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Details of Filing

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

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Important Information

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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

RESPONDENTS' SUPPLEMENTARY SUBMISSIONS ON

***SMITH v FONTERRA CO-OPERATIVE GROUP LTD* [2021] NZCA 552**

1 In *Smith v Fonterra Co-operative Group Ltd* [2021] NZCA 552 (***Smith***), an elder of Ngāpuhi and Ngāti Kahu and the climate change spokesperson for the Iwi Chairs Forum brought claims in tort against seven New Zealand companies, the activities or products of which caused greenhouse gases to be released into the atmosphere (at [3]). His claim in negligence alleged that each of the respondents owed him (and persons like him) a duty to take reasonable care not to operate its business in a way that would cause him loss by contributing to dangerous anthropogenic interference with the climate system (at [94]). The Court of Appeal upheld the High Court's decision to strike out the claim in negligence.

2 *Smith* is distinguishable for the following reasons.

3 First, the New Zealand legislature had enacted a comprehensive legislative framework to address climate change (discussed further below), and to superimpose a common law duty of care was likely to cut across that framework, not enhance or supplement it (at [30]–[33]). In other words, the legislature has entered the field. What Australian law would describe as "incoherence" therefore arose directly between the posited duty of care and the statutory regime, and this issue permeated the judgment (see, eg, [33]). The courts would have a "meaningful role" — to support and enforce the statutory scheme (at [35]). Given that legislative context, it is unsurprising that the Court of Appeal referred to the American authorities cited in footnote 5 of the judgment. Those cases were also decided in the context of a comprehensive legislative framework to address greenhouse gas emissions. By contrast, the EPBC Act does not (and does not purport to) regulate greenhouse gas emissions in any comparable way.

4 Second, the claim was brought by Mr Smith against only seven companies. However, those being indistinguishable from any other, in effect, the claim represented an attempt to have the court impose on all private companies and individuals a duty of care owed to every person in New Zealand (at [18]–[19]). Further, each established by evidence that it was operating within all relevant statutory and regulatory requirements (at [9]). In *Sharma*, the primary judge correctly rejected an argument that the conclusion the Minister for Environment owed a duty necessarily entailed a duty owed by Whitehaven, or other private companies whose activities caused greenhouse gas emissions. Even if *Smith* were to be accepted as the correct result in a claim by an Australian adult against Australian companies operating in accordance with valid legislative and administrative requirements, that would not require rejection of the duty the primary judge found was owed by the Minister of Environment to Australian children. Rather,

that would be entirely consistent with the primary judge's reasons for rejecting the "floodgates" arguments (J [486]–[488]), where his Honour observed (correctly) that "[t]he totality of the relations between the Minister and the Children is unique to them".

5 Third, the claim was pleaded in such a way as to require "net zero" emissions, making the claimed tort "a tort like no other" (at [23]), and requiring, in effect, a "court-designed and court-supervised regulatory regime", which the Court was not institutionally equipped to provide (at [26]). By contrast, in *Sharma*, the claim focused solely on causation of harm by a single exercise of statutory power, in an entirely orthodox manner, with the Respondents eschewing any concept of "netting" (including under the new "substitution" argument run on appeal).

6 Fourth, the Court applied the two-stage test from *Anns v Merton London Borough Council* [1978] AC 728, which is still good law in New Zealand. This explains the prominence of policy considerations in the judgment. The two-stage test is not good law in Australia.

7 The decision being distinguishable for those reasons, the Court should not apply broad statements in the Court of Appeal's judgment (such as those in [28]) that might be invoked by the Minister in support of her arguments, without having regard to the critical differences between *Smith* and the present case. The relevant arguments have been made by the Minister on the hearing of the appeal, in the proper context and having regard to the dispositive legal principles, and those arguments should be accepted or rejected on their merits, not by reference to broad statements made in the application of a different common law country in a crucially different context.

Dated: 25 October 2021

Noel Hutley

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