July 2022

Newsletter

"Climate Change Litigation"

Minister for the Environment v Sharma [2022] FCAFC 35

Following our previous Newsletter in 2021 relating to Sharma v Minister for the Environment [2021] FCA 560, this Newsletter will discuss the Full Federal Court's reasonings for overturning the 2021 decision and finding that the Minister does not have a duty of care to the respondents.

1.Background (Earlier Decision)

A coal mining company had applied under the *Environment Protection and Biodiversity Conservation Act 1999* ('EPBC Act')[1] for approval to expand and extend a coal mine (the 'Extension Project'). At first instance, the Court accepted that there was a real risk of harm to the Children arising from climate hazards by increase to global average surface temperatures and that the Extension Project would lead to a small but measurable increase to global average temperature. It was argued that she owed a duty of care to protect young people of Australia ('Children') from the future harm that will be caused by climate change, through statutory interpretation of the EPBC Act, with a particular focus of ss 130 and 133. (see the Schedule at the end of this newsletter for EPBC ss 130 and 133) The relevant duty was expressed that it requires the Minister to take reasonable care to avoid causing harm to the Children arising from climate change harm which specifically focused on the exercise of the Minister's power under the EPBC Act to approve or refuse the Extension Project.

[1] Environment Protection and Biodiversity Conservation Act 1999 (FC).

2.The Appeal

The question on the appeal was whether the primary judge was correct to declare that the Commonwealth Minister for the Environment, in exercising powers under s130 and s133 of the EPBC Act in respect of an extension to the operations of the Extension Project, owed to the respondents and those whom they represent a common law duty to take reasonable care to avoid causing personal injury or death arising from emissions of carbon dioxide (CO_2) into the Earth's atmosphere.[2]

3. The Minister's Grounds of Appeal and Submission

The Minister's grounds of appeal and submissions are listed below:[3]

-Policy

-Incoherence

-Lack of legal foreseeability

-Lack of Relevant Control

-Lack of Relevant Vulnerability

-Indeterminacy

-Reliance on Factual Errors

4. The Court's Findings

Separation of Power Principle

The Court agreed that the Minister did not owe the argued duty of care with respect to the exercise of a statutory power under the EPBC Act, with Allsop CJ mainly focusing on separation of power principle. In his judgement he states that the duty of care here concerns matter of so-called "core" policy,[4] hence it is not the function of the Judicial branch to rule upon any lack of adequacy or any lack of wisdom of government policy by reference to the

[2] *Minister for the Environment v Sharma* [2022] FCAFC 35, 179.
[3] Ibid 177-187.
[4] Ibid 247.

law of torts.[5] The duty concerns matters of so-called "core" policy.[6] Such is to appreciate the nature and character of the necessary appropriate power to deal with the problem and so the nature and extent or scope and content of the duty.[7] The evaluation of good or bad decision-making about greenhouse gas emissions and the risks of global warming is one to which the highest considerations of the welfare of the Commonwealth attend, by reference to a range of matters that involve scientific, social and economic considerations and ultimately democratic political choice.[8] This can be called, at the very least, core government policy.[9] It is perhaps better described as public policy of the highest importance.[10] The uncontested evidence makes that pellucidly incontestable.[11]

Allsop CJ further highlighted the text and structure of the EPBC Act and states to impose the duty upon the Minister would be inconsistent with that text and structure of the EPBC Act in its context of the wider legal and governmental framework of responsibility for the protection of the environment.[12] The natural places for the development of such policy and the making of decisions as to the implementation of such policy is the Executive branch of government, and Parliament.[13] Additionally, the nature of the harm was worldwide global climate, and the Minister did not have an exclusive control over any risk by granting the approval of the Extension Project.[14] Allsop CJ states that the relationship that found the duty is one between the government and the governed, and lacks the relevant nearness and proximity necessary for the imposition of a duty of care.[15]

The natural places for the development of such policy and the making of decisions as to the implementation of such policy is the Executive branch of government, and Parliament.[16] Both have the power and the ability to obtain all relevant up-to-date information bearing

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[5] Ibid 248.
[6] Ibid 247.
[7] Ibid.
[8] Ibid.
[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] Ibid.
[13] Ibid 249.
[14] Ibid 334.
[15] Ibid 344.
[16] Ibid 250.

upon policy.[17] Both arms of government are, in a parliamentary democracy, responsible to the people of the polity.[18]

Tiny vs Material Contribution

Further, two key words for liability stand out in Allsop CJ's decision: "tiny" vs "material". The primary Judge at [253] in drawing conclusion about the foreseeability of harm said, "...the prospective contribution to the risk of exposure to harm made by the approval of the extraction of coal from the Extraction Project may be characterised as small, it may fairly be described as "tiny"...[19] (meaning tiny contribution to the identified risk of harm which will expose the Children to a greater risk of injury).[20] However, "material" contribution is referred to as "the material contribution to increasing the minimum level at which [carbon dioxide] concentration can flatten".[21] Reliance was placed on *Bonnington Castings* [1956] AC 613 to support the proposition that any contribution to the harm (amid multiple conjunctive factors) above *de minimis* is material.[22]

Lack of Proximity & Indeterminacy of Liability

Beach J in his judgement relied on the lack of sufficient closeness/ directness between the Minister's exercise of power, the risk of harm, and the lack of indeterminacy of liability, stating that a lack of sufficient closeness and directness and its related partial inverse, namely, indeterminacy, were such as to deny the posited duty of care. Further, the Act does not make or recognise the claimant class as a protected species or a potential beneficiary of any exercise of power.[23] Members of the claimant class are all strangers.[24] As a result, there cannot be any member of the claimant class that could reasonably be "so closely and directly affected" by any act of the Minister with respect to her exercise of statutory power in the

[17] Ibid.
[18] Ibid.
[19] Ibid 116.
[20] Ibid 106, 182.
[21] Ibid 11.
[22] Ibid 200.
[23] Ibid.
[24] Ibid.

present context.[25] The class of likely vulnerable victims is simply unascertainable today.[26] His Honour ought not to have declared that the posited duty of care was owed.[27]

Existence of a Relationship Between the Minister and the Children

Further, three main reasons existed for Justice Wheelahan's findings in favour of the Minister are as follow:

(1) the Minister's function under s130 and s133 of the EPBC Act in this case does not erect or facilitate a relationship between the Minister, and the respondents and those whom they represent, that supports the recognition of a duty of care;

(2) it would not be feasible to establish an appropriate standard of care, with the consequence that there would be incoherence between the suggested duty and the discharge of the Minister's statutory functions; and

(3) His Honour is not persuaded that it is reasonably foreseeable that the approval of the Extension Project would be a cause of personal injury to the respondents, as the concept of causation is understood for the purposes of the common law tort of negligence.

5. Criticism of the Decision

In the case of *Bushfire Survivors for Climate Action*[28], which was a claim against the NSW Environmental Protection Authority ('EPA'), the evidence was allowed to be presented from former Australian Chief Scientist, Penny Sackett, on climate change impacts. The treatment of evidence on climate change in that case is consistent with *Sharma* decision. However, in *Bushfire Survivors* case, the Land and Environment Court held that the EPA had failed to develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change and ordered the EPA to develop those instruments. In *Sharma* the Court did not consider the Minister's failure "to provide protection of the

[25] Ibid 701.
[26] Ibid 747.
[27] Ibid 748.
[28] *Bushfire Survivors for Climate Action Inc v Environmental Protection Authority* [2021] NSWLEC 92.

environment that are matters of national environmental significance" in accordance with section 3 of the EPBC Act (see the Schedule for s3 of the EPBC Act). Instead, the Court mainly stated that the scope and content of the duty of care concerned core policy considerations which are unsuitable for judicial determination.

The primary judge focused on the interpretation of the EPBC Act, Justice Bromberg's duty of care inquiry was in close analysis of the purpose of the statutory approval power. The objects of the Act included the protection of the environment and the ecologically sustainable use of natural resources. Further, the Act specifically contemplated the position of future generations, defining 'ecologically sustainable use' as ensuring that 'the benefit of the use to the present generation does not diminish the potential to meet the needs and aspirations of future generations' (s 528 of the Act) and adopting 'inter-generational equity' as a principle of ecologically sustainable development (s3A of EPBC). While the Act did not expressly protect against harm to people, it did contemplate the protection of the environment for the benefit of ongoing human use and enjoyment.[29] This allowed Bromberg J to interpret protection of human safety as an implied 'relevant mandatory consideration' for the purpose of the Minister's decision-making.[30] This line of argument was important since statutory construction was critical in reconciling public and private duties. However, in rejecting the primary judge's argument, the Court states that the latter implication cannot be derived from the EPBC Act. The imposition of the duty should be rejected.[31] First, the posited duty throws up for consideration at the point of breach matters that are core policy questions unsuitable in their nature and character for judicial determination.[32] Secondly, the posited duty is inconsistent and incoherent with the EPBC Act.[33] Thirdly, considerations of indeterminacy, lack of special vulnerability and of control, taken together in the context of the EPBC Act and the nature of the governmental policy considerations necessarily arising

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[29] *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560, 157-159.
[30] Ibid 404.
[31] Above n2, 7.
[32] Ibid.
[33] Ibid.

at the point of assessing breach make the relationship inappropriate for the imposition of the duty.[34]

6. How does the *Sharma* [2022] decision affect the increasing body of climate change litigations?

- The decision emphasises justiciability, causation and foreseeability of harm and indeterminacy as important factors in establishing duty of care.
- Allsop CJ's decision highlights "tiny" vs "material" contribution to harm (see above for the meaning of "tiny" and "material" in this context). He used the former to find no liability.[35] Therefore, future climate litigations can still succeed if they establish the contribution to harm was "material".
- The decision does not mean that future climate litigations related to duty of care will be unsuccessful. Under different statutory contexts, the litigation might be successful although causation, foreseeability and indeterminacy need to be established.
- Despite the decision in Sharma being overturned, The Full Federal Court in the first instance upheld these facts and noted *"the nature of the risks and the dangers from global warming, including the possible catastrophe that may engulf the world and humanity were never in dispute."* This means that the climate science is accepted and that any defendants in the future litigations will face difficulty challenging the existence of the harms of climate change.
- The Chief Judge of the NSW Land and Environment Court has suggested that *'as attitudes to climate change continue to shift, assisted by the recognition of the importance of mitigating climate change in the Paris Agreement, existing legislative frameworks are more likely to be interpreted by the courts as requiring a decision-maker to take climate change into account.'*[36] However, any decision relating to the climate change will be examined against the text, structure and context of the relevant legislation.

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[34] Ibid.

[35] Ibid 344-346.

[36] Brian Preston, 'Influence of the Paris Agreement on Climate Change Litigation: Legal Obligations and Norms (Part I)' (2021) 33(1) *Journal of Environmental Law* 1, 27; 28.