at least two important qualifications. *First*, the presumption is readily displaced by clear statutory text: *Polites v Commonwealth* (1945) 70 CLR 60; [1945] HCA 3, CLR at 69 (Latham CJ), 73-74 (Rich J), 75-76 (Starke J), 79 (McTiernan J), 81 (Williams J). *Second*, the presumption will ordinarily apply only if the relevant international law obligation was made or recognised before the pertinent portion of the statute was

customary international law and, at least for Commonwealth legislation, to obligations assumed by treaty. So too, legislation will not be construed to interfere with fundamental rights or freedoms in the absence of unmistakable and unambiguous language; general words will rarely be sufficient.¹⁵⁶ There is precedent for international human rights norms informing the rights and freedoms protected by that principle of statutory interpretation.¹⁵⁷ Finally, customary international law may also be a “source” for the development of the common law in an appropriate case.¹⁵⁸ The High Court’s reconsideration of the common law concept of terra nullius in *Mabo v Queensland (No 2)* was in part predicated on an ICJ advisory opinion on the same concept under customary international law.¹⁵⁹

100. The Opinion has already been influential in common law jurisdictions that have a similar “dualist” approach to international law.
101. In September 2025, the Federal Court of Canada concluded that the Opinion “has substantial persuasive legal authority since it emanates from the principal legal organ of the United Nations”.¹⁶⁰ While the Court noted that the Opinion was not binding, it considered that it may nonetheless have “significant legal implications in the Canadian context” and influence how courts interpret domestic laws.¹⁶¹
102. To date, the Opinion has been relied upon in at least three Australian cases challenging decisions to approve fossil fuel projects.
103. The first is the challenge to the Winchester South Coal Mine brought by the Australian Conservation Foundation (**ACF**), which was heard in the Land Court of Queensland from

introduced: *Al-Kateb v Godwin* (2004) 219 CLR 562; [2004] HCA 37 at [63] (McHugh J), citing *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; [1995] HCA 20, CLR at 287 (Mason CJ and Deane J).

¹⁵⁶ *Coco v The Queen* (1994) 179 CLR 427; [1994] HCA 15, CLR at 437 (Mason CJ, Brennan, Gaudron and McHugh JJ), 446 (Deane and Dawson JJ).

¹⁵⁷ *Director of Public Prosecutions v Kaba* (2014) 44 VR 526; [2014] VSC 52 at [178]-[181]. That case concerned rights contained in the International Covenant on Civil and Political Rights (**ICCPR**). The application of the principle of legality to those rights was predicated on the significant overlap between common law rights and those in the ICCPR, the widespread acceptance of the ICCPR in the Australian legal system, and an appropriate fit with the constitutional relationship between the parliament and the judiciary: [181]-[187]. There is a question as to whether the same can be said of the international human rights norms recognised in the Opinion.

¹⁵⁸ *Chow Hung Ching v The King* (1949) 77 CLR 449; [1948] HCA 37, CLR at 477 (Dixon J); *Australian Competition and Consumer Commission v P.T. Garuda Indonesia (No 9)* (2013) 212 FCR 406; [2013] FCA 323 at [38(a)] and the authorities cited therein.

¹⁵⁹ *Mabo v Queensland (No 2)* (1992) 175 CLR 1; [1992] HCA 23, CLR at 41-42 (Brennan J, Mason CJ and McHugh J agreeing).

¹⁶⁰ *Lho’imggin & Ors v Her Majesty the Queen* [2025] FC 1586 at [42].

¹⁶¹ *Lho’imggin* at [44].

July to December 2025. ACF seeks a recommendation from the Court, acting in its administrative capacity, that the mine should not be granted an environment authority under the *Environmental Protection Act 1994* (Qld) due in part to its climate change impacts.¹⁶²

104. In 2022, the Land Court of Queensland recommended against the approval of another proposed thermal coal mine, which recommendation was accepted by the Department.¹⁶³ The Court in that case concluded that the mine was not in the public interest¹⁶⁴ because its economic and social benefits were outweighed by factors including its material contribution to climate change, which would narrow the options to achieve the temperature goals of the Paris Agreement contrary to the interests of future generations,¹⁶⁵ and would limit human rights.¹⁶⁶ We understand that ACF seeks similar findings and relied on the Opinion to support its case.¹⁶⁷
105. The second case is the judicial review of the Commonwealth Minister for the Environment and Water's decision to conditionally approve the North West Shelf gas extension, which is listed for hearing in July 2026. The UN Special Rapporteur on the Human Right to a Clean, Healthy and Sustainable Environment has sought leave to intervene in the proceeding in order to address how Australia's international law obligations inform the interpretation of the legislation under which the approval was granted, being the *Environment Protection and Biodiversity Consideration Act 1999* (Cth).¹⁶⁸ In particular, we understand that she seeks to be

¹⁶² ACF, 'LIVE updates: ACF vs. Whitehaven Coal court case' (Website, 28 July 2025) <available at: <https://www.acf.org.au/news/live-updates-acf-vs-whitehaven-coal-case>>.

¹⁶³ Queensland Department of the Environment, Tourism, Science and Innovation, 'Waratah Galilee Coal Mine EA refused' (Website, 3 April 2023) <accessible at: <https://www.detsi.qld.gov.au/our-department/news-media/mediareleases/2023/waratah-galilee-coal-mine-ea-refused>>.

¹⁶⁴ Being a criterion the Court was required to consider under s 233 of the *Environmental Protection Act 1994* (Qld).

¹⁶⁵ *Waratah Coal Pty Ltd v Youth Verdict & Ors* (No 6) [2022] QLC 21 at [31]-[35], [1409], [1793].

¹⁶⁶ *Youth Verdict* at [44], [1513]. Given it was acting in its administrative capacity, the Court was required to comply with the obligations imposed on public entities under the *Human Rights Act 2019* (Qld): [57], citing *Waratah Coal Pty Ltd v Youth Verdict & Ors* [2020] QLC 33.

¹⁶⁷ ACF, 'International court puts heat on fossil fuel exporting countries like Australia' (Website, 24 July 2025) <available at: [https://www.acf.org.au/news/live-updates-acf-vs-whitehaven-coal-case](https://www.acf.org.au/news/international-court-puts-heat-on-fossil-fuel-exporting-countries-like-australia#:~:text=%E2%80%99COur%20initial%20analysis%20of%20the,is%20attributable%20to%20that%20Stat e.>; ACF, 'LIVE updates: ACF vs. Whitehaven Coal court case' (Website, 28 July 2025) <available at: .

¹⁶⁸ ACF, 'UN Special Rapporteur to join legal cases challenging North West Shelf gas hub extension' (Website, 14 November 2025) <available at: <https://www.acf.org.au/news/un-special-rapporteur-to-join-legal-cases-challenging-north-west-shelf-gas-hub-extensions>>.

heard on the definition of “impact” in s 572E,¹⁶⁹ which has previously been relied upon by decision makers to exclude consideration of a project’s forecast greenhouse gas emissions.¹⁷⁰

106. The third case is the judicial review of the NSW Independent Planning Commission’s (IPC) decision to grant a development consent for the construction and operation of a coal mine in the Hunter Valley. In July 2025, the NSW Court of Appeal declared the development consent was invalid because the IPC failed to consider the causal connection between the project’s greenhouse gas emissions and the environmental impacts of climate change *in the locality* of the project.¹⁷¹ In a pending appeal of that decision to the High Court, the appellant contends the NSW Court of Appeal erred because, amongst other things, it incorrectly assumed there is a “necessary and detectable causal link between the Scope 3 emissions of the Project... and the various specific effects of climate change on the locality” (emphasis in original).¹⁷² The first respondent resists that contention on that basis that, amongst other things, the ICJ recognised in the Opinion the “near linear relationship between emissions and global warming and the development of climate change attribution science”.¹⁷³
107. If the Opinion informs the interpretation of environmental laws and/or the decisions made under them, that could decrease the likelihood of emissions-intensive projects obtaining necessary regulatory approvals. That may pose a risk of harm to corporations with proposed emissions-intensive projects that require such approvals.
108. The Opinion may also provoke direct litigation against corporations. For example, claimants may allege that a corporation contravenes statutory prohibitions on misleading or deceptive conduct if it describes its business activities and/or emissions reductions targets as “Paris

¹⁶⁹ ACF, ‘UN Special Rapporteur to join legal cases challenging North West Shelf gas hub extension’ (Website, 14 November 2025) <available at: <https://www.acf.org.au/news/un-special-rapporteur-to-join-legal-cases-challenging-north-west-shelf-gas-hub-extensions>>.

¹⁷⁰ See, for example, *Environment Council of Central Queensland Inc v Minister for the Environment and Water* (2024) 304 FCR 91; [2024] FCAFC 65 at [50]-[57] (Mortimer CJ and Colvin J). Their Honours left open the possibility that the phrase “substantial cause” in that definition could have a qualitative meaning, such that the climate change impacts of a project’s greenhouse gas emissions cannot be reduced to a simple arithmetical analysis: [46], [121]-[122].

¹⁷¹ *Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd* [2025] NSWCA 163.

¹⁷² *MACH Energy Australia Pty Ltd v Denman Aberdeen Muswellbrook Scone Healthy Environment Ground Inc & Anor* (Appellant’s submissions, S174/2025, 5 February 2026) at [59].

¹⁷³ *MACH Energy Australia Pty Ltd v Denman Aberdeen Muswellbrook Scone Healthy Environment Ground Inc & Anor* (First respondent’s submissions, S174/2025, 5 March 2026) at [49].

aligned”, despite increasing its production of fossil fuels or not otherwise aligning its activities and/or targets with the 1.5°C temperature goal.

109. More significantly, claimants may rely on the Opinion to support claims that corporate emitters are tortiously liable for climate-related harms.¹⁷⁴ The potential for such liability is already crystallising in foreign jurisdictions. For example, in May 2025, the Higher Regional Court of Hamm held that a corporation could, in principle, be liable under German tort law for the climate-related impacts of its greenhouse gas emissions, even where those impacts occur in another jurisdiction.¹⁷⁵
110. Similar developments have occurred in common law jurisdictions with constitutional and legal frameworks more analogous to that of Australia.
111. In 2024, the Supreme Court of New Zealand allowed a case to proceed which alleges that New Zealand’s seven largest corporate emitters committed tortious wrongs by reason of their contributions to climate change, and seeks injunctions requiring those corporations to reduce their greenhouse gas emissions to net zero by 2050.¹⁷⁶ The Court considered that there would need to be an evolution of the law in order for the case to be successful, but noted the potential for such evolution by reference to tort law’s response to the industrial revolution.¹⁷⁷ The case is listed for hearing in April 2027.
112. In December 2025, survivors of Typhoon Odette in the Philippines commenced legal proceedings against Shell in the UK seeking damages for property damage, personal injury, and psychological trauma.¹⁷⁸ The claimants allege that Shell was aware that the burning of fossil fuels is the primary driver of climate change and, despite this knowledge, expanded its production and sale of fossil fuels, tripling its greenhouse gas emissions between 1965 and 2021. They allege that Shell is therefore liable under Philippine law for negligence,

¹⁷⁴ There is precedent for international law inspiring the development of domestic tort law in common law jurisdictions: see, for example, *Newsun Resources Ltd v Araya* [2020] 1 SCR 166, particularly the discussion at [232]-[233] (Brown and Rowe JJ). Claimants have already relied on the Opinion to support tort-based claims concerning climate change in Canada, albeit in respect of the Crown and unsuccessfully: *Lho’imggin* at [65].

¹⁷⁵ *Lliyua v RWE AG* (2015) Case No. 2 O 285/15.

¹⁷⁶ *Smith v Fonterra* [2024] NZSC 5.

¹⁷⁷ *Fonterra* at [156]-[166] (Williams and Kos JJ on behalf of the Court).

¹⁷⁸ BBC, ‘Shell facing first UK legal claim over climate impacts of fossil fuels’ (Website, 11 December 2025) <<https://www.bbc.com/news/articles/c0r9p1ypyjyo>>.

unjust enrichment, and violation of the claimants' constitutional right to a balanced ecology.¹⁷⁹

113. There have been two tort claims concerning climate change in Australia, but both were against the Executive government and were unsuccessful.¹⁸⁰ There has not yet been a claim seeking damages for climate-related harms against a corporate emitter. Given international developments and the domestic increase in climate-related public interest litigation, it appears likely that such a claim will be filed in the future.
114. The developments described above reflect a rapidly evolving legal landscape that is already being shaped by the Opinion. Those developments increase the risk of litigation, and all of its attendant risks, for Australian corporations, particularly in high-emitting sectors. Corporations with significant greenhouse gas emissions and/or plans to expand emissions-intensive activities would be well advised to remain abreast of such developments so that they can monitor the potential impact on their interests.

D WHAT SHOULD DIRECTORS DO?

115. What emerges from the preceding analysis is that corporations in high-emitting sectors or with plans to expand emissions-intensive activities are likely to be the most exposed to adverse legal and regulatory developments driven by the Opinion.
116. For the reasons explained in Section B above, it is not possible to provide comprehensive or uniform guidance as to the steps that directors should take, if any. That will depend on the sector in which the corporation operates, its size, and the director's office and responsibilities in the corporation, amongst other matters.
117. Nonetheless, it would be prudent for directors of such corporations to ensure that there are systems and processes in place for them to remain abreast of developments that pose a foreseeable risk of harm to the corporation, particularly in the context of considering and approving annual sustainability reports under Pt 2M.3 of the Act. They should also take all

¹⁷⁹ Hausfeld, 'Shell hit with legal action over climate damages by Typhoon Odette survivors' (Website, 23 October 2025) <available at: <https://www.hausfeld.com/en-gb/news/shell-hit-with-legal-action-over-climate-damages-by-typhoon-odette-survivors>>.

¹⁸⁰ *Minister for the Environment v Sharma* (2022) 291 FCR 311; [2022] FCAFC 35; *Pabai v Commonwealth of Australia* (No 2) [2025] FCA 796 (under appeal).

reasonable steps to ensure that the corporation discloses such risks in accordance with any reporting obligations under Pt 2M.3.¹⁸¹

118. In some cases, a director may need to do more than merely consider a risk in order to discharge their duty under s 180(1). That will be highly fact dependent. Directors will minimise the risk of breaching their duty of care and diligence if they conduct the balancing exercise referred to in paragraph 27 themselves, and act or decline to act based upon a rational and informed assessment of the corporation's best interests.

119. An example assists. A board of hypothetical directors approve a final investment decision in relation to an emissions-intensive project with significant capital expenditure, which project subsequently becomes a stranded asset due to legal, regulatory or market developments. If that eventuality was a foreseeable risk at the time the final investment decision was made, the directors most exposed to a risk of liability would be those who failed to consider the risk at all or approved an annual sustainability report that failed to disclose the risk. It would in principle be more difficult to establish that a director had breached her or his duty under s 180(1) if:
 - a. she or he considered and, if necessary, sought advice on the risk, but nonetheless decided to pursue that course of action based upon a rational and informed assessment of the corporation's best interests; and
 - b. she or he took all reasonable steps to ensure the risk was disclosed in accordance with the corporation's disclosure obligations, including the reporting obligations imposed by Pt 2M.3 of the Act.

E CONCLUSION

120. It is now well-established that climate change poses foreseeable risks of harm to most, if not all, Australian corporations. The Opinion has already precipitated legal and regulatory developments that create or amplify climate-related transition risks to which some Australian corporations, particularly those that derive revenue from fossil fuels or other emissions-intensive activities, are exposed. We expect it will continue to do so. As the

¹⁸¹ Act s 344(1).

magnitude of those risks or the probability of their occurrence rises, so too may the standard of care expected of directors of those corporations.

121. It is not possible to provide uniform guidance as to how directors, occupying that role in varying sectors at varying times, would discharge their duty of care in relation to climate-related risks. That will depend on circumstances particular to the corporation and the director. However, in general, a director will minimise the risk of being found liable for breaching her or his duty of care under s 180(1) if:

- a. a director is sufficiently apprised of the corporation's climate-related risks;
- b. a director takes a diligent and intelligent interest in information about the corporation's climate-related risks, ensures she or he understands that information, and applies an enquiring mind to her or his responsibilities;
- c. having considered and sought advice on a corporation's climate related risks, a director decides to act or declines to act based upon a rational and informed assessment of the corporation's best interests;
- d. a director takes all reasonable steps to ensure those risks are disclosed in accordance with the corporation's disclosure obligations, particularly those imposed by Pt 2M.3 of the Act; and
- e. a director takes all reasonable steps to ensure that statements she or he approves, especially statements contained in annual sustainability reports under Pt 2M.3 of the Act, are accurate and do not omit any material climate-related risks.

26 March 2026

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