

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 29/10/2020 5:59:06 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Concise Statement
File Number: VID607/2020
File Title: ANJALI SHARMA & ORS (BY THEIR LITIGATION REPRESENTATIVE SISTER MARIE BRIGID ARTHUR) v MINISTER FOR THE ENVIRONMENT (COMMONWEALTH)
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Dated: 29/10/2020 5:59:09 PM AEDT

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

CONCISE STATEMENT IN RESPONSE



FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
DIVISION: GENERAL

No. VID 607 of 2020

ANJALI SHARMA & ORS (BY THEIR LITIGATION REPRESENTATIVE, SISTER MARIE BRIGID ARTHUR)

Applicants

MINISTER FOR THE ENVIRONMENT

Respondent

PARTIES

1. The Applicants have commenced this proceeding, by their litigation guardian, on their own behalf and purportedly as a representative proceeding representing certain children resident in Australia or elsewhere. In circumstances where the Applicants seek only a declaration and injunction, the representative aspect of the proceeding is of no practical utility. The Respondent (the **Minister**) does not accept that all children born before the commencement of the proceeding and resident in Australia or elsewhere necessarily have the same interest as the Applicants.
2. The matters in paragraph 2 of the Concise Statement are not disputed.

THE EXTENSION PROJECT

3. Whitehaven Coal Ltd (**Whitehaven**) holds development consent under the *Environmental Planning and Assessment Act 1979* (NSW) for a greenfield coal mine in northern New South Wales, known as the Vickery Coal Project (the **Approved Project**). Although approved some time ago, coal production from the Approved Project has not yet commenced.
4. The Approved Project will, if it proceeds, involve the extraction of 135 million tonnes (**Mt**) of coal over a 30 year period, with up to 4.5 Mt of coal per year to be hauled by road to an existing coal handling and preparation plant near Gunnedah, for processing and transport by rail to the Port of Newcastle.
5. On 12 February 2016, Whitehaven referred a proposal to extend the Approved Project to the Minister pursuant to s 68 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the **Act**) for consideration as to whether it involved a controlled action under Pt 3 of the Act. The Extension Project would involve an increase in the total coal to be extracted over the life of the mine from 135 Mt to 168 Mt, with an increase in the maximum annual extraction rate to 10 Mt.
6. On 14 April 2016, a delegate of the Minister determined pursuant to s 75 of the Act that the Extension Project is a controlled action, the relevant controlling provisions being ss 18, 18A, 24D and 24E of the Act.

Filed on behalf of the Respondent

File ref: 20206340

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1903

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7. The Extension Project was assessed by the NSW Independent Planning Commission (the **IPC**) which granted development consent for the Extension Project subject to a number of conditions. By letter dated 14 August 2020, the NSW Department of Planning, Industry and Environment provided a copy of the IPC's signed development consent, together with the NSW Department's Assessment Report, to the Minister.
8. In the circumstances, the Minister is subject to a statutory duty to make a decision whether or not to approve the Extension Project for the purpose of the relevant controlling provisions of Pt 3 of the Act. Such a decision must be made within the statutory timeframe, which has been extended to 10 December 2020.
9. The Minister denies that the coal that presently lies underground at the NSW site cannot be extracted without the Minister's approval under the Act for the Extension Project (Concise Statement [5]). Because of the prior approval of the Approved Project, the Minister's approval under the Act is only required to extract the increased amount of coal at the increased annual extraction rate.
10. If the Minister (or her delegate) determines to grant approval for the Extension Project, the question of whether or not coal is extracted in reliance on the approval and, if so, how much and when, and the additional question of how, when and where such coal is burned, depends on the decisions and actions of Whitehaven and others.

IMPACTS OF CLIMATE CHANGE

11. In response to the matters set out in paragraphs 6 to 19 of the Concise Statement, the Minister accepts that the following facts relating to climate change are accurate.
12. There is no dispute that the Earth's climate is changing and humans are primarily responsible. Since 1910, Australia's climate has warmed by just over 1°C, and the surface temperature of oceans around Australia have warmed by around 1°C. Consistent with global trends, eight of the 10 warmest years on record in Australia have occurred since 2005.
13. The observed changes in the Earth's climate are caused by increased greenhouse gases (**GHG**), such as carbon dioxide, in the atmosphere.
14. It is accepted that the concentration of carbon dioxide in the atmosphere has increased globally by 47 per cent since pre-industrial times (around 1750). The main contributor to that observed growth in atmospheric carbon dioxide is emissions from burning fossil fuels, including coal, oil and gas. In the period 1800 to 2018, burning of coal accounted for approximately 45.8% of global carbon dioxide emissions from fossil fuels.
15. Some further warming of the Australian climate is unavoidable. Under all future emissions scenarios, it is very likely that: (a) average temperatures will continue to increase and Australia will experience more heat extremes and fewer frosty days; (b) extreme rainfall events will become more intense; (c) southern and eastern Australia will experience more extreme fire-related weather; (d) the time in drought will increase over southern Australia; (e) sea levels will continue to rise throughout the 21st century, with increased frequency of storm surge events; and oceans around Australia will warm and become more acidic.
16. It is accepted that increases in temperature affect the environment, economy and society. Climate change exacerbates inherent risks in the Australian climate and introduces new risks.

Heatwaves, droughts, bushfires, floods and tropical cyclones are all part of the Australian climate experience. Economic infrastructure in Australia's cities and ports is vulnerable to sea-level rise and storm surges. Australia's agricultural, mining and other industries are all vulnerable to increasing frequency of severe heat and intensity of drought, floods and storms. Terrestrial and marine ecosystems are facing serious threats from climate change, including extreme weather events, bushfires, ocean acidification and marine heatwaves.

17. The effects of increased temperatures are likely to be compounded by climate change induced events such as severe storms, heatwaves, more extreme droughts and floods and sea-level rise. These events have impacts on the Australian economy, Australia's natural and managed terrestrial and marine ecosystems and on the health and wellbeing of individuals, communities, and society.
18. Every part of the globe will be affected by the impacts of climate change. The impacts will vary depending on the vulnerabilities of the specific region.
19. The projected effects of climate change vary depending on the extent of global emissions of GHG in coming years.
20. Australia is a signatory to the Paris Agreement, which came into force on 4 November 2016. The Paris Agreement aims to strengthen the global response to the threat of climate change by holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C. Nationally determined contributions (**NDCs**) are the mechanism by which the Paris Agreement seeks to achieve the long-term goals of holding the increase in the global average temperature to below 2°C above pre-industrial levels. Australia's first NDC under the Paris Agreement include an economy-wide target to reduce GHG emissions by 26 to 28% on 2005 levels by 2030. Australia is on track to exceed its 2030 emissions target by an estimated 16Mt CO₂-e.
21. The effectiveness of measures within Australia to reduce GHG emissions, in terms of reducing adverse effects of climate change within and outside Australia, will depend on the timing and extent of global action to reduce GHG emissions.

IMPACT OF THE PROJECT

22. If it proceeds, by comparison with the Approved Project, the Extension Project would result in a reduction of about 1Mt CO₂-e of Scope 1 emissions, increase of about 0.15 Mt CO₂-e Scope 2 emissions and an increase of about 100 Mt CO₂-e of Scope 3 emissions over the life of the Extension Project.
23. Global CO₂ emissions over the next two decades are dependent on which socio-economic pathway the global economy proceeds on. The US Energy Information Administration International Energy Outlook 2017 states that under their reference case, world energy-related carbon dioxide emissions rise from 33.9 billion metric tons in 2015 to 36.4 billion metric tons in 2030 and to 39.3 billion metric tons in 2040 – an increase of 16% over that period.
24. The Applicants allege that the risk of harm, and the extent and severity of the harm, that they will experience from climate change are questions of degree that depend on the level of concentration of CO₂ at the point when the rate of increase reaches zero. Having regard to the uncertainty as to when the rate of increase will flatten, and the consequential uncertainty as to the risk and extent of harm, and the complex web of factors influencing the overall level of

emissions globally and the resulting impacts on the environment across the world, the allegation that the Applicants will be “more likely” to suffer the relevant harm if the Extension Project goes ahead is speculative.

NO DUTY OF CARE

25. The Minister does not owe a duty of care as alleged. The relevant salient features point overwhelmingly against recognition of the novel duty.

Incoherence

26. The duty of care is incoherent with the Act and more generally with public law principles. Imposition of the duty would distort the statutory task required by ss 130(1) and 133(1) of the Act by elevating as a paramount, and apparently overriding, consideration the potential for the controlled action to cause relevant harm. That is inconsistent with the nature of the task conceived by Div 1 of Pt 9 of the Act.
27. Further, imposition of the alleged duty of care would involve the Court in consideration of the merits of the decision, by requiring it to consider whether the Minister exercised reasonable care to prevent a particular kind of harm when exercising the power under ss 130 and 133 of the Act. Recognition of the duty would therefore introduce into the legal validity of the decision-making a standard which is neither sourced in, nor consistent with, the principles of administrative law. Recognition of the alleged duty would be inconsistent with the limited role of the courts in supervising the legality of statutory decision-making.
28. Coherence of the law is a consideration having such significance as to outweigh any other relevant features that might favour recognition of the alleged duty of care.

Indeterminate liability

29. The Applicants claim that the duty is owed to them, and all children born before the date this proceeding was filed who reside in Australia or anywhere else. Recognition of that duty would expose the Minister to a potential liability of vast scope. Further, there is no logical reason to confine the duty for which the Applicants contend to children already born at the time of commencement of this proceeding. If the duty was recognised, it would be a duty owed to all living persons (perhaps excluding the elderly) and perhaps also to children yet to be born. A duty owed to a class of such breadth is not one which the common law could sensibly recognise.
30. Further and relatedly, recognition of the alleged duty of care would lead, by analogy, to the imposition of an equivalent duty of care on every person who carries out an activity that generates GHG emissions in any quantity that “materially contributes” to overall emissions and every person who performs an act that facilitates or authorises such an activity to occur. If the Applicants’ contentions as to duty were to be accepted, every time a person suffered harm attributable to climate change, a cause of action would arise against every person who has in the past materially contributed to overall emissions, including every statutory authority that has granted approval to engage in an activity that materially contributed to overall emissions. All such people would be joint tortfeasors, liable to contribute to any damages.

Other factors

31. The Minister can control only whether or not the Extension Project is approved in accordance with law pursuant to ss 130(1) and 133 of the Act. As only one of many factors that will determine the extent of future global GHG emissions, approval of the Extension Project will not be determinative of whether or not the Applicants and the represented children experience the relevant harm in the future. Accordingly, the Minister cannot control whether or not the relevant harm occurs.
32. The Applicants do not identify the nature or source of the “special responsibilities” that the Minister is alleged to have to the Applicants and the represented children. The Minister cannot respond to the allegation, which is vague and unclear. Subject to that objection, the Minister says that her responsibility is to discharge her duties as Minister according to law. She denies that she has any special responsibility to the Applicants and the represented children by reason of her position in the Commonwealth Executive.

CAUSATION

33. If there is such a duty of care, which is denied, the Minister further denies that any future breach of that duty would have the necessary causal nexus with the alleged relevant harm.
34. If the Minister approves the Extension Project, that will expand the scope of a project that is already approved for development and cause an incremental increase in permitted coal extraction and therefore the possibility of an increase in downstream emissions. The contribution of the Extension Project to future global GHG emissions does not provide a sufficient factual foundation for the allegation that if the Extension Project goes ahead, it is “more likely” that the Applicants and the represented children will suffer the relevant harm, or more of, and more severe forms of, the relevant harm.

THE MINISTER’S UNDISCHARGED STATUTORY DUTY

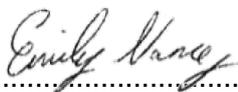
35. The Minister is required by the Act to make a decision as to whether or not to approve the Extension Project. In making that decision, the Minister (or her delegate) must act in accordance with the Act, including by exercising a discretion based on the facts of the matter before her and the criteria in the Act. There is no proper basis for the Applicants to contend that the Minister will, or is likely to, make a particular decision. There is no allegation of predetermination and the statutory discretion has yet to be exercised.

RELIEF

36. The relief sought in the Originating Application should be refused with costs.

I, Emily Nance, certify to the Court that, in relation to the Response to the Concise Statement filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for each of the matters in the Response.

Date: 29 October 2020



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Emily Nance
AGS lawyer
for and on behalf of the Australian Government Solicitor
Lawyer for the Respondent