

A duty of care to future generations? The case of Minister for the Environment v Sharma [2022] FCAFC 35

By Ricardo Agostino

It is well established that a common law duty of care may apply to governmental and local government decision makers in certain circumstances. The nature and scope of such a duty has become a topical issue given the increase in legal challenges to the validity of government approvals on grounds of potential climate change repercussions for future generations. The Federal Court of Australia case of *Minister for the Environment v Sharma* [2022] FCAFC 35 (**Minister v Sharma**) explores the importance of this duty in the context of planning decision making. This article examines the key elements of the decision in *Minister v Sharma* and its potential implications for local government decision-making.

Background Facts

The case of *Minister v Sharma* is an appeal from the Federal Court of Australia concerning the application to expand an already approved coal mining operation in Gunnedah, New South Wales known as the Vickery Coal Project. Development approval for the coal mining operation was granted on 19 September 2014 pursuant to the *Environmental Planning and Assessment Act 1979* (NSW) (**Original Approval**). The Original Approval was exempt from the requirement to seek approval from Federal Minister for Environment (**Minister**) because a delegate of the Minister determined it was not a 'controlled action' under section 75 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**). "Controlled action" are actions which may have a significant impact on matters of national environmental significance.^[1]

The operator subsequently wished to expand the area of coal mining operations under the Original Approval and in this instance the approval from the Minister was required pursuant to section 68 of the EPBC Act (**Expansion Project**). The applicants were Australian children represented on behalf of Sister Marie Brigid Arthur, a Sister of the Brigidine Order (**Children**), who claimed that the Minister had a duty of care not to approve Expansion Project because it might result in significant harm suffered by the Children in the future:

The particular harm relevant to the alleged duty of care is mental or physical injury, including ill-health or death, as well as economic and property loss. The applicants assert that the Children are likely to suffer those injuries in the future as a consequence of their likely exposure to climatic hazards induced by increasing global surface temperatures driven by the further emission of CO2 into the Earth's atmosphere.^[2]

The decision at first instance was that a duty to take reasonable care to avoid causing personal injury to the Children arose

when deciding whether to approve the Expansion Project pursuant to sections 130 and 133 of the EPBC Act.^[3] The appeal decision of *Minister v Sharma* rejected this decision and determined that no duty of care arises for the primary reasons outlined below.

Reason 1: Inconsistency with the EPBC Act

Similar to those considerations listed under section 67(2) of the Deemed Provisions,^[4] the EPBC Act sets out those planning considerations which the Minister must take into account when considering whether or not to approve a proposed development.^[5] Chief Justice Allsop in *Minister v Sharma* held that the consideration of a duty of care to the Children was outside of the scope of the EPBC act stating –

The duty would create a form of mandatory consideration beyond the considerations in respect of the decision in question provided for by the EPBC Act on its proper construction. The EPBC Act does not contain as an overall purpose the safety of human life. Here those considerations concern the protection of species, communities and water resources. The creation of an overriding common law duty to a significant proportion of the population of Australia to consider all factors and information concerned with greenhouse gas emissions and the risks of global warming, and the proper policy response thereto is to impose upon the EPBC Act, or overlay the EPBC Act with, a responsibility and duty of the Minister personally not found within the statute and which, given its capacity for personal liability, would be to change the whole nature of the decision-making in question.^[6]

Chief Justice Allsop in making the statement above alluded to the idea that if factors beyond what is required to be considered by the decision maker had been considered, it would materially impact on the entire decision-making process.

Reason 2: Remoteness of the duty

In order to establish whether a duty of care exists, there must be an identifiable relationship between the claimant and the wrongdoer.^[7] In other words, there must be established factors which bind the Minister as decision maker to the Children who claimed to be affected by that decision.^[8] Justice Beach in *Minister v Sharma* held that none of the Children or any class of Australian children could reasonably be considered to be so closely and directly affected by any act of the Minister with respect to the exercise of statutory power for reasons below:^[9]

- *First, there is no temporal closeness between the Minister and her exercise of statutory power to approve on the one hand, and the effects on the claimant class on the other hand by reason of such exercise. Indeed, the gap is many decades.*
- *Second, there is no geographic closeness. The claimant class consists of members all over Australia. Contrastingly, the extension project and the decision to approve are in one sense more locally positioned.*
- *Third, there is no causal closeness and directness between the approval on the one hand, and the effects on the claimant class on the other hand, in the sense that there are many links and other actors in the causal chain. I have dealt with this in a slightly different context when considering reasonable foreseeability.*
- *Fourth, there is no otherwise relationship between the Minister and the claimant class, whether to be gleaned from the Act or otherwise. The Act (EPBC) has little to do with or say concerning GHG emissions or their consequences. Moreover, the Act does not make or recognise the claimant class as a protected species or a potential beneficiary of any exercise of power. Members of the claimant class are all strangers.*^[10]

Reason 3: Indeterminacy

The Justices were also concerned with the indeterminate class of claimants if a duty of care were to be imposed on the Minister. The class of claimants was so wide in breadth and not clearly identifiable that imposing a duty would have resulted in the Minister being open to limitless actions, claims, suits and demands.^[11] The reason for indeterminacy of a class of persons that may be affected is explained by Justice Beach as follows –

But here we are not dealing with the possibility or consequences of a single catastrophic event. I agree with the Minister that the concern is with rolling events potentially causing damage where there is no meaningful limit on how many of the claimant class will suffer harm and how many times they will be so harmed, when that damage will occur over the next century or so, and the extent of that damage.

To put simply a duty of care to protect against climate change is extremely difficult to relate specifically to a single class of persons when by its nature, any future harm from climate change would affect every person.

Lessons from the decision

The decision of *Minister v Sharma* is a significant case in determining that no duty of care in relation to the potential effects of climate change on future generations applied to the Minister when exercising decision-making powers in relation to approval of the Expansion Project. The decision illustrates some of the limiting factors particularly in regards to remoteness that may preclude a duty arising and serves as a reminder of the primacy of the governing statutory framework in the decision-making process. Given that a wide range of government decisions may have potential impacts in relation to future climate change effects, the decision is also likely to be of relevance in a variety of statutory contexts.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For any comments or questions on this article please contact Ricardo Agostino by email to ragostino@mcleods.com.au.

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^[1] See section 67 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

^[2] *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560 at [11] (Bromberg J).

^[3] *Ibid* at [513] (Bromberg J).

^[4] Schedule 2 Part 9 of the *Planning and Development (Local Planning Schemes) Regulations 2015* (WA).

^[5] Section 136 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

^[6] *Minister for the Environment v Sharma* [2022] FCAFC 35 at [268] (Chief Justice Allsop).

[7] *Donoghue v Stevenson* [1932] AC 562 at 580 and 581 (Lord Atkin).

[8] See causal relationships in *Sullivan v Moody* (2001) 207 CLR 562.

[9] *Minister for the Environment v Sharma* [2022] FCAFC 35 at [701] (Justice Beach).

[10] *Ibid* [679] – [700] (Justice Beach).

[11] *Ibid* [745] – [747] (Justice Beach).