HERBERT SMITH FREEHILLS

A CLIMATE CHANGE DUTY OF CARE: SHARMA V MINISTER FOR THE ENVIRONMENT

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Legal Briefings – By **Mark Smyth, Peter Briggs, Timothy Stutt, Melanie Debenham and Georgia Roy**

The recent decision of Justice Bromberg in *Sharma v Minister for the Environment* [2021] FCA 560 found that a novel duty of care is owed by the Minister for the Environment to Australian children who might suffer potential "catastrophic harm" from the climate change implications of approving the extension to the Vickery coal mine in New South Wales.

KEY TAKEAWAYS

1. Bromberg J held that the potential harm to children was a mandatory relevant consideration that the Minister was required to take into account as a matter of administrative law in determining the approval under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).

2. Bromberg J also recognised a novel private law duty of care to protect Australian children from personal injury arising from the effects of climate change, noting that "by reference to contemporary social conditions and community standards, a reasonable Minister for the Environment ought to have the Children in contemplation when facilitating the emission of 100 Mt of CO2 into the Earth's atmosphere."

3. Bromberg J was not, at this stage, prepared to find a breach of the duty of care, noting that the Minister may now wish to consider conditions on the approval or other mechanisms to seek to reasonably address the risk of harm to children in discharging her duty of care. Further relief may be sought, pending steps taken by the Minister.

The decision is likely to have consequences for environmental impact assessment and approval of projects with a material emissions profile under the EPBC Act, as well as other similar regimes.

The decision has been handed down in the context of a growing body of case law in Australia and overseas recognising the impact of climate change on government decision-making and private law duties. We expect further actions in Australia by plaintiffs seeking to expand these duties on both governments and private companies in analogous contexts.

BACKGROUND

The claim was brought on behalf of eight Australian children as a representative proceeding representing "all children who ordinarily reside in Australia", who sought:

- a declaration that the Minister of the Environment owes a duty of care to not cause Australian children harm resulting from the extraction of coal and emission of CO2 into the Earth's atmosphere from the Extension Project; and
- an injunction to restrain the Minister from an apprehended breach of the asserted duty of care.

The Extension Project application was made by Whitehaven Coal Pty Ltd to the Minister in 2016, which would which would increase total coal extraction from the mine site from 135 to 168 million tonnes (**Mt**) which would produce approximately 100 Mt of carbon dioxide (**CO2**). The Minister has the discretion to approve or not approve the Extension Project under sections 130 and 133 of the EPBC Act.

FEDERAL COURT FINDINGS

THE RISK OF HARM ALLEGED BY THE APPLICANTS

A key step to establishing that the Minister owed a duty of care, was establishing that the approval of the Extension Project involved a risk of harm to the children. The Court framed this risk of harm as a risk of future injury from "climatic hazards" (for e.g., bushfires and heatwaves) induced by increases in the Earth's average surface temperature. The particular harm alleged by the plaintiff's was mental or physical injury, including ill-health or death, as well as economic and property loss.

The applicant's unchallenged expert evidence was accepted in this regard. It was also accepted that even though the 100 Mt of CO2 attributable to the Extension Project could be characterised as "small" it was not so insignificant as to deny a real risk of harm to Australian Children.

THE NOVEL DUTY OF CARE

The Court found that the Minister owed the alleged duty of care to Australian children, to exercise her powers under ss 130 and 133 of the EPBC with reasonable care, to not cause the children harm resulting from the emissions from the Extension Project.

In finding that the alleged duty of care existed, the court accepted that:

- It was **reasonably foreseeable**, for a person in the Minister's position, that the risk of harm to Australian children would flow from the emissions from the Extension Project.
- The Minister has direct **control** over the risk, as the creation of the risk depends on her decision to approve the Extension Project.
- Australian Children are extremely **vulnerable** to a real risk of harm from "climatic hazards", a function of the magnitude of the potential risk of harm and of their powerlessness to avoid that harm.

The Court did however find that the duty was limited to personal injury and death and did not extend to property damage or pure economic loss, on the basis that the broader duty of care would likely distort or skew the exercise of the Minister's broad discretion under the EPBC Act.

This novel duty of care is additional to the same matters being implied as a relevant mandatory consideration for the Minister under the EPBC Act.

REFUSAL TO GRANT THE INJUNCTION

Although the Minster's duty of care was established, the Court refused to grant the injunction sought to prevent the Minister from the apprehended breach of the duty, which would require the Minister to not approve the Extension Project.

The applicant's did not establish a reasonable apprehension of a breach of the duty of care, which required an assessment as to what were the reasonably available responses to the Minister, to the reasonable foreseeability of personal injury to Australian children. Justice Bromberg suggested that there was scope for the Minister to make a reasonable response to the foreseeable harm by approving the Extension Project, subject to conditions, but this was not the subject of any detailed submissions by the parties.

IMPLICATIONS

The imposition of the duty of care to children is novel and significant – as a private law duty operating alongside the Minister's normal statutory approval obligations it provides a separate and likely more attractive avenue to challenge government decisions in this context.

Practically, we expect to see a far greater focus from decisions makers on greenhouse gas emissions and climate change risk during environmental impact assessment processes for projects with a material emissions profile. Conditions of approval directed at avoidance, management and offset of emissions are a likely consequence.

The decision has been handed down amongst a growing body of case law in Australia and overseas recognising the impact of climate change and ESG issues on government decision-making and private law duties.

Last week, a Dutch court determined that Royal Dutch Shell is required to reduce its carbon dioxide emissions by 45% by 2030, compared to 2019 levels. That claim was brought by seven environmental associations and NGOs acting as co-claimants. The Court determined that under the Dutch Civil Code, Shell owed an unwritten duty of care to Dutch residents and the inhabitants of the Wadden region to take adequate action to curb contributions to climate change, even as a private company and not a state actor. The Court held that to act contrary to what is generally accepted under that duty of care is unlawful under Dutch law. Our further thoughts on this decision are available here.

In light of these developments, further actions in Australia by plaintiffs seeking to expand these duties on both governments and private companies in analogous contexts are to be expected.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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