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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' OUTLINE OF SUBMISSIONS

Contents

A. Introduction

(i) The facts

1 The judicial method by which the common law of negligence is developed, starts not with an abstract rule of universal application,[1] but by analogical reasoning on facts,[2] guided by relevant legal principles.[3] It is therefore necessary, but not sufficient, in deciding whether a novel duty of care should be recognised, to pay careful attention to the facts of the case.[4]

2 Here, the primary judge found, on uncontested evidence, the facts in J [18]–[28], [37]–[90], [205]–[246][5] and [290]–[292]. It was from those facts, by reference to the "salient features"[6] and the facts and principles of decided cases, that the primary judge reasoned that the appellant (the **Minister**) owed a duty of care.

3 Those factual findings have not been seriously controverted.[7] The Minister largely appears to accept them as correct (Appellant's Submissions (**AS**), [1]). They found the judgment, and the respondents rely on them in their entirety. What follows is a summary for the purpose of argument.

4 **Whitehaven** Coal Pty Ltd sought approval under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the **Act**) to increase total coal extraction from its Vickery mine from 135 to 168 megatonnes (**Mt**) (**Extension Project**).[8] Whitehaven's sole purpose of mining the coal is to supply customers in Japan, South Korea and Taiwan, who will then burn it.[9] No evidence suggested it would not do so, if permitted, and it is difficult to see why approval would be given unless the Minister was persuaded that the perceived economic benefits of the

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1 ***Crimmins*** *v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, [73] (McHugh J); ***Brodie*** *v Singleton Shire Council* (2001) 206 CLR 512, [317]–[319] (Hayne J); ***Sullivan*** *v Moody* (2001) 207 CLR 562, [47]–[49] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); ***Graham Barclay*** *Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, [231] (Kirby J). Compare ***Sutherland*** *Shire Council v Heyman* (1985) 157 CLR 424, 497 (Deane J).

2 *Crimmins* (1999) 200 CLR 1, [72]–[77] (McHugh J); *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560 (**J**), [139], [142].

3 *Crimmins*, [73] (McHugh J); *Sullivan* (2001) 207 CLR 562, [49]; J [107]–[108]. The UK Supreme Court's current approach is not so different: *N v Poole Borough Council* [2020] AC 780 (***N v PBC***), [64] (Lord Reed DPSC, Baroness Hale PSC, Lord Wilson, Lord Hodge and Lady Black JJSC agreeing).

4 *Caltex Refineries (Qld) Pty Ltd v* ***Stavar*** (2009) 75 NSWLR 649 (Allsop P), [102]–[103]; J [97]–[99], [143]–[473].

5 Note that J [74(ii), (iii)], [75], [79], [84], [86]–[87] are the subject of some contest by Ground 5.

6 *Stavar* (2009) 75 NSWLR 649, [159]–[163] (Basten JA).

7 And nor could they be, given the conduct of the trial: the Minister did not call evidence or cross-examine.

8 A wholly-owned subsidiary of Whitehaven, Vickery Coal Pty Ltd, replaced Whitehaven as proponent of the Extension Project on 17 July 2018: J [6]-[7].

9 J [195]; Department of Planning, Industry and Environment, Vickery Extension Project State Significant Development Assessment SSD 7480 (May 2020) (**DPIE**) (Appeal Book (**AB**) Pt B Tab 30) [54], [707]; NSW Independent Planning Commission, Vickery Extension Project SSD 7480 Statement of Reasons for Decision (August 2020) (AB Pt B Tab 33) [277].

mine proceeding would be realised.

5 The carbon presently stored, away from the atmosphere, in the coal to be extracted by the Extension Project would, when burned, be emitted as carbon dioxide (**CO_2**) (J [38]). CO_2 is a "greenhouse gas". The "scope 3 emissions"[10] of the increased extraction (including burning the coal) would comprise 100Mt of CO_2-equivalent greenhouse gas emissions (J [24(iii)]).

6 Increased emissions of CO_2, from the Earth's surface, increase CO_2 **concentration** in the Earth's atmosphere[11] (J [40]), intensifying the "greenhouse effect", which increases the Earth's global average surface **temperature** (J [37], [40]), in an approximately linear relationship (absent non-linear feedback effects) (J [41]).

7 Since the Industrial Revolution, humans have emitted 2,180 Gt of CO_2, increasing temperature by 1.1°C (46% from burning coal, being 1,000 Gt and 0.5°C) (J [39]). Concentration is increasing by 2.5 parts per million (**ppm**) per year;[12] and temperature by 0.24°C per five years. At that rate, by 2100, temperature will be 5°C above pre-industrial temperature (J [43]). Post-industrial increases in concentration and temperature to date have caused phenomena including extreme heat events, bushfires and droughts, rising sea levels and ocean acidification, and changes in rainfall, streamflow, and cyclones (J [54]).

8 Concentration and temperature will continue to rise unless and until after greenhouse gas emissions reach net zero (J [53]). The lowest post-industrial temperature increase that can now realistically be contemplated is 2°C (J [64]).[13] This will increase the likelihood, duration and intensity of extreme heat events, bushfires and the other phenomena described above (J [67]).

9 As temperature rises to 2°C above the pre-industrial level and beyond, the risk of feedback processes increases, as does the prospect that a tipping cascade may be activated, leading to an uncontrollable trajectory to a much hotter Earth (J [51], [90]).

10 There is, of course, a spectrum of possible future worlds, depending (apart from feedback) on how much more CO_2 humans emit by burning coal and other fossil fuels. At the other end of the spectrum, if temperature increases to ≥4°C above the pre-industrial level, the phenomena

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10 J [23]. And see DPIE [672], [678] (AB Pt B Tab 30).

11 Which absorbs what cannot be absorbed by land and ocean sinks: J [47]–[48].

12 Professor Steffen explained that this rate is itself increasing: Expert Report of Professor Will Steffen (**Steffen**) at p 5 (AB Pt B Tab 44).

13 This opinion was expressed on the basis of research by McGlade and Ekins: J [71]–[73], [86]–[87]; Steffen at pp 20–22 (AB Pt B Tab 44). An objection on basis was originally made, but then withdrawn; an objection on expertise was dismissed: see transcript, TT18–32 (Free / Nekvapil).

described above will change accordingly (J [69], [221]). In the last few decades of this century, the respondents, and other Australian children today, will live in significantly altered conditions. Each is more likely to suffer personal injury or death directly caused by heat and fire (or smoke), and as a group, more of them will suffer personal injury or death from heat and fire (or smoke) (J [205]–[235]). The Minister knew this.

11 The carbon presently captured and stored in the Vickery Extension Project will, on being burned, become a necessary cause of the concentration that causes those harms (whatever future world eventuates).

(ii) The primary judge was not concerned with a political question

12 This appeal is not about "[h]ow 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" (AS, [1]). Political questions of that kind are playing out at an international level and a domestic level, here and elsewhere. Such questions are the concern of the executive and the legislature, and of diplomats and political parties, but not of the common law (J [478]–[485]): "it is no answer to a claim in tort against the Commonwealth under s 75(iii) of the Constitution that its wrongful acts or omissions were the product of a 'policy decision' taken by the Executive Government; still less that the action is 'nonjusticiable' because a verdict against the Commonwealth will be adverse to that 'policy decision'."[14]

13 The question on this appeal is whether the common law can and should respond to uncontested facts showing that the Minister's exercise of a discretionary statutory power will unlock a specific, physical chain of causation that foreseeably will materially contribute to the future personal injury and death of present Australian children. Imposing duties on those whose conduct causes harm to others has always been the method of the common law, and an institutional responsibility of the judiciary.

14 That there are "competing interests and potential benefits" (AS, [1]) because the activity causing physical harm may have economic benefits (here, through private profits and employment, and public revenue) may count against a duty founded on economic loss,[15] but it has never been a reason to exclude the common law from protecting life and bodily integrity.

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14 *Brodie* (2001) 206 CLR 512, 520–521 (F S McAlary QC), [106] (Gaudron, McHugh and Gummow JJ). See also *N v PBC* [2020] AC 780, [51].

15 J [345], [416]; ***MM*** *Constructions (Aust) Pty Ltd v Port Stephens Council* (2012) 191 LGERA 292, [98] (Allsop P, Basten JA and Bergin CJ in Eq agreeing); ***Roo Roofing*** *Pty Ltd v Commonwealth* [2019] VSC 331 [486], [503]–[506] (John Dixon J).

If the people, through parliament, judge that economic benefits justify denying the common law's jurisdiction to prevent consequent harm, this can be achieved by legislation.

15 On appeal, as below, it is the Minister who seeks to rely on the Paris Agreement, not the respondents.[16] What national governments agree, and what policies they adopt, does not concern the common law, and formed no part of the respondents' case. The respondents claimed only that the Minister had a specific power to unlock CO_2 emissions that, in aggregation, may cause them physical injury. They proved this claim by undisputed expert evidence.

16 The Commonwealth seeks to erect an exclusionary "political question", because the Minister is a member of the executive and/or is exercising the discretion conferred by Pt 9 of the Act. Whether the Act here excludes a duty of care is discussed in section B below. Beyond that, "policy" is either an irrelevant distraction or an attempt to carve out a common law immunity for the executive, beyond that defined by parliament.[17]

(iii) The common law method of development

17 Physical causation of harm, including by intermediate natural forces, has been the concern of the common law for hundreds of years, as demonstrated by cases (eg, J [116]–[137]) that have been influential on the development of the Australian common law at the present day.

18 It is a tautology to say that a novel duty of care, when first recognised, has never before been declared to exist (AS, [3]). Nor is there any reason why such a duty may not first be recognised by the common law of Australia (AS, [3]). The appellant has not pointed to any claim analogous to the respondents' that has been rejected.[18]

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16 AS [1]; T32.46, T146.28-32.

17 *Brodie* (2001) 206 CLR 512, [231] (Kirby J).

18 No useful analogy can be drawn with a New Zealand claim against a grab-bag of different private industries that emit greenhouse gases: *Smith v Fonterra Co-Operative Group Ltd* [2020] 2 NZLR 394. And it is not surprising that claims seeking to impugn a wide range of international commitments, domestic policy commitments, executive decisions and other conduct by a government, on the basis of constitutional rights, would not be justiciable: see, eg, *Juliana v United States* 947 F 3d 1159 (9th Cir 2020); *La Rose by her Guardian ad litem Andrea Luciuk v Her Majesty the Queen in the Right of Canada* 2020 FC 1008, [40]. Cf *Mathur v Ontario* [2020] ONSC 6918, [139]–[140]. The US cases in AS, fn 2, were brought against private companies, when the Environmental Protection Agency was tasked with regulating greenhouse gas emissions, on a different cause of action (public and/or private nuisance), and/or turned on the standard for displacement of federal common law by statute (which is less demanding than the standard for pre-emption of state law: see *American Electric Power Co v Connecticut* 564 US 410 (2011). See further, paragraph 53 below. In Australia, there is "but one common law": *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563, which has developed, including with respect to duties of care owed by public authorities, in its own peculiar way, and is the law to here be applied.

19 "Incrementalism" (AS, [3]) refers to the process for legal development, not to the scale of the decision's consequences.[19] The Industrial Revolution's enhancement of the power of humans to harm each other, including through intermediate natural forces, did not prevent the common law from responding.[20] The common law is not static.[21] It develops incrementally and in a principled manner, by way of analogy, subject to the constitutional and statutory framework alongside which it operates.[22] Developments in the common law arise through cases brought before the courts and reflect material changes in society (such as the Industrial Revolution (J [131], [137]), which gave rise to the modern torts of nuisance and negligence[23]). Indeed, "adaptability is one of the common law's most fundamental and valuable qualities".[24]

20 There is nothing, in principle, to prevent the common law from recognising a duty to avoid causing personal injury by the positive exercise of a power that unlocks carbon, for the very purpose of becoming CO_2 emissions, where indisputable science predicts the likelihood that all such future emissions will, in aggregate, cause widespread physical harm.

(iv) A public authority can owe a common law duty of care in the valid exercise of statutory powers

21 Section 75(iii) of the Constitution made the executive liable in tort (including in the execution of statutory functions) unless excluded by parliament, creating a unique relationship between the judiciary and the executive, as compared with the position of the Crown at common law.[25] Where, as here, an officer of the Commonwealth (including a Minister) does a positive act under a statutory power, the starting point is that the officer exercises that power subject to any

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19 See the judicial observations collected in J [436]–[439], as to why scale is no reason to exclude the common law.

20 As to nuisance, eg, *Attorney-General v Birmingham Corporation* (1858) 4 K & J 528; 70 ER 220; *Bamford v Turnley* (1862) 3 B&S 67; 122 ER 27; *St Helens Smelting Co v Tipping* (1865) 11 ER 1483. As to negligence, eg, ***Geddis** v Proprietors of Bann Reservoir* [1878] 3 App Cas 430. And see *Rylands v Fletcher* (1868) LR 3 HL 330.

21 William Gummow, 'Common Law' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (OUP 2018), 190, 198.

22 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 29 (Brennan J); *Crimmins* (1999) 200 CLR 1, 32 [73] (McHugh J); ***Brookfield** Multiplex v Owners 61288* (2014) 254 CLR 185, 201 [25] (French CJ). As Sir Owen Dixon observed, the content of Australian law comprises "besides legislation the general common law which it is the duty of the courts to ascertain as best they may": Owen Dixon, 'Sources of Legal Authority (1943)', *Jesting Pilate* (Law Book Co 1965), 199 (emphasis added).

23 See generally McLaren, "Nuisance Law and the Industrial Revolution — Some Lessons from Social History" (1983) 3(2) *Oxford Journal of Legal Studies* 155; Simpson, "Legal Liability for Bursting Reservoirs: The Historical Context of *Rylands v Fletcher*" (1984) 13(2) *Journal of Legal Studies* 209. See also the authorities cited at J [118]–[136]. As to J [137], the torts of negligence and nuisance originated from the same source, the action on the case: Winfield, "The History of Negligence in the Law of Torts" (1926) 42(2) *Law Quarterly Review* 184, 185, 197–198; Winfield, "Nuisance as a Tort" (1931) 4(2) *The Cambridge Law Journal* 189, 198.

24 Winterton, 'The Relationship between Commonwealth Legislative and Executive Power' (2004) 25 *Adelaide Law Review* 21, 34.

25 J [330]; *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, [125] (Gageler J); *Commonwealth v Mewett* (1997) 191 CLR 471, 545–551 (Gummow and Kirby JJ). See also ***Ibrahimi** v Commonwealth of Australia* (2018) 366 ALR 341, [163] (Payne JA).

common law duty of care,[26] thus ensuring equality before, and equal protection of, the law.[27] Whether the executive owes a common law duty of care is a proper question for the judiciary, provided it uses the method apposite to the function of a Ch III court.[28]

22 The tort of negligence, as it applies to public authorities, is developed by the judiciary, with an awareness of the statute conferring the power, but without requiring alignment (contrast the torts of misfeasance in public office[29] or breach of statutory duty). In both ***Pyrenees*** *Shire Council v Day*[30] and ***Crimmins*** *v Stevedoring Industry Finance Committee*,[31] a majority of the High Court rejected the attempt to force such an alignment.

23 *Pyrenees* has been characterised as a case where harm is caused by the positive exercise of statutory powers.[32] The relevant council was specifically aware of a fire risk, in a building with a double fireplace, one being in the residential half of the building, the other in the half used as a fish-and-chip shop. Its inspector identified defects. The lease was assigned, then the new lessees lit a fire, causing substantial property damage, including to the neighbouring video-hire shop, owned by the respondent. The council had fire-prevention powers it could have used to require the defect be remedied and prohibit any fire in the meantime.

(1) Chief Justice Brennan, agreeing with Lord Hoffman in ***Stovin*** *v Wise*,[33] would have held that "if a decision not to exercise a statutory power is a rational decision, there can be no duty imposed by the common law to exercise the power … A statutory power and its incidents are creatures of the legislature and the common law must conform to the legislative intention".[34] While his Honour concurred in holding a duty was owed, he did so because he held the council was under a public law duty to exercise its statutory

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26 *Sutherland* (1985) 157 CLR 424, 458 (Mason J). And see J [332].

27 *Brodie* (2001) 206 CLR 512, [134] (Gaudron, McHugh and Gummow JJ), [210] (Kirby J). And see Dicey, *Introduction to the Study of the Law of the Constitution* (4th edn, 1893), 183 ("every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals"), 305 ("the action of every servant of the Crown, and therefore in effect of the Crown itself, is brought under the supremacy of the law of the land. Behind Parliamentary responsibility lies legal liability, and the acts of Ministers no less than the acts of subordinate officials are made subject to the rule of law") (cf AS, [12]); *Re Patterson; ex parte Taylor* (2001) 207 CLR 391, [64] (Gaudron J). See also *N v PBC* [2020] AC 780, [65].

28 See Stellios, *Zines's The High Court and the Constitution* (6th edn, 2015), 260 (explaining a reference by Kitto J in *R v Davison* (1954) 90 CLR 353) and 265–266.

29 See further at paragraph 31 below.

30 (1998) 192 CLR 330.

31 (1999) 200 CLR 1.

32 *Crimmins* (1999) 200 CLR 1, [25] (Gaudron J); *Stuart v* ***Kirkland-Veenstra*** (2009) 237 CLR 215, [117] (Gummow, Hayne and Heydon JJ). Compare *Pyrenees* (1998) 192 CLR 330, [85], [101] (McHugh J).

33 [1996] AC 923, 953 (Lord Hoffmann, with whom Lord Goff and Lord Jauncey concurred).

34 *Pyrenees* (1998) 192 CLR 330, [22] (Brennan CJ).

powers. His Honour was alone in taking this approach.

(2) Justice Toohey appeared to equate Lord Hoffman's approach in *Stovin* with the "policy/operational distinction", and did not consider either to be useful in resolving the question of duty.[35]

(3) While McHugh J agreed with much of the reasoning of Brennan CJ, he drew a distinction between the public and private duties,[36] and did not refer to or adopt the reasoning in *Stovin*. His Honour's reasoning the following year in *Crimmins* (see paragraph 24(2) below) makes it very unlikely he intended to adopt Brennan CJ's reasoning on this point.

(4) Justice Gummow observed that: (a) misfeasance in public office is the only tort having its roots and application within public law alone;[37] (b) by contrast, *Sutherland*[38] established that "the circumstance that a public authority is the repository of a statutory discretion does not prevent the application of the ordinary principles of the law of negligence";[39] (c) the broad concepts which found negligence reflect its development from action on the case;[40] (d) the council's liability in negligence did not turn upon the further (public law) question whether they could have sought public law remedies.[41]

(5) Justice Kirby rejected the approach of Lord Hoffman in *Stovin*, saying that "[a]lthough such a test might have the attraction of reconciling principles of the law of negligence and administrative law, it would impose on a claimant a burden more onerous than the law of negligence typically does".[42]

24 *Crimmins* was treated as a failure-to-act case.[43] On the evidence, the Australian Stevedoring Industry Authority knew, or ought to have known, that asbestos dust was dangerous and that workers unloaded cargoes in conditions that exposed the workers to a significant risk of injury.[44] The respondent contended that "[w]here it is sought to impose a duty of care based on

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35 *Pyrenees* (1998) 192 CLR 330, [66]–[67], [80] (Toohey J).
36 *Pyrenees* (1998) 192 CLR 330, [119], [120] (McHugh J).
37 *Pyrenees* (1998) 192 CLR 330, [124] (Gummow J).
38 (1985) 157 CLR 424.
39 *Pyrenees* (1998) 192 CLR 330, [124] (Gummow J).
40 *Pyrenees* (1998) 192 CLR 330, [125] (Gummow J).
41 *Pyrenees* (1998) 192 CLR 330, [172] (Gummow J).
42 *Pyrenees* (1998) 192 CLR 330, [253(5)] (Kirby J).
43 *Crimmins* (1999) 200 CLR 1, [24] (Gaudron J), [49], [79], [91]–[94] (McHugh J, with whom Gleeson CJ agreed), although McHugh J opined at [62] that the case was covered by *Caledonian Collieries Ltd v* ***Speirs*** (1957) 97 CLR 202, 220 (Dixon CJ, McTiernan, Kitto and Taylor JJ), but (at [63]) that this was not the way the case was put at trial or on appeal below.
44 *Crimmins* (1999) 200 CLR 1, [111] (McHugh J), [324] (Callinan J).

a statutory power, the policy of the statute is significant. The absence of a statutory duty normally negates the existence of a common law duty".[45]

(1) Justice Gaudron disagreed, holding that: (a) the common law is not "superimposed upon statutory powers"; (b) the statute operates "in the milieu of the common law"; (c) the common law applies unless excluded; (d) the common law may be excluded expressly, or by necessary implication, such as where the proposed duty of care would involve a breach of statutory duty, require the exercise of powers the body does not possess, or from the terms, nature or purpose of the powers and functions conferred by the statute.[46]

(2) Justice McHugh (with whom Gleeson CJ relevantly agreed[47]) also disagreed, holding that: (a) contrary to the approach of Lord Hoffman in *Stovin*, determination of a duty of care does not depend on public law concepts; and (b) on the authorities, "the negligent exercise of a statutory power is not immune from liability simply because it was within power, nor is it actionable in negligence simply because it is ultra vires".[48]

(3) Justice Kirby also disagreed, holding that: (a) a common law duty of care is excluded at the threshold if, on a true reading of the statute, Parliament has expressly excluded it, or has imposed a discretionary function incompatible with a common law action;[49] (b) otherwise, application of public law criteria to evaluate whether a common law duty can co-exist with a statute was contrary to the majority in *Pyrenees* and expressly rejected by the House of Lords in *Bedfordshire*;[50] and (c) the public law and the common law had developed in different ways and by reference to different considerations.[51]

(4) It may be inferred that Callinan J also disagreed. In stating the terms of the duty of care owed by the Authority, his Honour footnoted "cf" Lord Nicholls in *Stovin* at 936, where his Lordship opined that the extent of a common law obligation would "march hand in hand with the authority's public law obligations".[52]

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45 *Crimmins* (1999) 200 CLR 1, 10.5 (D F Jackson QC).
46 *Crimmins* (1999) 200 CLR 1, [26]–[27] (Gaudron J).
47 *Crimmins* (1999) 200 CLR 1, [3] (Gleeson CJ).
48 *Crimmins* (1999) 200 CLR 1, [82]–[83] (McHugh J).
49 *Crimmins* (1999) 200 CLR 1, [203], [213] (Kirby J).
50 *X (Minors) v Bedfordshire County Council* [1995] AC 633.
51 *Crimmins* (1999) 200 CLR 1, [216]–[218] (Kirby J).
52 *Crimmins* (1999) 200 CLR 1, [360] (Callinan J).

25 The precise reason why each of Gummow J and Hayne J dissented is important. It lay in Hayne J's conclusion that the only statutory power to which the duty of care could attach was a power to make orders, which had a legislative character.[53]

(1) Justice Gaudron, had she agreed, would have held that a common law duty was excluded by necessary implication from the statute.[54]

(2) Similarly, McHugh J (with whom Gleeson CJ agreed) held that the Authority had powers not of a quasi-legislative or "policy" character by which it could have ameliorated the relevant risk.[55]

26 This conclusion was a necessary and essential premise to Hayne J's discussion of "distortion", which related to quasi-legislative powers.[56] His Honour's dissenting reasons in this regard were also expressly addressed to a duty of care to positively exercise a quasi-legislative power.

27 Thus, *Crimmins* and *Pyrenees* both stand in the path of an exclusionary principle that precludes a duty of care, in the exercise of an administrative (non-legislative) power in the circumstances of a particular case, only because it would affect the field of public law discretion (or "decisional freedom") conferred by the statute.

(v) A duty to not cause harm in the valid exercise of statutory powers

28 In a long line of authority, the common law has made those exercising statutory power liable for harm caused in the positive exercise of those powers.[57] That the power exercised to cause harm derives from statute has never, of itself, denied liability at common law.[58] The imposition of a common law duty on a public authority cannot, therefore, of itself involve an impermissible distortion of the authority's statutory power, without departing from that line of authority. The Minister's reliance on cases concerning judicial review (AS, fn 23, [13]) starts in the wrong field to found propositions about the degree of constraint required by the common law in tort.

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53 *Crimmins* (1999) 200 CLR 1, [280], [284], [288] (Hayne J). Justice Gummow's agreement at [169] formed the basis of his conclusion at [170].

54 *Crimmins* (1999) 200 CLR 1, [32] (Gaudron J).

55 *Crimmins* (1999) 200 CLR 1, [131] (McHugh J).

56 *Crimmins* (1999) 200 CLR 1, [291]–[297] (Hayne J).

57 J [359]–[363]; *Weld v The Gas-Light Company* (1816) 171 ER 442; *Geddis* [1878] 3 App Cas 430, 455–456; *Speirs* (1957) 97 CLR 202, 220 (Dixon CJ, McTiernan, Kitto and Taylor JJ), and the decisions referred to; *Birch v Central West County District Council* (1969) 119 CLR 652, 657–659 (Barwick CJ); *Sutherland* (1985) 157 CLR 424, 436–437 (Gibbs CJ), 458–459 (Mason J), 501 (Deane J); *Pyrenees* (1998) 192 CLR 330, [177] (Gummow J), [252.2] (Kirby J); *Crimmins* (1999) 200 CLR 1, [25] fn 36 (Gaudron J), [62] (McHugh J); *Ibrahimi* (2018) 366 ALR 341, [213] (Payne JA). See also the list in *Sutherland* (1985) 157 CLR 424 at 458.

58 *Geddis* [1878] 3 App Cas 430.

B. Common law and statute: inconsistency, incoherence, policy (Grounds 1 and 2)

(i) The test for inconsistency or incoherence

29 *Sullivan* exemplifies an instance where "a statutory regime may itself, in express terms or by necessary implication, exclude the concurrent operation of a duty at common law".[59] An equivalent explanation of "competing duties" was earlier given by Gaudron J in *Crimmins* (paragraph 24(1) above). The result may be described as "inconsistency" or "incoherence" — the statute having excluded the common law, the common law must give way.

30 However, "incoherence" cannot cloak a principle precluding a duty of care on the executive in valid exercise of statutory power, without contradicting *Crimmins*, *Pyrenees* and the premise of s 75(iii). As Mason J observed in *Sutherland*, "unless the statute manifests a contrary intention, a public authority which enters upon an exercise of statutory power may place itself in a relationship to members of the public which imports a common law duty to take care".[60]

31 Unlike the tort of misfeasance in public office, where "the purported exercise of power must be invalid",[61] in negligence, "[p]ublic officers, like all other subjects, are liable for conduct that amounts to a tort unless their conduct is authorised, justified or excused by statute. A statute is not construed as authorising, justifying or excusing tortious conduct unless it so provides expressly or by necessary intendment".[62]

32 Express exclusion of a common law duty of care[63] must be clear, and even then, is strictly confined.[64] Necessary intendment may be inferred, for example, where the proposed common law duty would: (a) require breach of a statutory duty;[65] (b) be incompatible or irreconcilable with a statutory duty or give rise to inconsistent obligations;[66] or (c) require the Minister to exercise powers she does not possess.[67]

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59 *Graham Barclay* (2002) 211 CLR 540, [147] (Gummow and Hayne JJ).
60 (1985) 157 CLR 424, 459 (Mason J).
61 *Northern Territory v Mengel* (1995) 185 CLR 307, 356 (Brennan J).
62 *Northern Territory v Mengel* (1995) 185 CLR 307, 358 (Brennan J).
63 *Crimmins* (1999) 200 CLR 1, [114] (McHugh J). See, eg, *Civil Liability Act 2002* (NSW), s 43A.
64 *Brodie* (2001) 206 CLR 512, [197] (Kirby J).
65 *Crimmins* (1999) 200 CLR 1, [26] (Gaudron J).
66 *Sullivan* (2001) 207 CLR 562, [55], [60] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); ***Tame*** *v New South Wales* (2002) 211 CLR 317, [24], [28] (Gleeson CJ), [57] (Gaudron J), [122]–[126] (McHugh J), [298] (Hayne J); *Hunter and New England Local Health District v* ***McKenna*** (2014) 253 CLR 270, [29]–[33] (French CJ, Hayne, Bell, Gageler and Keane JJ).
67 *Crimmins* (1999) 200 CLR 1, [26] (Gaudron J); *Kirkland-Veenstra* (2009) 237 CLR 215, [63] (French CJ), [112] (Gummow, Hayne and Heydon JJ), [149] (Crennan and Kiefel JJ).

33 That inconsistency may arise where recognition of the common law duty would conflict with the statutory duty[68] does not lead to the conclusion that anything short of complete coincidence between public law and private law duties denies the latter, which would swing back to Lord Hoffman's reasoning in *Stovin*, rejected by majorities in both *Pyrenees* and *Crimmins*. Rather, there is a grey area where the two legal frameworks may co-exist: "[p]eople may be subject to a number of duties, at least provided they are not irreconcilable".[69]

34 Further, in *Sullivan*, a common law duty to persons suspected of harming children was inconsistent with a statutory scheme that made the interests of the children paramount.[70] To put it another way, parliament had impliedly authorised mental injury to persons accused of child abuse (J [324]-[327]). Cases of inconsistency, where a proposed duty would fundamentally undermine the purpose of a statute, are not special to public authorities.[71]

35 Discussions of "inconsistency" or "incoherence" in failure-to-act cases such as ***Graham Barclay*** *Oysters Pty Ltd v Ryan*[72] and *Stuart v* ***Kirkland-Veenstra***,[73] cannot be automatically translated to a case asserting a duty to take reasonable care in the exercise of statutory powers, where there is less scope for inconsistency. The authority's positive steps are taken under the statute, and it is those steps which "create a danger".[74] The courts should not impute to parliament an intention to authorise causation of physical harm in the positive exercise of statutory powers, unless such an implication is irresistible.[75]

36 By reason of the matters in Section A(iv) above, such an implication is not required only because the imposition of a common law duty of care would affect the manner in which a statutory power can be validly exercised (AS [25], [38]). Every declaration by the judiciary that the executive owes a common law duty of care in the valid exercise of statutory power might be said to "distort" or "skew" the exercise of that power, if one means to say that the common

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68 See, eg, *Sullivan* (2001) 207 CLR 562, [55]-[62] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *Tame* (2002) 211 CLR 317, [24]–[27] (Gleeson CJ), [57] (Gaudron J), [231] (Gummow and Kirby JJ), [298]-[299] (Hayne J); *McKenna* (2014) 253 CLR 270, [29] (French CJ, Hayne, Bell, Gageler and Keane JJ).

69 *Sullivan* (2001) 207 CLR 562, [60] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).

70 (2001) 207 CLR 562, [62] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).

71 See, eg, *Miller v Miller* (2011) 242 CLR 446, [101] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

72 (2002) 211 CLR 540.

73 In *Kirkland-Veenstra* (2009) 237 CLR 215, the consideration by Crennan and Kiefel JJ of statutory purpose at [139] was explicitly in the context of considering "provisions, which might be utilised to prevent or minimise harm". See also *Sutherland* (1985) 157 CLR 424, 460, 464 (Mason J).

74 *Sutherland* (1985) 157 CLR 424, 460 (Mason J). See also ***Alec Finlayson*** *Pty Ltd v Armidale City Council* (1994) 51 FCR 378, 409–410 (Burchett J).

75 *Binsaris v Northern Territory* (2020) 94 ALJR 664, [25] (Gageler J, citing *Coco v The Queen* (1994) 179 CLR 427, 436), [101] (Gordon and Edelman JJ, citing *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, [11]).

law has drawn a line through the field of options for valid exercise of the power (J [388]–[391]).

37 Different considerations arise in respect of pure economic loss. Where a public power must be exercised having regard to a range of public and private interests, imposing a duty to pay special regard to private economic interests of a discrete class will often "skew" the exercise of the power, in that Parliament may be taken not to have intended that such a duty be recognised.[76]

(ii) The proposed duty does not create incoherence with the Act

38 The Act is enacted, relevantly, to give effect to Australia's obligations under the Biodiversity Convention and other environmental and world heritage treaties (J [156]). The Biodiversity Convention's preamble stated that the parties were conscious of the "importance of biological diversity for … maintaining life sustaining systems of the biosphere" and were concerned that biological diversity was being "significantly reduced by certain human activities".

39 Part 3 prohibits the taking of actions that have, would have, or are likely to have, a significant impact on specified matters of national environmental significance (**MNES**). Those prohibitions are subject to exemptions. They do not apply if the taking of the action has been approved under Pt 9, or if the Minister (on receiving a referral) has decided under Pt 7 that the prohibiting provision is not a "controlling provision" in respect of the action.

40 Here: (a) the Minister received a referral in respect of the Extension Project (J [22]); (b) a delegate determined under s 75(1) that the Extension Project was a "controlled action" for ss 18, 18A, 24D and 24E (J [25]); (c) the Extension Project was assessed under a bilateral agreement (J [25]); (d) the NSW Independent Planning Commission assessed the Extension Project, and then provided a copy of its assessment report, and its statement of reasons, to the Minister, under ss 47(4) and 130(2)(a) of the Act, and cl 6.2 of the bilateral agreement (J [26]).

41 In deciding, under Pt 9, whether to approve the Extension Project (with or without conditions), the Minister had to consider (a) matters relevant to any matter protected by the "controlling provisions" for the action and (b) economic and social matters (s 136(1)). In considering those matters, the Minister had to take into account, relevantly, the principles in s 3A, including: (a) "decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations"; (b) "if there are threats of

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[76] See, eg, *MM* (2012) 191 LGERA 292, [98] (Allsop P, Basten JA and Bergin CJ in Eq agreeing); J [345]. For similar reasons, Dixon J held in *Roo Roofing* [2019] VSC 331 [486], [503]–[506], that the Commonwealth did not owe a duty to avoid economic loss, in exercise of executive power under s 61 of the Constitution.

serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation"; and (c) "the principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations"[77] (s 136(2)(a)).

42 The Minister could decide what specific "economic and social matters" to take into account,[78] including any adverse economic and social impacts.[79] Further, an object of the Act is to provide for the protection of the environment (s 3(1)(a): including especially, but not limited to, MNES); "environment" includes "people and communities" and the "social, economic and cultural aspects of" the environment (s 528).

43 Those provisions authorise the Minister to consider whether an action will cause physical harm to human beings (especially where s 3A principles are engaged). This falls within the "closed system of the matters the Minister [is] to consider in making [her] decision and the things that should be taken into account".[80]

44 The respondents accept that the Minister's condition-making power correlates to s 136(1)(a) (matters protected), rather than s 136(1)(b) (economic and social matters). However, the Minister's submission that this "signifies a distortion" (AS, [37]) proves too much. Parliament surely intended the Minister could refuse to approve an action that threatened to cause economic and social harm (something she could not take into account under s 75) — there is nothing in s 136(1)(b) to indicate that this consideration can only support approval. It must be inferred that parliament intended, in such a case, that the Minister would unconditionally refuse, and could invite the proponent to refer a proposed action without the consequent harm.

45 Nothing in those provisions expressly, or by necessary intendment, excludes the Minister from civil liability for approving a project that causes personal injury. Rather, the duty found by the primary judge is consistent with ss 3(1)(a), 3A, 136(1)(b) and 136(2)(a).

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77 See also *Convention on Biological Diversity*, art 3, and definition of "sustainable use" in art 2.

78 *Blue Wedges Inc v Minister for Environment, Heritage and the Arts* (2008) 167 FCR 463, [115] (North J); *Tarkine National Coalition Inc v Minister for the Environment* (2015) 233 FCR 254, [25], [45] (Jessup J).

79 Compare s 75(2) of the Act, which expressly distinguishes between adverse and beneficial impacts.

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

46 The power under ss 130 and 133 is plainly not of a quasi-legislative character (J [476]).[81] That the Minister may decide which "economic and social matters" to take into account for a proposed action, means that her discretion is not "distorted" or "skewed" by being exercised in the 'milieu' of a common law that imposes a duty to avoid causing personal injury.

47 That outcome makes sense. If the Minister approved the building and operation of a factory, upriver from a town, knowing it would emit cyanide that would poison the residents' water supply and might cause them harm, there is no good reason why parliament should be taken necessarily to have intended to deny the residents relief at common law. Unlike the powers exercised in *Sullivan* and ***Tame*** *v New South Wales*,[82] there is no competing duty imposed on the Minister by the Act, such as would require the approval of the Extension Project regardless of the harm caused to human and non-human life.

48 The consideration favouring approval of most actions is their economic and social benefits (AS, [19]), which the Minister must consider <u>together with economic and social detriments</u>, under s 136(1)(b). In *Sullivan*, the proposed duty fundamentally undermined the purpose of the statutory powers. By contrast, the Minister will owe a duty only where a specific action referred under the Act will foreseeably cause physical harm. Here, protection of human life from harm caused by increased atmospheric CO_2 concentration is entirely consistent with the protection of MNES: including non-human species, ecological communities, and heritage places (such as the Great Barrier Reef), which will also be harmed by fires, heatwaves etc.

49 Nor does the definition of "impact" in s 527E, which affects s 136(1)(a), create any potential inconsistency (AS, [36]). That definition applies to prohibition, assessment and approval or refusal of impacts <u>on MNES</u> under the Act. The duty of care does not affect those matters.

<u>(iii) "Policy" as distinct from coherence</u>

50 In *Roads and Traffic Authority of NSW v* ***Refrigerated Roadways*** *Pty Ltd*, Campbell JA (with whom McColl JA agreed) conducted a comprehensive review of judicial treatment of the so-called "policy/operational distinction".[83] His Honour concluded, with respect correctly, that "the weight of opinion seems to be against the policy/operational distinction being used as a

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81 Cf *Sutherland* (1985) 157 CLR 424, 500 (Deane J); *Pyrenees* (1998) 192 CLR 330, [180]–[182] (Gummow J); *Crimmins* (1999) 200 CLR 1, [27], [32] (Gaudron J), [87] (McHugh J), [170] (Gummow J), [292] (Hayne J); *Graham Barclay* (2002) 211 CLR 540, [14] (Gleeson CJ).

82 (2002) 211 CLR 317.

83 (2009) 77 NSWLR 360, [231]-[259].

determinant of when a duty of care is owed".[84] To the extent that the policy/operational distinction remains part of Australian common law,[85] it should be applied at the breach stage, when the court is determining what should have been done to discharge the duty of care.[86] The distinction, which itself is unstable,[87] has been developed in non-feasance cases, as opposed to cases where the public authority 'creates the danger' by exercising its statutory power.

51 Many statutory decisions made by the executive concern "policy", or "political questions", in the sense that they involve competing considerations and are made by a government elected by the people, whose ministers are accountable to parliament. That does not, of itself, deny the common law (see [12] and fn 14 above): "'every judge throughout the land' decide[s] political questions because they are tendered in a justiciable form. In such cases, judges enjoy no privilege to refrain from giving answers. The fact that the questions are political, or have political connotations or consequences, affords no excuse for inaction".[88]

52 The Minister's submissions seem to invite adoption of the American "political questions" doctrine,[89] or one like it. The political questions doctrine has not been accepted in Australia.[90] Chapter III confers jurisdiction to hear and determine a "matter",[91] including under s 75(iii). In the present matter, the question whether a public authority owes a duty of care to not cause harm in the positive exercise of its powers[92] is justiciable.

53 In *American Electric Power Co v Connecticut*,[93] the Supreme Court held that any claim against private fossil fuel emitters under the "federal common law of nuisance" had been displaced by federal legislation authorising the US EPA to regulate CO_2 emissions. In that case, the relevant "policy" creating inconsistency was in legislation enacted by the federal congress.

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84 *Refrigerated Roadways* (2009) 77 NSWLR 360, [259(b)].

85 It has been abandoned in England: see *N v PBC* [2020] AC 780, [31].

86 See ***Romeo*** *v Conservation Commission (NT)* (1998) 192 CLR 431, [115], [138]–[140] (Kirby J) cf [18] (Brennan CJ); *Crimmins* (1999) 200 CLR 1, [87] and [131] (McHugh J with whom Gleeson CJ agreed); *Brodie* (2001) 206 CLR 512, [151] (Gaudron, McHugh and Gummow JJ); *Refrigerated Roadways* (2009) 77 NSWLR 360, [259].

87 See *Pyrenees* (1998) 192 CLR 330, 393–4 (Gummow J); *Romeo* (1998) 192 CLR 431, 484 (Kirby J) and 492 (Hayne J); *Crimmins* (1999) 200 CLR 1, 101 [292] (Hayne J); *Graham Barclay* (2002) 211 CLR 540, 556 [12] (Gleeson CJ), 664 [321] (Callinan J); ***Vairy*** *v Wyong Shire Council* (2005) 223 CLR 422, 451 (Gummow J).

88 *Bennett v The Commonwealth* (2007) 231 CLR 91, [82] (Kirby J citing A. V. Dicey).

89 See generally *Baker v Carr* 369 US 186 (1962).

90 See *Melbourne Corp v Commonwealth* (1947) 74 CLR 31, 82 (Dixon J); *Thorpe v Commonwealth of Australia (No 3)* (1997) 144 ALR 677, 692 (Kirby J); *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1998) 19 FCR 34, 373 (Gummow J).

91 See generally *South Australia v Victoria* (1911) 12 CLR 667, 708 (O'Connor J); *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, 606 (Gaudron J); *Brodie* (2001) 206 CLR 512, 555 (Gaudron, McHugh and Gummow JJ).

92 Compare *Graham Barclay* (2002) 211 CLR 540, [5] ("[t]he complaint is not about acts, but about omissions").

93 564 US 410 (2011).

54 If the label "policy" or "political" — which the Minister seeks to attach to the primary judge's decision — relies on something beyond the legislative intention of Parliament, it is unclear what criteria are invoked, or why they are appropriate for a Ch III Court.

(iv) A mandatory consideration?

55 The primary judge held that human safety was a relevant mandatory consideration, outside of s 136(1), but implied from the subject-matter, scope and purpose of the Act (J [404], [406]).

56 That was not a conclusion the respondents sought, and nor was it necessary to their argument. With respect, his Honour could have reached the same conclusions on incoherence in J [398], [399], [402], [405] and [407] on the basis that human safety was a permissible consideration, under s 136 (as the Minister accepts it is: AS, [33]), without needing to elevate it to the level of a mandatory consideration. Coherence did not require the public law to align with the common law, any more than the common law had to align with the public law (Section A(iv)). There is no incoherence because the Act does not stand against the Minister giving appropriate weight to a risk of harm to human safety from an action, and refusing if that risk (together with any residual impacts on MNES) outweighs the economic and social benefits of the action.

57 Therefore, even if Ground 2(a) and/or (b) are made out, for the reasons given in Section B(ii), the proposed duty is not incoherent with the Act.

C. Reasonable foreseeability (Ground 3(a)-(b))

(i) The test for reasonable foreseeability

58 Reasonable foreseeability of harm is a necessary, but not sufficient, condition for recognising a duty.[94] It is undemanding.[95] A risk of injury "which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable".[96] It is not necessary that precise particulars of each potential harm be foreseeable; it is sufficient that harm of the kinds and by the causes identified be reasonably foreseeable.[97] It is enough at the duty stage that the risk of harm be real, not far-fetched or fanciful,[98] in the exercise of reasonable foresight.[99] Reasonable

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94 *Crimmins* (1999) 200 CLR 1, [72], [93.1] (McHugh J); *Sullivan* (2001) 207 CLR 562, [42] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *Tame* (2002) 211 CLR 317, [12] (Gleeson CJ), [250] (Hayne J); *Graham Barclay* (2002) 211 CLR 540, [9] (Gleeson CJ).

95 *Tame* (2002) 211 CLR 317, [96] (McHugh J, citing *Shirt v Wyong Shire Council* [1978] 1 NSWLR 631, 641).

96 (1980) 146 CLR 40, 48 (Stephen and Aickin JJ agreeing); see also 53 (Wilson J).

97 *Chapman v Hearse* (1961) 106 CLR 112, 120–121 (Dixon CJ, Kitto, Taylor, Menzies and Windeyer JJ).

98 *McKenna* (2014) 253 CLR 270, [30] (French CJ, Hayne, Bell, Gageler and Keane JJ).

99 *Tame* (2002) 211 CLR 317, [14], [16] (Gleeson CJ), [105]–[108] (McHugh J), [233] (Gummow and Kirby JJ).

foreseeability is more-readily established if the authority has actual knowledge of the risk of harm.[100] Once reasonable foreseeability is established, other salient features must be considered, while adhering to the appropriate common law method of reasoning.[101]

59 The above analysis occurs before both breach and causation. At the breach stage, the court considers the magnitude of the risk and its degree of probability with other relevant factors.[102] At the causation stage, the court considers whether the negligence either caused or materially contributed to the loss, in both a factual and legal sense.

60 In ***Bonnington*** *Castings Ltd v Wardlaw*,[103] the medical evidence was that "pneumoconiosis is caused by a gradual accumulation in the lungs of minute particles of silica inhaled over a period of years" (at 621). Lord Reid held that: (a) "the disease is caused by the whole of the noxious material inhaled and, if that material comes from two sources, it cannot be wholly attributed to material from one source or the other"; (b) "the source of his disease was the dust from both sources, and the real question is whether the dust from the swing grinders materially contributed to the disease"; (c) any contribution above *de minimis* is material; (d) the swing grinders contributed a non-negligible quota of dust; and (e) the factory owners were therefore liable (at 621–623). That is good law in Australia, where harm is caused by multiple conjunctive factors.[104]

61 The accumulated cause of harm is a strong analogy for the causation of harm by the accumulation of CO_2 in the atmosphere. The present case is stronger than multiple polluters to a river, where each cause is neither necessary nor sufficient.[105] Like *Bonnington*, each contributing cause is necessary, though not sufficient, because it is the accumulated whole that causes the harm. Nor is the harm divisible, as might be possible where two defendants each pollute a stream with oil; a bushfire in conditions caused by the concentration generated by the perfect accumulation of all CO_2 emissions is more analogous to a fire that burns a barn,[106] or wharf,[107] when the oil ignites.

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100 *Pyrenees* (1998) 192 CLR 330, [246] (Kirby J).
101 *Crimmins* (1999) 200 CLR 1, [77] (McHugh J), compare [160] (Gummow J, in dissent); *Sullivan* (2001) 207 CLR 562, [51] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *Brookfield* (2014) 254 CLR 185, [25] (French CJ).
102 *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 48 (Mason J).
103 [1956] AC 613.
104 *Amaca Pty Ltd v Booth* (2011) 246 CLR 36, [70] (Gummow, Hayne and Crennan JJ).
105 *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] AC 649, [185].
106 *Rahman v Arearose Ltd* [2001] QB 351, [17]–[18] (Laws LJ).
107 *The Wagon Mound (No 2)* [1967] 1 AC 617; AS, [43].

62 The Minister denies the possibility of imposing a duty, where the reasonably foreseeable harm is caused by an accumulation, to which the defendant will be one of many contributors (AS, [47]). That inverts the analysis. That a person who owes a duty of care can be liable for harm caused by their material contribution entails that a person can owe such a duty of care, based on the foreseeability of such harm. Whether materiality is established is a question for the causation stage, not the duty stage.

63 Had the Minister wished to submit that accumulation of CO_2 in the atmosphere would in future be the same whether or not the Extension Project was approved (cf AS, [42], [46], [68], [69]), she would have had to lead expert evidence, or at least cross-examine Professor Steffen to put that to him. She did neither. It is not a proposition of which the Court can take judicial notice.[108]

(ii) The primary judge applied the correct test for reasonable foreseeability

64 The primary judge correctly: (a) identified and applied the test for reasonable foreseeability (J [186]–[192]); and (b) rejected the Minister's assertion that a break in the chain of causation would deny the reasonable foreseeability of harm.[109]

65 The risk of harm to Australian children, from hazards caused by temperature rise, increases with increased CO_2 emissions (J [75], [83]). However, the uncontroverted evidence of Professor Steffen was that there is a real risk that the accumulation of CO_2, including carbon from the Extension Project, would increase temperature to, or beyond, a level that would trigger a 'tipping cascade' of feedback processes, which would result in the 'Hothouse Earth' scenario (and consequent personal injury to Australian children) (J [87]-[88], [90], [257], [249]).

66 ***Fairchild*** *v Glenhaven Funeral Services Ltd*[110] (AS, [48]) arose from an "evidentiary gap".[111] The House of Lords held that, where a mesothelioma victim was tortiously exposed to asbestos by two or more employers, but due to the limitations of medical science, could not prove on the balance of probabilities which of them had caused the mesothelioma, all were liable. Their liability "was for causing the disease … and not merely for exposing the employee to the risk of doing so".[112] The Minister submits that the primary judge's reasoning on the "tipping

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108 Reasoning to similar effect was held, on judicial review, to be "arbitrary and capricious" in *WildEarth Guardians v US Bureau of Land Management* 870 F 3d 1222 (10th Cir, 2017), 1235–1236. See also J [86].

109 J [194].

110 [2003] 1 AC 32.

111 *Amaca Pty Ltd v Booth* (2011) 246 CLR 36, [80], quoting Jane Stapleton, "Factual Causation and Asbestos Cancers" (2010) 126 *Law Quarterly Review* 351, 356.

112 *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* [2019] 3 WLR 613, [25] (Males LJ).

cascade" adopts the *Fairchild* approach to causation (AS, [48]). That fails to take account of the primary judge's (correct) observations that: (a) the risk of an occurrence and its cause are quite different; and (b) ordinarily, risk is assessed prospectively, and causation is assessed retrospectively (J [78], [187], [194]).

67 Once carbon is extracted from the Extension Project, transported, burned, and emitted as CO_2, it will accumulate, and contribute to the total atmospheric CO_2 concentration. If a tipping cascade then occurs, thus increasing concentration and temperature regardless of further human emissions, that will have been caused by all accumulated carbon, including that presently stored underground, north of Gunnedah. In that event, the 100Mt of CO_2 will have contributed to catastrophic harm, and that will be relevant to assessing the materiality of its contribution. There will be retrospective certainty, and no question of risk. The primary judge assessed risk only because that is what the prospective foreseeability inquiry requires.

(iii) Conclusion

68 *Ground 3(a)*: The primary judge was right not to incorporate causation into reasonable foreseeability. The Court had to assess the foreseeability of the risk of harm, not to chart a direct line of causation between the Extension Project and the harm to Australian Children. The primary judge's finding (at J [253]) that the prospective contribution to the risk of exposure to harm made by the approval of the extraction of coal from the Extension Project "may fairly be described as tiny" does not detract from his Honour's conclusion that the risk of harm was not far-fetched and fanciful and therefore was reasonably foreseeable. The Minister has actual knowledge of the risk of harm caused by increased CO_2 emissions. Reasonable foreseeability is established.

69 *Ground 3(b)*: It is important to bear in mind that the parties' submissions about the prospective connection between the 100 Mt of CO_2 emissions and increased risk of harm were directed to a prospective question of causation raised by the claim for an injunction (J [79]). If duty were established, the injunction claim required consideration of "the degree of probability of the apprehended injury, the degree of seriousness of the injury and the requirements of justice between the parties"[113] (J [497]–[498]). That was the context for the contentions recorded in J [80] and [84]. When that prospective question intersected with *Bonnington*, materiality became a significant issue. Its significance to the question whether harm caused by the

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113 *Apotex Pty Ltd v Les Laboratoires Servier* (No 2) (2012) 293 ALR 272, [46] (Bennett J, citing *Hurst v Queensland (No 2)* [2006] FCAFC 151, [21]).

accumulated CO_2 emissions is reasonably foreseeable (see J [225], [234], [235]) is far less. It is plainly foreseeable that, at the end of the 21st century, people aged 80–100 will suffer personal injury from the increased accumulation, and atmospheric concentration, of CO_2. The injunction claim having failed, the question whether the 100 Mt from the Extension Project materially contributed to the harm actually caused by the aggregate is a question to be asked, if at all, retrospectively after harm has been suffered.

D. Control (Grounds 3(c) and 4)

(i) The test for control

70 Another salient feature, "the degree and nature of control able to be exercised by the defendant to avoid harm",[114] is a measure of whether a public authority's conduct so closely and directly affects the plaintiff as to justify imposing a duty of care.[115] It includes the public authority's power to minimise the risk of harm.[116] For a proposed duty to act, the authority's control over the risk is very significant.[117] The court considers the degree and nature of the authority's control over the risk of harm in question.[118] In such non-feasance cases, where statutory powers exist which may be exercised to minimise or increase the risk, this will be indicative of a duty.[119] An example is where a public authority has statutory powers that enable it to prohibit or regulate activity in a particular location.[120]

71 By contrast, in cases where the positive exercise of statutory power is said to create the danger, control is more readily seen as sufficient to impose a duty of care to exercise that power with reasonable care (J [268–[269]).[121]

72 Control need not be exclusive. One or more entities may have control, to varying degrees, over the risk of harm. A duty may be imposed on a public authority, even if a private party has more

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114 *Stavar* (2009) 75 NSWLR 649 at [102] (Allsop P).

115 *Graham Barclay* (2002) 211 CLR 540, [154] (Gummow and Hayne JJ); *Agar* (2000) 201 CLR 552, [70].

116 *Crimmins* (1999) 200 CLR 1, [43] fn 57 and the authorities cited therein (Gaudron J).

117 *Pyrenees* (1998) 192 CLR 330, [80] (Toohey J), [115] (Mason J), [168] (Gummow J); *Graham Barclay* (2002) 211 CLR 540, [20] (Gleeson CJ), [90]–[94] (McHugh J), [149], [150] (Gummow and Hayne JJ); *Kirkland-Veenstra* (2009) 237 CLR 215, [113], [114] (Gummow, Hayne and Heydon JJ), [136]–[138] (Crennan and Kiefel JJ).

118 *Kirkland-Veenstra* (2009) 237 CLR 215, [113] (Gummow, Hayne and Heydon JJ); *Graham Barclay* (2002) 211 CLR 54, [149] (Gummow and Hayne JJ).

119 As to control or minimisation of risk, see *Pyrenees* (1998) 192 CLR 330, [168] (Gummow J); *Crimmins* (1999) 200 CLR 1, [43] fn 57 (Gaudron J). As to increasing the risk see *Great Lakes Shire Council v Dederer* [2006] NSWCA 101, [179] (Ipp JA).

120 *Vairy* (2005) 223 CLR 422, [37] (McHugh J).

121 See *Sutherland* (1985) 157 CLR 424, 445 (Gibbs CJ), 460 (Mason J); *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 556-58 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ); *Alec Finlayson* (1994) 51 FCR 378, 411 (Burchett J).

control than the public entity (J [281][122]). For example, control was the basis of liability in ***Dorset Yacht*** *Co Ltd v Home Office*,[123] where the Home Office was liable for damage caused by criminal acts of others.[124]

73 Control is more likely to indicate a duty where the person at risk of harm has little or no control over that risk. By contrast, autonomy of actors in the causal chain may contraindicate a duty. For example, in ***Agar*** *v Hyde*,[125] injured rugby players were unable to establish that the defendants owed them a duty of care to alter the rules of play so as to reduce their exposure to unnecessary risk, because they, and those who injured them, autonomously engaged in the risky activity.[126] The same would not be true for children playing compulsory sport at school.[127]

(ii) The Minister has sufficient control

74 The primary judge was correct to find that the Minister has "substantial and direct control over the source of harm" (J [288]). The Minister would, by approving the Extension Project, unlock a causal chain that would contribute to the increasing accumulation of atmospheric CO_2, which accumulation would cause harm by events including fires and heatwaves (J [193]–[200], [205]–[235]). Consistently with *Caledonian Collieries Ltd v* ***Speirs***[128] and *Crimmins*, approving the Extension Project is an act which will "create a danger" to Australian children in the future.

75 Unlike adult rugby players, the Australian children have no autonomy or control in respect of the foreseeable harm that is coming. That a third party, the owner of the mine, also has control over the risk (addressed further below) does not deny the Minister control. This is a positive act case (cf AS, [54]). The Minister has authorised Whitehaven to extract the coal, for the very purpose of exporting it for combustion, and emission as CO_2. The Minister cannot deny control because Whitehaven does exactly what she has authorised it to do. This direct authorisation of the harmful conduct is analogous to the development approval cases.[129] Whitehaven will extract

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122 In *Crimmins* (1999) 200 CLR 1, it was held that there was a sufficient level of control to impose a duty of care, see: [45]–[46] (Gaudron J), [129]–[130] (McHugh J, Gleeson CJ agreeing at [3]), [351], [354] (Callinan J), [206] (Kirby J), despite the employer being in a much greater position of control, see [278], [285] (Hayne J in dissent).

123 [1970] AC 1004, cited in ***Modbury Triangle*** *Shopping Centre ltd v Anzil* (2000) 205 CLR 254, [21] (Gleeson CJ).

124 See also, eg, *Lee v Carlton Crest Hotel (Sydney) Pty Ltd* [2014] NSWSC 1280, [356] (Beech-Jones J); *Swan v South Australia* (1994) 62 SASR 532.

125 (2000) 201 CLR 552.

126 *Agar* (2000) 201 CLR 552, [88]–[90] (Gaudron, McHugh, Gummow and Hayne JJ).

127 *Agar* (2000) 201 CLR 552, [13] (Gleeson CJ), [91] (Gaudron, McHugh, Gummow and Hayne JJ).

128 (1957) 97 CLR 202.

129 See, eg, J [391]. And see *Sutherland* (1985) 157 CLR 424, *Alec Finlayson* (1994) 51 FCR 378, *Avenhouse v Hornsby Shire Council* (1998) 44 NSWLR 1, *Moorabool Shire Council v Taitapanui* (2006) 14 VR 55, *Western Districts Developments Pty Ltd v Baulkham Hills Shire Council* (2009) 75 NSWLR 706, *Makawe Pty Ltd v Randwick City Council* [2009] NSWCA 412, and *Bankstown City Council v Zraika* (2016) 94 NSWLR 159.

and export the coal for burning, precisely as it proposes, only with the Minister's knowing approval;[130] without it, it will not. That is more control than a parent has over a boy with a shanghai, who will hit another in the eye although told to use it only at home.[131] And the intervening action of Whitehaven is more likely to happen than the theft by Borstal boys of a yacht.[132] The present case bears no analogy to the control the owner of a shopping centre has over unknown men who come at night with a baseball bat.[133]

E. Vulnerability and reliance (Ground 3(d))

76 "Was the plaintiff … vulnerable in the sense that the plaintiff could not reasonably be expected to adequately safeguard himself or herself … from harm?"[134] While 'general reliance' is no longer good law, McHugh J's reference in *Pyrenees* to "situations where individuals are vulnerable to harm from immense dangers which they cannot control or understand and often enough cannot recognise"[135] is apposite here.

77 The law has long recognised children as a class of vulnerable persons. The *parens patriae* doctrine, which dates back to the 13th or early 14th century,[136] provides that the Crown has an inherent jurisdiction to do what is for the benefit of the incompetent: the care of those who are not able to take care of themselves.[137] Since at least 1696, that inherent jurisdiction has extended to children.[138] The jurisdiction has been described as "essentially protective in nature".[139] Although the jurisdiction has, in practice, long-since been delegated to the courts, it is a jurisdiction that belongs to the Crown. The "protective" aspect inherent in the relationship between the executive and Australian children was also recognised by Gaudron J in *Minister for Immigration and Ethnic Affairs v Teoh*.[140] In *Vaitaiki v Minister for Immigration and Ethnic Affairs*, Burchett J, giving the leading judgment of the Full Court, referred to her Honour's judgment in *Teoh* and acknowledged the significance of the "well-being of the community's

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130 *Smith v Leurs* (1945) 70 CLR 256, 262 (Dixon J) ("the act of the third person could not have taken place but for his own fault or breach of duty"). See also J [283].
131 *Smith v Leurs* (1945) 70 CLR 256, 264 (Dixon J).
132 *Dorset Yacht* [1970] AC 1004, 1030 (Lord Reid).
133 *Modbury Triangle* (2000) 205 CLR 254.
134 *Crimmins* (1999) 200 CLR 1, [93(3)]; see also [91] (McHugh J).
135 (1998) 192 CLR 330, [107] (McHugh J).
136 *Re Eve* (1986) 2 SCR 388, 407. See generally Custer, "The Origins of the Doctrine of *Parens Patriae*" (1978) 27 *Emory Law Journal* 195, 195.
137 See generally *Department of Health and Community Services v JWB and SMB* (***Marion's Case***) (1992) 175 CLR 218, 258–259 (Mason CJ, Dawson, Toohey and Gaudron JJ).
138 *Falkland v Bertie* (1696) 23 ER 814 (Ch), 818.
139 *Marion's Case* (1992) 175 CLR 218, 280 (Brennan J).
140 (1995) 183 CLR 273, 304 (Gaudron J); see also 292 (Mason CJ and Deane J).

weakest and most vulnerable members, who are also its future".[141]

78 Ground 3(d) of the Notice of Appeal misrepresents the primary judge's findings. His Honour did not find that the Minister was in a "protective relationship" with the Australian Children. Rather, without determining whether legal obligations were imposed upon the Minister by reason of *parens patriae*, he held that common law jurisdictions have historically identified, and continue to identify, a relationship between the government and children, founded upon the capacity of the government to protect, and the special vulnerability of children. This special vulnerability was taken to support 'vulnerability' and 'reliance' as affirmative indicators supporting the recognition of a common law duty of care (J [311]).

79 In any event, children are specially vulnerable to the harms foreshadowed by the evidence. On the uncontested evidence, they are "extremely vulnerable" to a real risk of harm from events in the "fundamentally altered world" (J [289]) in which they will live in the last decades of this century, including frequent, long, intense heatwaves and fires. There is nothing they can do to protect themselves from the "immense dangers" posed by increasing CO_2 concentration in their lifetime. They are powerless to prevent CO_2 emissions or the consequences of its accretion in the atmosphere (J [296]). They cannot even vote or stand as candidates in federal elections, or otherwise seek to effect change through the political system.

F. Indeterminacy (Ground 3(e))

80 Indeterminacy is a policy consideration utilised to avoid liability in an indeterminate amount for an indeterminate time to an indeterminate class.[142] Concern about indeterminacy frequently arises where the defendant cannot determine how many claims might be brought against it or what the general nature of those claims might be.[143] However, it is not the size or number of claims that is decisive. If both the likely number of claims and the nature of them can be reasonably calculated, it cannot be said that imposing a duty on the defendant will render that person liable in an indeterminate amount for an indeterminate time to an indeterminate class.[144] The principle of indeterminacy is designed to protect the defendant against indeterminate liability, not numerous plaintiffs.[145]

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141 (1998) 150 ALR 608, 616.
142 ***Bryan*** *v Maloney* (1995) 182 CLR 609, 618 (Mason CJ, Deane and Gaudron JJ).
143 ***Perre*** *v Apand Pty Ltd* (1999) 198 CLR 180, [106] (McHugh J).
144 *Perre* (1999) 198 CLR 180, [107]–[108] (McHugh J).
145 *Perre* (1999) 198 CLR 180, [139] (McHugh J).

81 Indeterminacy is a key salient feature where the proposed duty is to avoid causing pure economic loss. Where a duty involves avoidance of physical harm, limits on potential physical consequences of a defendant's conduct can almost always be sufficiently identified, for the purposes of identifying the class to whom the duty is owed with sufficient certainty.[146]

82 Further, "it is fallacious to argue that a duty of care cannot arise if the members of the class to whom it is owed cannot be identified before the harm eventuates".[147] Examples to the contrary include: (a) a duty owed by a council to any person injured by driving over a faulty bridge;[148] (b) a duty owed by a council to all pedestrians to construct and keep a footpath reasonably safe;[149] (c) a duty owed by an employer to any person who lived with an employee and contracted mesothelioma from exposure to asbestos on the employee's clothes;[150] (d) a duty owed by a council, in granting development consent for a driveway, to persons injured by a car entering an intersection from that driveway;[151] and (e) a duty owed by a council to the owner of a property, damaged by a fire that started at the council tip, 11km away.[152]

83 In *Agar*, indeterminacy was one reason why the International Rugby Football Board members owed no duty of care to injured players.[153] There, the extent of the potential liability was uncertain because it was confined only by the number of people who chose to play the sport anywhere in the world.[154] The class was therefore not ascertainable by reference to immutable characteristics of class members. Instead, the size and make-up of the class could change, based on people's choices, in a way that was not reasonably ascertainable to the Board. Again, school-aged children playing compulsory sport might have been in a different position.[155]

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146 *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 7)* [2021] FCA 237, [1043] (Yates J). See also *Caltex Oil (Aust) Pty Ltd v The Dredge Willemstad* (1976) 136 CLR 529, 544-545 (Gibbs J); *Bryan* (1995) 182 CLR 609, 618-619 (Mason CJ, Deane and Gaudron JJ), 633 (Brennan J); *Esanda Finance Corp Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241, 302 (Gummow J) quoting *Al Saudi Banque v Clark Pixley* [1990] Ch 313, 330; *Perre* (1999) 198 CLR 180, [6] (Gleeson CJ), [101], [108] (McHugh J), [198] (Gummow J), [244] (Kirby J), [330] (Hayne J).

147 ***Weber*** *v Greater Hume Shire Council* (2019) 100 NSWLR 1 at 8 [23] (Basten JA, with whom the other judges agreed at 44 [200], 46 [210]).

148 *Brodie* (2001) 206 CLR 512.

149 *Ghantous v Hawkesbury City Council* (1999) 102 LGERA 399.

150 *Stavar* (2009) 75 NSWLR 649.

151 *Bankstown City Council v Zraika* (2016) 94 NSWLR 159. An appeal was allowed, because s 43A of the *Civil Liability Act 2002* (NSW) denied breach. But Leeming JA described the council's submission that it owed no duty as "a large one" ([106]).

152 *Weber* (2019) 100 NSWLR 1.

153 (2000) 201 CLR 552, [19]–[21] (Gleeson CJ), [67] (Gaudron, McHugh, Gummow and Hayne JJ), [127] (Callinan J).

154 *Agar* (2000) 201 CLR 552, [19] (Gleeson CJ).

155 (2000) 201 CLR 552, [13] (Gleeson CJ) and [91] (Gaudron, McHugh, Gummow and Hayne JJ).

84 Ground 3(e) mischaracterises the judgment. It suggests that the primary judge held that there was indeterminacy of the posited duty. However, the primary judge made no such finding (J [442], [469]–[473]). Rather, his Honour identified that: (a) the posited duty related to personal injury only; and (b) the Minister is or can be sufficiently informed about the likely number of potential claimants (J [469]–[470]).[156] His Honour rejected the Minister's submissions on indeterminacy, which principally turned on the size of the class of people the subject of the posited duty (J [435], [442]). In doing so, his Honour correctly held that size is not a proxy for indeterminacy (J [436]–[440]).

85 In any event, the error asserted is that a finding of indeterminacy was not coupled with a finding that this tended against recognition of a duty. Indeterminacy is only one factor for the court to consider.[157] The weight that will be placed on indeterminacy will depend on the degree of indeterminacy of the class (it would be inaccurate to consider indeterminacy as binary; it is better considered as a spectrum of determinacy). The scope of liability is not, here, so indeterminate as to deny a duty of care.

86 The unprecedented scope of the duty owed to Australian Children is the product of the unprecedented scale of the potential, irreversible harm that will be caused by increasing CO_2 concentration (AS, [60]). That scale does not make liability indeterminate. The class of persons to whom the duty is owed is, by the terms of the primary judge's declaration, ascertainable. Unlike in *Agar*, the class is not defined by reference to the members' choice to engage in a particular activity. They have no choice but to live the remainder of their lives on Earth. Further, the foreseeable harm is personal injury. As stated above, duties to avoid physical harm are ordinarily sufficiently determinate to give rise to the requisite 'neighbourhood' or proximity to warrant the imposition of the duty.

87 The common law imposes "solidary liability": "liability may be joint or several but each wrongdoer can be treated as the effective cause and therefore bear the whole loss".[158] That legislation modifying a defendant's liability for economic loss or property damage[159] does not apply to personal injury cannot be used by a defendant to deny solidary liability for personal injury (cf AS, [61]). In *Bonnington*, the appellants had accepted below that, if they were liable,

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156 J [469]-[470].
157 *Stavar* (2009) 75 NSWLR 649, [103] (Allsop P); J [98].
158 ***Hunt & Hunt*** *Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 656, [10] (French CJ, Hayne and Kiefel JJ).
159 *Hunt & Hunt* (2013) 247 CLR 656, [16]–[17].

they were liable for the whole.[160] By contrast, if the Minister were, in future, sued for damages, she could seek contribution against other persons she says should make contribution, either under statute or general law.[161] The converse of the Minister's submission about proportionality (AS, [61]) is that if enough people make a small-enough contribution to catastrophic harm, none of them is liable, leaving the harm "as an unexplained, non-caused miracle".[162]

G. Findings of fact (Ground 5)

88 *Ground 5(a)*: The Minister submits that the primary judge erred in fact in finding that "the best available outcome that climate change mitigation measures can now achieve is a stabilised global average surface temperature of 2°C above pre-industrial levels" (at J [31] and [74(ii)]).

89 These paragraphs contain no error on the part of the primary judge. They reflect his Honour's acceptance of the uncontroverted evidence regarding the first of "three possible climate futures", described by Professor Steffen as "stabilisation of global average surface temperatures at, or very close to, 2°C above pre-industrial".[163] Professor Steffen's unchallenged evidence was that Scenario 1 "is the best possible outcome we can envisage today",[164] and is one that would require certain mitigation measures (including restriction of emissions) to be taken.[165]

90 Professor Steffen variously referred to the temperature increase associated with this scenario (Scenario 1) as being "at, or very close to, 2°C",[166] "approximately 2°C above the pre-industrial level",[167] "a 2°C target",[168] "the 2°C temperature target",[169] "around 2°C",[170] "a 2°C temperature level",[171] "about 2°C"[172], as well as "approximately equivalent to, or slightly higher than, the upper Paris accord target of "well below 2°C"".[173] This is consistent with IPCC

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160 *Bonnington* [1956] AC 613, 614.5; *Holtby v Brigham & Cowan (Hull) Ltd* [2000] ICR 1086, [14].
161 See, eg, *CSR Ltd v Amaca Pty Ltd* (2016) 62 VR 359.
162 *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] AC 649, [189], quoting Richard Wright, "The NESS Account of Natural Causation: A Response to Criticisms" in R Goldberg (ed), *Perspectives on Causation* (2011), 304–305.
163 Steffen at p 19 (answer to Q25), (AB Pt B Tab 44); J [59].
164 Steffen at p 19 (answer to Q25), (AB Pt B Tab 44); J [64].
165 Steffen at pp 20-21 (answer to Q25), (AB Pt B Tab 44); J [65], [70] ff.
166 Steffen at p 19 (answer to Q25), (AB Pt B Tab 44).
167 Steffen at p 20 (answer to Q25), (AB Pt B Tab 44).
168 Steffen at pp 20, 22 (answer to Q25), (AB Pt B Tab 44).
169 Steffen at pp 21-22, 24 (answer to Q25), (AB Pt B Tab 44).
170 Steffen at p 20 (answer to Q25), (AB Pt B Tab 44).
171 Steffen at p 21 (answer to Q25), (AB Pt B Tab 44).
172 Steffen at p 27 (answer to Q26), (AB Pt B Tab 44).
173 Steffen at p 19 (answer to Q25), (AB Pt B Tab 44). So much was acknowledged by the primary judge at J [89], where his Honour concluded that "Read in context, the better view is that when Professor Steffen was referring to the stabilised average global temperature for his "Scenario 1" he meant 2°C or slightly lower but not "well below 2°C" and not the upper target of the Paris Agreement".

estimates that for Scenario 1, global surface temperature change was projected to likely exceed 1.5°C by 2100 (high confidence), and it was more likely than not that it would exceed 1.5°C (medium confidence).[174] Accordingly, the primary judge did not go "further along the scale than Professor Steffen" in describing this scenario.

91 *Ground 5(b):* the Minister submits that the primary judge erred in fact in finding that "at a stabilised global average surface temperature above 2°C, there is an exponentially increasing risk of the Earth being propelled into an irreversible 4°C trajectory" (at J [31], [74(iii)], [75]).

92 In these paragraphs, the primary judge sought to address the evidence regarding the relationship between (a) increases in global average surface temperature, and (b) the risk of triggering "a global tipping cascade" of feedback processes, many of which are linked,[175] that "takes the trajectory of the Earth System out of human control or influence and leads to a much hotter Earth" (being the 'Hothouse Earth' scenario described by Professor Steffen).[176] In this regard, Professor Steffen gave unchallenged evidence that the risk of triggering a tipping cascade increases with the rise in global average surface temperature.[177] He also gave evidence about the approximately linear relationship between (a) human emissions of CO_2 from all sources, and (b) the increase in global average surface temperature.[178] However, there are also "non-linear" impacts of this relationship, whereby the activation of feedback processes (some of which have begun to activate even at the current global average temperature increase of approximately 1.1°C above pre-industrial levels[179]) may "accelerate warming of the Earth System".[180] It was these non-linear impacts to which the primary judge refers when reference is made to "an exponentially increasing risk of the Earth being propelled into an irreversible 4°C trajectory because of 'Earth System' changes".[181]

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174 Intergovernmental Panel on Climate Change (IPCC), 'Climate Change 2014: Synthesis Report', November 2014 at p 60 (AB Pt B Tab 16). Scenario 1 is equivalent to RCP 4.5: Steffen at p 19 (answer to Q25), (AB Pt B Tab 44).

175 Feedback processes (which accelerate the warming of the Earth System) are of three main types: melting ice, forest dieback and changes in the Earth System circulation patterns: Steffen at pp 17, 24 (answers to Q24 and Q25), (AB Pt B Tab 44).

176 Steffen at p 17 (answer to Q24), (AB Pt B Tab 44). 'Hothouse Earth' is broadly correlated with a 4C global average surface temperature increase: Steffen at p 20 (answer to Q25), (AB Pt B Tab 44); J [65]-[66].

177 Steffen at p 24 (answer to Q25), (AB Pt B Tab 44).

178 Steffen at p 17 (answer to Q24), (AB Pt B Tab 44); J [41].

179 Steffen at pp 20, 24 (answers to Q24, Q25), (AB Pt B Tab 44).

180 Steffen at p 17 (answer to Q24), (AB Pt B Tab 44); J [30], [41], [50].

181 J at [31].

93 Consistent with this, the evidence at trial was that "there is a small (but non-zero) probability of initiating a tipping cascade at a 2°C temperature rise",[182] and that whilst there is "a risk that a 2°C temperature rise could trigger a Hothouse Earth trajectory … the probability of such a scenario is much lower for a 2°C temperature rise than for a 3°C temperature rise".[183] However, as the global surface temperature "rises towards 2°C and beyond, the risk of such feedbacks being activated increases".[184] Critically, Professor Steffen opined that there is a "significant risk" that 'Scenario 2' (which assumed a 3°C increase in global average surface temperatures) "is not accessible", by reason of the "many feedback processes [that] will be activated by a 3°C (or even lower) temperature rise, with a consequent significant risk that a tipping cascade will be activated".[185] In this regard, Professor Steffen observed that "there is a very significant risk that strongly nonlinear feedbacks will be activated by a 3°C warming".[186]

94 *Ground 5(c)*: the Minister submits that the primary judge erred in fact in finding that "there is a real risk that even an infinitesimal increase in global average surface temperature above 2°C above pre-industrial levels may trigger a 4°C Future World" (at J [253]).

95 The Minister's assertion that there was no evidence before the primary judge capable of supporting such a finding is inaccurate.[187] As set out in paragraphs 91 and 92 above, Professor Steffen's evidence was that the risk of initiating a tipping cascade (which could in turn trigger the Hothouse Earth scenario) increases at and from 2°C — and that it may not be possible to stabilise the Earth System at 3°C, by reason of the non-linear feedback processes that are at "significant risk" of being triggered at that level.[188] By contrast, Professor Steffen opined that it is still possible (at this time) to stabilise the Earth System at around 2°C of warming (our current "best outcome"), if significant actions are taken in pursuit of this scenario.[189] It was therefore open to the primary judge to construe the risk in the manner that his Honour did.

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182 Steffen at p 21 (answer to Q25), (AB Pt B Tab 44); J [65]. To this end, Professor Steffen referred to IPCC data (2018) that estimated that there was a 'moderate' risk of triggering these feedbacks even at a 2C temperature rise: Steffen at p 23 (answer to Q25), (AB Pt B Tab 44).

183 Steffen at p 20 (answer to Q25), (AB Pt B Tab 44).

184 Steffen at p 17 (answer to Q24), (AB Pt B Tab 44); J [51].

185 Steffen at p 20 (answer to Q25), (AB Pt B Tab 44); J [65].

186 Steffen at p 23 (answer to Q25), (AB Pt B Tab 44); J [65] (note: this paragraph of the judgment contains a typographical error, it should say "warming" not "warning").

187 AS, [67].

188 Steffen at p 20 (answer to Q25), (AB Pt B Tab 44).

189 Steffen at pp 20-21 (answer to Q25), (AB Pt B Tab 44).

96 *Grounds 5(d) and 5(e)*: The Minister submits that the primary judge erred in fact in finding that:

(1) "a decision under the EPBC Act to approve the Extension Project would cause an increase in CO_2 emissions of 100Mt above the CO_2 emissions that would otherwise occur" (at J [79], [84], [247]–[249]); and

(2) "if the Extension Project were to proceed, any CO_2 emissions resulting from burning of coal extracted through that project would be outside the emissions contemplated by the "carbon budget" necessary to achieve a target of 2°C above pre-industrial levels" (at J [86]–[87], cf [72]).

97 These grounds mischaracterise the respondents' case and the primary judge's findings.

98 The respondents were not required, as part of their case, to establish a counterfactual regarding what would happen to global CO_2 emissions if the Extension Project were not approved.[190] Further, the Minister chose to lead no evidence at trial in support of such a counterfactual.[191]

99 Rather, the respondents' case is that, if the Extension Project is approved, it will materially contribute to the accumulated CO_2 emissions and increased atmospheric concentration. The Department of Planning, Industry and Environment, Vickery Extension Project State Significant Development Assessment SSD 7480 (May 2020) (which was admitted into evidence without objection) states that the Extension Project will cause an increase of 100 Mt of CO_2 'Scope 3' emissions over the life of that project.[192] Further, Professor Steffen gave uncontroverted evidence[193] that in order to stabilise global average surface temperatures at around 2°C, "over 90% of Australia's ***existing*** coal reserves cannot be burned", "currently operating coal mines must be phased out as soon as possible (preferably no later than 2030), and […] no new coal mines, or extensions to existing coal mines, can be allowed".[194] It is clear from Professor Steffen's evidence that he considered the CO_2 Scope 3 emissions expected to result from approval of the Extension Project (being an extension to an existing coal mine) to

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190 The primary judge (correctly) rejected this submission by the Minister at trial: J at [85]–[86].

191 J at [86]: "The Minister called no evidence. The Minister essentially contended that the Court should infer that the 100 Mt of CO_2 would likely be emitted in accordance with the Paris Agreement. There is no sufficient basis for that inference. The Minister relied upon little else than speculation, in circumstances where the evidence showed that at least one of the potential consumers of the coal is not a signatory to the Paris Agreement." It is submitted that the Minister's reliance on generic statements about demand for coal made in a 2018 Austrade publication (AB Pt B Tab 19) and a 2019 Ministers for the Departments of Industry, Science, Energy and Resources press release are not sufficient to make out the Minister's case in this regard.

192 DPIE at p 122 [678] (AB, Pt B, Tab 30).

193 Which the primary judge accepted: J [70] ff.

194 Steffen at p 22 (answer to Q25), (AB Pt B Tab 44) (emphasis added).

be incompatible with the carbon budget associated with Scenario 1. This was correctly recognised by the primary judge (J [87]).

100 The Minister led no evidence to suggest that the 100 Mt of CO_2 from the Extension Project would likely be burnt 'within' the carbon budget that Professor Steffen identified as being compatible with Scenario 1 (and the Minister did not cross-examine Professor Steffen) (J [86]–[87]). The primary judge observed that "there is not sufficient evidence before me on which I could conclude that there is no real prospect of the 100 Mt of CO2 being burnt outside the available fossil fuel budget necessary to meet a 2°C target" (J [86]). Further and in any event, the primary judge found that it was not necessary for success of the respondents' case for them to demonstrate that the 100 Mt of Scope 3 CO_2 would be emitted by the Extension Project outside of the 'carbon budget'. In this regard, his Honour made the observations at J [88].

101 As stated in Section C(ii), this evidence was directed to prospective causation and breach, for the purpose of seeking an injunction. Even if one of the Minister's factual grounds were to succeed on appeal, the Court would conclude, on the uncontested evidence, that the Minister can reasonably foresee the risk of harm that will be suffered by today's children at the end of this century, as the result of the accumulation of future CO_2 emissions, of which the 100Mt will form a part. Whether that part amounts to a material contribution will be a question for breach and causation; it cannot undermine duty.

H. Disposition

102 The appeal should be dismissed.

Dated: 27 September 2021

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