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Case Alert

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No novel duty owed: Full Federal Court upholds Minister's appeal in *Sharma*

***Minister for the Environment v Sharma* [2022] FCAFC 35**

22 March 2022

AT A GLANCE

- The Full Federal Court (FFC) has unanimously overturned a landmark decision that found the Commonwealth Minister for the Environment owed a duty of care to Australian children to avoid risk of personal injury when considering whether to approve a coalmine expansion.
- All three Justices gave different reasons for rejecting the duty, with detailed consideration of the arguments for and against the duty.
- While accepting the 'catastrophic' risks posed by climate change to humankind, there are limitations to the way in which the Australian courts and the common law can respond to that threat and interact with 'core policy' matters.
- When the exercise of powers under a statutory scheme are involved, expect the Court to closely scrutinise the purpose, scope and terms of that scheme for 'coherence' with a duty of care.
- We expect further duty of care arguments will be made in the Courts, so this will remain an issue to be watched closely by government decision-makers and agencies, company directors and insurers alike.

BACKGROUND

This high-profile appeal was from a decision of His Honour Justice Bromberg on a representative proceeding brought by eight Australian children (Respondents) against the Australian Minister for the Environment (Minister).

To recap, the claim at first instance related to a decision previously facing the Minister: whether to approve an extension project for a coal mine near Gunnedah in NSW, owned by Vickery Coal Pty Ltd (the Extension Project). The Minister's decision was an exercise of her statutory power under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act).

It was a peculiar, pre-emptive case. The Court was asked by the Respondents to recognise a novel duty of care owed by the Minister to them and all children to exercise her power under the EPBC Act with reasonable care to not cause them harm resulting from carbon stored safely underground at the mine, which would be extracted, combusted and emitted as CO_2 into the earth's atmosphere (future emissions).

It was common ground that if the Minister did approve the Extension Project the future emissions would result. The 'harm' referred to included mental or physical injury, as well as damage to property and economic loss. It was not argued that any breach of the duty had happened yet or that any harm had materialised. The asserted duty was said to arise decades before any damage occurs and decades before the causal contribution, if any, of this decision to any harm can begin to be assessed.

The Respondents sought to bring the proceeding on their own behalf, and as a representative proceeding on behalf of children who ordinarily reside in Australia (which was allowed) as well as children residing anywhere in the world (which was not allowed).

At first instance, His Honour Justice Bromberg found that the Minister did personally owe the Applicants a duty to take reasonable care in the exercise of relevant powers under the EPBC Act, to avoid causing personal injury or death to the Australian children arising from the future emissions. The recognised duty was novel, seen as having wide-ranging implications for development projects, government decision-makers and insurers. Separately, Justice Bromberg declined to allow the *quia timet* injunction sought by the Respondents that would effectively restrain the Minister from approving the Extension Project. Following that decision, the Minister did approve the Extension Project.

OUTCOME OF APPEAL

The Minister's appeal against the Court's recognition of a novel duty of care of this kind was upheld.

UNPACKING THE FFC'S REASONS

Although the decision to allow the appeal was unanimous, each of Justices Allsop, Beach and Wheelahan gave considered reasons as to why.

Chief Justice Allsop's principal decision found:

1. A duty of the kind sought is not suitable for judicial determination by applying any legal standard. It relates to a decision that was a "core area of policy making" or "quasi-legislative or regulatory in nature".
2. The duty is incoherent and inconsistent with the EPBC Act, the scheme under which the Minister was required to make her decision. The EPBC Act is not directed to the proper response of the Commonwealth to climate change but rather to the protection of species, communities and water resources (a deliberate policy choice). Since the EPBC Act required the Minister to make her decision on a closed system of mandatory considerations, the primary judge erred in implying a new consideration, "human safety", into the mix.
3. If the duty was recognised, the potential liability of the Minister is indeterminate in number and nature. It is said to be owed to all children in Australia born at the time of the commencement of the proceeding, but there is no reason in logic why the duty should not also expand beyond that, such as to the unborn.
4. The Minister had no real "control" over the harm. Controlling a "tiny" increase in the risk created by the Extension Project is different to control over the nature of the harm (a worldwide global climate catastrophe).
5. The relationship between the Minister and the Respondents is one of "the governing" and "the governed" – it is not near or proximate enough for the imposition of a duty of care.
6. There is no special vulnerability on the part of the Respondents. While all Australians would have a political reliance on the Minister, being the expectation of good government, that does not translate to a legal reliance.

Justice Beach seemed the most sympathetic of the FFC bench to the imposition of a duty. Still, Justice Beach rejected the duty on two principal bases:

1. There was no special relationship and sufficient "closeness and directness" between the Respondents and the Minister. There is no temporal closeness between the exercise of power and effects (the gap is many decades), no geographic closeness (the Respondents are all over Australia) and no causal closeness (there are many links and actors in the causal chain).
2. The class of likely vulnerable victims was indeterminate. It was simply unascertainable today.

Interestingly, Justice Beach did not think this concerned a "core policy" decision nor that the incoherence here would interfere with the Minister's exercise of power in a way that would tell against recognising a duty. He also found the Minister did have control over the risk of harm – it was sufficient that the Minister was facilitating and intentionally, or at least knowingly, fostering the Future Emissions.

Justice Wheelahan considered the EPBC Act did not create a relationship between Minister and the children potentially harmed and it was not feasible to establish an appropriate standard of care.

His Honour was also not persuaded that it was reasonably foreseeable that the approval would be a cause of personal injury to the Respondents, insofar as the concept of causation in torts is understood.

IMPLICATIONS

While this appeal concerned one Minister's specific exercise of power under Commonwealth legislation, and the FFC took an orthodox approach to reject a novel duty, we expect many more claims seeking to recognise novel duties.

This is not the end of the road. It shows the courts are reckoning, empathetically, with changed contemporary social conditions and community standards. Justice Beach suggests the time has come for the High Court to engineer new sustainable models to consider the prism of a novel duty of care. His Honour noted that the very concepts we use to consider whether there is a novel duty "may have reached their shelf life". Those comments may make their way into other litigation over the coming years, where novel duties of care are contended for, until the High Court is eventually asked to grapple with them.

The Commonwealth

The *Sharma* litigation is one of a string of cases that suggest the Commonwealth Government's exposure on climate change risks, in particular, is increasing. For example, in the ongoing case of *Kathleen O'Donnell v Commonwealth of Australia & Ors* filed in the Federal Court, the Applicant represents investors in exchange-traded Australian Government bonds and alleges that the Commonwealth has failed to disclose to the material risk of climate change to the sovereign bond market.

The states

While the FFC's decision was firm on the point that there is no requirement to consider greenhouse gases or climate change within the current federal legislative framework, the same cannot necessarily be said at the state level.

The FFC noted that the NSW Department (namely the Independent Planning Commission) needs to consider greenhouse gas emissions in exercising its statutory function under the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act), the framework of the public interest and other relevant SEPPs. Potentially state decisions on development approvals made under the EPA Act could be distinguished from this appeal.

The other matters raised by the FFC regarding meeting thresholds for indeterminacy, control and proximity remain to establish the duty of care on state ministers.

Directors & officers

The *Sharma* appeal decision is good news for directors and officers who may have approved investment of company funds into preparing development proposals similar to the Extension Project and have been concerned about the imposition of a novel duty of care into government decision-making.

Company directors and their insurers should also take comfort in the Court's requirements for sufficient levels of control, proximity and indeterminacy to be met in any potential claims arising out of climate change impacts allegedly caused by corporate (rather than government) decision-making[1].

However, while the legal risks to similar projects may have reverted to the status quo, the political and community sentiment around climate change continues to evolve. This will create risks that still need to be considered by directors and officers in making investment decisions and in making disclosures in financial statements about the value of assets (such as the coal mine that was the subject of the *Sharma* dispute) that may be impacted by future changes in climate change policy.

Environment-related litigation is likely to increase, so company directors should watch for any changes to government policies at all levels regarding what decision-makers are required to consider when approving projects and developments.

More claims are likely to follow

The question now is whether the Respondents will seek special leave from the High Court to appeal to the High Court from the FFC decision.

We can also expect to see a range of novel duties of care being argued for under different legislation and across jurisdictions, seeking to hold the government (ministers, public officers and delegated decision-makers at federal, state and local levels) and private actors accountable for decisions. These may involve climate change, human rights, environmental protection, intergenerational trauma or other issues.

Given the widespread impact of the changes arising from climate change, seen most recently though the floods in North Eastern Australia, and the impact of governmental decisions, it is not difficult to conceive of enterprising claimants use the comments from the FFC to mould a duty to be owned by government entities. The duty could relate to a wide range of issues, including development approvals, public utilities, road design, and care and guardianship decisions.

[1] See for example the German case *Luciano Lliuya v. RWE AG* brought by a Peruvian farmer against Germany's largest electricity producer for allegedly emitting greenhouse gases that contributed to the melting of mountain glaciers near his town.

NEED TO KNOW MORE?

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