

The Concept of Solastalgia & the Novel Duty of Care over the Future Generations

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Preface

Whilst the Firm has a history of prosecuting and defending statutory liability claims principally for “construction” disputes and professional negligence/medical claims, recently the Firm has been looking at a number of “public interest” claims both against statutory authorities and their duties to neighbours but also at Government Ministers exercise of authority. We’d thought it of interest to summarise a number of key interest items.

Prelude

We refer to our recent newsletter which looked at the historic decision in *Re Sydney Harbour Collieries (No1)* (1895) that banned a coal mine project. In this newsletter, we’ll look at a more modern application of public interest in not only protecting an environment for the future generations but preserving the close-knit community in both rural and urban settings. The following article considers how the Court applied the concept of “solastalgia” to both rural and urban settings.

Background

A mining company lodged a major project application to extend its mining project in Mount Thorley which was conditionally approved by the Planning Assessment Commission (‘PAC’).¹ Upon approval, many local residents objected to the Project.² The principle issue before the Court was whether the Project will exacerbate existing experience of solastalgia, and whether there is a risk that the affected community will be destroyed, and people will be forced to leave their community as a result of the environment, social and economic impacts.³ Solastalgia, or “loss of place” is according to Professor Glenn Albrecht, “a condition caused by the gradual erosion of the sense of belonging to a particular place and a feeling of distress about its transformation.”⁴

Decision

The Court overturned the decision of the PAC to allow extension of mining project.⁵ The Court stated that “the existence of the mineral resource does not necessitate its exploitation or give priority to the mineral resource exploitation over other uses of land, including nature conservation.”⁶ The main elements the Court considered included but not limited to solastalgia. The Court was then required to assign weight to all those relevant matters with emphasise placed on environmental impacts, and balance them in favour of and against granting approval.⁷ The applicant relied on evidence from experts and the residents, and submitted that as a direct result of impacts from noise and a deterioration in air quality, Bulga residents are experiencing, among other negative impacts,

¹ *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48, 5; *Environmental Planning and Assessment Act 1979* (NSW) s75].

² *Ibid* 6; s75L(3).

³ *Ibid* 404.

⁴ *Ibid*.

⁵ *Ibid* 1, 14.

⁶ *Ibid* 168.

⁷ *Ibid* 70, 497.

solastalgia; hence the Court should refuse the Project by reason of the Project's significance and unacceptable impacts on the community which are not avoided, mitigated, offset or otherwise compensated.⁸ The Court accepted the applicant's argument regarding solastalgia, stating that the Project's impacts in terms of the adverse change in the composition of the community are likely to cause adverse social impacts on individuals and community of Bulga which would exacerbate solastalgia, and materially and adversely change the sense of community, of the residents of Bulga and the surrounding countryside.⁹ The Court concluded that the substantial economic benefits did not outweigh the unacceptable impacts on the community and biodiversity, hence rejected the Project approval.

Key Takeaways

The decision in *Bulga* gave legal credence to "loss of sense of place" and other subjective indicators of community well-being.¹⁰ The Court's application of solastalgia concept was applied further in 2018 decision in *Nerringillah Community Association Inc v Laundry Number Pty Ltd* in which the Court considered whether the interest is limited to a small number of members in the vicinity of the development in Bendalong, concerned with their own private amenity; or whether the interest is a wider public interest.¹¹ The Court stated that it is incorrect to assume that people living outside of the vicinity of the area subject to the litigation have no interest in seeking to preserve and protect a specific environment or the public interest.¹² The Court observed that the application of the concept of solastalgia was not limited to the rural community and extended to an urbanised community because "the preservation of rural landscapes and lifestyles in an increasingly urbanised and built environment can be in the wider public interest."¹³ "Members of the public do not need to reside in rural communities to experience feelings of solastalgia occasioned by its development".¹⁴ The Court concluded that although some of the community members who live in the close proximity of the site seek to protect their amenity, there is a wider public interest in the subject matter of the proceedings.¹⁵

And now the Federal Court looks at "Duty of care"

Further, it seems that the issue in the 1895 decision, 'whether the government should prevent exploitation of the public domain' returned in 2021 where the Federal Court of Australia established that the Minister of the Environment owes a duty of care to not cause the Australian children mental or physical harm resulting from exposure to climatic hazard brought by approval of the mining project in question.¹⁶ What needed to be established was that the injury to the children is a foreseeable consequence of the Minister's approval of the Project.¹⁷ Therefore, the Court needed to be satisfied that a reasonable person in the Minister's position would foresee that a risk of injury to the children would flow from the increased in the contribution of CO2 brought by the project which the Minister's approval would facilitate.¹⁸ On the issue of foreseeability, there were reports which considered the

⁸ Ibid 12, 256.

⁹ Ibid 18.

¹⁰ Glenn A. Albrecht, 'Submission to the Planning Assessment Commission (PAC) for the Warkworth Continuation and Mount Thorley Continuation Projects 2014' (2014) NSW Department of Planning and Environment 2.1, 2.3.

¹¹ *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236, 80.

¹² *Nerringillah Community Association Inc v Laundry Number Pty Ltd* [2018] NSWLEC 157, 132.

¹³ Ibid 135.

¹⁴ Ibid.

¹⁵ Ibid 142.

¹⁶ *Sharma v Minister for the Environment* [2021] FCA 560, 11, 84, 513.

¹⁷ Ibid 247.

¹⁸ Ibid.

scope of emissions from the Project to be a significant contributor to climate change.¹⁹ Further, although the Court accepted that this was a case where foreseeability of the probability of harm may be small, the consequent harm is so immense that it powerfully support the conclusion that children should be regarded as persons who are “so closely and directly affected” that the Minister ought reasonably to have them in contemplation as being affected when directing her mind in making a decision.²⁰

This judgement is significant since it would impose similar duty of care on environmental decision makers to consider the interest of “people and communities” and specifically the future generations in making decision.²¹ However, since the Court rejected the application for “injunctive relief”, it means while the duty of care would impose obligation on decision-making process, it does not mandate rejection of the Project application by the Minister.²²

Conclusion

It's of interest and indeed assurance that a Judgement of 1895 has such currency almost 130 years later.

Equally the Court's recognising the importance of the environment and its natural resources for all to appreciate and enjoy, now and into the future.

If you look to the NSW Design and Building Practitioners Act, it requires of Engineers as part of their “Code” that they protect the “natural environment” with the designs they create. It's only appropriate that those in charge of statutory authorities and Government Ministers are also held to account to act consistently with protecting our shared environment.

¹⁹ Ibid 250.

²⁰ Ibid 257.

²¹ Ibid 158.

²² Ibid 510.