

NOTICE OF FILING AND HEARING

Filing and Hearing Details

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Place:	To Be Advised



Sia Lagos

Registrar

Important Information

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 of the filing of the document is determined pursuant to the Court's Rules.



Notice of appeal

No. _____ of 20____

Federal Court of Australia
District Registry: Victoria
Division: General

On appeal from the Federal Court

Pabai Pabai and another named in the schedule
Appellants

Commonwealth of Australia
Respondent

To the Respondent

The Appellants appeal from the judgment 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 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: [Registry will insert time and date. NOTE: This would usually be the date of the next callover]

Place: [address of Court]

Date:

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

Filed on behalf of (name & role of party) Pabai Pabai & Guy Paul Kabai, the Appellants
Prepared by (name of person/lawyer) Brett Spiegel
Law firm (if applicable) Phi Finney McDonald
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The Appellants appeal from the following orders of the Federal Court given on 14 October 2025 at Sydney:

1. Order 1;
2. Orders 2 and 3, but only insofar as is necessary to give effect to the changes the Appellants seek to Annexure A to the orders, which changes are recorded in Annexure AA to this notice of appeal.

Grounds of appeal

Justiciability

1. The primary judge erred in holding as a threshold issue that the imposition of the alleged duty of care should be rejected as it concerned matters of high or core government policy.

Particulars

- a. The primary judge identified, as a “key threshold issue”, a question as to “whether the alleged duty concerns decisions or conduct of the Commonwealth in respect of matters of core or high government policy or policymaking”: J [846].
- b. The primary judge considered that the alleged duty of care would – albeit apparently at the breach stage of the analysis – require “the Court to pass judgment on the reasonableness of the Commonwealth’s actions concerning ... issues ... involving ... matters of high or core government policy and political judgment”, which would be “inappropriate and impractical”: J [865], [977].
- c. Accordingly, the primary judge concluded that the Commonwealth did not owe the alleged duty of care: J [866].
- d. In so reasoning, the primary judge erred in:
 - i. concluding that it was “inappropriate and impractical” for the Court to pass judgment on the reasonableness of the Commonwealth’s actions that were the subject of the alleged duty of care;
 - ii. characterising those actions as “matters of high or core government policy and political judgment”; and/or
 - iii. treating this as a “threshold issue”, rather than one to be addressed in the course of the salient features analysis and/or at the breach stage of the analysis.



Duty of care / salient features

2. The primary judge erred in concluding that the relationship between the Commonwealth and Torres Strait Islanders, including when viewed through the lens of relevant salient features, was not one that was appropriate for the imposition of the alleged duty of care.

Particulars

- a. The primary judge considered the nature of the relationship between the Commonwealth and Torres Strait Islanders, including through the lens of relevant salient features: J [867]-[940], see also the findings at [941]-[949].
- b. The primary judge concluded that the relationship between the Commonwealth and Torres Strait Islanders, including when viewed through the lens of relevant salient features, was not one that was appropriate for the imposition of the alleged duty of care: J [941].
- c. The primary judge accepted that the Torres Strait Islanders are more vulnerable to the impacts of climate change than other communities in Australia: J [944] but did not accept that the relationship was one involving special obligations of protection: J [942]. The primary judge found that the Torres Strait Islanders did not rely on the Commonwealth to protect them from harm from the impacts of climate change by the setting of emission reduction targets in accordance with the best available science: J [945].
- d. The most important salient feature on the primary judge's analysis was that of "control", which his Honour found "effectively compels the conclusion in this case that the alleged targets duty of care should not be imposed": J [949], see also [947]-[948], [978].
- e. In so reasoning, the primary judge erred in:
 - i. failing to have adequate regard to the current impacts and risks posed to the Torres Strait Islands and Torres Strait Islanders from climate change in the salient features analysis, which bore upon his Honour's conclusions on knowledge, vulnerability and reliance: J [893], [912], [916];
 - ii. framing the analysis of control as turning on a failure to act in a particular way (or an inadequate exercise of power) rather than a contribution to the causal chain: J [929]; and/or
 - iii. concluding that even though "the Commonwealth is able to exercise some degree of control over the risk of harm to Torres Strait Islanders from the impacts of climate change" (J [921]), this salient feature nevertheless counted decisively against the imposition of a duty of care.



Standard of care / breach

3. The primary judge erred in failing to conclude that to meet or discharge the alleged duty of care, the Commonwealth was required to exercise the alleged standard of care.

Particulars

- a. The alleged standard of care was one that required the Commonwealth to, *inter alia*, “have regard to the Best Available Science” in, relevantly, identifying the impacts of climate change in the Torres Strait Islands and implementing measures to reduce emissions: see third further amended statement of claim, [82].
- b. The primary judge considered the “negligence calculus” and the alleged standard of care: J [986]-[1013].
- c. The primary judge was not persuaded that, even if the Commonwealth owed Torres Strait Islanders a duty of care, the Commonwealth was required to exercise the alleged standards of care: J [1010].
- d. In so reasoning, the primary judge erred in:
 - i. failing to have adequate regard to the current impacts and risks posed to the Torres Strait Islands and Torres Strait Islanders from climate change in considering whether the alleged standard of care was appropriate;
 - ii. accepting that an appropriate standard of care could have “required the Commonwealth to give real and genuine consideration to the best available science, and perhaps even identify a target that the best available science indicated would likely prevent or minimise the harm that vulnerable communities might suffer” (J [1010]) but nevertheless failing to find that there was an appropriate standard of care by which to judge the Commonwealth’s conduct.

Causation

4. The primary judge erred in failing to conclude that causation was established.

Particulars

- a. The primary judge accepted the force of the “tragedy of the commons” reasoning: J [1094].
- b. However, the primary judge failed to conclude that any breach of the duty of care by the Commonwealth had materially contributed to the harm of Torres Strait Islanders: J [1094];
- c. The primary judge also failed to conclude that any breach of the duty of care by the Commonwealth materially increased the risk of harm: J [1095].



- d. In so reasoning, the primary judge erred in:
- i. failing to conclude that there was a necessary causal link between emissions targets and emissions: J [1062];
 - ii. failing to conclude that the Commonwealth materially contributed to any form of harm suffered by the applicants: J [1094];
 - iii. proceeding on the basis that the Court needed to find that the Commonwealth's contribution to the harm was itself measurable, rather than it being sufficient to establish causation that the Commonwealth had made a contribution (even if to an immeasurable extent) to a measurable harm: J [1084]–[1087]; and/or
 - iv. failing to conclude that the Commonwealth materially contributed to the risk of harm: J [1095]–[1096].

Loss / damage

5. The primary judge erred in declining to find that loss of fulfilment of Ailan Kastom is compensable under the Australia common law of negligence.

Particulars

- a. The primary judge found that loss of fulfilment of Ailan Kastom is not compensable under the Australia common law of negligence: J [1134].
- b. The primary judge apparently felt constrained by the “current state of authority” on this issue: J [1135], see also [1131].
- c. In so reasoning, the primary judge erred in:
 - i. reasoning that to be compensable under the Australian common law of negligence, loss of fulfilment of Ailan Kastom had to be a right or interest that was recognised as capable of protection by law: [1131]; and/or
 - ii. concluding that loss of fulfilment of Ailan Kastom is not a right or interest recognised as capable of protection by law: J [1131].

Relief

6. The primary judge erred in concluding that it would have been inappropriate to make either of the declarations sought by the applicants.

Particulars

- a. The primary judge concluded that, even if his Honour had accepted the alleged duty of care and made findings of breach, it would have been inappropriate to make declarations in the terms sought by the applicants: J [1239];



- b. In so reasoning, the primary judge erred in:
 - i. failing to acknowledge that this was a case (given the loss of fulfilment of Ailan Kastom, as to which see ground 5) where there had been loss or damage caused by a breach of duty (cf J [1239], [1241]) ; and/or
 - ii. characterising the declarations as highly general, abstract and lacking in utility: J [1239].

Orders sought

1. The appeal be allowed.
2. Orders 1, 2 and 3 made by the Federal Court of Australia on 14 October 2025 be set aside and in lieu thereof it be ordered that:
 - a. The amended originating application filed on 10 October 2022 be upheld.
 - b. A declaration that the Commonwealth owes a duty of care to Torres Strait Islanders, including the Applicants and the Group Members, to take reasonable steps to:
 - i. protect Torres Strait Islanders; and/or
 - ii. protect Torres Strait Islanders' traditional way of life, including taking steps to preserve Ailan Kastom; and/or
 - iii. protect the marine environment in and around the Protected Zone, including the Torres Strait Islands;from the Current and Projected Impacts of Climate Change in the Torres Strait Islands (**Duty of Care**).
 - c. A declaration that the Commonwealth was in breach of the Duty of Care when:
 - i. setting and maintaining Australia's 2030 Target;
 - ii. setting and maintaining Australia's Re-affirmed 2030 Target;
 - iii. setting and maintaining Australia's 2050 Target.
 - d. Alternatively to (b) and (c) above, the matter be remitted to the primary judge for determination of the appropriate remedy.
 - e. Pursuant to s 33Z(1)(a) and (b) of the *Federal Court of Australia Act 1976* (Cth), the Common Questions are answered as set out in Annexure AA to these orders.
 - f. The Respondent pay the Applicants' costs of the proceeding, as agreed or taxed.
3. The Respondent pay the Applicants' costs of the appeal, as agreed or taxed.

**Appellant's address**

The Appellant's address for service is:

Place: Phi Finney McDonald, Level 24, 500 Bourke Street, Melbourne VIC 3000

Email: brett.spiegel@phifinneymcdonald.com

The Appellant's address is c/- Phi Finney McDonald, Level 24 500 Bourke Street, Melbourne VIC 3000.

Service on the Respondent

It is intended to serve this application on all Respondents.

Date: 11 November 2025

A handwritten signature in black ink, appearing to read "Brett Spiegel", is positioned above the signature block.

Signed by Brett Spiegel
Lawyer for the Appellant
Principal Lawyer, Phi Finney McDonald

Schedule

No. of 20

Federal Court of Australia
District Registry: Victoria
Division: General

Appellants

Second Appellant: GUY PAUL KABAI



ANNEXURE AA

(Note – the underlining and strikethrough in the below text reflects the changes sought by the Appellants to the primary judge’s answers to the common questions.)

Duty of care

Common question 1: Has climate change had and does it continue to have any or all of the impacts described in paragraph [57] of the Third Further Amended Statement of Claim (3FASOC) and the particulars thereto (the Current Impacts of Climate Change in the Torres Strait)?

Answer: Yes. See paragraphs [528], [552], [560]-[561], [566]-[567], [570], [581] and [713]-[714] of the Reasons [of the primary judge (Reasons)].

Common question 2: Will climate change in the future have any of the impacts described in paragraph [59] of the 3FASOC and the particulars thereto (the Projected Impacts of Climate Change in the Torres Strait) if Global Temperature Increase exceeds the Global Temperature Limit?

Answer: Yes. See paragraphs [721], [723]-[726], [730], [735], [738], [740]-[741], [744], [746]-[752] and [759] of the Reasons.

Common question 3: At any relevant time, did or does the Commonwealth owe a duty of care to Torres Strait Islanders to take reasonable steps to:

- (a) protect Torres Strait Islanders; and/or
- (b) protect Torres Strait Islanders’ traditional way of life, including taking steps to preserve Ailan Kastom; and/or
- (c) protect the marine environment;
- (d) from the Current Impacts of Climate Change in the Torres Strait Islands and the Projected Impacts of Climate Change in the Torres Strait Islands?

Answer: ~~No. See paragraphs [977]-[978] of the Reasons.~~ Yes, the Commonwealth owed such a duty at all relevant times.

Common question 4: If the answer to question 3 is ‘yes’, did or does any such duty of care require the Commonwealth to take reasonable steps to ensure that, having regard to the Best Available Science, it:

- (a) identifies the Current Impacts of Climate Change in the Torres Strait Islands and the Projected Impacts of Climate Change in the Torres Strait Islands;
- (b) identifies the risk, scope and severity of the Current Impacts of Climate Change in the Torres Strait Islands and the Projected Impacts of Climate Change in the Torres Strait Islands;
- (c) identifies the Global Temperature Limit necessary to prevent or minimise many of the most dangerous Current Impacts of Climate Change in the Torres Strait Islands and the Projected Impacts of Climate Change in the Torres Strait Islands;
- (d) identifies a Best Available Science Target reflecting the Global Temperature Limit identified at subparagraph (c) above to prevent or minimise the Current Impacts of Climate Change in the Torres Strait Islands and the Projected Impacts of Climate Change in the Torres Strait Islands; and
- (e) implements such measures as are necessary to reduce Australia’s GHG emissions consistent with a Best Available Science Target identified at subparagraph (d) above?

Answer: ~~Unnecessary to answer. If, however, the answer to 3 was ‘yes’, the answer to this question would be ‘no’. See paragraph [1010] of the Reasons.~~ Yes, the duty of care required and requires the Commonwealth to do those things.

Common question 5: At any relevant time, did or does the Commonwealth owe a duty of care to Torres Strait Islanders to take reasonable care to protect against marine inundation and erosion causing:

- (a) property damage;



- (b) loss of fulfilment of Ailan Kastom; and/or
- (c) injury, disease or death?

Answer: No. See paragraphs [1186]-[1187] of the Reasons.

Common question 6: If the answer to question 5 is 'yes', did or does such duty of care require the Commonwealth to take reasonable steps to:

- (a) provide access to predictable funding, including additional funding as required, that was sufficient to construct seawalls on the Torres Strait Islands;
- (b) lead and coordinate and establish a coherent plan for the provision of funding for the protection of the Torres Strait Islanders from the adverse effects of sea level rise, inundation and erosion through the construction of seawalls - as part of the Seawalls Project Stage 1 and Stage 2 on Saibai, Boigu, Poruma, Iama, Masig and Warraber (the Seawalls Projects).
- (c) (Note: seawalls includes bunds, wave return walls, geotextile bags and associated coastal protection infrastructure)

Answer: Unnecessary to answer. If, however, the answer to 5 was 'yes', the answer to this question would be 'no'. See paragraph [1210] of the Reasons.

Breach of duty of care

Common question 7: If the answer to questions 3 and 4 is 'yes', did the Commonwealth breach the duty of care by failing to take any, or any reasonable steps to ensure that, having regard to the Best Available Science, it:

- (a) identified the Current Impacts of Climate Change in the Torres Strait Islands and the Projected Impacts of Climate Change in the Torres Strait Islands;
- (b) identified the risk, scope and severity of the Current Impacts of Climate Change in the Torres Strait Islands and the Projected Impacts of Climate Change in the Torres Strait Islands;
- (c) identified the Global Temperature Limit necessary to prevent or minimise many of the most dangerous Current Impacts of Climate Change in the Torres Strait Islands and Projected Impacts of Climate Change in the Torres Strait Islands;
- (d) identified a Best Available Science Target reflecting the Global Temperature Limit identified at subparagraph (c) above to prevent or minimise the Current Impacts of Climate Change in the Torres Strait Islands and the Projected Impacts of Climate Change in the Torres Strait Islands; and
- (e) implemented such measures as are necessary to reduce Australia's GHG emissions consistent with a Best Available Science Target identified at subparagraph (d) above;

when:

- (f) setting and maintaining Australia's 2030 Target;
- (g) setting and maintaining Australia's Re-affirmed 2030 Target;
- (h) setting and maintaining Australia's 2050 Target;
- (i) setting and maintaining Australia's Updated 2030 Target?

Answer: ~~Unnecessary to answer. If, however, the answer to 3 and 4 was 'yes', the~~ answer to (f) ~~would be is~~ 'yes', the answer to (g) ~~would be is~~ 'yes', the answer to (h) ~~would be is~~ 'yes' and the answer to (i) ~~would be is~~ 'no'. See paragraphs [1020], [1024], [1029] and [1033] of the Reasons ~~above~~.

Common question 8: If the answer to question 7 is 'yes', is there an ongoing breach of the duty of care?

Answer: ~~Unnecessary to answer. If, however, the answer to 7 was 'yes', the answer to this question would be 'no'.~~ See paragraphs [1034] of the Reasons.

Breach of alternative duty of care

Common question 9: If the answer to questions 5 and 6 is 'yes', did the Commonwealth breach the alternative duty of care by failing to take any, or any reasonable steps to:



(a) provide predictable funding necessary to complete all planned projects;

(b) lead and coordinate and establish a coherent plan for the provision of funding for the protection of the Torres Strait Islanders from the adverse effects of sea level rise, inundation and erosion through the construction of seawalls;

as part of the Seawalls Project Stage 1 and Stage 2 on Saibai, Boigu, Poruma, Iama, Masig and Warraber (**the Seawalls Projects**)?

Answer: Unnecessary to answer. If, however, the answer to 5 and 6 was 'yes', the answer to this question would be 'no'. See paragraph [1216] of the Reasons.

Common question 10: If the answer to question 9 is 'yes', is there an ongoing breach of the alternative duty of care?

Answer: Unnecessary to answer.

Causation, loss, and damage

Common question 11: If the answer to question 7 is 'yes', was the breach of the duty of care a cause of Torres Strait Islanders collectively suffering loss of fulfilment of Ailan Kastom arising from damage to or degradation of the land and marine environment of the Torres Strait Islands? (Note: this question does not address any specific claims of loss or damage that the applicants or any specific group member may have)

Answer: ~~Unnecessary to answer. If, however, the answer to 7 was 'yes', the answer to this question would be 'no'. See paragraph [1134] of the Reasons.~~ Yes.

Common question 12: If the answer to 8 is 'yes', will the ongoing breach of the duty of care, if not restrained, continue to be a cause of Torres Strait Islanders collectively suffering loss of fulfilment of Ailan Kastom arising from damage to or degradation of the land and marine environment of the Torres Strait Islands? (Note: this question does not address any specific claims of any ongoing loss or damage that the applicants or any specific group member may have)

Answer: Unnecessary to answer.

Common question 13: If the answer to question 9 is 'yes', was the breach of the alternative duty of care a cause of Torres Strait Islanders collectively suffering loss of fulfilment of Ailan Kastom arising from damage to or degradation of the land and marine environment of the Torres Strait Islands? (Note: this question does not address any specific claims of loss or damage that the applicants or any specific group member may have)

Answer: Unnecessary to answer. If, however, the answer to 9 was 'yes', the answer to this question would be 'no'. See paragraph [1234] of the Reasons.

Common question 14: If the answer to question 10 is 'yes', will the ongoing breach of the alternative duty of care, if not restrained, continue to be a cause of Torres Strait Islanders collectively suffering loss of fulfilment of Ailan Kastom arising from damage to or degradation of the land and marine environment of the Torres Strait Islands?

Answer: Unnecessary to answer.

Relief

Common question 15: What statutory law applies to the claims of the applicants and group members?

Answer: The substantive law of the Australian Capital Territory applies to the applicants' and group members' claims relating to both the targets duty of care and the alternative duty of care. Those laws include the *Limitation Act 1985* (ACT). However, the *Civil Law (Wrongs) Act 2002* (ACT) does not apply to the Commonwealth. Accordingly, the common law applies to the applicants' and group members' negligence claims. See paragraphs [82]-[87] of the Reasons.



Common question 16: Is the loss of fulfilment of Ailan Kastom, arising from damage to or degradation of the land and marine environment of the Torres Strait Islands compensable under the law of negligence?

Answer: ~~On the current state of authority, the answer to this question is 'no'. See paragraphs [1131]-[1132], [1223], [1232] and [1234] of the Reasons.~~ Yes.

Common question 17: Can the declaratory and injunctive relief sought by the applicants be granted and, if so, should it be granted?

Answer: As to declaratory relief, the answer to this question is 'yes'. As to the injunctive relief, the answer to this question is 'No'. See paragraphs [1240]-[1241] and [1243]-[1244] of the Reasons.