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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: 13/09/2021 4:11:03 PM AEST 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 OUTLINE OF SUBMISSIONS

Filed on behalf of the Appellant

File ref: 21005261

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A. INTRODUCTION

1. How to respond to anthropogenic climate change – the measures that should be taken to militate against it and ameliorate its effects, and how to manage the social and economic impacts of those measures – is one of the most complex and difficult policy questions that faces the Commonwealth of Australia. The Minister has never disputed in these proceedings that climate change presents real threats to Australia and Australians. Those threats were described in the respondents' expert evidence. That evidence highlighted at a global scale (with very little attention to the Extension Project) the causes and consequences of anthropogenic climate change, and recognised that the response to climate change, both within Australia and internationally, is necessarily a process of managed transition which will involve the continued generation of greenhouse gas (**GHG**) emissions, reducing over time, as signatories to the Paris Agreement take action to achieve international targets. The particular choices made during that transition about which activities should and should not be undertaken are policy choices that involve balancing competing interests and potential benefits and harms.

2. In the judgment under appeal (*Sharma (by her litigation representative Sister Marie Brigid Arthur) v Minister for the Environment* [2021] FCA 560 (**PJ**)), the primary judge sought to overlay the law of negligence onto a process of statutory decision-making under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (***EPBC Act***) that is not directed to the protection of human health at all, but rather is concerned with the regulation of "controlled actions" that affect the particular matters protected under Pt 3 of the *EPBC Act*. Through that overlay, which required the primary judge to recognise a highly novel duty of care of indeterminate scope, the *EPBC Act* was re-purposed into a mechanism for minimising the risk of anthropogenic climate change. The result was to assert for the judiciary an unprecedented role in responding to the policy challenge posed by anthropogenic climate change, that being a role for which the judicial process is institutionally ill-suited.

3. No court in any common law jurisdiction has recognised a duty of care of the kind that the primary judge declared to exist. Indeed, no arguably analogous claim has succeeded in any common law jurisdiction.[1] There has not even been a tort claim against a GHG emitter that has been permitted to proceed to a substantive hearing.[2] That makes it all the more remarkable that

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1 United Nations Environment Programme and Sabin Center for Climate Change Law at Columbia Law School, *Global Climate Litigation Report: 2020 Status Review* (2020) at 42.

2 See, *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419 (***Fonterra***); *American Electric Power Co v Connecticut* 564 US 410 (2011) (***American Electric Power Co***); *People of the State of California v General*

a duty of the kind the subject of this appeal has been recognised in Australia, where so much emphasis has been placed on the need for "incrementalism" in recognising novel duties of care.[3]

B. JUDGMENT BELOW

4. The primary judge found that the Minister owes 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 (PJ [491]). "Children" referred to the named applicants below and all children who ordinarily reside in Australia (PJ [4]). The relevant risk of personal injury is the risk of death or personal injury from heatwaves or bushfires: PJ [247]. Although his Honour found that it was reasonably foreseeable that some of the Children would be exposed to risk of other personal injury, such as injury from flooding and extreme cyclones (PJ [236]) and risk of recognised psychiatric illness as a result of climate induced drought (PJ [245]), these risks did not apply to the cohort of Children generally. The primary judge rejected the existence of a duty to take reasonable care not to cause economic loss: PJ [148], [416].

5. The primary judge's analysis of the salient features focused on foreseeability of harm, coherence, control, vulnerability, reliance and indeterminacy. His Honour concluded that reasonable foreseeability "strongly favours the recognition of [a] duty of care" (PJ [490]). Coherence, indeterminacy and policy considerations were found to be "agnostic", but even if those matters were treated as tending against the recognition of a duty of care, their significance was outweighed by control, vulnerability and reliance which his Honour found "significantly" supported recognition of the more limited duty (PJ [490]).

6. Although the Court recognised a duty of care, it refused to grant a *quia timet* injunction, because it was not satisfied that it was "probable" that the Minister would breach the duty of care in exercising the power whether or not to approve the Extension Project: PJ [510].

Motors Corp (ND Cal, C-06-05755 MJJ, 17 September 2007) slip opinion; *Native Village of Kivalina v ExxonMobil Corp* 696 F 3d 849 (9th Cir 2012); *Comer v Murphy Oil USA Inc* 718 F 3d 460 (5th Cir 2013); *City of New York v Chevron Corp* 993 F 3d 81 (2nd Cir 2021) (***Chevron Corp***). As to why claims have been brought in nuisance rather than negligence, see DA Kysar, "What Climate Change can do about Tort Law" (2011) 41(1) *Environmental Law* 1 at 34.

3 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 (***Heyman***) at 481 (Brennan J); *Hill v Van Er*p (1997) 188 CLR 159 at 178-179 (Dawson J); *Pyrenees Shire Council v Day* (1998) 192 CLR 330 (***Pyrenees Shire Council***) at [245] (Kirby J); *Perre v Apand* (1999) 198 CLR 180 (***Perre***) at [93] (McHugh J), [333] (Hayne J), [405] (Callinan J); *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 (***Crimmins***) at [73] and [77] (McHugh J), [272] (Hayne J).

C. OUTLINE OF ARGUMENT

C1. The policy nature of the Minister's statutory decision (Ground 1)

7. The decision as to whether the Extension Project should be approved under the *EPBC Act* is a discretionary decision involving policy considerations, made according to a process of evaluation that is carefully prescribed by the Act. The legislature has determined that the responsibility for exercising the discretion lies with the Minister. These two features ought to have been central to the primary judge's assessment of whether a duty of care should be recognised. Instead, the first feature is dealt with abruptly and the second is barely considered.

8. The primary judge accepted (PJ [475]) that the decision to approve the Extension Project: (i) involved "the exercise of a broad discretionary power given to the Minister requir[ing] evaluative judgment"; and (ii) would be a "value-laden exercise". However, his Honour thought that these were "common feature[s]" of many exercises of statutory discretion and were no barrier to the recognition of a duty of care for two principal reasons. First, the "operational/policy dichotomy" is now "largely … discredited" or "thought to be of dubious utility" (PJ [387] and [475]). Secondly, any other concerns about the effects of recognising the posited duty in relation to a policy decision could be dealt with as part of the salient feature referred to as "coherence" (PJ [480]-[482]). This approach relies on an inaccurate simplification of the law and sidesteps the special considerations that courts in this country and overseas have repeatedly recognised arise when a novel duty of care is said to exist in respect of the making of a policy decision.

9. The operational/policy dichotomy was first recognised in Australian law in *Heyman*, where Mason J stated "[t]he distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognize that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints."[4] The utility of such a dichotomy as a "touchstone of liability"[5] or a "determinant of when a duty of care is owed"[6] has since been questioned, in part because of a recognition that "decisions made at an operational level could … also be based on policy".[7] The difficulties in distinguishing operational decisions from policy

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4 (1985) 157 CLR 424 at 469.

5 See *Rowling v Takaro Properties Ltd* [1988] AC 473 (***Rowling***) at 501 (Lord Keith of Kinkel); *Stovin v Wise* [1996] AC 923 (***Stovin***) at 951 (Lord Hoffmann).

6 *Roads and Traffic Authority of NSW v Refrigerated Roadways Pty Ltd* (2009) 77 NSWLR 360 (***Refrigerated Roadways***) at [259] (Campbell JA).

7 *Pyrenees Shire Council* (1998) 192 CLR 330 at [181] (Gummow J), quoting *United States v Gaubert* 499 US 315 at 326 (1991).

decisions at the boundary between those categories has also been recognised,[8] and indeed were acknowledged in *Heyman* itself.[9]

10. None of that is to deny the importance of the underlying point that the law of negligence does not recognise a duty of care in relation to policy decisions. That is why Australian courts have continued to acknowledge the validity[10] of the operational/policy distinction and to apply it.[11] For decisions that properly fall into the policy category, "the idea behind [the dichotomy] remains relevant"[12] because it remains the case under Australian law that "matters of policy are ones that are unsuited for determination by courts".[13] Even in foreign jurisdictions in which the operational/policy dichotomy has been disparaged, it is still accepted that classification of a decision as a policy decision may exclude liability on the basis that the question of whether it was "made negligently is unsuitable for judicial resolution".[14] As McLachlin CJ explained in *R v Imperial Tobacco*, after conducting a comprehensive review of the case law on this point in the leading common law jurisdictions:[15]

> … there is considerable support in all jurisdictions reviewed for the view that "true" or "core" policy decisions should be protected from negligence liability … The difficulty in defining such decisions does not detract from the fact that the cases keep coming back to this central insight.

11. There are a number of reasons why courts abstain from recognising a duty of care in respect of policy decisions. One is the institutional inappropriateness of having courts determine whether such duties have been breached. As Gleeson CJ explained in *Graham Barclay Oysters*, policy matters typically "involve competing public interests in circumstances where, as Lord Diplock put it, 'there is no criterion by which a court can assess where the balance lies between the weight

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8 See *Anns v Merton London Borough Council* [1978] AC 728 at 754C-E (Lord Wilberforce); *Just v British Columbia* [1989] 2 SCR 1228 at 1242 (Cory J); *Stovin* [1996] AC 923 at 951 (Lord Hoffmann); *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431 at [166] (Hayne J); *Crimmins* (1999) 200 CLR 1 at [86] and [131] (McHugh J, with whom Gleeson CJ agreed at [3]); *Sutherland Shire Council v Becker* [2006] NSWCA 344 at [82] and [95] (Bryson JA).

9 (1985) 157 CLR 424 at 469.

10 See *Pyrenees Shire Council* (1998) 192 CLR 330 at [253] (Kirby J); *Crimmins* (1999) 200 CLR 1 at [27] (Gaudron J); [79], [87] (McHugh J, with whom Gleeson CJ agreed at [3]); [292] (Hayne J); *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 (***Graham Barclay Oysters***) at [12] (Gleeson CJ); *Refrigerated Roadways* (2009) 77 NSWLR 360 at [259(a)] (Campbell JA); *Roo Roofing Pty Ltd v Commonwealth* [2019] VSC 331 (***Roo Roofing***) at [496] (Dixon J).

11 *Graham Barclay Oysters* (2002) 211 CLR 540 at [26]-[27] (Gleeson CJ); *Sutherland Shire Council v Becker* [2006] NSWCA 344 at [95] (Bryson JA); *Refrigerated Roadways* (2009) 77 NSWLR 360 at [429] (Campbell JA); *Roo Roofing* [2019] VSC 331 at [498] (Dixon J).

12 *Graham Barclay Oysters* (2002) 211 CLR 540 at [12] (Gleeson CJ).

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

14 *Rowling* [1988] AC 473 at 501 (Lord Keith of Kinkel). See also, *Stovin* [1996] AC 923 at 951 (Lord Hoffmann); and *Barrett v Enfield London Borough Council* [2001] 2 AC 550 at 571.

15 [2011] 3 SCR 45 at [85] (emphasis added).

to be given to one interest and that to be given to another'".[16] Determining what weight should be given to competing public interests in reaching a decision is the essence of political judgment – accordingly, there is no legal basis on which a court can assess the reasonableness of the decision reached.[17] A related consideration is that litigation involves an assessment of the reasonableness of particular decisions in an artificially constrained context, for a court necessarily focuses on the case before it, isolated from any consideration of analogous decisions or offsetting measures or policies, and without the benefit of the resources that support policy making processes in government. It is for these reasons that courts in other common law jurisdictions have determined that they are "incapable" of, or "unsuited to" dealing with claims against government involving action or inaction on climate change.[18]

12. The constitutional setting of a decision-making process is also significant. The primary judge in the present case gave no weight to the fact that the legislature had conferred power on the Minister. That is a matter of significance in characterising the power being exercised. The primary judge described the case as involving unremarkable "statutory decision-making" (PJ [476]) and suggested that it was analogous[19] to decisions concerned with statutory powers of approval conferred on councils.[20] The comparison is inapt. Decision making by elected officials at the highest levels of government[21] commonly involves acute policy considerations.[22] The conferral of power on a Minister reinforces that the primary system of accountability for lawful decisions is political, including through the institution of responsible government, which make Ministers of the Crown answerable to Parliament and thus to the electorate in relation to the

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16 (2002) 211 CLR 540 at [13], quoting *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 at 1067.

17 *Graham Barclay Oysters* (2002) 211 CLR 540 at [15] (Gleeson CJ).

18 See *Juliana v United States* 947 F 3d 1159 (9th Cir 2020) at [15]-[16]; *Cecilia La Rose by her Guardian ad litem Andrea Luciuk v Her Majesty the Queen in the Right of Canada* 2020 FC 1008 at [33] and [40] (Manson J); *Lho'imggin v Her Majesty the Queen in Right of Canada* 2020 FC 1059 at [19], [72] and [77] (McVeigh J); *Fonterra* [2020] NZHC 419 at [92] (Wylie J).

19 Cf *Roo Roofing* [2019] VSC 331 at [493], where Dixon J acknowledged that the nature of the relevant power to be exercised must be identified before drawing analogies with cases in which duties of care have been recognised in respect of the exercise of different powers.

20 See *Armidale City Council v Alec Finlayson Pty Ltd* [1999] FCA 330; *Voli v Inglewood Shire Council* (1963) 110 CLR 74; *Wollongong City Council v Fregman* [1982] 1 NSWLR 244; *Bamford v Albert Shire Council* [1998] 1 Qd R 125; *Port Stephens Shire Council v Booth* [2005] NSWCA 323.

21 While the Minister's power of approval under ss 130 and 133 of the *EPBC Act* are capable of being delegated to certain persons (subject to Ministerial directions), even if that happens the Minister remains accountable to Parliament for such decisions: see *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 364 (Mason J); *Comcare v Banerji* (2019) 267 CLR 373 (***Banerji***) at [60] (Gageler J).

22 See *Graham Barclay Oysters* (2002) 211 CLR 540 at [26] (Gleeson CJ); *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at [50] (Gaudron, Gummow and Hayne JJ); *Roo Roofing* [2019] VSC 331 at [498] (Dixon J); *United States v Gaubert* 499 US 315 at 335-336 (1991) (Scalia J).

exercise of their powers.[23] Imposing a common law duty of care upon a Minister invites "the judicial arm of government to pass judgment upon the reasonableness of the conduct of the legislative or executive arms of government" in a manner that will frequently raise "issues that are inappropriate for judicial resolution, and that, in a representative democracy, are ordinarily decided through the political process".[24]

13. A determination by a Minister as to whether an action that has a significant impact on matters of national environmental significance should be allowed to proceed is on the "policy" side of the line. It is not operational in nature, or even close to the boundary. It requires an essentially political judgment to be made striking a balance between incommensurable environmental, social and economic interests (as is addressed further in paragraph 19 below). As the Full Court recognised in *Australian Conservation Foundation Inc v Minister for the Environment and Energy*, a decision authorised by ss 130 and 133 of the *EPBC Act* "may well have political consequences. That is a matter for the Minister and the government".[25] Recognition of this assists the Court in "focusing on whether the decision is of such a nature that … judicial abstention is required" by "fasten[ing] attention on the rationale (separation of powers and institutional competence) for shielding certain administrative decisions from tortious judicial scrutiny."[26]

14. The primary judge, at PJ [476], appears to have taken the view that the Minister's decision-making was not of a "policy" character because it did not involve the making of a "policy" in the sense of a "general rule or approach, [that is] applied to a particular situation"[27] of the kind that frequently arises for consideration when a council or other public authority is alleged to have negligently exercised some statutory power.[28] It is erroneous to confine the principles relating to

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23 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [63], [102]-[103] (Gleeson CJ and Gummow J, Hayne J agreeing at [176]), [182] and [187]); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [55] (Gummow, Hayne, Crennan and Bell JJ); *Re Lambie* (2018) 263 CLR 601 at [23]-[24] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); *Banerji* (2019) 267 CLR 373 at [59] (Gageler J).

24 *Graham Barclay Oysters* (2002) 211 CLR 540 at [6] (Gleeson CJ); see also [15].

25 (2017) 251 FCR 359 at [50] (Dowsett, McKerracher and Robertson JJ) (***Australian Conservation Foundation Inc***). See, also *Secretary, Department of Primary Industries, Parks, Water and Environment v Tasmanian Aboriginal Centre* (2016) 244 FCR 21 at [93] (Allsop CJ, Griffiths and Moshinsky JJ), stating that the *EPBC Act* "reposes in the Minister the decision whether or not to approve, for the purposes of each controlling provision for a controlled action, the taking of the action, if there is a referral. The Act does not contemplate an *ex ante* decision in exercise of judicial power of what would be or would not be a contravention of the Act if action … took place".

26 Hon JJ Doyle and J Redwood, "The common law liability of public authorities: The interface between public and private law" (1999) 7 *Tort Law Review* 30 at 44. See also, JJ Doyle QC, "Tort Liability for the Exercise of Statutory Powers" in PD Finn (ed), *Essays on Torts* (Law Book Company, 1989) at 233.

27 *R v Imperial Tobacco* [2011] 3 SCR 45 at [87].

28 See, eg, the discussion in *Ann v Merton London Borough Council* [1978] AC 728 at 754C-H (Lord Wilberforce).

"policy" decisions, in the context of novel duties of care, to policy-making in this narrow sense. An evaluative discretionary judgment of the kind required to be made by the Minister under ss 130 and 133 of the *EPBC Act* has the relevant characteristics of a "policy" decision. A judicial assessment about whether the Minister exercised reasonable care in deciding whether or not to approve a controlled action necessarily draws a court into assessing the reasonableness of the way the Minister balanced the competing environmental, social and economic interests in issue, such as the relative importance of the "tiny" contribution the Extension Project might make to the risk of harm to the Children as opposed to the economic and social impact that the Extension Project will have on surrounding communities and Australia as a whole. It also intrudes on the Executive's management of Australia's foreign policy interests with respect to climate change.[29] Courts in other jurisdictions have rightly recognised that it is appropriate to exercise caution in climate change cases in part for that reason.[30]

15. Foreign decisions have recognised that no legal criterion is available to enable a court to determine: (i) the relative weight to be given to the above considerations; and (ii) whether the risks of climate change make it unreasonable for a particular level of emissions to occur.[31] Nor are the courts institutionally equipped to make such judgments. Instead, as recognised in *American Electric Power Co*,[32] the Executive is better suited to regulate GHG emissions than judges, who must determine matters on a case-by-case basis and who are confined by the evidence adduced by the parties. For those reasons, no novel duty of care should have been recognised in this case.

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29 See *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 643–4 (Latham CJ); *McCrea v Minister for Customs and Justice* (2004) 212 ALR 297 at [18] (North J); *Thorpe v Commonwealth* (1997) 144 ALR 677 at 693 (Kirby J); *Petrotimor Companhia de Petroleos SARL v Commonwealth* (2003) 126 FCR at [63] (Black CJ and Hill J).

30 *Chevron Corp* 993 F 3d 81 at 102-103 (2nd Cir 2021). See also *Connecticut v American Electric Power Co*, Inc 406 F Supp 2d (SDNY 2005) at 273 (Preska J).

31 See, *Fonterra* [2020] NZHC 419 at [98(g)] (Wylie J). See also the US decisions in which it has been held that common law claims for public nuisance with respect to climate change are non-justiciable by reason of the "political question doctrine" because the claims cannot be adjudicated by a Court without an "initial policy determination" having been made: *Connecticut v American Electric Power Co*, Inc 406 F Supp 2d (SDNY 2005) at 271-274 (Preska J); *People of the State of California v General Motors Corp* (ND Cal, C-06-05755 MJJ, 17 September 2007) slip opinion at [10] (Jenkins J); *Native Village of Kivalina v ExxonMobil Corp* 663 F Supp 2d 863 (2009) at 876-877 (Armstrong J); *Comer v Murphy Oil USA Inc* 839 F Supp 2d 849 (SD Miss 2012) at 864. Note, however, that the Supreme Court was equally divided on whether a claim of this kind was non-justiciable on the basis of the political question doctrine: *American Electric Power Co* 564 US 410 at 420 (2011).

32 *American Electric Power Co* 564 US 410 at 428 (2011).

C2. Incoherence (Ground 2)

16. Where a novel duty of care is proposed to be imposed on a statutory decision-maker, the statutory context is critical.[33] Coherence with the statutory scheme is a matter of such significance that it can outweigh any other consideration that might favour a duty being recognised.[34] The primary judge concluded that the broader duty alleged by the applicants below was incoherent with the *EPBC Act*, but that a duty limited to an obligation to take reasonable care to avoid personal injury or death to the Children was not (or to the extent that it was, that incoherence was not determinative) (PJ [148], [409], [414], [416]). That conclusion is affected by three errors.

(a) Paramountcy of statutory purpose

17. The primary judge identified coherence between "statutory purpose" and the alleged duty of care as a "potent consideration favouring a conclusion of coherence" (PJ [395]). His Honour approached this issue on the basis that priority should be given to perceived coherence between "the purpose of the statute and the concern or object of the duty of care" (PJ [396]), rather than coherence with the Minister's statutory function.

18. The primary judge was wrong to divorce the statutory function from the statutory purpose in this way and to elevate statutory purpose as the "paramount consideration". His Honour gave insufficient attention to the nature and function of the approval power, and its place within the scheme of the *EPBC Act* as a whole, including as the legislature's chosen means of fulfilling the statutory purpose. As Allsop P said in *Precision Products (NSW) Pty Ltd v Hawkesbury City Council*:[35]

> The necessary starting point for any analysis is the legislation in question. From this one finds not only the express powers, duties and functions of the Council, but also the statutory background and framework in which any relevant common law principle must be placed in an harmonious, compatible and coherent way.

19. Sections 130 and 133 of the *EPBC Act* confer power on the Minister to approve the taking of an action that is a controlled action (and thus prohibited unless approved) only because it has been determined to "significantly impact" one or more of the matters of national environmental significance identified in Pt 3 of Ch 2 of the *EPBC Act*. Section 136(1) makes clear that, in determining whether to approve a controlled action, the Minister must weigh competing interests, including matters relevant to a matter of national environmental significance and

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33 *Graham Barclay Oysters Pty Ltd* (2001) 211 CLR 540 at [78], [145]-[146].
34 *State of NSW v Paige* (2002) 60 NSWLR 371 at [182].
35 (2008) 74 NSWLR 102 at [78] (Allsop P), [199] and [200] (Beazley and McColl JJA agreeing).

"economic and social matters". The Minister is clearly empowered to approve a controlled action notwithstanding the impact that action will have on the relevant matters of national environmental significance. By mandating consideration of "economic and social matters" in addition to environmental matters, the approval power recognises that the Minister may need to address considerations that are in tension with each other, and to attempt to reconcile competing objectives including protecting "the environment, especially those aspects of the environment that are matters of national environmental significance" (s 3(1)(a)) and promoting ecologically sustainable development (s 3(1)(b)). The scheme of the *EPBC Act* makes the Minister responsible for balancing these competing interests and objectives in particular instances.

20. This is reflected in various features of the Act. Subsection 3(2)(a) provides that in order to achieve its objects, the *EPBC Act* "recognises an appropriate role for the Commonwealth in relation to the environment by focussing Commonwealth involvement on matters of national environmental significance and on Commonwealth actions and Commonwealth areas". The scheme for approval of controlled actions confirms that the focus of Commonwealth involvement in relation to the environment is not all aspects of the "environment" as defined in s 528, but the limited matters of national environmental significance identified in Pt 3, and the impacts of Commonwealth actions[36] and of actions affecting Commonwealth areas. The *EPBC Act* provides for the protection of the "environment" only in specific circumstances: in relation to "nuclear action" (ss 21 to 22A), from Commonwealth action (s 28) or from an action in, or that will have a significant impact on the environment in, a "Commonwealth marine area" (ss 23-24A), the Great Barrier Reef Marine Park (ss 24B to 24C), "Commonwealth land" (ss 26-27A) or a Commonwealth Heritage place outside the Australian jurisdiction (ss 27B and 27C).

21. Section 67 provides that the taking of an action that is prohibited by a provision of Pt 3, without approval under Pt 9, is a "controlled action". If a person proposes to take an action that they think may be a controlled action, they must refer the proposal to the Minister for a decision as to whether or not it is a controlled action: s 68(1). The Minister must decide whether an action the subject of a proposed referral is a controlled action, and which provisions of Pt 3 are controlling provisions for the action: s 75(1). Section 75(2) provides that, at the stage of determining whether a particular action is a controlled action, the Minister is obliged to consider only "adverse

[36] An "action" does not include a decision by (relevantly) a "Commonwealth agency" (s 524(b)), including a Minister (see definition of "Commonwealth agency" in s 528).

impacts" of the action, and not "beneficial impacts". The task of bringing to bear both adverse and beneficial impacts is left to the final step of approval.

22. If an action is a controlled action, the relevant controlling provisions in Pt 3 prohibit the taking of the action unless an approval under Pt 9 is in operation. To inform the Minister's decision whether or not to approve the taking of a controlled action under Pt 9, the *EPBC Act* provides for various assessment processes. Each of the assessment processes is directed towards assessing the "relevant impacts" of a controlled action.[37] Those are the impacts of the action on the matters protected by the controlling provisions: s 82(1). The report of the relevant assessment process must be taken into account by the Minister when deciding whether or not to approve a controlled action: s 136(2)(b)-(d). The scheme for assessment of referrals in relation to controlled actions thus confirms that, except in the limited circumstances referred to in paragraph 20 above, the focus of the *EPBC Act* is <u>not</u> all aspects of the "environment" as defined in s 528 (which is where a reference to the protection of people and communities is found), but the impacts upon particular matters of national environmental significance identified in Pt 3.

23. The full terms of s 3, and the scheme of the *EPBC Act* as a whole, therefore do not support the primary judge's finding that protection of people and communities is a purpose of the *EPBC Act* (PJ [158] and [405]). That is not surprising, for the approval provisions in Pt 9 are not engaged <u>at all</u> unless a proposal involves the taking of action that is prohibited by a provision of Pt 3, which concerns harm to matters of national environmental significance or harm to the environment in a Commonwealth area or from Commonwealth action. It is only where harm of that kind will occur that the Minister is called upon under ss 130 and 133 to make a decision that strikes a balance between competing interests and objectives. The primary judge's approach of identifying a single statutory purpose (being one that was not tied to a matter protected by Pt 3), and his Honour's assessment of the coherence of the posited novel duty of care against that singular purpose, involved error because it fundamentally mistook the purpose of the statutory scheme.

(b) Nature, scope and purpose of approval power

24. In attempting to reconcile cases such as *Pyrenees Shire Council* and *Crimmins* with those cases where incoherence was an important factor in rejection of the alleged duty of care, the primary judge attributed no significance to the nature of the discretion involved in those cases (PJ [386]).

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[37] See, for example, s 47(4).

Whilst accepting that a "discretion not to act is different to a discretion to act in a particular way", and that "the nature of the impairment upon the discretion may be different", the primary judge considered that these differences were not telling (PJ [386]). His Honour also dismissed the contention that the nature of the power exercised, the subject matter of that power and the statutory context required rejection of the alleged duty of care, because to distinguish this case on that basis involved descending into the "policy/operational" dichotomy (PJ [387]).

25. Contrary to the primary judge's approach, consideration of the nature of the approval power, including the requirement to balance competing public and private interests, was an important aspect of the coherence analysis which could not be avoided on the basis that it involved impermissible reliance on the "policy/operational" dichotomy. That follows because, s 136(1) having identified the mandatory (and permissible) considerations relevant to the exercise of the approval power, the *EPBC Act* leaves the balance to be struck to the Minister, who as explained above must weigh the competing interests "in the exercise of public power".[38] The primary judge should have found that the imposition of a duty of care to avoid causing personal injury to Children would tend to "skew"[39] resolution of the balancing exercise conferred by the legislature on the Minister, and "distort" the focus of the Minister's statutory task.[40] The primary judge recognised that this was the case in relation to the alleged duty to avoid property damage and pure economic loss (PJ [416]). His Honour should have found that the same incoherence arises from the posited duty to take reasonable care to avoid personal injury to the Children (PJ [414]).

26. Contrary to his Honour's reasoning at PJ [391]-[394], *Alec Finlayson Pty Ltd v Armidale City Council*[41] is not relevantly analogous. In exercising the approval power at issue in that case, the Council had an express duty to take into consideration whether the land to which the application related was "unsuitable" for the particular development by reason of it being, or being likely to be, "subject to flooding, tidal inundation, subsidence, slip or bush fire *or to any other risk*".[42] There was thus a clear statutory foundation for the notion that the safety of persons directly affected by the decision was a mandatory consideration. *Alec Finlayson* therefore involved a discretionary power to permit an activity in circumstances where the statute required

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38 *MM Constructions (Aust) Pty Ltd v Port Stephen Council (No 7)* (2012) 191 LGERA 292 (***MM Constructions***) at [98] (Allsop P), Basten JA at [203] and Bergin CJ in Eq at [229] agreeing.

39 *MM Constructions* (2012) 191 LGERA 292 at [98] (Allsop P), Basten JA at [203] and Bergin CJ in Eq at [229] agreeing.

40 *Crimmins* (1999) 200 CLR 1 at [292] (Hayne J).

41 (1994) 51 FCR 378 (***Alec Finlayson***). Affirmed on appeal: *Armidale City Council v Alec Finlayson Pty Ltd* [1999] FCA 330.

42 *Alec Finlayson* (1994) 51 FCR 378 at 401B-D. See also at 402B-C.

consideration of the safety of the very persons to whom the duty of care was found to be owed. That meant that the common law duty was coherent with the statutory duty in a similar way to *Pyrenees Shire Council*, where the inspection powers of the council building inspector were protective of the same class of person to whom the common law duty was owed. Ultimately, those cases emphasise the need to consider all relevant aspects of the particular statutory power, including its nature, purpose and place within the scheme of the legislation. They do not support the approach adopted by the primary judge of treating perceived consistency with statutory purpose as decisive, with little or no consideration of statutory function.

(c) Human safety is not a mandatory consideration

27. Without reference to any authority, the primary judge found that "Parliament may be assumed to have intended that in the performance of the powers and functions conferred by it, reasonable care will be taken to avoid endangering the safety of humans" (PJ [399]). His Honour reasoned that the preservation of human safety and the avoidance of personal injury were societal priorities of such magnitude that it was unlikely they would "not be reflected and accommodated in any statutory scheme which provided a statutory authority the capacity to carry out functions which could endanger human safety" (PJ [398]). Thus, "[u]nless legislation has identified considerations which are to take priority over human safety or which are to compromise the natural priority that attends human safety, Parliament may be taken to have intended that the priority given to safety by the community is reflected in the statutory scheme it has created" (PJ [399]). That reasoning suggests that the protection of human safety is to be implied as a mandatory consideration in every case where the exercise of a power may have even an indirect effect on human safety (even if the legislative scheme is not directed to preventing any such effect), unless that implication is positively excluded. No authority supports the existence of default mandatory considerations of that kind. Applying that default approach, his Honour concluded that there was nothing to suggest that in the *EPBC Act* "the priority usually given to the need to take reasonable care to avoid endangering the safety of humans" had "not found its natural place in the intended statutory balance as a relevant consideration deserving at least elevated weight" (PJ [402]).

28. The finding that human safety was a "relevant mandatory consideration in relation to a controlled action which may endanger human safety" (PJ [404]) was expressly <u>not</u> founded on any of the specified considerations in s 136 of the *EPBC Act*. Thus while the Act mandates consideration of "social matters" in s 136(1)(b), his Honour held that "human safety" sits outside this concept

and outside s 136(1) altogether (PJ [406]). Despite that fact, his Honour concluded that, faced with a controlled action which poses a real risk to the safety of members of the Australian community, the Minister "may be expected to give at least elevated weight to the need to take reasonable care to avoid that risk of harm" (PJ [407]). That is so even though the reason that the relevant action is "controlled action" may have nothing whatsoever to do with human safety.

29. The reasoning above was critical to the primary judge's conclusion that the posited duty of care "would be in harmony with the statutory scheme in relation to the need to protect the safety of humans" (PJ [408]), to his conclusion that such a duty did not give rise to any "process-based impairment" upon the exercise of the statutory power under ss 130 and 133 of the *EPBC Act* (PJ [409]), and to his conclusion that, even if such impairment was made out, it was "outweighed by the consistency between statutory purpose and the duty of care in relation to the avoidance of personal injury to the Children": PJ [409]. All of those conclusions were erroneous, because the primary judge should not have found that human safety was a mandatory relevant consideration under ss 130 and 133 of the *EPBC Act* at all, let alone a consideration to which special priority or elevated weight must be given. That is so for four reasons.

30. First, the primary judge's approach inverts the proper process of statutory construction. His Honour made an *a priori* assumption about the preservation of human safety being both a mandatory consideration and a matter of priority concern or elevated weight. The exercise of construction was then performed as a search for contrary intention displacing that default assumption. That approach is erroneous. The mandatory considerations for decisions under ss 130 and 133 can only properly be identified from the text, context and purpose of the *EPBC Act*.[43] Yet those matters provide no sound basis for the conclusion that human safety is a mandatory consideration, let alone one required to be given elevated weight. The fact that the *EPBC Act* deals directly with human safety in only isolated respects (in s 193(1)), and not in the way found by the primary judge, tells against the conclusion reached by the primary judge rather than in favour of it: contra PJ [403].

31. The primary judge's reasoning overlooks or ignores the fact that the only reason there is any occasion for the Minister to make an approval decision under ss 130 and 133 of the *EPBC Act* with respect to the Extension Project is because it has been determined to be a "controlled action"

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43 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 (***Peko-Wallsend***) at 40 (Mason J).

under s 75 of that Act.[44] That determination was solely because of impacts the project may have on listed threatened species and ecological communities (pursuant to ss 18 and 18A) and on a water resource (ss 24D and 24E). That is, the need for approval of the Extension Project under the *EPBC Act* is unrelated to any potential impact of GHG emissions or any potential contribution those emissions may make to a risk of personal injury to the Children. As a matter of statutory construction, it is very difficult to see how a matter that has no bearing on whether approval is required must be given elevated weight in the approval process in the event that approval happens to be required for unrelated reasons.

32. Secondly, s 136 expressly identifies the considerations that are relevant under ss 130 and 133. It is true, as Mason J stated in his classic judgment in *Peko-Wallsend*, that "[i]f the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive".[45] But here, s 136(5) makes that task very straightforward, by expressly requiring the Minister not to consider any matters that the Minister is not "required or permitted" by Div 1 of Pt 9 to consider. The effect is to make Div 1 of Pt 9 of the *EPBC Act* a "closed system".[46] To imply a mandatory requirement to consider human safety into that closed system is contrary to the express prohibition in s 136(5).

33. Thirdly, and relatedly, the primary judge was wrong to construe the expression "economic and social matters" in s 136(1)(b) as excluding matters relating to human safety (PJ [406]). Section 136(1) identifies the "broad categories of consideration"[47] to which the Minister was required to turn her mind, which unsurprisingly commence with matters relevant to any matter protected by a provision of Pt 3 that is a controlling provision for the controlled action (meaning that the approval decision must address the possible harms to the particular matters protected by Pt 3 that provide the reason why approval is required at all). However, neither s 136(1)(a) nor (b) deal, at a level of detail, with particular matters that the Minister is required to consider. In particular, which "social or economic" matters are relevant in relation to a particular controlled action is left to the Minister to decide.[48] Section 136(2) sets out the things that the Minister must

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44 See, in evidence below, Court Book Doc 73, p 1480.

45 *Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39, applied in *Plaintiff S156/2013 v Minister for Immigration* (2012) 254 CLR 28 at [41] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

46 *Tarkine National Coalition Inc v Minister for the Environment* (2015) 233 FCR 254 (***Tarkine National Coalition***) at [28] (Jessup J, Kenny and Middleton JJ substantially agreeing).

47 *Tarkine National Coalition* (2015) 233 FCR 254 at [25] (Jessup J, Kenny and Middleton JJ substantially agreeing).

48 *Tarkine National Coalition* (2015) 233 FCR 254 at [25] and [45] (Jessup J, Kenny and Middleton JJ substantially agreeing). See also *Blue Wedges Inc v Minister for Environment, Heritage and the Arts* (2008) 167 FCR 463 (***Blue Wedges Inc***) at [115].

"take into account" in considering the matters identified in s 136(1), including: the principles of ecologically sustainable development (s 136(2)(a)), the assessment report relating to the action (s 136(2)(b)) and any other information the Minister has on the relevant impacts of the action (s 136(2)(e)). Those matters do not necessarily include anything about human safety. However, the ordinary meaning of the word "social" includes matters relating to society, which is broad enough to encompass matters of human safety. That is why human safety is a matter that the Minister may choose to consider when deciding whether or not to approve the taking of a controlled action.[49] But the statutory scheme is quite inconsistent with the conclusion that that is an unstated mandatory consideration.

34. Fourthly, as explained in paragraphs 20 to 23 above, the primary judge's reliance on the specification of the "protection of the environment" as an object of the *EPBC Act* in s 3(1)(a), together with the inclusive reference to "people and communities" in the definition of "environment" in s 528 (PJ [158] and [405]), falls well short of supporting the contrary conclusion. Indeed, ss 3(1)(a) and 3(2)(a) make clear that an object of the *EPBC Act*, and the focus of the Commonwealth's role, is limited to the protection of the particular matters identified in Pt 3.

35. Once it is appreciated that human safety is neither a mandatory consideration nor a matter that is required to be given special weight, the primary judge's conclusion that the alleged duty of care was in harmony with the statutory scheme and would not "distort the Minister's discretion or skew the intended statutory balance" cannot stand: see PJ [407] and [408]. To the contrary, the duty of care would require elevated weight to be given to matters that the Minister otherwise would not be required to be considered at all when making decisions under the *EPBC Act*.

36. The imposition of a duty of care on the Minister in exercising the power of approval also distorts the statutory scheme in other respects. One is that it introduces, through the framework of the common law duty, common law standards of foreseeability. That is at odds with the *EPBC Act's* carefully defined standards of causation in characterising whether actions have an "impact" of the relevant kind: ss 82, 136(2)(e), 527E.[50] According to the statutory definition in s 527E(1)(b),

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49 *Tarkine National Coalition* (2015) 233 FCR 254 at [25] and [45] (Jessup J, Kenny and Middleton JJ substantially agreeing). See also *Blue Wedges Inc* (2008) 167 FCR 463 at [115].

50 See consideration in *Australian Conservation Foundation Inc* (2017) 251 FCR 359 at [53], [58]-[59].

an event that is an "indirect consequence" of an action is only an "impact" of that action if the action is a "substantial cause" of that event.

37. Another example of incoherence with the statutory scheme is the limited nature of the Minister's power to impose conditions on approval. Pursuant to s 134 the Minister may impose a condition of approval if it is "necessary or convenient" for, *inter alia*, protecting a matter protected by a provision of Pt 3 for which the approval has effect (s 134). The Minister has no power to impose conditions directed to the prevention of physical harm being caused to the Children (cf PJ [501] and [503]). This is a further indication that the primary judge erred. It also signifies a distortion of the task that the legislature intended the Minister to perform, which was to use conditions on approval to protect matters for which an approval has effect under Pt 3, rather than to attempt to comply with a duty to take reasonable care not to cause harm to Children. Similar points can be made about the limits on the Minister's powers under ss 143 (variation of conditions), 144 (suspension of approval) and 145 (revocation of approval).

38. Finally, and fundamentally, the posited duty distorts the discretionary evaluation required to be undertaken by the Minister under s 136. The Minister carries the statutory responsibility of weighing adverse and beneficial impacts of a proposed action, by reference to specified criteria that may be in tension. The *EPBC Act* does not dictate the outcome (except where it does so explicitly[51]), or give any preference to particular considerations. It proceeds on the implicit basis that, except in the case of particular actions that it expressly provides cannot be approved, an action which has a significant impact on matters protected by Pt 3 may nevertheless be allowed to proceed, if the Minister decides that is appropriate. To interpose on that decision-making a duty to take reasonable care not to approve an action that may contribute (even in a tiny way) to a risk of physical harm to the Children is to give decisive priority to a factor not even mentioned in the statute. The respondents' case at trial went further – the application for a *quia timet* injunction was premised on the notion that, if the duty of care existed, any decision to approve the Extension Project would necessarily amount to a breach of that duty. It is unclear if the primary judge accepted that this must necessarily follow, but at a minimum the common law duty of care puts pressure on the Minister to refuse approval, to avoid the risk of civil damages. The distortion of the decision-making process that the *EPBC Act* creates is obvious. The tendency for common law duties of care to produce such a "defensive state of mind" is well

51 See ss 137-140A.

recognised.[52] For those reasons, the duty of care recognised by the primary judge was not coherent with the *EPBC Act*.

C3. Reasonable Foreseeability (Ground 3(A) and (B))

39. The primary judge held that the reasonable foreseeability of injury to the Children that would result from the "increased global average surface temperature brought about by the combustion of the coal which the Minister's approval would facilitate" is a salient feature that strongly supports recognition of the posited duty of care (PJ [247], [257] and [490]). In the unusual circumstances of this case, where relief was sought prior to breach or damage having occurred, the question of what is required for harm of a particular kind to be reasonably foreseeable assumes particular significance.

40. The primary judge repeatedly emphasised (eg PJ [192] and [251]) that "the term 'reasonably foreseeable' is not, in itself, a test of 'causation'".[53] In one sense that is true. But the inquiry as to whether a harm is reasonably foreseeable is an inquiry that necessarily has a causal element, as a more complete statement of the relevant inquiry immediately reveals. As Mason J put it in *Wyong Shire Council v Shirt*, "a duty of care arises on the part of a defendant to a plaintiff when … a reasonable man in the defendant's position would foresee that carelessness on his part may be <u>likely to cause</u> damage to the plaintiff."[54] Such a notion is at the heart of the concept of neighbourhood articulated by Lord Atkin in *Donoghue v Stevenson.*[55] The primary judge acknowledged (PJ [194]) that "it is necessary to consider whether the steps in the chain of events asserted by the applicants, individually or collectively, by reason of the complexity of their interactions or otherwise, deny reasonable foreseeability".[56] But he did not focus on the fact that what needs to be foreseeable is that the Minister's act is likely to <u>cause</u> the identified harm (as opposed to making a "tiny" contribution to the conditions that, together with millions of other acts of actors around the globe, might cause that harm unless mitigated by countervailing global action).

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52 See *X v State of South Australia (No 3)* (2007) 97 SASR 180 at [18], [178], [180].

53 *Chapman v Hearse* (1961) 103 CLR 112 at 122 (The Court).

54 (1980) 146 CLR 40 (***Shirt***) at 44 (emphasis added). See also *Crimmins* (1999) 200 CLR 1 at [72] (McHugh J); *Shirt v Wyong Shire Council* [1978] 1 NSWLR 631 at 639–640 (Glass JA); *Seltsam v McNeill* [2006] NSWCA 158 (***Seltsam***) at [38] (Bryson JA).

55 [1932] AC 562 at 580.

56 See also the terms of the declaration made by the primary judge: the Minister has a duty to take reasonable care to "avoid causing personal injury or death" to the Children.

41. The primary judge had evident difficulty articulating on the facts how it was reasonably foreseeable that the act of granting approval for the Extension Project would cause CO_2 emissions that were likely to cause personal injury to the Children. This is not unsurprising given that the "'diffuse and disparate' origin, [and] 'lagged and latticed' effect" of climate change is notorious.[57] His Honour accepted that he was "unable to say that the evidence … demonstrates the extent, if any, that a fractional increase in average global temperature of the kind in question poses any additional risk of harm to the Children" (PJ [83] (emphasis added)). His Honour also stated that "the prospective contribution to the risk of exposure to harm made by the approval of the extraction of [this] coal … may fairly be described as tiny" (PJ [253]). While the second finding is impossible to reconcile with the first, and problematic in its own right for that reason, it is telling that this is as far as the evidence before the Court could go. Those findings should have been fatal to the respondents' case.

42. The primary judge reasoned that, despite these findings, a risk of injury flowing from a defendant's action need only be "real" to be reasonably foreseeable and that it is no barrier to the existence of a duty of care that the probability of injury occurring is "remote", or even "infinitesimal",[58] provided it is "not far-fetched or fanciful"[59] (PJ [187], [251]-[252]). In reaching these conclusions his Honour drew on statements of Mason J in *Shirt* at 44-45. There are persuasive judicial statements that his Honour's observations in that case unduly attenuated the reasonable foreseeability test.[60] Here, they seem to have led the primary judge to ignore the difference between: (i) a case where it is possible to foresee that a particular action or inaction may combine with other circumstances to cause harm; and (ii) a case where it is not possible to predict whether a defendant's action or inaction will make any difference at all to whether harm will arise. To adopt the primary judge's language (from PJ [194]), in the former case it is possible to foresee a "causal chain" that is contingent on the occurrence of other events in addition to the defendant's action or inaction (though of course, if those contingencies become too complex, the

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57 Hon Helen Winkelmann, Susan Glazebrook and Ellen France, "Climate Change and the Law" (Paper prepared for the Asia Pacific Judicial Colloquium, held in Singapore, 28–30 May 2019) at [109], quoting DA Kysar "What Climate Change Can Do About Tort Law" (2011) 41 *Environmental Law* 1 at 4.

58 *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty (The Wagon Mound (No 2))* [1967] 1 AC 617 at 642 (Lord Reid), discussing *Bolton v Stone* [1951] AC 850.

59 *Shirt* (1980) 146 CLR 40 at 46 (Mason J).

60 See *Tame v New South Wales* (2002) 211 CLR 317 (***Tame***) at [103]-[108] (McHugh J), [331] (Callinan J); *Swain v Waverley Municipal Council* (2005) 220 CLR 517 (***Swain***) at [79]-[80] (Heydon J). See also *Julia Farr Services Inc v Hayes* [2003] NSWCA 37 at [3] (Spigelman CJ); *University of Wollongong v Mitchell* [2003] NSWCA 94 at [27] (Meagher JA); *O'Leary v Oolong Aboriginal Corp Inc* [2004] NSWCA 7 at [12] (Spigelman CJ); *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649 at [65] (Allsop P).

risk of harm may be too remote to be "real"). In the latter case, by contrast, there is no foreseeable causal connection between a defendant's action or inaction and the harm.

43. In *The Wagon Mound (No 2)*, for example, which is a case that has itself been criticised for unduly relaxing the test of reasonable foreseeability,[61] it was: (i) very unlikely that furnace oil carelessly leaked into Sydney Harbour from the defendant's ship would be ignited by some flammable material floating in the water being hit by a hot piece of metal that fell on it during some welding and would thus destroy the plaintiff's ships and wharf;[62] but (ii) nonetheless it would have been foreseeable to a person in the position of the defendant that the careless leaking of furnace oil was a necessary pre-condition of such damage (for ignition could not occur without it).[63] That kind of foreseeability analysis does not support the notion that a risk of harm that exists whether or not the Extension Project proceeds (such that the basic element of "but for" causality is missing[64]), being a risk of harm that the evidence does not establish would be increased at all by any additional GHG emissions from the Extension Project, is nevertheless foreseeable risk of harm that may be caused by approving that Project.

44. Two explanations were given by the primary judge for his contrary conclusion (without any clear indication as to whether they are truly alternatives). His Honour said:

    (a) ***First***, it is foreseeable that the total accumulation of CO_2 emissions exposes the Children to a risk of harm, and the Extension Project emissions (being some 100Mt of CO_2 emissions) will make a material contribution to the accumulated emissions (PJ [83]).

    (b) ***Second***, the risk of harm to the Children caused by climate change does not increase linearly as CO_2 emissions accumulate, rather "there is a risk … as the global average surface temperature increases from 2°C to 3°C above the pre-industrial level, that a 'tipping cascade' will trigger a 4°C Future World trajectory" (PJ [84]). Having regard to this "heightened realm of risk in prospect" an additional 100 Mt of CO_2 emissions is

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61 *Tame* (2002) 211 CLR 317 at [104] (McHugh J, with whom Callinan J agreed at [331]); *Swain* (2005) 220 CLR 517 at [79] (Heydon J).

62 [1967] 1 AC 617 at 632-633.

63 [1967] 1 AC 617 at 643B-D.

64 As has been observed in a related context, "the law tampers with the 'but for' test of causation at its peril": *Sienkiewicz v Greif (UK) Ltd* [2011] 2 AC 229 (***Sienkiewicz***) at [186] (Lord Brown of Eaton-under-Heywood JSC).

capable of constituting a "material contribution" to the risk that the Children will be exposed to harm.

45. In both explanations, the reference to a "material contribution" suggests that the evidence established a link between the very marginal contribution associated with the Extension Project and the specific negative consequences his Honour identified (see PJ [253]). However, that cannot be reconciled with the primary judge's clear finding that the evidence did not demonstrate that the fractional increase in average global surface temperature that would be caused by the Extension Project emissions posed any additional risk to the Children (PJ [83]). That is, even a "material contribution" (if it be relevant) was not proved on the evidence.

46. Moreover, ordinarily in the law of negligence, proof that a defendant's action or inaction "materially contributed" to a harm (let alone to a risk of harm) is not sufficient to establish liability. If it was, defendants would commonly be liable for harm that probably would have occurred irrespective of their action or inaction. Nevertheless, the primary judge implicitly reasoned that, in deciding whether it is reasonably foreseeable that harm of a particular kind will be caused by a defendant's action or inaction, causation is to be assessed not on the usual "but for" basis,[65] but by one of the less stringent tests that have been exceptionally adopted for limited purposes in the tort of negligence. The two possible alternative less stringent tests are:

    (a) ***First,*** that adopted in *Fairchild v Glenhaven Funeral Services Ltd*,[66] whereby causation can be proved where negligent conduct has resulted in a material increase in the risk of harm occurring; and

    (b) ***Second***, that adopted in *Bonnington Castings Ltd v Wardlaw*,[67] whereby causation can be proved in certain circumstances where negligent conduct has materially contributed to the occurrence of the harm.

47. Neither test is relevant here. Both tests were developed in lung disease-related litigation[68] and in the context of claims by employees against their employers or former employers (where the

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65 As for the applicable principles of causation that are authoritatively established in Australia, see *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506 at 514 (Mason CJ). See, also *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 at [45]; *Henville v Walker* (2001) 206 CLR 459 at [106]; *Chappel v Hart* (1998) 195 CLR 232 at [27]; *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 428 and the discussion in *Allianz Australia Ltd v Sim* [2012] NSWCA 68 at [41]-[52] (Allsop P); [140]-[145] (Basten JA).

66 [2003] 1 AC 32 (***Fairchild***).

67 [1956] AC 613 (***Bonnington Castings***) at 621 (Lord Reid).

68 See the discussion in *Evans v Queanbeyan City Council* [2011] NSWCA 230 (***Evans***) at [27] (Allsop P); and *Sienkiewicz* [2011] 2 AC 229 at [174] and [186] (Lord Brown of Eaton-under-Heywood JSC). See, also Hon J

existence of a duty of care is well-established). The primary judge's first explanation (concerning a "material contribution" to the accumulation of emissions) seeks to deploy the *Bonnington Castings* approach. There was no warrant for applying that approach to causation in determining whether to recognise a novel duty of care. However, even if that approach was relevant (which is denied) the finding that the evidence did not establish that the Extension Project would pose any additional risk of harm to the Children (PJ [83]) had the necessary consequence that any emissions from the Extension Project were not material. That is unsurprising, given that the total emissions from the Extension Project would result in an increase of only 1/18,000th of one degree Celsius (PJ [81]).

48. The primary judge's second explanation (the "tipping cascade") implicitly adopts the *Fairchild* approach to causation, in that it turns on an alleged material contribution to the risk of harm. That itself involved error, for the *Fairchild* approach has never been accepted as a test for factual causation in Australia, and it could only properly be recognised by the High Court.[69] Further, even if that approach were to be adopted for some purposes, it could not be adopted as a test for the causation element of the reasonable foreseeability inquiry without creating circularity.[70]

49. The primary judge's analysis did not merely accept that a defendant may owe a duty of care to prevent a foreseeable risk of harm ("X") where there is only a tiny risk of X occurring, and where the defendant's actions are a necessary pre-condition of X occurring. His Honour went much further, holding it to be sufficient to recognise a novel duty of care if it is foreseeable that the defendant's action may make a tiny contribution to the risk of X occurring (PJ [253]). In the former category, the capacity of the defendant to foresee that their actions may cause harm to an identified class of persons (eg patients of a surgeon) provides a justification for requiring the defendant to exercise reasonable care to avoid even unlikely kinds of harm; there is no equivalent justification for a duty of care in the latter category. Further, the development of the law of negligence in this manner would run counter to the renewed emphasis in more recent authorities

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Basten, "The Richard Davies QC Memorial Lecture: Loss of a Chance" (Presentation to the Injury Bar Association – UK, 10 November 2020)) at 7-8.

69 *Alcan Gove Pty Ltd v Zabic* (2015) 257 CLR 1 at [15] (The Court); *Strong v Woolworths Ltd* (2012) 246 CLR 182 at [26] (French CJ, Gummow, Crennan and Bell JJ); *Amaca Pty Ltd v Ellis* (2010) 240 CLR 111 at [12] (The Court); *Evans* [2011] NSWCA 230 at [31] and [52] (Allsop P).

70 This is because, when one is assessing whether it is foreseeable that conduct may cause harm prior to any damage having been suffered, the purpose of the exercise is to determine whether the conduct will so increase the risk of harm occurring that the defendant ought to have the person who may suffer the harm in mind. Introducing into this analysis a test for causation framed in terms of whether there will be a material increase in risk due to the conduct in question will inevitably result in circularity.

on the requirement that harm be reasonably foreseeable.[71] Inherent in the notion of "reasonable" foreseeability are concepts of fairness, policy, practicality, proportion, expense and justice.[72]

C4. Conduct of Third Parties and Control (Grounds 3(c) and 4)

50. The primary judge found that the Minister has "very substantial, if not exclusive, control" over the real risk of harm to the Children that would flow from her approval of the Extension Project (PJ [284]). That finding significantly overstates the extent of the Minister's relevant "control".

51. Control over the source of a risk of harm is a factor of "fundamental importance" in determining whether a public authority owes a duty of care.[73] A form of control that is remote or indirect will not suffice.[74] "Control" is not simply capacity to affect in some way the risk that harm arises. Such a diffuse notion of control would be little more than a description of the test of reasonable foreseeability. What is significant, as a salient feature, is a measure of control over the relevant harm that is, by its nature and extent, indicative of a relationship where it is normatively appropriate for the law to recognise a duty of care arising by reason of that relationship.

52. The Minister has little, if any, control over the risk of death and personal injury from heatwaves or bushfires that may be caused by climate change. The extent to which that risk can be mitigated or eliminated depends on many different actions or factors, including the extent of co-ordinated global action to address climate change over coming years and decades. These matters are entirely beyond the control of the Minister. The Minister has "control" only in the limited sense that she has power to grant an approval for the Extension Project which – even if it proceeds – will make, if any, a "tiny" contribution to the identified risk of harm. The Minister has nothing remotely approaching the kind of control over the risk of harm that is present in the cases where control is a significant salient factor.

53. Further, such "control" as the Minister has is neither "very substantial" nor "exclusive". The Minister does have capacity to decide (for the purposes of, and by reference to matters specified in, the *EPBC Act*) whether to approve the Extension Project. But if approval is granted, the Minister thereafter has no capacity to control the way in which the activity is carried out (subject to a confined power to impose conditions of approval and the power to enforce compliance). Nor

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71 *Sydney Water Corporation v Turano* (2009) 239 CLR 51 at [45] (The Court); *Tame* (2002) 211 CLR 317 at [12] (Gleeson CJ); *Seltsam* [2006] NSWCA 158 at [36] (Bryson JA).

72 *Swain* (2005) 220 CLR 517 at [79] (Heydon J).

73 *Graham Barclay Oysters* (2002) 211 CLR 540 at [150] (Gummow and Hayne JJ).

74 *Graham Barclay Oysters* (2002) 211 CLR 540 at [150] and [153]-[154] (Gummow and Hayne JJ).

does she have "exclusive" control. Even if approved, whether or not the Extension Project actually proceeds depends on other statutory decision-makers granting other approvals, on the economic and other decisions of the party that actually proposes to carry out that project, and on the decisions of others (including financiers and shareholders) who influence those decisions. Whether or not the coal from the Extension Project is consumed, and in what circumstances, depends on the downstream decisions and actions of yet more people.

54. As was the position in *Graham Barclay Oysters*, the relationship between the Minister and the Children is "indirect" and "mediated by intervening conduct on the part of others".[75] The primary judge failed to recognise that aspect of the case, instead treating the Minister as though she was in the same position as the company that will dig up the coal, or the companies or persons who will actually cause the emission of GHG by using it (eg PJ [79], [274]). In fact, however, no action of the Minister will make any direct contribution to GHG emissions.[76] As just noted, even if the Minister approves the Extension Project (noting that the act of approval is not itself an "action" for the purposes of the EPBC Act[77]), it is entirely possible it will not proceed, in which case her decision would have no effect on any risk to the Children. It is only if independent third parties decide for themselves to mine and utilise the coal that there may be even a tiny contribution to the identified risk. But, if third parties chose to take those actions, they may be held legally responsible for their own conduct. The primary judge ought to have found that there were "too many intervening levels of decision-making" between the conduct of the Minister in approving the Extension Project[78] and any physical harm that may be suffered by the Children at an unknown time in the future to impose a duty of care on the Minister to try to avoid those harms. Control of the remote kind that the Minister has is insufficient to justify an exception to the usual principle that a person is not responsible in negligence for the conduct of a third party, even where that conduct is foreseeable.[79]

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75 *Graham Barclay Oysters* (2002) 211 CLR 540 at [154] (Gummow and Hayne JJ).

76 Compare *Save the Ridge Inc v Commonwealth* (2005) 147 FCR 97 at [62] (Emmett J, dissenting, but not on this point: see [17]), stating "The mere removal of a legal obstacle in the way of action that might have an impact on the environment does not itself have any impact on the environment. What has impact is the action that takes place as a consequence of the removal of the legal prohibition." See the discussion of this case in *Esposito v Commonwealth* (2015) 235 FCR 1 at [104] (The Court).

77 As noted above, an "action" does not include a decision by (relevantly) a "Commonwealth agency" (s 524(b)), including a Minister (see definition of "Commonwealth agency" in s 528). See also *Tasmanian Aboriginal Centre* (2016) 244 FCR 21 at [80].

78 It being necessary to assume approval for present purposes.

79 *Smith v Leurs* (1945) 70 CLR 256 at 262 (Dixon J); *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at [19] and [21] (Gleeson CJ, Gaudron J at [42] and Hayne J at [98] agreeing).

C5. Vulnerability (Ground 3(d))

55. The primary judge held that the "vulnerability" of the Children to the harm that may result from the impugned conduct of the Minister was one of the "affirmative indicators of a duty of care" (PJ [311]). There is a lack of clarity as to what the primary judge meant when referring to the Children's "vulnerability". At PJ [289]-[294], his Honour used the term "vulnerability" to refer to the increased likelihood that the Children will suffer harm because they will live through a period in which the effects of climate change are more likely to be experienced. Those observations do not establish the presence of vulnerability as a salient feature.[80] It is clear from the authorities that this salient feature requires a plaintiff to be "specially vulnerable".[81] So much was accepted by the primary judge at PJ [295]. While all of humanity will be affected by climate change, no individual person is possessed of sufficient agency to safeguard themselves from it. For that reason, contrary to PJ [297], it does matter that the Children are in the same position as basically all people who will be alive in the relevant period in that they will be affected by climate change, for that negates the possibility that the Children can be said to suffer from a "special vulnerability". Finally, vulnerability takes on significance as a salient feature principally where there is a relationship between the plaintiff and a defendant who is in a position to control the relevant risk of harm (PJ [294] and [299]-[300]).[82] For the reasons already given, the Minister is not in such a position, with the result that any vulnerability of the Children is also of limited significance.

56. The reasoning is not improved by the unorthodox conclusion that the Minister is in a special "protective relationship" with the Children by virtue of her role within the Commonwealth Executive (PJ [306]-[311]). No constitutional or other legal principle or authority supports the notion that there is a special relationship of "vulnerability" and "reliance" (PJ [311]) between all members of the Executive and all Australian children. Here, the Minister had power with respect to the Extension Project only because that project happened to require approval under the *EPBC Act* because of environmental risks unrelated to climate change or to any risk to the Children. Nothing about the applicable statutory scheme created any relationship between the Minister and

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80 *Crimmins* (1999) 200 CLR 1 at [93] (McHugh J). See also *Perre* (1999) 198 CLR 180 at [50], [104], [118]-[120] and [149] (McHugh J); *Woolcock Street Investments v CDG Pty Ltd* (2004) 216 CLR 515 at [23] (Gleeson CJ, Gummow, Hayne and Heydon JJ); [80] (McHugh J);

81 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ); *Crimmins* (1999) 200 CLR 1 at [91], [108] (McHugh J)

82 See *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 at [133]-[135] (Crennan and Kiefel JJ), citing *Graham Barclay Oysters* (2002) 211 CLR 540 at [149] (Gummow and Hayne JJ); *Perre* (1999) 198 CLR 180 at [127] (McHugh J).

the Children, let alone a special protective one. The reference in PJ [312] to the supposedly "potent" consideration of the innocence of the Children is not relevant to any legal issue.

C6. Indeterminacy of liability (Ground 3(e))

57. The primary judge accepted that "indeterminacy … is really about a defendant's inability to sufficiently ascertain the nature and extent of its prospective liability" (PJ [436] and [438]). His Honour asserted that indeterminacy will not arise merely because of the "very wide" size of a class of potential claimants (PJ [436]-[442]), although he acknowledged "the larger the class of potential claimants and the more extensive the nature of their potential claims, the more difficult it may be to assess prospective liability" (PJ [438]). Given that acknowledgment, the fact that the class of potential claimants – all Australian children – is vast might be thought to be of some significance. So, too, the fact that the risk of harm from future bushfires and heatwaves is highly variable across the wide variety of climatic conditions in Australia, given the obvious impact of those matters on the practicability of assessing the nature and extent of prospective liability. The indeterminacy of any liability is further magnified by the fact that, on any view, the actions or inactions of the Minister can affect the relevant risk at most minimally, meaning the magnitude of any liability therefore depends on the future decisions of vast numbers of other global actors.

58. The indeterminacy of the duty of care imposed by the primary judge is reinforced when it is recognised that there is no logical reason to confine the duty to Children, as opposed to all living people (who will be exposed to the same risks as the Children, albeit for different periods of time). The primary judge found that the Minister's responsibilities under the *EPBC Act* were "directed to protecting the interests of Australians <u>including</u> Children" (PJ [273], emphasis added). The inclusive reference highlights that analytically (as opposed to rhetorically) there was no justification for defining the persons to whom the novel duty of care was owed to Children, given that the foreseeable risk of harm from bushfires or heatwaves that the primary judge identified is not confined to the Children.

59. Despite those matters, the primary judge held that indeterminacy of liability did not have a "determinative negative role" for three primary reasons: (1) the posited duty of care is only concerned with personal injury "where indeterminacy commonly has no role to play" (PJ [430]-[434] and [469]); (2) as the proceeding was brought before any damage has been suffered, the Minister "has the capacity to be sufficiently informed … about the likely number of potential

claimants and the likely nature of their claims" (PJ [465]-[467] and [470]); and (3) there are others who will "share responsibility" for the consequences of climate change and mechanisms exist to apportion liability (PJ [471]-[472]).

60. Those reasons are, with respect, unpersuasive. To observe that "physical damage … usually provides a sufficient limiting factor" (PJ [430]) is simply to highlight that conventional duties of care are concerned with a finite set of physical consequences of an act or omission. The same cannot be said where the allegedly foreseeable damage is the prospect of every person in the country of a certain age experiencing adverse consequences from a heatwave or bushfire. To hold the Minister liable in tort for all physical harm to the Children that arises due to weather events caused by climate change is far removed from the possibility of a single catastrophic event occurring, like the train derailment referred to in *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd*[83] (PJ [438]). The concern is, instead, with rolling events causing damage where there is no meaningful limit on: (i) how many of the Children will suffer harm (and how many times they will be so harmed); (ii) when that damage will occur, over the next century or more; and (iii) the extent of that damage. Courts have resisted, on indeterminacy grounds, attempts to impose much more modest duties of care.[84]

61. It is no answer to the indeterminacy identified above that responsibility for the effects of climate change could be apportioned (PJ [472]). First, it would not be possible for the Minister to rely on the statutory regimes that provide for proportionate liability, because they do not apply to claims for personal injury.[85] As to the "principle of proportionality", this is not a mechanism for apportioning liability. Instead, it was referred to by McHugh J in *Perre*[86] and Gibbs J in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* as a reason not to recognise a duty of care where the resulting liability would be "out of all proportion to [the defendant's] wrong".[87] Such a principle therefore reinforces the Minister's submissions about indeterminacy, rather than answers them. A similar principle was applied in *Fonterra*, another case involving GHG emissions, where Wylie J stated that recognising a duty of care would have exposed the

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83 [2003] VSC 27 at [920] (Gillard J)

84 *Agar v Hyde* (2000) 201 CLR 552, 578 [67] (Gaudron, McHugh, Gummow and Hayne JJ); *X v State of South Australia (No 3)* (2007) 97 SASR 180 at 230 [184]; *Electro Optic Systems Pty Ltd v New South Wales (Canberra Bushfires Case)* (2014) 10 ACTLR 1 at [352]-[353] (Jagot J).

85 See, eg, *Civil Liability Act 2002* (NSW), s 34(1)(a); *Civil Liability Act 2003* (Qld), s 28(3)(a); *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA), s 3(2); *Civil Liability Act 2002* (Tas), s 43A(1)(a); *Wrongs Act 1958* (Vic), s 24AG(1); *Civil Liability Act 2002* (WA), ss 5AI and 5AK.

86 (1999) 198 CLR 180 at [108].

87 (1976) 136 CLR 529 at 551-552.

defendants (corporate emitters of GHG) to "an undue burden of legal responsibility, way beyond their contribution to damaging global GHG emissions".[88] That is even more true in this case.

62. Finally, it is legitimate, when considering indeterminacy, to ask whether recognition of a duty of care would require a similar duty to be imposed on a large number of other persons.[89] If the Minister is to be subject to a duty of care, the possibility exists (as the primary judge recognised at PJ [471]) that others would be subject to similar duties. It is difficult to see why the same reasoning that the primary judge deployed would not also mean that the NSW Minister responsible for planning approvals is under a similar duty of care, as perhaps might be a bank that finances the Extension Project. It is difficult to imagine a case where considerations of indeterminacy could call more strongly for the rejection of a novel duty of care.

C7. Factual Errors (Ground 5)

63. The Minister challenges five specific findings of fact made by the primary judge.

(a) Best available outcome and increasing risk of irreversible 4ºC trajectory above 2ºC

64. The primary judge found that at and beyond a global average surface temperature of 2ºC above pre-industrial levels, there is "an exponentially increasing risk of the Earth being propelled into an irreversible 4ºC trajectory because of 'Earth System' changes" (PJ [31], [74(iii)] and [75]). That finding reflects a misunderstanding of the evidence regarding "tipping points".

65. Professor Steffen's evidence regarding tipping points was that there was a small (but not zero) probability of initiating a tipping cascade at a 2ºC temperature rise,[90] whereas there was a "significant risk" that a tipping cascade would be activated "by a 3ºC (or even lower) temperature rise".[91] His evidence did not support a finding that the risk between 2ºC and 3ºC would increase "on a continuum", let alone "exponentially" (PJ [75]). The evidence regarding tipping points was not sufficiently granular to permit any finding as to the nature of the relationship between increasing temperature from 2ºC to 3ºC, except that the risk of triggering tipping points was very

88 [2020] 2 NZLR 394 at [95]. See, also [98(a)].

89 See, eg, *Topp v London Country Bus South West* [1993] 3 All ER 448 at 460 (May J): "Floodgates arguments are not always attractive where they imply that the court is unable to express itself with sufficient precision, but the nature of the subject matter sometimes means that you cannot include one plaintiff's case without also encompassing many others … if there were a duty of care in this case, such a duty would also have to be placed on a large number of other owners of vehicles upon whom as a matter of policy, the law ought not, other than by statute, to impose a duty."

90 Report of Professor Will Steffen dated 7 December 2020 (AB Pt B Tab 44) at 21.

91 Report of Professor Will Steffen dated 7 December 2020 (AB Pt B Tab 44) at 20.

low at 2ºC and "significant" at or even lower than 3ºC. The finding of an "exponential" increase in risk as temperatures increase beyond 2ºC was unsupported by evidence.

66. The analysis also proceeds from a false premise because his Honour erred in treating Professor Steffen's evidence as establishing that the "best available outcome" is a stabilised global average surface temperature of 2ºC above pre-industrial levels (PJ [31] and [74(ii)]). Professor Steffen in fact described as a "real possibility" a scenario involving "a global average surface temperature in 2100 that would be approximately equivalent to, or slightly higher than, the upper Paris accord target of 'well below 2ºC'".[92] That reflected Professor Steffen's assessment of relative probabilities, having regard to modelling which is itself expressed in terms of ranges of potential outcomes measured on temperature scales.[93] The primary judge erred in going further along the scale than Professor Steffen. The error assumes significance given the way in which the primary judge conceived of the risks existing on the spectrum between 2ºC and 3ºC.

(b) Risk of triggering 4ºC Future World

67. The primary judge found that there was "a real risk that even an infinitesimal increase in global average surface temperate may trigger a 4ºC Future World" (PJ [253]). There was no evidence capable of supporting that finding. As noted at paragraph 65, Professor Steffen's evidence was that the risk of triggering tipping points was low (but not zero) at 2ºC and "significant" at or even lower than 3ºC. Professor Steffen's evidence regarding the risk of triggering tipping points was high level and did not descend into sufficient detail to enable any finding regarding the sensitivity of the tipping point mechanism. There was no evidence on which an inference could be drawn that each and every infinitesimal increase in global average surface temperature beyond 2ºC carries a "real risk" of triggering the Earth System processes that underlie the tipping point hypothesis. That cannot simply be inferred from the proposition that there is a higher risk of triggering tipping points at 3ºC than there is at 2ºC. The primary judge's finding at PJ [253], which was critical to the conclusion regarding reasonable foreseeability, had no foundation in the evidence.

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92 Report of Professor Will Steffen dated 7 December 2020 (AB Pt B Tab 44) at 19. The upper Paris target of "well below 2ºC has been understood to mean approximately 1.8ºC: Report of Professor Will Steffen to NSW IPC dated 30 June 2020 (AB Pt B Tab 39) at [11].

93 See IPCC, *Climate Change 2014: Synthesis Report* (AB Pt B Tab 16) at 56 – 64.

(c) Approval of Extension Project would cause net increase in global CO_2 emissions

68. It is implicit in the primary judge's findings at [247] – [249] that his Honour found that approval of the Extension Project would result in a net addition of 100Mt of CO_2 emissions to the global emissions, beyond what would otherwise occur if the Extension Project were not approved. There was no foundation in the evidence for that finding.

69. It was a necessary element of the respondents' case below that the GHG emissions from burning of the coal extracted from the Extension Project would add to the emissions that will otherwise occur if the Extension Project were not approved. However, that was not a proposition established by the evidence. Professor Steffen simply proceeded on the basis of an assumption, as per his instructions, that the Extension Project would cause an increase in Scope 3 emissions of approximately 100Mt in GHG emissions.[94] It was not appropriate for the primary judge to approach that issue by reversing the onus of proof, which is what his Honour did at PJ [86]. In fact, the effect of the limited evidence on this issue was that there would continue to be significant demand for coal because of ongoing reliance of many countries on coal for baseload energy supply.[95] There was no foundation in the evidence for a conclusion that, if the Extension Project did not proceed, demand for coal would not be met from other sources. For that reason, there was no basis to infer that approval of the Extension Project would contribute to an overall increase in global emissions of CO_2 over the next few decades.

(d) CO_2 emissions attributable to Extension Project outside 2ºC "carbon budget"

70. The primary judge found that the CO_2 emissions attributable to the Extension Project would not be emitted within the available carbon budget that would allow a 2ºC target to be achieved (PJ [87]). Relatedly, his Honour analysed the emissions associated with the Extension Project as being additional to the emissions that would be associated with temperatures increasing to the level of a 2ºC increase. This is the premise for the treatment of the Extension Project emissions as being the cause of temperatures increasing, albeit infinitesimally, beyond 2ºC.

71. There is an internal inconsistency in the primary judge's reasoning in this regard. The "carbon budget" approach contemplates that some proportion of the world's existing fossil fuel reserves

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94 See letter of instructions to Professor Steffen, 12 January 2020, for purposes of the Supplementary Report (AB Pt B Tab 43) at [5].

95 Austrade, Australian Capability Across the Coal Supply Chain (AB Pt B Tab 19) at 4; Ministers for the Department of Industry, Science, Energy and Resources, press release entitled "Energy outlook highlights important role of Australia's coal and gas exports" (AB Pt B Tab 27).

can be consumed without the budget being exceeded in a way leading to an increase in temperatures beyond 2°C. The primary judge accepted that, on the definition used in the relevant evidence (McGlade and Ekins), the Extension Project involved mining coal from an existing reserve: PJ [73]. That being so, and contrary to PJ [87], there was no sound basis to treat the Extension Project as a "new reserve", or to infer that when Professor Steffen referred to "existing" reserves he "must have meant those already being exploited" (and thus to have used a different definition to that used by McGlade and Ekins, who defined existing reserves as those it was "economically and technically viable to exploit now" (PJ [73])). There was therefore no basis to find that the coal consumption associated with the Extension Project should be treated as outside the "carbon budget" and as contributing to temperature increases beyond 2°C.

D. CONCLUSION

72. For the reasons outlined, the primary judge erred in finding that the Minister owed a duty to the Children to avoid causing harm of the relevant kind when exercising the power under ss 130 and 133 of the *EPBC Act* to approve or not approve the Extension Project. The appeal should be allowed, the orders made on 8 July 2021 set aside, and in their place it should be ordered that the application be dismissed and the applicants pay the first respondent's costs of the proceeding. The respondents should be ordered to pay the Minister's costs of the appeal.

Dated: 13 September 2021

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