

FEDERAL COURT OF AUSTRALIA

Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment (No 2) [2021] FCA 774

File number: VID 607 of 2020

Judgment of: **BROMBERG J**

Date of judgment: 8 July 2021

Catchwords: **COSTS** – Whether applicants’ failure to fully obtain the relief claimed justifies an order apportioning the applicants’ costs.

DECLARATIONS – Whether declaration describing the duty of care owed by the respondent utile – whether content of duty of care should be formulated by reference to the genus of the risk of harm or by reference to particular manifestations thereof.

REPRESENTATIVE PROCEEDINGS – Rule 9.21(1) of the *Federal Court Rules 2011* (Cth) – whether proceeding should not continue as a representative proceeding – whether representative proceeding should be discontinued because of risk of prejudice to represented persons by operation of *res judicata*.

Legislation: *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 130, 133
Federal Court of Australia Act 1976 (Cth) s 23
Federal Court Rules 2011 (Cth) rr 1.32, 9.21, 9.22, Div 9.2
Supreme Court Rules 1970 (NSW) r 13(1)

Cases cited: *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398
Cruse v Multiplex Ltd (2008) 172 FCR 279
Firebird Global Master Fund II Ltd v Republic of Nauru (No 2) (2015) 90 ALJR 270; [2015] HCA 53
Fuchs Lubricants (Australasia) Pty Ltd v Quaker Chemical (Australasia) Pty Ltd (No 2) [2021] FCAFC 114
Jolley v Sutton London Borough Council [2000] 1 WLR 1082
Kerrison v Melbourne City Council (2014) 228 FCR 87
Mount Isa Mines Ltd v Pusey (1970) 125 CLR 383

Muldoon v Melbourne City Council (2013) 217 FCR 450

Plaintiff M61/2010E v Commonwealth (2010) 243 CLR 319

Queensland North Australia Pty Ltd v Takeovers Panel (No 2) (2015) 236 FCR 370

Roads and Traffic Authority of New South Wales v Dederer (2007) 234 CLR 330

Sandvik Intellectual Property AB v Quarry Mining & Construction Equipment Pty Ltd (No 2) [2017] FCAFC 158

Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment [2021] FCA 560

Stuart v Construction, Forestry, Mining and Energy Union (2010) 185 FCR 308

Zhang v Minister for Immigration, Local Government and Ethnic Affairs (1993) 45 FCR 384

Division:	General Division
Registry:	Victoria
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	59
Date of hearing:	Determined on the papers
Counsel for the Applicants:	Mr N Hutley SC with Mr E Nekvapil, Ms K Brazenor, Ms S Brenker and Mr N Petrie
Solicitor for the Applicants:	Equity Generation Lawyers
Counsel for the First Respondent:	Mr S Free SC with Ms Z Maud
Solicitor for the First Respondent:	Australian Government Solicitor
Counsel for the Second Respondent:	Mr T Howard SC
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ORDERS

VID 607 of 2020

BETWEEN: **ANJALI SHARMA AND OTHERS NAMED IN THE
SCHEDULE (BY THEIR LITIGATION REPRESENTATIVE
SISTER MARIE BRIGID ARTHUR)**
First Applicant

AND: **MINISTER FOR THE ENVIRONMENT
(COMMONWEALTH)**
First Respondent

VICKERY COAL PTY LTD (ACN 626 224 495)
Second Respondent

ORDER MADE BY: BROMBERG J

DATE OF ORDER: 8 JULY 2021

THE COURT DECLARES THAT:

1. The first respondent has a duty to take reasonable care, in the exercise of her powers under s 130 and s 133 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) in respect of referral EPBC No. 2016/7649, to avoid causing personal injury or death to persons who were under 18 years of age and ordinarily resident in Australia at the time of the commencement of this proceeding arising from emissions of carbon dioxide into the Earth's atmosphere.

THE COURT ORDERS THAT:

2. The proceeding not continue as a representative proceeding in respect of persons who were under 18 years of age and not ordinarily resident in Australia at the time of the commencement of this proceeding.
3. The Minister pay the applicants' costs of the proceeding.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BROMBERG J:

1 These reasons deal with the orders and any declarations that should now be made to reflect my earlier reasons published on 27 May 2021 as *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560 (**earlier reasons**). These reasons should be read with the earlier reasons. The abbreviations and defined terms utilised in the earlier reasons are here continued.

2 In the earlier reasons (at [513]), I concluded that the applicants had established that the Minister has a duty to take reasonable care to avoid causing personal injury to the Children when deciding, under s 130 and s 133 of EPBC Act, to approve or not approve the Extension Project. I also concluded that an injunction restraining the Minister from exercising her power under s 130 and s 133 of the EPBC Act in a manner that would permit the extraction of coal from the Extension Project should not be granted.

3 I then raised a number of questions as to what declarations or orders the Court should make. It is convenient to identify the issues raised for determination by these reasons by repeating those questions in the context in which they were raised at [514]-[519] of the earlier reasons:

514 A number of questions arise as to what declarations or orders the Court should make.

515 One of those questions concerns whether any declaration or order made by the Court should extend to the children who are represented by the applicants. As set out at the beginning of these reasons, the applicants have brought the proceeding in a representative capacity on behalf of children who reside in Australia or elsewhere. An issue as to whether the representative nature of the proceeding should be continued was initially raised by the Minister's Concise Statement in Response, but it was not pursued. No submissions have been made on that question at all. Any orders I now make will be binding on each person represented (Rule 9.22(1) of the Rules). Although no order binding on a person represented may be enforced without the Court's leave (Rule 9.22(2) of the Rules), there may nevertheless be consequences for a represented person arising from the doctrine of *res judicata*: see *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398 at 423-424 (Toohey and Gaudron JJ); *Zhang v Minister for Immigration* (1993) 45 FCR 384 at 401-402 (French J). Further, although the applicants did not press for relief in relation to children residing outside of Australia, those children remain represented persons in the proceeding.

516 By reason of those concerns, before making any declarations or orders that may be binding on a represented person, I should hear from the parties and consider whether any such orders should be made including whether the representative nature of the proceeding should be confined or continued.

517 Until that is done, it is appropriate that I confine any binding orders I now make to the applicants alone. I will therefore dismiss the applicants' claim for an injunction and reserve for later consideration whether the claim for an injunction made on behalf of the represented persons should be dismissed or, alternatively, discontinued.

518 I will not, at this juncture, make a declaration as to the duty of care owed by the Minister which reflects my conclusions on that issue. Apart from the question of whether any declaration made should extend to any of the represented persons, the utility of any declaration and the terms of any such declaration should also be addressed by further submissions.

519 Additionally, I need to hear the parties on the question of any order that should be made as to the legal costs of the proceeding.

SCOPE OF THE REPRESENTATIVE PROCEEDING

4 On this issue, the applicants' further submission contended that the representative proceeding should continue in relation to the Represented Children, being the children represented by the applicants who are ordinarily resident in Australia. No submission contending that the representative proceeding should be continued in relation to the represented children not ordinarily resident in Australia (**Other Represented Children**) was made.

5 The Minister contended that the Court should order that the proceeding not continue as a representative proceeding at all.

6 I have determined that the proceeding should continue as a representative proceeding in relation to the Represented Children but should not continue as a representative proceeding in relation to the Other Represented Children.

7 Rule 9.21(1) of the *Federal Court Rules 2011* (Cth) provides:

A proceeding may be started and continued by or against one or more persons who have the same interest in the proceeding, as representing all or some of the persons who have the same interest and could have been parties to the proceeding.

8 Furthermore, r 9.22 of the Rules relevantly provides:

- (1) An order made in a proceeding for or against a representative party is binding on each person represented by the representative party.
- (2) However, the order can be enforced against a person who is not a party only if the Court gives leave.

9 In *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398, the High Court considered r 13(1) of the *Supreme Court Rules 1970* (NSW) (**NSW Rules**) which employed similar language to that utilised by r 9.21(1) of the Rules. Chief Justice Mason and Justices Deane and Dawson described r 13(1) as "expressed in broad terms and ... to be interpreted in the light of

the obvious purpose of the rule, namely, to facilitate the administration of justice by enabling parties having the same interest to secure a determination in one action rather than in separate actions” (at 404). In *Muldoon v Melbourne City Council* (2013) 217 FCR 450 at [184], North J similarly perceived the primary purpose of rule 9.21 as being the avoidance of “a multiplicity of proceedings that agitate the same issues”. That view was endorsed on appeal by Flick, Jagot and Mortimer JJ in *Kerrison v Melbourne City Council* (2014) 228 FCR 87 at [104].

10 Whether a proceeding may be “started and continued” (r 9.21(1)) as a representative proceeding turns in the first instance on whether the party has the “same interest” (r 9.21(1)) as the represented persons, in the sense that “there is a significant question common to all members of the class and they stand to be equally affected by the declaratory relief”: *Carnie* at 421 (Toohey and Gaudron JJ, Mason CJ, Deane and Dawson JJ agreeing except on the question of remitter).

11 I am satisfied that the applicants and the Represented Children have the “same interest”. The proceeding has raised a significant question common to all of them, namely, whether the Minister owes a duty to take reasonable care to avoid causing personal injury to the Children when deciding, under s 130 and s 133 of the EPBC Act, to approve or not approve the Extension Project. As the earlier reasons demonstrate, that question, which has now been answered in the affirmative, is itself dependent upon a series of common questions each of which may also be regarded as “significant”. Furthermore, there is no doubt that both the applicants and the Represented Children stand to be equally affected by the declaration sought.

12 The resistance of the Minister to the representative proceeding continuing in relation to the Represented Children was not based on a lack of commonality of interest. It was based on the contention that whether the proceeding ought to be allowed to continue as a representative proceeding depends on other considerations and that it is appropriate in the exercise of the Court’s discretion that the representative proceeding be discontinued.

13 Division 9.2 of the Rules does not expressly provide for a proceeding commenced as a representative proceeding to continue as such “unless the Court otherwise orders”, as did r 13(1) of the NSW Rules: see *Carnie* at 407. However, it is not in contest that such an order may be made. The Minister relied on s 23 of the *Federal Court of Australia Act 1976* (Cth) as the source of the Court’s undoubted power to order that a proceeding not continue as a representative proceeding. Reliance may also be placed on r 1.32 of the Rules, which provides

that the Court may make any order that the Court considers appropriate in the interests of justice: see *Muldoon* at [173] (North J).

14 *Carnie* suggests that the Court has a broad discretion to discontinue a representative proceeding despite the threshold requirement for such a proceeding having been satisfied. In the leading judgment of Toohey and Gaudron JJ, their Honours at 422 noted that the Court may give directions to enable the proceeding to be determined “with justice to all concerned”. Their Honours continued (references omitted):

The simplicity of the rule is also one of its strengths, allowing it to be treated as a flexible rule of convenience in the administration of justice and applied “to the exigencies of modern life as occasion requires”. The Court retains the power to reshape proceedings at a later stage if they become impossibly complex or the defendant is prejudiced.

15 Further, as Brennan J said at 408 it is “precisely because of the flexible utility of the representative action that judicial control of its conduct is important, to ensure not only that the litigation as between the plaintiff and defendant is efficiently disposed of but also that the interests of those who are absent but represented are not prejudiced by the conduct of the litigation on their behalf”. His Honour went on to say later in that passage that “if, for any reason, the court is not satisfied that the interests of the absent but represented class are being properly advanced, the court should exclude the represented persons from the action. That power can be exercised at any time before the judgment is perfected”.

16 Those observations made in *Carnie* as to the nature and extent of the Court’s discretion to discontinue a representative proceeding, confirm that the Court may exercise that discretion to protect those persons who are represented but not active participants in the proceeding from any potential prejudice to their individual interests which may be brought about by reason of their absence.

17 The potential for those interests to be prejudiced arises primarily from the fact that, subject to the operation of subrr 9.22(2), (3), (4), a represented person is bound by an order made in the proceeding “for or against a represented party” (r 9.22(1)). The exception provided for by subrr 9.22(2), (3), (4) is designed to ameliorate the potential prejudice of an adverse order imposing liability upon a represented party where liability is able to be disputed “on the ground that facts and matters particular to the person entitle the person to be exempt from liability”.

18 However, a represented party may also be prejudiced by reason of the application of the principle of *res judicata*. That possibility was discussed by Toohey and Gaudron JJ in *Carnie*

at 423-424 (and see also *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384 at 401-403 (French J)).

19 To some extent each of the Minister and the applicants relied upon the prospect of prejudice to the Represented Children brought about the possible application of the principle of *res judicata* as a basis for asserting discontinuance in part or in whole.

20 The Minister pointed to the prejudicial consequences of the Court's rejection of the applicants' claim made on behalf of the Represented Children for a finding of a broader duty of care, being a duty extending beyond personal injury and requiring the Minister to take reasonable care to avoid economic loss or property damage to the Represented Children (see my earlier reasons at [148] and [416]).

21 The applicants pointed to my rejection of their own claim for an injunction as posing a risk of a prejudicial consequence for the Represented Children. That was done in support of what was expressed as an application to discontinue the claim for an injunction made by the applicants on behalf of the Represented Children.

22 In both instances, what was relied upon to justify a discontinuance or partial discontinuance was the outcome of the proceeding and in particular the applicants' failure or partial failure to obtain the relief which they had sought on behalf of the Represented Children.

23 In my view, in neither case is the discontinuance contended for justified.

24 It may have been justified if the failure to obtain the full extent of the relief sought by the applicants had occurred because the interests of the Represented Children were not properly advanced in the proceeding or because the conduct of the litigation by the applicants on behalf of the Represented Children had brought about some prejudice to their interests. However, no contention to that effect has been made and nor is there any apparent basis for it.

25 If the justifiable exercise of the Court's discretion to discontinue a representative proceeding was based merely on the potential for a claim or claims made on behalf of represented persons to fail either in part or in whole, the discretion would almost always be exercised and representative proceedings would almost never be permitted to continue. Such an approach would substantially undermine the primary purpose of r 9.21(1) of avoiding the multiplicity of proceedings or, as was said in *Carnie* at 404, of facilitating the administration of justice by

enabling parties with the same interests to secure a determination in one rather than separate actions.

26 In their discussion of *res judicata* in *Carnie*, Toohey and Gaudron JJ did not refer to the possibility that the claims made on behalf of the represented persons may fail as a source of prejudice to those persons and thus a basis for an order requiring discontinuance. So far as their Honours identified a concern that the rights and interests of represented persons not be compromised, the concern did not relate to rights agitated by the proceeding but related to “other rights” against the respondent that the represented persons may have. No such rights are here raised or relied upon.

27 This is not a case where the participation of one or more of the represented persons was likely to affect the outcome of the proceeding. The extent of the duty of care found to exist, and the applicants’ failure to establish a duty in relation to economic or property loss, did not depend on facts and circumstances particular to any of the Represented Children or any subgroup thereof. Likewise, there is no basis for thinking that the injunction sought by the applicants on behalf of the Represented Children may have been granted if the Represented Children had been given the opportunity to put before the Court facts and circumstances particular to them or some of them.

28 There is no basis to substantiate the Minister’s contention that the absence of notice to the Represented Children of the proceeding or the lack of an opportunity for them to have opted out has caused any real prejudice. To the contrary, as the applicants contended, the continuance of the proceeding as a representative proceeding provides to the Represented Children the benefit of any declaration to be granted in their favour.

29 I turn then to deal with whether an order should be made discontinuing the representative proceeding in relation to the Other Represented Children. As stated in the earlier reasons at [4], during the hearing the applicants confined their claims for relief to themselves and the Represented Children. No order or declaration extending to the Other Represented Children is now sought. No submission is now made either to justify the initial inclusion of the Other Represented Children in the representative proceeding or to support the representative proceeding continuing to extend to that class of persons. The utility of the representative proceeding continuing in relation to that class is not apparent. Even if I were to presume that the applicants and the Other Represented Children have the “same interest”, the absence of any

utility is of itself sufficient to justify an order that the representative proceeding not continue in relation to the Other Represented Children.

UTILITY OF DECLARATORY RELIEF

30 The Court’s power to make a declaration is not in contest. Nor is it in contest that the Court should exercise its discretion to do so. The Minister does not contend that the making of a declaration lacks utility. I am satisfied that there is utility in a declaration being made which defines the duty of care which the Court has found exists and which reflects the final outcome of the case with certainty and precision: *Stuart v Construction, Forestry, Mining and Energy Union* (2010) 185 FCR 308 at [89] (Besanko and Gordon JJ with whom Moore J agreed at [35]); *Cruse v Multiplex Ltd* (2008) 172 FCR 279 at [59] (Goldberg and Jessup JJ).

31 At the heart of the legal controversy raised by this proceeding was the issue of whether a duty of care was owed by the Minister to the Children and, if so, the nature and extent of that duty. Each of the parties to the proceeding has a “real interest” in raising the questions to which the declaration would go; the declaratory relief sought is not directed to answering some abstract or hypothetical question; it is directed to determining the legal controversy at the heart of the proceeding: *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at 359 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). Furthermore, the utility of a declaration is more obvious in a case such as this, in which no other relevant orders are to be made and in which the only formal record of the disposition of the proceeding, absent the making of a declaration, would be a dismissal thereof: *Cruse* at [59] (Goldberg and Jessup JJ).

FORM OF DECLARATION

32 The form of the declaration the Court should make is in contest in a number of respects.

33 First, the Minister contended that the declaration should only record the duty as being owed to the applicants. That submission, however, was premised on the Minister succeeding in its contention that the representative proceeding should be discontinued in relation to the Represented Children. Having now rejected that contention, it is appropriate that the declaration extend to the Represented Children.

34 The applicants’ suggested formulation of the persons owed the duty of care encompassed the applicants and “persons under the age of 18 ordinarily resident in Australia”. That formulation has an ambulatory dimension inconsistent with the definition of the Represented Children in the applicants’ Amended Concise Statement, which fixed the represented class of Australian

resident children to those “born before the date this proceeding is filed”. The scope of the declaration should reflect the persons for whom a declaration was sought. As all of the applicants themselves were ordinarily resident in Australia and under 18 years of age at the time the proceeding was commenced, it would be convenient for the declaration to identify the persons to whom the duty of care is owed as:

persons who were under 18 years of age and ordinarily resident in Australia at the time of the commencement of this proceeding.

35 Each of the parties accepts that the duty specified should be confined to the exercise of the Minister’s powers under s 130 and s 133 of the EPBC Act in respect of the Extension Project (expressed as “referral EPBC No.2016/7649”). There are, however, two matters in contest as to the content of the duty. The first is essentially semantic. The Minister suggested that the duty be expressed as a duty to “avoid causing” harm. The applicants contended for a duty “not to cause” harm. I consider that the former more appropriately reflects the final outcome of the case.

36 The second matter in contest is whether the risk of harm to be avoided should be expressed as “personal injury or death ... arising from emissions of carbon dioxide into the Earth’s atmosphere” as the applicants contended or, alternatively, “personal injury or death *from heatwaves or bushfires* arising from emissions of carbon dioxide into the Earth’s atmosphere” as the Minister contended (emphasis added).

37 The Minister’s approach of conditioning or limiting the risk of harm she is to avoid to physical harm caused by heatwaves or bushfires is said to be justified by the Court’s findings as to the risk of harm which is reasonably foreseeable. As I shall explain, the findings made by the Court were broader than those countenanced by the Minister. First, however, it is convenient to make some observations about the nature of a duty of care and the manner in which it should be framed.

38 In *Roads and Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330 at [44], Gummow J (with whom Heydon J agreed) said that “a duty of care involves a particular and defined legal obligation arising out of a relationship between an ascertained defendant (or class of defendants) and an ascertained plaintiff (or class of plaintiffs)”. By its nature, a duty of care entails an obligation to take reasonable care to avoid a risk of harm to those persons to whom the duty is owed. However, the precise content and scope of a duty of care is only able to be determined at the stage of its breach. It is only at that stage that, by reference to what a

reasonable person would do in the circumstances of the particular harm suffered, the nature and extent of the reasonable care required by the duty will be fully revealed.

39 It is rarely the case that a duty of care needs to be framed in other than a general manner. That approach is common because, in the usual case, both duty and its asserted breach are considered at the same time. The novelty of the present proceeding requires the framing of the duty of care to be given more attention than might ordinarily be the case.

40 Although absolute precision may not be available in framing the duty of care, a declaration describing the content of a duty of care ought to provide a respondent with a sufficient understanding of the risk of harm which that person is to avoid. The difference between the applicant and the Minister concerns how that risk of harm should be described.

41 Each of the applicants and the Minister contended that the risk of harm be described by reference to the type of injury at risk and the cause of that risk. I accept that it is appropriate that the description address both the injury and its cause. There is no issue between the parties that the injury in question (“personal injury or death”) should not be described with particularity and is instead appropriately framed by reference to its type or class. However, in relation to the description of the cause of the risk of that type of injury, the Minister contended for particularity of description (“heatwaves or bushfires”) whilst the applicants contended for the cause to be described by reference to its general source, namely, emissions of carbon dioxide into the Earth’s atmosphere. In my view, the applicants’ approach on this issue better reflects the final outcome of the case.

42 An element of a duty of care is the reasonable foreseeability of the risk of harm in question and I accept that the risk of harm described in the declaration to be made should reflect the risk of harm which the Court has found was reasonably foreseeable. The Minister contended, in essence, that the Court’s finding as to the reasonable foreseeability of the risk of harm was limited to heatwaves or bushfires as the responsible cause rather than arising more generally from emissions of carbon dioxide into the Earth’s atmosphere. That contention, in my view, mischaracterises the actual finding made.

43 To appreciate the finding made it is necessary to understand the nature of the exercise that was undertaken.

44 In that respect, it is well settled that what needs to be reasonably foreseeable in respect of the risk of harm is not any particular harm but the type or class of harm or, more accurately, the

type or class of the risk of harm. I referred to many of the relevant authorities in the earlier reasons at [192] as follows:

Before embarking upon the analysis required, there are further observations made in *Chapman v Hearse* which are of relevance to the present case. As the Court said at 120, the test for the existence of a duty of care does not depend upon “the precise sequence of events” which lead to the injury being reasonably foreseeable. Nor is it necessary that the precise damage that may be caused be reasonably foreseeable. That is because “...it would be quite artificial to make responsibility depend upon, or to deny liability by reference to, the capacity of a reasonable [person] to foresee damage of a precise and particular character or upon [that person’s] capacity to foresee the precise events leading to the damage complained of” (at 121).

45 Further, in the earlier reasons at [194] I said:

Furthermore, “[f]oreseeability does not mean foresight of the particular course of events causing the harm. Nor does it suppose foresight of the particular harm which occurred, but only of some harm of a like kind”: *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 402 (Windeyer J). As Gummow J said in *Rosenberg v Percival* (2001) 205 CLR 434 at [64], “[t]he precise and particular character of the injury or the precise sequence of events leading to the injury need not be foreseeable”.

46 To those observations may be added the remarks of Barwick CJ in *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 390 as follows:

But the rarity of such an injury in the circumstances does not in my opinion deny the foreseeability of an injury of the class of which it forms one. That it is sufficient that the class of injury as distinct from the particular injury ought to be foreseen as a possible consequence of particular conduct in order to establish liability for damages for the particular injury is well established. (See e.g., *Chapman v. Hearse*).

47 The well-settled principle referred to in those authorities and the nature of the description to be formulated was concisely stated in the following observation made by Lord Hoffmann in *Jolley v Sutton London Borough Council* [2000] 1 WLR 1082 at 1091:

It is also agreed that what must have been foreseen is not the precise injury which occurred but injury of a given description. The foreseeability is not as to the particulars but the genus. And the description is formulated by reference to the nature of the risk which ought to have been foreseen.

48 The nature of the risk of harm that the Minister must take reasonable care to avoid is personal injury or death to the Children arising from the emission of carbon dioxide from the burning of coal extracted from the Extension Project. That was always the applicants’ case (or part thereof). To establish that case it was necessary for the applicants to demonstrate reasonable foreseeability of that type or class of risk of harm and, forensically, that could only be done by evidence of particular manifestations of that risk. Thus the applicants’ evidence referred to various climatic phenomena induced by increased emissions of carbon dioxide into the Earth’s

atmosphere, such as bushfires, heatwaves, cyclones, air pollution and drought. Of all the particular manifestations of increased emissions of carbon dioxide relied upon, it was only heatwaves and bushfires which the evidence sufficed to establish were reasonably foreseeable in relation to all, rather than merely some, of the Children. However, the Court’s finding of reasonably foreseeability (essentially at [253] of the earlier reasons), although premised on two particular manifestations (heat-waves and bushfires) of the risk (see at [247]), nevertheless encompasses the genus of the risk in circumstances where all that needed to be established as reasonably foreseeable was the genus of the risk of harm in question.

COSTS

49 The applicants seek an order that the Minister pay their costs. The Minister contended that she should only pay two thirds of the applicants’ costs. The discount contended for is based on the applicants’ failure to persuade the Court that a *quia timet* injunction should be granted.

50 The Court has a broad discretion to award costs, but the exercise of that discretion must be guided by principle. The ordinary rule is that, unless there are special or exceptional circumstances, costs follow the event. That means that, absent special circumstances, the unsuccessful litigant will be ordered to pay the costs of the successful litigant. The applicants have here succeeded and, absent some special circumstance which would justify an apportionment of costs, they should have their legal costs paid for by the Minister.

51 The Minister contended that despite the applicants’ overall success, their loss on one “issue” justifies less than a full recovery of costs. The loss on that single issue is, essentially, the special circumstance relied upon by the Minister.

52 The applicants deny that they lost on any “issue”. They contend that this was not a case where there were separate and discrete issues raised for determination. There was, as the applicants contended, only one cause of action which raised the discrete issue of whether a duty of care was owed by the Minister. The applicants sought two forms of relief if they succeeded on that issue. They failed on one form of relief (the grant of an injunction) but succeeded on the other (the grant of a declaration).

53 Contrary to the applicants’ contention, I would not take a technical approach which required that only the failure on a question that may be characterised as an “issue” could justify the existence of the requisite special circumstance. There are at least three circumstances which might deprive a successful party of an order requiring that some or all of its costs be paid. One

of those is where an applicant has only been partly successful in obtaining the relief it sought. In an observation endorsed by the Full Court in *Sandvik Intellectual Property AB v Quarry Mining & Construction Equipment Pty Ltd (No 2)* [2017] FCAFC 158 at [10]-[11] (Greenwood, Rares and Moshinsky JJ) and *Fuchs Lubricants (Australasia) Pty Ltd v Quaker Chemical (Australasia) Pty Ltd (No 2)* [2021] FCAFC 114 at [15] (Beach, Moshinsky and Thawley JJ), Dowsett, Middleton and Gilmour JJ in *Queensland North Australia Pty Ltd v Takeovers Panel (No 2)* (2015) 236 FCR 370 at [11] identified three categories of situations in which a successful party might be deprived of costs:

One such category is where the applicant has been only partially successful in that it has not obtained all of the relief sought. The second category is where a party has succeeded in obtaining the relief sought, but has not succeeded on all bases (factual or legal) upon which it sought such relief. Of course, it is possible that a particular outcome will fall into both categories. A third category involves consideration of the successful party's conduct of the case.

54 Nevertheless, it is common for an applicant who does not succeed on all of the relief claimed to obtain an order in respect of all of its costs. Something more than a mere failure on an aspect of the relief which has been claimed is ordinarily required to demonstrate special circumstances.

55 There is, in my view, nothing in the conduct of the applicants' case which provides the additional factor required. Nor does the relative extent of the time and effort taken up by the unsuccessful claim for relief provide, on its own, the necessary ingredient which establishes the requisite special circumstance.

56 This is simply a case, common enough, where, though substantially successful, the applicants were not entirely successful. There are no special circumstances that warrant a departure from the general or ordinary rule that costs should follow the event and, as French CJ, Kiefel, Nettle and Gordon JJ said in *Firebird Global Master Fund II Ltd v Republic of Nauru (No 2)* (2015) 90 ALJR 270; [2015] HCA 53 at [6] there are "good reasons not to encourage applications regarding costs on an issue-by-issue basis, involving apportionments based on degrees of difficulty of issues, time taken to argue them and the like".

57 Accordingly, an order should be made requiring the Minister to pay the applicants' costs.

CONCLUSION

58 For those reasons, a declaration should be made in the following terms:

The first respondent has a duty to take reasonable care, in the exercise of her powers

under s 130 and s 133 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) in respect of referral EPBC No. 2016/7649, to avoid causing personal injury or death to persons who were under 18 years of age and ordinarily resident in Australia at the time of the commencement of this proceeding arising from emissions of carbon dioxide into the Earth's atmosphere.

59 An order will be made providing that the proceeding not continue as a representative proceeding in respect of persons who were under 18 years of age at the time of the commencement of this proceeding and not ordinarily resident in Australia, as well as an order that the Minister pay the applicants' costs of the proceeding.

I certify that the preceding fifty-nine (59) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Bromberg.

Associate:

Dated: 8 July 2021

SCHEDULE OF PARTIES

VID 607 of 2020

Applicants

Second Applicant:	ISOLDE SHANTI RAJ-SEPPINGS
Third Applicant:	AMBROSE MALACHY HAYES
Fourth Applicant:	TOMAS WEBSTER ARBIZU
Fifth Applicant:	BELLA PAIGE BURGEMEISTER
Sixth Applicant:	LAURA FLECK KIRWAN
Seventh Applicant:	AVA PRINCI
Eighth Applicant:	LUCA GWYTHER SAUNDERS