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COURT DECISIONS HERALD DRAMATIC EVOLUTION OF CLIMATE CHANGE LITIGATION

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Climate change litigation has evolved dramatically with the emergence of significant court judgments from the Federal Court of Australia and Hague District Court, Netherlands.

These developments occur in an international context of renewed focus on the *Paris Agreement*, and preparations for the 26th United Nations Climate Change Conference of the Parties (COP26) in Glasgow in November 2021.

The key takeaways from the decisions are:

- The Federal Court in *Sharma v Minister for the Environment* [2021] FCA 560 (*Whitehaven*) agreed with the applicants that, based on the common law of negligence, the Commonwealth Minister for the Environment owes a duty of care to protect young people from the human health impacts of climate change. While the applicants were ultimately unsuccessful in obtaining an injunction against Whitehaven, the Minister needs to make her decision about the project extension taking into account the Court's findings on climate change, and the duty of care. The stage is also set for further challenges to determinations by decision makers on this basis. This has implications for proponents seeking approvals for high emissions projects and in particular, those linked to fossil fuels.
- The decision of the Netherlands Court in *Milieudefensie et al. v Royal Dutch Shell plc (Shell)* points to the willingness of courts to impose positive obligations on major emitters to develop corporate policies that align with adopted international climate change agreements, such as the Paris Agreement. Shell has announced in its public statement of 26 May 2021 that it intends to appeal the Court's decision.
- A successful appeal against a decision of a regulator in Australia, such as the Commonwealth Minister for the Environment, on the grounds of a breach of a duty of care, could well pave the way for Australian litigation akin to the decision in *Shell.* Any such litigation could compel Australian corporations to take active steps to develop corporate policy to reduce emissions (including Scope 1, 2 and 3 emissions).

Shell Decision

In *Shell*, the applicants argued that the aggregate greenhouse gas emissions generated by the company via its business operations and products amount to a breach of the standard of care of persons and corporations to protect the human rights of others, specifically the right to life, as set out in the Dutch Civil Code.

The applicants relied upon the Netherlands' commitment to the Paris Agreement targets and the existing body of evidence surrounding the impacts of climate change, to argue that Shell has a human rights obligation to reduce its greenhouse gas emissions in alignment with the goals of the Agreement.
In coming to its decision, the Court posed the following question: is Shell obliged to reduce all Scopes of greenhouse gas emissions via its corporate policy?

The Court made the following key findings:

- The duty of care in the Dutch Civil Code is to be interpreted in the context of the relevant facts and circumstances. In this scenario, the "best available science on dangerous climate change and how to manage it, and the widespread international consensus that human rights offer protection against the impacts of dangerous climate change and that companies must respect human rights";
- The existential threat posed by climate change is serious;
- Enforcing action in alignment with the goals of the Paris Agreement sits within the the function of the Court; and
- Corporate entities have an obligation to limit and address the human rights impacts incurred via their activities, business relationships and supply chain, from the manufacturing to end-user stages.

In applying the above, the Court held that it could compel Shell to bring its corporate policy into alignment with the Paris Agreement. More specifically, the Court determined that Shell must reduce its net greenhouse gas emissions by 45% by the end of 2030, compared to 2019 levels.

Influence of *Urgenda*

This line of reasoning in *Shell* flows on from the 2019 *Urgenda* Decision. Here, the Supreme Court and Hague Court of Appeal held that the Dutch State had a duty of care to protect the human rights of its citizens, by taking appropriate action to mitigate the existential threat of climate change. This argument was framed in light of the human rights legislation operative in the Netherlands (the Dutch Civil Code), and the projected housing and safety crises that could arise by flooding as a result of sea level rise.
The Court held that the existential threat posed to the current and future citizens of the Netherlands was reasonably foreseeable on the available scientific evidence. Further, the Court could compel the State to implement an action plan to reduce its greenhouse gas emissions by at least 25% by the end of 2020 compared to 1990 levels.

Whitehaven: an Australian *Urgenda*?

Similar arguments have been advanced this week in an Australian Federal Court decision regarding the Vickery/Whitehaven Extension Project. *Whitehaven* concerned an application for approval by the Commonwealth Minister for the Environment (Minister) for the extension and expansion of a coal mine near Gunnedah pursuant to the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) ss 130(1) and 133 (EPBC Act).
The applicants in the class action, a group of eight Australian children, claimed that in considering the development, the Minister had breached her duty of care to protect Australian children from the reasonably foreseeable harm resulting from climate change incurred by increased greenhouse gas emissions.

Whitehaven indicates the emergence of an Australian line of precedent akin to that of *Urgenda* and *Shell*. However, the case was pursued under the common law of negligence rather than reliance upon international human rights principles.

The Court held that:

- The Minister's prospective approval of the development would have a direct impact in increasing greenhouse gas emissions, creating a nexus between the Minister's conduct and the human health risks experienced by children.
- A reasonable person in the Minister's position would foresee that, in granting the approval, Australian children would be exposed to a real risk of harm due to carbon emission induced climate change, being: "mental or physical injury, including ill health or death, as well as damage to property and economic loss".
- There is a duty owed by the Minister to Australian children, to protect them from the human health impacts of climate change which may be incurred by the grant of approvals under the EPBC Act.

The reasoning suggests the Minister may need to have more explicit regard to the future wellbeing of Australians, and the prospective climate impacts of proposals, when determining approvals under the EPBC Act. This will more likely apply to 'big emitter' developments such as fossil fuel developments. This is particularly poignant in light of the recent review of the EPBC Act, for which the Final Report was released in October 2020.

The key message being that:
"Australia's natural environment and iconic places are in an overall state of decline and are under increasing threat. The environment is not sufficiently resilient to withstand current, emerging or future threats, including climate change. The environmental trajectory is currently unsustainable."

Implications of Whitehaven

The finding that a duty of care exists suggests Australian jurisprudence may begin to develop along a similar trajectory to that observed in the Netherlands.
On the facts of the *Whitehaven* matter, the Court ultimately rejected the proposition that an injunction to restrain the Minister from granting an EPBC Act approval for the Whitehaven project was necessary. The Court noted that it was not satisfied "that it is probable that the Minister will breach the duty of care in making her decision as to whether or not to approve the Extension Project".
Instead, it was held to be preferable that the grant of any injunctive relief occur only after the Minister had made her decision pursuant to the EPBC Act. However, the Minister has now been left by the Court to make a decision about the project, having been told clearly by the Court that she must take into account the avoidance of personal injury to people, and will know she owes a duty of care to Australian children to protect them from foreseeable harm by her decision.
Likewise, the finding in *Shell* is not set in stone. While Shell is now subject to a positive and immediately binding obligation to reduce its greenhouse gas emissions, the full implications of this remain unclear as the Court found Shell had not yet violated this obligation, in light of its ongoing efforts to develop its emissions policy. Further, Shell announced in its public statement of 26 May 2021 that it intends to appeal the Court's decision.

While decisions such as *Urgenda* and *Shell* may have opened a window for duty of care arguments to be made in Australia, the extent to which this will result in enforceable sanctions against corporate entities remains unclear.

The distinction between *Shell* and *Whitehaven*, the latter being an Australian judgment, is that *Whitehaven,* akin to *Urgenda*, was an appeal against a prospective approval of a regulator (in this case, the Minister for the Environment) and not the entity behind the proposed action. However, a successful appeal against a decision of a regulator in Australia, such as the Minister for the Environment, on the grounds of a breach of a duty of care, could well pave the way for Australian litigation akin to the decision in *Shell*.