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| Document Lodged: | Submissions |
| File Number: | VID389/2021 |
| File Title: | MINISTER FOR THE ENVIRONMENT (COMMONWEALTH) v ANJALI SHARMA & ORS (BY THEIR LITIGATION REPRESENTATIVE SISTER MARIE BRIGID ARTHUR) |
| Registry: | VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA |

Dated: 4/10/2021 12:37:30 PM AEDT

Registrar

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FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
DIVISION: GENERAL

No. VID 389 of 2021

On appeal from a Single Judge of the Federal Court of Australia

**MINISTER FOR THE ENVIRONMENT**
Appellant

**ANJALI SHARMA**

First Respondent

**ISOLDE SHANTI RAJ-SEPPINGS**

Second Respondent

**AMBROSE MALACHY HAYES**

Third Respondent

**TOMAS WEBSTER ARBIZU**

Fourth Respondent

**BELLA PAIGE BURGEMEISTER**

Fifth Respondent

**LAURA FLECK KIRWAN**

Sixth Respondent

**LUCA GWYTHER SAUNDERS**

Seventh Respondent

# APPELLANT'S REPLY

Filed on behalf of the Respondent

File ref: 20206340

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## (a) Nature of the Minister's decision: RS [12] – [16], [50] – [54]

1. The respondents have advanced an array of arguments in response to the submission that the policy character of the decision in question ought to have weighed heavily against recognition of a duty of care. None provides an answer to the clear statements of principle in the most relevant High Court authority: *Graham Barclay Oysters Pty Ltd v Ryan*.[1] As those statements show, the Minister's analysis is conventional and does not call for the adoption of a novel "political question doctrine" (cf Respondents' Submissions (**RS**) [16], [52]). The Respondents have referred (at RS [50]) to various authorities said to provide that the policy/operational dichotomy: (i) is not determinative of when a duty of care is owed; and (ii) is only relevant to breach. The former point in no way undermines the proposition that, in the words of the judgment relied on by the respondents, "matters of policy are … unsuited for determination by courts".[2] The second point is not established by the authorities at RS fn 86, which rise no higher than stating that considerations such as resource allocation and convenience may be relevant to whether a statutory authority has breached a duty of care.[3] Similarly, the passage in *Brodie v Singleton Shire Council*[4] quoted at RS [12] and relied on at PJ [485] is directed to acts or omissions that are the <u>product</u> of a policy decision. It provides no support for the recognition of duties of care in respect of policy decisions <u>themselves</u>.

2. Contrary to the assertions at RS [14], [50], numerous cases have recognised that the policy nature of a decision may be a barrier to claims in respect of non-economic loss,[5] or arising from misfeasance.[6] By contrast, even though "many statutory decisions made by the Executive concern 'policy', or 'political questions'" (RS [51]) the respondents are unable to point to any case recognising a duty of care in respect of a decision analogous to that in the present case. Indeed, having opened with an acceptance of the importance of analogical reasoning in recognising a novel duty of care (RS [1]), the respondents attempt an analogy between the

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[1] (2002) 211 CLR 540 at [5]-[7], [12]-[13], [15], [26]-[27] (Gleeson CJ); [90]-[91] (McHugh J); [175]-[176] (Gummow and Hayne JJ, with whom Gaudron J agreed at [58]).

[2] *Refrigerated Roadways* (2009) 77 NSWLR 360 at [259(c)] (Campbell JA).

[3] In fact, in three of the four authorities referred to at **RS fn 86** – *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at [139] (Kirby J); *Crimmins* (1999) 200 CLR 1 at [87], [131] (McHugh J); and *Refrigerated Roadways* (2009) 77 NSWLR 360 at [253], [259], [283]-[286] (Campbell JA) – the possibility that "pure" or "core" policy decisions may not be subject to a duty of care was expressly acknowledged. See, also, *Roo Roofing* [2019] VSC 331 at [475] (John Dixon J).

[4] (2001) 206 CLR 512 at [106]. See, also,*Graham Barclay Oysters* (2002) 211 CLR 540 at [7] (Gleeson CJ).

[5] See, eg, *Graham Barclay Oysters* (2002) 211 CLR 540 at [1]-[3], [67], [116] and the passages cited in fn 1 above; *Refrigerated Roadways* (2009) 77 NSWLR 360 at [10]-[13], [301]-[305]; *Becker* [2006] NSWCA 344 at [70], [95].

[6] *Roo Roofing* [2019] VSC 331 at [15], [443]-[446], [450], [468]-[505] (especially [481]); *Dansar Pty Ltd v Byron Shire Council* (2014) 89 NSWLR 1 at [3], [68]-[69], [99], [104], [151]-[154], [190]; *Becker* [2006] NSWCA 344 at [95], [107]; *R v Imperial Tobacco* [2011] 3 SCR 45 at [7]-[9], [13], [92]-[96]. While *Graham Barclay Oysters* was concerned with omissions (albeit following a deliberate choice on the part of the State to permit self-regulation of the oyster industry), many of the statements of principle referred to at fn 1 expressly refer to <u>conduct</u> and <u>actions</u> of public defendants as well as inaction.

present case and the duty of a local authority which has knowledge of the fire risk posed by a blocked chimney (RS [23]), or the duty of an authority with power to direct workers at a specific workplace (RS [24]). The apparent submission that these cases are analogous to the imposition of a novel duty of care on the Minister with respect to decisions balancing competing environmental and economic factors under the *EPBC Act* is, to put it mildly, ambitious.

**(b) Incoherence: RS [21] – [27], [29] – [49]**

3. Contrary to RS [21], [30] – [37] and [45], whether a public authority owes a duty of care when exercising a statutory power does not start from the premise that such a duty is owed, with the coherence enquiry limited to a search for indications of a legislative intention to exclude the duty. The primary judge was correct to reject that approach (PJ [321], [322]). The principles cited at RS [31] concern statutory extinguishment of recognised common law duties, not the question of incoherence bearing on the recognition of a novel duty. Relatedly, a finding of incoherence does not require a conclusion that the legislature intended to authorise causation of physical harm (cf RS [34]-[35]). The fact that s 75(iii) of the Constitution enables claims in tort to be brought against the Commonwealth says nothing about whether or not a duty of care is owed in a particular case (cf RS [21], [30]). Where a statutory authority is alleged to owe a duty of care in relation to the exercise of a statutory power, the legislation is the necessary starting point,[7] the existence or otherwise of the duty turning on "a close examination of the terms, scope and purpose" of the relevant statute.[8] The question is whether the statutory regime "erects or facilitates a relationship between the authority and a class of persons that, in all the circumstances, displays sufficient characteristics to answer the criteria for intervention by the tort of negligence."[9]

4. The appellant does not contend that coherence analysis requires "complete coincidence" between public law and private law duties (cf RS [33]). The relevant question is whether the duty of care found by the primary judge would so interfere with the exercise of the approval power that it cannot be regarded as sitting harmoniously with the statute. The primary judge avoided the conclusion of incoherence by identifying harm to people as a relevant mandatory consideration (PJ [404]). The respondents do not seek to uphold that conclusion (RS [56], [57]), but without it the supposed coherence disappears and the type of "process-based impairment" alluded to by the primary judge (PJ [329], [335]) is manifest. The contention to the contrary at RS [56], [57] depends on the restrictive conception of incoherence that the primary judge correctly rejected

7 *Precision Products (NSW) Pty Ltd v Hawkesbury City Council* (2008) 74 NSWLR 102 at [78] (Allsop P), [199] and [200] (Beazley and McColl JJA agreeing).

8 *Graham Barclay Oysters* (2002) 211 CLR 540 at [146] (Gummow and Hayne JJ); see, also, [78] (McHugh J).

9 *Graham Barclay Oysters* (2002) 211 CLR 540 at [146] (Gummow and Hayne JJ).

(PJ [329], [335]). Nor can the principles regarding incoherence be confined to duties to avoid pure economic loss, or be seen as having diminished importance in respect of duties to avoid other types of harm (cf RS [37]). The same underlying concerns arise in relation to duties to avoid harming people or property.[10]

**(c) Reasonable foreseeability: RS [58] – [69]**

5. The respondents make two remarkable claims about causation and reasonable foreseeability. *First* (at RS [11], [61]; see also [13], [15], [67]), any action or omission that contributes at all to a physical phenomenon, where such phenomenon causes harm, is to be treated as a necessary cause of the harm. *Secondly* (at RS [62], [68]-[69]), there is no causation element of reasonable foreseeability; one only asks whether it is foreseeable that the defendant's conduct may make a contribution (even if "tiny") to a risk of harm, leaving questions of whether the conduct has the potential to actually cause harm for later stages of analysis.[11] The first claim alters the law of causation, such that action A may be deemed to be a "necessary" pre-condition to harm B, even if B would have occurred irrespective of action A. The point is exposed by the suggestion at RS [69] that it is enough that it is foreseeable that at the end of the 21st century people will suffer harm from the accumulation of GHG in the atmosphere, without any need to foresee that the quantity of the contribution said to arise (albeit indirectly) from the Minister's act would have any bearing on that outcome. The second claim breaks the basic connection between the conduct of the alleged torfeasor and the harm that is to be avoided by taking reasonable care. If the second claim were correct, the result would be to deprive reasonable foreseeability of almost all substantive function as a limit on liability.[12] If both claims are correct, then any motorist in 2021 would be liable in negligence for harm caused by climate change.[13] So would any other person knowingly engaging in an act that results in GHG emissions, of any magnitude. It is significant that no attempt is made by the respondents to explain how it is foreseeable that the actions of the Minister will make a material contribution to the occurrence of harm to the Children.[14] That being so it must be the case that, contra RS [66]-[67], the most that is foreseeable is that, if such harm does occur, while it would not be possible to attribute that harm to emissions resulting from the Extension Project, the evidentiary gap might be bridged if emissions from that project

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[10] See eg *X v State of South Australia (No 3)* (2007) 97 SASR 180 at [18] (Duggan J) and [178] (Debelle J).

[11] There is an inconsistency here: to ask whether an action or omission could foreseeably make a contribution to some harm is to consider whether there is foreseeably a causative relationship between the conduct and the harm. In other parts of their submissions, the Respondents concede as much: eg RS [48], recognizing that the Minister will owe a duty only where the action in question will "foreseeably cause physical harm".

[12] Cf the authorities cited at Appellant's Submissions (**AS**) **fn 60** and **71.**

[13] This is so because it is foreseeable that they will make a contribution to the total accumulation of emissions, and having done so their action is, on the Respondents' logic at **RS [11]**, a necessary cause of any resulting harm.

[14] See **RS [101]**. The Respondents contend (**RS [69]**) that the primary judge's discussion of materiality was relevant only to whether an injunction should issue. That is incompatible with the language at **PJ [2], [77], [79]-[90], [196]**.

increased the risk of that harm occurring (ie if the court adopts *Fairchild*[15] causation).

**(d) Control and third parties: RS [70] – [75]**

6. The respondents' various contentions in relation to control do not address the central point made by the Minister: that the limited form of control that she has over any future harm from GHG emissions is too remote and indirect to support recognition of a duty of care (AS [51] – [54]). In exercising the power to approve or not approve the Extension Project, the Minister has power to prevent an action that will make at most a "tiny" contribution to the risk of harm (PJ [253]). The respondents accept that the risk of harm that they rely upon will not be a product of the Minister's conduct in approving the Extension Project per se, but the accumulation of atmospheric $CO_2$ from all sources (RS [67], [74], [101]). That being so, the primary judge's finding that the Minister has "substantial and direct control over the source of harm" (PJ [288]) cannot stand.

**(e) Vulnerability and indeterminacy: RS [76] – [79] and [80] – [87]**

7. RS [76]-[79] restate the reasoning below without providing an explanation as to: (i) how the Children are specially vulnerable (in the sense of being specially unable to protect themselves[16]) beyond being unable to vote for a small fraction of the period during which the Minister will be exposed to liability; and (ii) why vulnerability has any role to play in relation to a duty in respect of non-economic loss[17] and where the Minister is in a position to exercise little or no control over the relevant potential harm by way of the approval power said to be subject to the duty.[18] The protection accorded to children as vulnerable persons is of no relevance in the present case, where people of a certain age have been said to be owed a duty because they will be alive at a certain time in the future, when they will not be children.

8. *Agar v Hyde*[19] is fatal to the contention at RS [81] that indeterminacy has no role to play in relation to duties of care in respect of personal injury. Here, the "likely number of claims", the uncertainty of the "extent of the potential liability" (which will depend, in part, on where people choose to live, for such choices will plainly impact on the risk of injury through bushfire or heatwaves: cf RS [86]) and the period of time over which claims may be brought, produces indeterminacy on a scale that far exceeds that in any of the authorities identified in RS [82].

**(g) Findings of fact: RS [88] – [101]**

9. The fact that the risk of triggering a tipping cascade increases beyond 2°C says nothing about the sensitivity of the tipping cascade mechanism. The evidence relied upon by the respondents

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[15] [2003] 1 AC 32.

[16] See, *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 575 at [23] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

[17] *Becker* [2006] NSWCA 344 at [76].

[18] See the authorities cited at **AS fn 82**.

[19] (2000) 201 CLR 552.

(RS [91]-[95]) does not justify the primary judge's finding that even an "infinitesimal increase in global average surface temperature may trigger a 4°C Future World" (PJ [253]).

10. The respondents were required to prove that it was reasonably foreseeable that approval of the Extension Project "may be likely to cause"[20] harm to the Children. Acceptance that the risk of harm is the product of the accumulation of GHG in the atmosphere from all sources required the respondents to establish, as an essential first step, that it was reasonably foreseeable that the approval of the Extension Project would increase the amount of GHG in the atmosphere. The respondents failed to prove that step, as they did not prove that, if the Extension Project was refused, the prospective customers would not simply obtain coal from other sources (cf RS [98]). Contrary to RS [63] it was not incumbent on the Minister to cross-examine Professor Steffen in circumstances where he gave no evidence to that effect and proceeded on assumption (see AS [69]). The respondents did not discharge the onus of proving a fact they needed to prove. The purpose for which the evidence referred to in RS [101] was adduced is not to the point; the findings the subject of ground 5 were necessary to the conclusion of reasonable foreseeability (cf RS [101]). Those findings were unsupported by evidence and should not have been made.

11. As a second step, in order to show that any emissions caused by the use of coal from the Extension Project increased the risk of global temperature increasing beyond 2°C, the respondents also needed to prove that those emissions were not included within existing carbon budgets that would limit temperature increases to below 2°C. That was not established on the evidence, particularly given the evidence that Scope 3 emissions from the Extension Project would be included in the national inventories of Japan, South Korea and Taiwan, each of which had committed to limiting emissions in line with the targets in the Paris Agreement.[21] The evidence did not support a finding that those countries would not adhere to their commitments. Plainly it would not be appropriate for the Court to draw an inference to that effect.

4 October 2021

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[20] *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 44 (Mason J).

[21] Department of Planning, Industry and Environment, Vickery Extension Project State Significant Development Assessment SSD 7480 (AB Pt C Tab 30) at [673] and [708].