

FEDERAL COURT OF AUSTRALIA

Minister for the Environment v Sharma (No 2) [2022] FCAFC 65

Appeal from: *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560
Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment (No 2) [2021] FCA 774

File number: VID 389 of 2021

Judgment of: **ALLSOP CJ, BEACH AND WHEELAHAN JJ**

Date of orders: 14 April 2022

Date of publication of reasons: 22 April 2022

Catchwords: **REPRESENTATIVE PROCEEDINGS** – whether orders should be made that proceeding not continue as a representative proceeding

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, 9.61

Cases cited: *Blair v Curran* [1939] HCA 23; 62 CLR 464
Carnie v Essanda Finance Corporation Ltd [1995] HCA 9; 182 CLR 398
Minister for the Environment v Sharma [2022] FCAFC 35
Muldoon v Melbourne City Council [2013] FCA 994; 217 FCR 450
Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment [2021] FCA 560; 391 ALR 1
Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment (No 2) [2021] FCA 774

Division: General Division

Registry: Victoria

National Practice Area: Administrative and Constitutional Law and Human Rights

Number of paragraphs: 13

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Date of hearing: Determined on the papers

Counsel for the Appellant: Mr S Free SC with Ms Z Maud

Solicitor for the Appellant: Australian Government Solicitor

Counsel for the Respondents: Mr E Nekvapil with Mr N Petrie

Solicitor for the Respondents: Equity Generation Lawyers

ORDERS

VID 389 of 2021

BETWEEN: **MINISTER FOR THE ENVIRONMENT
(COMMONWEALTH)**
Appellant

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

ORDER MADE BY: **ALLSOP CJ, BEACH AND WHEELAHAN JJ**

DATE OF ORDER: **14 APRIL 2022**

THE COURT ORDERS THAT:

1. Further to the orders of the Full Court made on 15 March 2022, the orders of the Court made by the primary judge on 8 July 2021 be set aside and in lieu thereof it be ordered that:
 - 1) The proceeding not continue as a representative proceeding.
 - 2) The amended originating application dated 14 December 2020 be dismissed.

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

REASONS FOR JUDGMENT

THE COURT:

- 1 On 15 March 2022, the Full Court made orders allowing an appeal from the orders made by the primary judge in *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560; 391 ALR 1 (the **first judgment**) and *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment (No 2)* [2021] FCA 774 (the **second judgment**): see *Minister for the Environment v Sharma* [2022] FCAFC 35 (J). The first and second judgments concerned a representative proceeding brought by eight (now six) Australian children on behalf of all children under the age of 18 and ordinarily resident in Australia at the time of the commencement of the proceeding (the **Represented Children**) alleging that the Commonwealth Minister for the Environment owed a duty of care to take reasonable care in exercising her duties, powers and functions under ss 130 and 133 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the **EPBC Act**) to avoid causing personal injury or death to Australian children arising from the emissions of carbon dioxide into the Earth's atmosphere. The Full Court was unanimous that such a duty should not be imposed on the Minister and therefore that the appeal should be allowed.
- 2 For reasons explained at J[347] (Allsop CJ), J[749] (Beach J) and J[888] (Wheelahan J), the Full Court was of the view that before orders were made setting aside the orders of the Court made by the primary judge and dismissing the amended originating application dated 14 December 2020, the parties should be afforded an opportunity to consider whether any further orders were appropriate or necessary to address the representative nature of the proceeding. Accordingly, Order 3 of the orders made on 15 March 2022 provided the parties with an opportunity within 14 days to file and serve brief written submissions on any further necessary or appropriate orders, as well as to costs.
- 3 On 29 March 2022, the parties filed brief joint submissions in accordance with Order 3 made on 15 March 2022, which annexed the following proposed minutes of orders:
1. The orders of the Court below made on 8 July 2021 be set aside and in lieu therefore [sic] it is ordered that:
 - (1) The proceeding not continue as a representative proceeding.
 - (2) The amended originating application dated 14 December 2020 is dismissed.

As is apparent from those proposed orders, the Minister did not seek an order for costs in respect of the appeal or at first instance. The effect of the proposed orders would be to set aside the costs order made in favour of the now respondents at first instance, but the Minister did not seek an order in lieu thereof for costs in her favour.

4 On 14 April 2022, the Full Court made orders in the following terms in accordance with the orders proposed by the parties:

1. Further to the orders of the Full Court made on 15 March 2022, the orders of the Court made by the primary judge on 8 July 2021 be set aside and in lieu thereof it be ordered that:
 - 1) The proceeding not continue as a representative proceeding.
 - 2) The amended originating application dated 14 December 2020 be dismissed.

5 These are the Court's brief reasons for making those orders.

The representative nature of the proceeding

6 As to the representative nature of the proceeding, the parties clear and thoughtful joint submissions, contended that it was appropriate for the orders of the Court made on 8 July 2021 to be set aside and in their place an order be made that the proceeding not continue as a representative proceeding. It should be noted that the Minister adopted a similar position at first instance (see J[763] per Wheelahan J).

7 In summary, the parties submitted that in the current form of the proceeding the outcome of the proceeding would bind all persons represented by the representative party: r 9.22 of the *Federal Court Rules 2011* (Cth). Not only would the Represented Children be bound by an order dismissing the application, but an issue estoppel would arise in relation to all questions of fact and law necessary to the Full Court's conclusion that the Minister did not owe the posited duty of care: see *Blair v Curran* [1939] HCA 23; 62 CLR 464 at 531–532 (Dixon J). Referring to what Toohey and Gaudron JJ stated in *Carnie v Essanda Finance Corporation Ltd* [1995] HCA 9; 182 CLR 398 at 423–424, the parties submitted that the prospect of such an issue estoppel is prejudice of a kind relevant to the exercise of the Court's power to determine that a proceeding not continue as a representative proceeding. Also relevant to that discretion is whether members of the class have had an opportunity to opt out of the proceeding: *Carnie* at 405 (Mason CJ, Deane and Gaudron JJ). The absence of an opportunity of members of the class to opt out of the proceeding, together with the prospect of issue estoppel arising against

them, was submitted to be sufficient to warrant an order that the proceeding not continue as a representative proceeding.

8 As to the Court's power, the parties noted that while Div 9.2 of the *Federal Court Rules* does not confer an express power on the Court to order that proceedings not continue as a representative proceeding, it is well understood that the Court has such a power, including pursuant to s 23 of the *Federal Court of Australia Act 1976* (Cth) and/or r 1.32 of the *Federal Court Rules*: see *Carnie* at 408 (Brennan J) and 422 (Toohey and Gaudron JJ); see also *Muldoon v Melbourne City Council* [2013] FCA 994; 217 FCR 450 at 488 [173], 489–490 [186].

9 The Court adopts the submissions of the parties, which were well made. To those submissions, three further matters may be emphasised.

10 First, the members of the class of the representative proceeding are (or were at the time the proceedings commenced) under 18 years of age. Not only have the Represented Children not had an opportunity to opt out of being members of the represented class, the Represented Children would not have been able to bring proceedings in their own right at the time the proceedings commenced, except by a litigation representative, being persons under a legal incapacity: r 9.61 of the *Federal Court Rules*. Each of the lead applicants commenced this proceeding by their litigation representative, Sister Marie Brigid Arthur. It would be unfairly prejudicial to bind, or risk binding, the Represented Children to the outcome in this proceeding (by operation of r 9.22(1) of the *Federal Court Rules*) in circumstances where they have not been provided with an opportunity to provide their consent (express or implied) to proceedings being brought on their behalf and where they could not have commenced these proceedings individually except through a litigation representative.

11 Secondly, the nature of this proceeding must be kept in focus. The duty of care posited by the respondents (and ultimately rejected by the Full Court) concerns an issue of fundamental importance: the exercise of statutory power by a Minister and its connection with the catastrophic risks of climate change and potential of future harm to Australians from global warming. That we have concluded that the posited duty of care under the *EPBC Act* should not be imposed in relation to this particular decision at this particular time should not preclude the Represented Children, by issue estoppel or otherwise, many of whom remain under a legal incapacity, from pursuing proceedings in the future, and raising such questions of fact or law, that may be necessary to assert a duty of care against the Minister in relation to future harm or

damage they may suffer as a result of global warming. The posited harm and therefore damage alleged in these proceedings capable of giving rise to a complete cause of action may not eventuate for decades, at which time any number of facts and circumstances, and the state and development of the law of negligence in Australia or the relevant law area in Australia, could dictate a different result. The Represented Children should not be prejudiced in any way by the outcome of these proceedings, which, as must be remembered, were initiated by way of a claim for injunctive relief in relation to a decision under the *EPBC Act* whether or not to approve the extension of a coal mine, decades before any of the alleged harm or damage resulting from the carbon dioxide emissions referable to a decision to approve the extension would eventuate.

12 Thirdly, given the commonality in interest between the respondents and Represented Children concerning the posited duty of care, ordinarily the risk of issue estoppel would not be grounds for an order that a proceeding no longer continue as a representative proceeding, given a primary purpose of r 9.21(1) is to prevent a multiplicity of proceedings through the joint determination of common issues. However, this is no ordinary representative proceeding, nor is it an ordinary torts case. As noted above, the duty of care posited by the respondents was not referable to harm and damage already suffered, but was advanced both as a necessary integer of their claim for injunctive relief in relation to the extension of a mine based on the risk of future harm, and to found a declaration as to the existence of such a duty, not as part of a complete cause of action. In those unique circumstances, the Represented Children should not be prejudiced by issue estoppel as to the existence of a duty of care (or any other factual or legal issues) arising from the Full Court's decision to allow the appeal, where any cause of action for damages they might have referable to the posited duty of care in this case has not yet arisen and may not arise for decades.

13 We were therefore satisfied that it is appropriate to make an order that the proceeding not continue as a representative proceeding before dismissing the amended originating application. Given the Minister's position as to costs, the primary judge's costs order should be set aside, but no other order is necessary.

I certify that the preceding thirteen (13) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Chief Justice Allsop and Justices Beach and Wheelahan.

Associate:

Dated: 22 April 2022

SCHEDULE OF PARTIES

VID 389 of 2021

Respondents

Second Respondent	ISOLDE SHANTI RAJ-SEPPINGS
Third Respondent	AMBROSE MALACHY HAYES
Fourth Respondent:	TOMAS WEBSTER ARBIZU
Fifth Respondent:	BELLA PAIGE BURGEMEISTER
Sixth Respondent:	LUCA GWYTHYR SAUNDERS