

Concise Statement

No. _____ of 2020

Federal Court of Australia

District Registry: Victoria

Division: General

Anjali Sharma (by her litigation representative, Sister Marie Brigid Arthur)

First Applicant

Isolde Shanti Raj-Seppings, Ambrose Malachy Hayes, Tomas Webster Arbizu, Bella Paige Burgemeister, Laura Fleck Kirwan, Ava Princi and Veronica Hester (by their litigation representative, Sister Marie Brigid Arthur)

Second to Eighth Applicants

Minister for the Environment

Respondent

The parties

- 1 The Applicants, who are less than 18 years' old (**children**), have commenced this proceeding, by their litigation representative, on their own behalf and as a representative proceeding representing children born before the date this proceeding is filed who ordinarily reside: (a) in Australia (the **Australian Represented Children**); or (b) elsewhere ((a) and (b) together, the **Represented Children**). The Represented Children share the same interests as the Applicants in obtaining the relief in this proceeding.
- 2 The Respondent (the **Minister**) is: (a) a Minister of the Commonwealth; (b) the "Minister" for the purposes of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the **Act**); and (c) an officer of the Commonwealth, within the meaning of s 75(v) of the Constitution.

The Project, the Act and the Minister

- 3 Whitehaven Coal Limited (**Whitehaven**): (a) is ultimately responsible for the proposed development of a greenfield coal mine in northern New South Wales (the **Mine**); (b) received development consent in 2014 to extract coal at the Mine; (c) seeks, via Vickery Coal Pty

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Ltd, its wholly owned subsidiary, to substantially increase the amount and rate of coal extraction permitted over the life of the Mine (the **Project**).

- 4 On 10 February 2016, Whitehaven applied under the Act for approval of the Project (EPBC ID Number 2016/7649). On 14 April 2016, the Minister's delegate decided the Project was a controlled action under s 75(1) of the Act, for ss 18 and 18A, and ss 24D and 24E. The Project was assessed, for the purpose of the Act, under a Bilateral Agreement with NSW. Vickery Coal Pty Ltd is the designated proponent for the Project.
- 5 The coal Whitehaven proposes to extract from the Mine: (a) presently lies underground, storing carbon, and cannot be extracted without the Minister granting the approval sought under the Act; (b) if the Project be approved, will be extracted, exported, and burned, emitting the carbon it contains, as carbon dioxide (**CO₂**), into the atmosphere.

Extraordinary rates of increase in CO₂ concentration and surface temperatures

- 6 During the Holocene period, beginning around 11,700 years before 1750, concentrations in the atmosphere of CO₂, methane, nitrous oxide and tropospheric ozone (the **greenhouse gases**) were consistent with a stable climate, and the concentration of CO₂ in Earth's atmosphere (**CO₂ concentration**) naturally fluctuated between 260 and 280 parts-per-million (**ppm**).
- 7 From about 1750, large-scale industrial activity began in the United Kingdom and then spread throughout the world (the **Industrial Revolution**). First the steam engine, powered by burning coal, and later the burning of oil and natural gas, drove: (a) a transformation in human activity and prosperity; and (b) a sustained and accelerating increase in CO₂ concentration.
- 8 When burned to produce energy: (a) coal produces CO₂; (b) oil produces about 2/3, and natural gas about 1/2, the CO₂ per energy unit, as compared to coal; (c) CO₂ is emitted into Earth's atmosphere, where a substantial portion of it persists for >1,000 years. About 1/3 of present global CO₂ emissions are caused by burning coal.
- 9 During the 800,000 years before the Industrial Revolution, CO₂ concentration ranged from 160–300 ppm. But for human activity, CO₂ concentration would likely have remained in the same range from 1750 until 2150 (the **relevant period**). Since 1750, CO₂ concentration has increased from about 280ppm to about 409ppm, greater than the CO₂ concentration at any previous time in the last 3 million years.
- 10 For 7,000 years before the Industrial Revolution, Earth's global mean surface temperature (**surface temperature**) changed by about 0.01°C per century. But for human activity,

surface temperature would likely have remained in the same range during the relevant period. Since the Industrial Revolution, the surface temperature has increased by greater than 1°C, and is currently increasing at 0.2°C per decade.¹

- 11 The rate of increase in CO₂ concentration, and the rate of increase in surface temperature, have each accelerated since 1750.
- 12 Compared to the rate of change in CO₂ concentration and surface temperature that would otherwise have occurred by operation of the forces and laws of nature (**natural, naturally**), the accelerating rates of increase that have occurred since 1750 are extraordinary.
- 13 Unless the extraction and burning of fossil fuels, coal in particular, is constrained, those extraordinary rates of increase will continue.
- 14 Those extraordinary rates of increase were caused by human activities. Of all human activities, the burning of coal has caused, causes, and unless constrained will continue to cause, the greatest proportion of those extraordinary rates of increase.

Harm from CO₂ emissions

- 15 Humans, by emitting CO₂ into the atmosphere:
 - 15.1 have changed, and will continue to change during the relevant period, Earth's systems, as compared to the way those systems would have changed naturally.
 - 15.2 in particular, are: (a) heating Earth's surface and oceans; (b) acidifying oceans; (c) changing precipitation patterns; (d) raising sea levels; (e) increasing the incidence and intensity of heatwaves, droughts, bushfires, violent storms, storm-surge flooding and other extreme weather events; (f) eroding soil; (g) melting ice on land and sea, and permafrost; and (h) harming and destroying non-human ecosystems, species and beings.
 - 15.3 have, in Australia: (a) increased mean surface temperature to 1.14°C higher than natural; (b) caused unprecedented temperatures and heatwaves; (c) increased the regularity and intensity of heat waves, extreme fire weather days, bushfires, floods, droughts, extreme storms and rain events, and other extreme climatic and weather events; (d) reduced cool-season rainfall in southeast and southwest Australia, increased wet-season rainfall in northern Australia, and increased the proportion of

¹ The Intergovernmental Panel on Climate Change uses the reference period of 1850–1900 to approximate pre-industrial global mean surface temperatures.

total Australian rainfall caused by heavy rainfall since the 1970s; (e) since 1966 increased the rise of sea levels by about 1.4mm per year higher than natural.

- 15.4 increasingly, risk triggering tipping points, including the Amazon tipping point, the Boreal tipping point, thawing of global permafrost, reduction in Arctic and East Antarctic sea ice, disintegration of the West Antarctic and Greenland ice sheets, and large-scale coral reef die offs, that will cause massive additional increases in CO₂ concentration, sudden major shifts in Earth's natural systems, or both.
- 15.5 will, unless constrained from doing so, harm — with increasing regularity, scope and intensity — humans, and non-human beings, species and ecosystems, and will eventually destroy the life-sustaining systems of the biosphere that support human life.
- 16 Particulars of harm include mental or physical injury, including ill-health or death, or economic loss, from: (a) more, longer and more intense: (i) bushfires, storm surges, coastal flooding, inland flooding, cyclones and other extreme weather events; (ii) periods of extreme heat; (iii) periods of drought; (b) sea-level rise; (c) increasing loss of non-human species and ecosystems, on land and in oceans; (d) systemic breakdowns and overwhelming of infrastructure networks and critical services, including electricity, water supply, internet, health care, and emergency services; (e) food insecurity and breakdown of food systems; (f) adverse impacts on: (i) national and global economies; (ii) financial markets; (iii) industries, businesses and professions; (iv) the number and quality of employment opportunities; (v) standard of living; and (vi) living costs; (g) increasing smoke, heat, and disease; (h) loss of clean water, clean air and nutriment (**essentials**); (i) social and political unrest, violence and scarcity as essentials are depleted, and humans try to move in search of essentials, habitable land, or both; and (j) mental harm caused by solastalgia, and the experience and anticipation of the above.

Likely harm if the Project goes ahead

- 17 Unless the rate of increase in CO₂ concentration reaches zero (**flattens**) and then decreases, then humans will be very likely to experience the harm described in 15 and 16 (the **relevant harm**). The greater the level of CO₂ concentration when it flattens, the higher the risk that humans will suffer: (a) the relevant harm; (b) more of, and more severe forms of, the relevant harm. The less coal that is burned on Earth from today, the lower will be the level of CO₂ concentration when it flattens.
- 18 By reason of the matters in 5 and 15–17, if the Project goes ahead, then the Applicants, the Australian Represented Children and the other Represented Children are more likely,

during the relevant period, to suffer: (a) the relevant harm; (b) more of, and more severe forms of, the relevant harm.

Knowledge

19 The Minister knows, or ought reasonably to know, the matters in 5–18 above.

Other salient features

20 The Applicants are vulnerable to a known, foreseeable risk of serious harm, which the Minister can control but they cannot.

21 The Minister has special responsibilities to the Applicants and the Australian Represented Children, by reason of her position in the Commonwealth Executive.

Duty

22 By reason of the above matters, the Minister owes the Applicants, the Australian Represented Children and the other Represented Children a duty to exercise the power under ss 130 and 133 of the Act with reasonable care to not cause them harm (the **relevant duty**). The relevant duty is not inconsistent with the Act, or incoherent with public law principles.

Likely breach, unless restrained

23 By reason of the above matters, if the Minister exercises the power under ss 130 and 133 of the Act in a manner that materially contributes to increasing the minimum level at which CO₂ concentration can flatten, the Minister is likely to cause harm to the Applicants, the Australian Represented Children and the other Represented Children, in breach of the relevant duty.

Relief

24 The Applicants claim against the Minister the relief specified in the Originating Application.

Date: 8 September 2020

Emrys Nekvapil

Stephanie C. B. Brenker

Certificate of lawyer

I David Barnden certify to the Court that, in relation to the concise statement filed on behalf of the Applicants, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 8 September 2020

A handwritten signature in black ink, appearing to read 'DBO', followed by a horizontal line extending to the right.

Signed by David Barnden

Lawyer for the Applicants