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## SHARMA COURT FINDS DUTY OF CARE TO PROTECT YOUNG AUSTRALIANS FROM FUTURE INJURY FROM CLIMATE CHANGE

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Further to our recent alert regarding the impact of the German Federal Constitutional Court's decision on the German Climate Change Act, the Federal Court of Australia has now handed down its decision in *Sharma v Minister for the Environment*, finding when the Minister exercises powers under the *Environment Protection and Biodiversity Conservation Act 1999* in respect of a proposed coal mine expansion, she is bound by a common law duty to take reasonable care to avoid causing personal injury to the children of Australia in deciding whether or not to grant the approval.

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### BACKGROUND

*Sharma v Minister for the Environment* is one of [19 climate change litigation cases listed in the Federal Court of Australia](#).

The case is the result of a class action by 8 Australian school students, representing the children of Australia in a representative capacity ("Children"), that was commenced in September 2020 with the aim of setting a precedent that would stop or reverse project approval for fossil fuel developments in the future.

The application specifically sought an injunction to restrain the Commonwealth Minister for the Environment from approving Whitehaven's proposed Vickery coal mine extension project in New South Wales. When burned, the coal produced from the mine extension would generate approximately 100 million tonnes of carbon emissions over the next 25 years, potentially accelerating climate change.

The application contended that the Minister would be breaching a common law duty of care to protect younger people against future harm from climate change, arising from the new footprint of the coal mine, if she exercised her powers under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) to approve the mine expansion.

We [recently noted that the Sharma case would test the duty of care approach](#), given that for the application to be successful, the Court must find both that a duty of care is owed by the Minister to the applicants, and that approving the coal mine extension project was a breach of that duty.

### DECISION IN SHARMA

On 27 May 2021, the Federal Court of Australia handed down its decision in *Sharma*, publishing a judgment could potentially provide a starting point for an intriguing range of future claims and applications.

In that judgment, the Hon. Justice Mordecai Bromberg found that the applicants had established that the Minister had a duty to take reasonable care to avoid causing personal injury to the children of Australia when deciding under the EPBC Act to approve or not approve the Vickery extension project.

However, the Court also determined that in the circumstances and at this time, no injunction should yet be granted to restrain the Minister from exercising her power to permit the extraction of coal from the extended Vickery mine.

### REASONS FOR THE DECISION

The basis for the applicants' claim that a duty of care exists was the law of negligence, which incorporates long-established principles relating to the foreseeability of possible future harm, and the relationship between the person whose actions cause or contribute to the harm and the person who may be harmed as a result of those actions.

It was undisputed in the course of the hearing that human emissions of CO<sub>2</sub> into the atmosphere are largely responsible for the warming of the Earth's surface temperature in the last Century, and that Australia will experience more drought, sea level rises and extremes of heat, rainfall and fire-related weather as a result of these surface temperature rises. It was also undisputed that the extent of these effects will depend upon the extent of greenhouse gases emitted globally in coming years.

The scientific evidence heard by the Court demonstrated, among other things, that the potential harms that may result from the surface temperature rises would be substantial, particularly should global average surface temperatures rise to and exceed 3°C beyond the pre-

industrial level. The Court's judgment cites as one "startling" example of these potential harms the expectation that one million of today's Australian children will suffer at least one heat-stress episode serious enough to require acute care in a hospital, with many thousands suffering premature death from heat-stress or bushfire smoke.

The Court accepted that this evidence demonstrates that "a reasonable person in the position of the Minister would foresee that, by reason of the Extension Project's effect on increased CO<sub>2</sub> in the Earth's atmosphere and the consequential increase in global surface temperatures", each of the Children would be exposed to a risk of death or other personal injury. This foreseeable risk, combined with "the Minister's control over the potential harm in question, the extent of the vulnerability of the Children to that harm and the extent to which the Children rely upon the Minister to avoid the potential harm they face" was sufficient to establish the duty of care in this case.

That being said, the Court recognised that there is a need for coherence in the law, and this need requires that the Minister's broad statutory discretion not be overly impaired by the imposition of a duty of care. Consequently, the scope of the duty of care should not extend beyond a duty to take reasonable care to avoid personal injury to the Children when making the decision on the approval.

Further, despite recognising the existence of the duty of care, and that an injunction may be issued by the Court to prevent or restrain a threatened breach of a duty of care, the Court was careful to point out that before such an injunction can be issued, the Court must be satisfied that there is a reasonable apprehension that the duty of care will be breached, and that the injunction is appropriate in the exercise of the Court's discretion.

The Court determined that as the Minister had not yet made her decision in respect of the approval, the applicants had not established a reasonable apprehension of breach of the duty of care by the Minister. Instead, the Court indicated that it would be "more appropriate to assess whether any breach of the duty of care should be restrained once it is known what it is the Minister proposes to do" in respect of the approval.

Similarly, the Court concluded that the applicants had not established that the extent of the restraint they sought (being an order preventing the Minister from permitting the extraction of coal from the mine expansion) was justified at this point in time, given that the Minister's decision is still pending.

This potentially leaves open an opportunity for an injunction to be sought following the Minister's decision, as the judgment suggests (but does not state unconditionally) that the Minister's approval of the Vickery expansion would amount to a breach of the duty that ought to be enjoined.

## CONSEQUENCES OF THE DECISION

There is likely to be intense debate as to what the full consequences of this decision will be, not only for the Minister's decision in respect of the Vickery expansion, but also for other decisions under the EPBC Act in future.

The duty of care that was identified by the Court was limited to the Minister's decision under the EPBC Act in respect of the proposed Vickery expansion, and as such does not broadly recognise a duty of care to avoid injury to the children of Australia in respect of all other decisions (or all other decisions under the EPBC Act). The judgment therefore does not automatically restrain the Minister in her assessment of other applications for approval, and further Court proceedings will need to be undertaken in order for the Court's conclusions to be applied to other projects.

On that basis, the *Sharma* decision does not immediately restrain or otherwise impact the continued operation of the fossil fuel industry in Australia. Nevertheless, it is likely that without further clarity from the Court, or perhaps legislative intervention, there will be a cloud of uncertainty overshadowing the assessment of applications for other EPBC Act approvals in coming years, particularly where the projects involve the emission of significant volumes of greenhouse gas.

If you have questions regarding this legal alert, please contact:



Jeremy Schultz, Partner  
[jeremy.schultz@finlaysons.com.au](mailto:jeremy.schultz@finlaysons.com.au)  
+61 8 8235 7408



Kyra Reznikov, Special Counsel  
[kyra.reznikov@finlaysons.com.au](mailto:kyra.reznikov@finlaysons.com.au)  
+61 8 8235 7561

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