

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 16/07/2021 4:30:11 PM AEST and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Notice of Appeal (Fee for Leave Not Already Paid) - Form 122 - Rule 36.01(1)(b)(c)
File Number:	VID389/2021
File Title:	MINISTER FOR THE ENVIRONMENT (COMMONWEALTH) v ANJALI SHARMA & ORS (BY THEIR LITIGATION REPRESENTATIVE SISTER MARIE BRIGID ARTHUR)
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised



Sia Lagos

Dated: 16/07/2021 5:27:09 PM AEST

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 Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

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.



Form 122
Rule 36.01(1)(b), 36.01(1)(c)

NOTICE OF APPEAL

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: Victoria
DIVISION: GENERAL

NO. VID

MINISTER FOR THE ENVIRONMENT

Appellant

**ANJALI SHARMA AND OTHERS NAMED IN THE
SCHEDULE (BY THEIR LITIGATION REPRESENTATIVE,
SISTER MARIE BRIGID ARTHUR)**

Respondents

To the Respondents

The Appellant appeals from the judgment and orders as set out in this notice of appeal.

1. The papers in the appeal will be settled and prepared in accordance with the *Federal Court Rules 2011*, Division 36.5.
2. The Court will make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence. You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

TIME AND DATE FOR HEARING:	
PLACE:	Federal Court of Australia Owen Dixon Commonwealth Law Courts Building 305 William Street Melbourne Vic 3000

Date:

.....
Signed by an officer acting with
the authority of the District Registrar

Filed on behalf of the Appellant, the Minister for the Environment
Prepared by: Emily Nance
AGS lawyer within the meaning of s 551 of the *Judiciary Act 1903*
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The Appellant appeals from the whole of the judgment of the Federal Court, except for that part concerning the dismissal of the application for an injunction. Reasons for judgment were given on 27 May 2021 at Melbourne and the Court's orders granting the declaration in respect of a duty of care and as to costs were made on 8 July 2021 at Melbourne. On the same date the Court gave reasons for judgment in respect of those final orders.

GROUND OF APPEAL

1. The primary judge erred in finding that the Minister owed a duty to take reasonable care, in the exercise of her powers under ss 130 and 133 of the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)* in respect of referral EPBC No. 2016/7649 (**Extension Project**), 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 the proceeding (**Australian children**), arising from emissions of carbon dioxide into the Earth's atmosphere.
2. Without limiting ground 1, the primary judge erred in law:
 - (a) in finding that, in exercising her power of approval under ss 130 and 133 of the *EPBC Act*, the Minister must take into account as a mandatory consideration any effect of a decision on human safety;
 - (b) in finding that, as a result of that mandatory consideration, the recognition of a novel duty of care would be in harmony with the *EPBC Act*, because that duty of care required the Minister to consider and give elevated weight to a matter that the *EPBC Act* already required her to consider;
 - (c) in failing to find that the novel duty of care alleged should not be recognised because it was incoherent with the *EPBC Act*, including because it would distort the capacity of the Minister, when exercising her power of approval under ss 130 and 133 in an area of highly contested public policy, to balance competing considerations and interests in the manner contemplated by the *EPBC Act*.
3. Without limiting ground 1, the primary judge erred in law:
 - (a) in failing to identify the causal requirement inherent in determining whether a risk of harm is reasonably foreseeable in the sense relevant to the recognition of a duty of care, or in treating that causal requirement as capable of being satisfied even if the contribution to the risk of the harm occurring that would result from a failure of the Minister to exercise reasonable care is assessed as "tiny" (PJ [253]);
 - (b) in finding that, despite the fact that the primary judge was "unable to say that the evidence itself demonstrates the extent, if any, that a fractional increase in average global temperature of the kind in question poses an additional risk of harm" (PJ [83]), a reasonable person in the Minister's position would nevertheless foresee that a decision under the *EPBC Act* to approve the Extension Project would materially increase the risk:



- (i) that the future world would shift from a stabilised global average surface temperature of 2°C above pre-industrial levels to a point 4°C above pre-industrial levels; or
 - (ii) that all Australian children would be exposed to a real risk of death or personal injury from heatwaves and bushfires induced by climate change resulting from increased CO₂ in the Earth's atmosphere;
 - (c) in finding that the Minister had substantial control, in the sense relevant to the consideration of salient features bearing on the recognition of a novel duty of care, over the risk of emissions of carbon dioxide into the Earth's atmosphere causing personal injury or death to all Australian children;
 - (d) in finding that the Minister is in a protective relationship with the Australian children, in the exercise of executive power and founded upon the capacity of the government to protect and upon the special vulnerability of children, and in treating such a relationship as supporting the recognition of a novel duty of care;
 - (e) in finding that the indeterminacy of the posited novel duty of care did not tend against its recognition.
4. Without limiting ground 1, in circumstances where the identified risk of harm to Australian children arises from the emission of carbon dioxide into the Earth's atmosphere, the primary judge erred in law:
- (a) in treating the position of the Minister in exercising a power of approval under ss 130 and 133 of the EPBC Act as if it was equivalent to that of a person who chooses to engage in activities that emit carbon dioxide into the Earth's atmosphere (PJ [79]);
 - (b) as a consequence, in imposing a novel duty of care the effect of which is to require the Minister to take reasonable care to prevent harm that may be caused or contributed to by the voluntary actions of other persons, in disregard to the general rule that a person is under no duty to prevent another person from doing damage to a third person.
5. Without limiting ground 1, the primary judge erred in fact in finding that:
- (a) 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 (PJ [31] and [74(ii)]);
 - (b) 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 (PJ [31], [74(iii)] and [75]);
 - (c) 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 (PJ [253]);



- (d) a decision under the *EPBC Act* to approve the Extension Project would cause an increase in CO₂ emissions of 100Mt above the CO₂ emissions that would otherwise occur (PJ [79], [84], [247] – [249]);
- (e) if the Extension Project were to proceed, any CO₂ 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 (PJ [86] – [87], cf [73]).

ORDERS SOUGHT

1. That the appeal be allowed.
2. The orders made on 8 July 2021 be set aside and in lieu thereof the following orders be made:
 - (a) The application be dismissed.
 - (b) The applicants pay the first respondent’s costs of the proceedings at first instance as agreed or taxed.
3. Costs of the appeal.

APPELLANT'S ADDRESS

The Appellant's address for service is:

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Melbourne VIC 3000

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The Appellant's address is:

C/- Australian Government Solicitor
Level 34, 600 Bourke Street
Melbourne VIC 3000



SERVICE ON THE RESPONDENT

It is intended to serve this notice of appeal on all Respondents.

Date: 16 July 2021

A handwritten signature in cursive script that reads "Emily Nance".

.....
Emily Nance
AGS Lawyer
for and on behalf of the Australian Government Solicitor
Solicitor for the Appellant



SCHEDULE

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