A NOVEL DUTY OF CARE? RECENT DEVELOPMENTS IN AUSTRALIAN AND INTERNATIONAL CLIMATE CHANGE LAW

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In the past month, a number of landmark developments have occurred in climate change law in Australia and overseas, which have the potential to materially impact emissions intensive corporations and projects. These reflect the ongoing willingness of courts to intervene and regulate carbon dioxide emissions based on actions founded in tort and negligence.

In this article, we briefly summarise the following key recent climate change law cases:

- *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560, where the Federal Court of Australia held that a novel duty of care applied to a government decision maker in approving a coal mine extension under Commonwealth environmental legislation
- *Milieudefensie et al. v. Royal Dutch Shell* C/09/571932 / HA ZA 19-379, where a Dutch court made orders requiring Royal Dutch Shell to substantially tighten its emissions reduction targets in line with a 1.5 degree pathway.

We also provide a brief outline of the update to the Memorandum on Climate Change and Directors' Duties prepared by Mr Noel Hutley SC and Mr Sebastian Hartford Davis for the Centre for Policy Development (Directors Duties Advice). This provides an up to date, concise and useful outline of potential liabilities for emissions intensive corporations and their directors when setting emissions targets and addressing climate change risks in Australia.

Commonwealth Minister for the Environment Held to Owe Climate Change Duty of Care

In May 2021, Justice Bromberg of the Federal Court of Australia handed down his decision in Sharma by her litigation representative *Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560.

Justice Bromberg held that the current Minister for the Environment, The Hon Sussan Ley MP (Minister) owed a novel common law duty of care to the applicants (a group of young climate activists) in exercising her powers to determine an application for approval under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) for the expansion of the Vickery Coal Project (Mine).

In applying the standard tests for establishing a novel duty of care and taking into account contemporary social conditions and community standards, Bromberg J found that:

> "… the relations between the Minister and the Children answer the criterion for intervention by the law of negligence. That conclusion is confirmed when re-examined through the lens of the neighbourhood principle and the criteria of reasonableness fundamental to the law of negligence. 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. It follows that the applicants have established that the Minister has a duty to take reasonable care to avoid causing personal injury to the Children when deciding, under s 130 and s 133 of the EPBC Act, to approve or not approve the Extension Project."

Despite finding that the Minister owed a duty of care to the applicants in exercising her powers to approve the Mine under the EPBC Act, Bromberg J declined to grant an injunction to restrain the Minister from granting approval for the Mine.

The injunction was refused on the basis that the Minister is now aware that she *"must take into account, as a mandatory relevant consideration, the avoidance of personal injury to people"* in determining whether to approve the Mine under the EPBC Act. Further, Bromberg J found that the Minister could potentially discharge this duty of care through the imposition of climate change related conditions on any approval for the Mine.

This decision will impact all future determinations of applications for the approval of actions which require approval under the EPBC Act (that relevantly includes all large coal mining development which is likely to have a significant impact on a water resource and other projects, and on a matter protected by the EPBC Act, such as listed threatened species and communities). In particular, it is likely to result in proponents of projects being assessed under the EPBC Act being required to consider and assess the long term climate impacts their project may cause to Australians.

It remains to be seen how the Minister and the Department of Agriculture, Water and the Environment will respond to and interpret this novel duty of care in considering granting approval for controlled actions under the EPBC Act. Assuming the decision is not successfully appealed, it is possible that any approval ultimately granted for the Mine under the EPBC Act will include more stringent conditions regulating Scope 1,2 and/or 3 carbon emissions, including a requirement that the proponent procure and retire carbon offsets to mitigate emissions.

This case also opens the door to further challenges of decisions made by Australian environmental and planning regulators who grant approvals for emissions intensive projects, such as coal and gas projects, on the basis that they also owe the same duty of care to *"take into account, as a mandatory relevant consideration, the avoidance of personal injury to people"* resulting from climate change impacts.

The full decision can be read here.

Judicial Setting of Corporate Climate Targets in the Netherlands - A Sign of Things to Come?

Overseas courts have recently shown increasing willingness to make orders restricting the carbon emissions of emissions intensive corporations.

In May 2021, the District Court of The Hague (Court) in the Netherlands handed down its decision in *Milieudefensie et al. v. Royal Dutch Shell* C/09/571932 / HA ZA 19-379 which ordered Royal Dutch Shell plc (RDS) to reduce its Scope 1, 2 and 3 carbon emissions by 45 per cent by the end of 2030 based on a 2019 baseline. This is a substantial undertaking as it includes the emissions of RDS products sold and consumed by their customers.

The Court made this order in response to a challenge brought by a consortium of environmental groups and over 17,000 individual complainants, who appointed an environmental group known as Milieudefensie as their representative (together referred to as Milieudefensie).

In commencing the proceedings, Milieudefensie alleged that RDS' current carbon emissions targets breached a duty RDS owed to prevent harm to Milieudefensie under the Dutch *"unwritten standard of care"*. The Dutch *"unwritten standard of care"* allows negligence-like actions to be brought in response to breaches of *"unwritten laws"*, being standards or agreed norms of social conduct (in this case, various human rights statutes and international climate agreements). These concepts have no application under Australian law.

In assessing the *"unwritten standard of care"* owed by RDS to Milieudefensie under Dutch law and considering the risks of climate change impacts on Dutch citizens, the Court held that emissions reduction pathways that limit global warming to 1.5 degrees Celsius **must** be followed by RDS.

This resulted in the Court ordering that RDS pursue Scope 1, 2 and 3 emissions reductions of 45 per cent by 2030 on a 2019 baseline, which the Court considered was in line with a 1.5 degree pathway. Importantly, the Court held that:

- RDS was not currently in breach of its *"unwritten standard of care"*, but held that its current emissions targets were not adequately stringent or aligned with at 1.5 degree pathway
- RDS is free to pursue the Court mandated emissions target in any way it deems appropriate.

RDS has issued a statement and has indicated that it plans to lodge an appeal against this decision.

While this case turned on a legal concept that has no application to Australian law, it is conceivable that judicial decisions ordering companies to adopt more stringent emissions targets in response to common law tort and negligence actions from environmental groups may occur in the future in Australia. This risk is highlighted by the Directors Duties Advice, which documents the rising expectation of shareholders and the general public that directors of Australian companies are appropriately disclosing and acting on climate change risks.

The Court's decision in English can be read here.

Directors Duties and Climate Change Advice

In April 2021, the Centre for Policy Development published its third update to the Memorandum on Climate Change and Directors' Duties prepared by Mr Noel Hutley SC and Mr Sebastian Hartford Davis. The Directors Duties Advice updates earlier landmark advice on directors duties and climate change published in 2016 and previously updated in 2019.

The updated Directors Duties Advice highlights the continuing rise in expectation by regulators, the public and shareholders for directors to proactively address climate change risks. It considers the evolving duty of care and diligence imposed upon company directors in relation to climate risks by s 180(1) of the *Corporations Act 2001*

(Cth) and confirms that the standard of care has now risen to the point that disclosure only is no longer sufficient in key sectors and directors now need to take proactive steps to address climate change risks:

> "… it is no longer safe to assume that directors adequately discharge their duties simply by considering and disclosing climate-related trends and risks; in relevant sectors, directors of listed companies must also take reasonable steps to see that positive action is being taken: to identify and manage risks, to design and implement strategies, to select and use appropriate standards, to make accurate assessments and disclosures, and to deliver on their company's public commitments and targets."

The Directors Duties Advice also considers liabilities in the context of, increasingly common, corporate "net zero" commitments. The Directors Duties Advice highlights the risk of claims of misleading and deceptive conduct being made where a company:

- makes a net zero or other emissions target without having *"reasonable grounds"* to support achievement of their emissions targets (including a genuine intention to achieve those targets); or
- does not accurately convey their progress towards their goals when making public statements about their targets.

It provides guidance on the practical steps which companies need to take to appropriately minimise the risk of such claims when making carbon related commitments.

The Directors Duties Advice highlights the risk of claims being made by shareholders and consumers in relation to climate change risks and greenwashing in the Australian context. These types of claims are already becoming commonplace in other developed jurisdictions, and the Directors Duties Advice provides a timely reminder that such claims may also succeed under Australian law.

The Centre for Policy Development's media release which includes the Directors Duties Advice can be found here.

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