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VID1479/2025

Federal Court of Australia
District Registry: Victoria
Division: General

On appeal from the Federal Court

Pabai Pabai and another

Appellants

Commonwealth of Australia

Respondent

Appellants' Submissions

I Introduction and summary

- 1 For thousands of years, the peoples of the Torres Strait nations have lived in the area that is known as *Zenadth Kes* (or the Torres Strait Islands). Throughout that time, they have practiced and observed *Ailan Kastom* — the body of customs, traditions and beliefs of the people of *Zenadth Kes*. *Ailan Kastom* reflects a unique spiritual and physical connection with *Zenadth Kes* and its surrounding waters and reefs. It includes, amongst other things, connection to the marine and land environment as part of cultural ceremony; the use of plants and animals for food, medicine and cultural ceremony; burial and mourning rituals; visiting or caring for sacred sites (including on uninhabited islands); hunting and fishing for dugong, turtle and other totemic marine species. This connection is unique: it is the essence of what it means to be a Torres Strait Islander.
- 2 The issue in this appeal is whether the Commonwealth is liable in negligence for the loss of fulfilment of *Ailan Kastom* suffered by Torres Strait Islanders caused by the impacts of climate change on the Islands, as a result of the Commonwealth's material contributions to those impacts.
- 3 The Appellants' case on appeal is that the Commonwealth owed a duty of care to the Torres Strait Islanders to take reasonable steps to protect them, their traditional way of

life, and the marine environment in and around the Torres Strait Islands, from the impacts of climate change. The Commonwealth breached this duty by failing to set greenhouse gas (**GHG**) emissions reductions targets under the Paris Agreement, in 2015, 2020, and 2021, that were consistent with the best available science regarding the reductions required to limit average global surface temperature increase to 1.5°C above pre-industrial levels (**temperature goal**). Because the scientific evidence establishes that all GHG emissions contribute to global temperature increase and therefore the impacts of climate change on the Torres Strait Islands, the excess emissions that resulted from the Commonwealth's breach made a material (and not *de minimis*) contribution to those impacts. The effects of the impacts of climate change on the Torres Strait Islands are loss of enjoyment of Ailan Kastom. That loss ought to be recognised as compensable.

- 4 The appeal focuses on questions of law set against the primary judge's unchallenged factual findings, almost all of which were favourable to the Appellants. The primary judge accepted that the relationship between the Commonwealth and Torres Strait Islanders extends beyond a relationship between the governing and the governed, including because of the Commonwealth's assumption of obligations under the Torres Strait Treaty¹: J [877], [880], [883], [942]. His Honour accepted that Torres Strait Islanders are deserving of particular protection from the impacts of climate change by the Commonwealth: J [882], [946]. The undisputed scientific evidence was that all GHG emissions, no matter where, when, or by whom they are emitted, contribute to global temperature increase: J [211], [224]–[237]. His Honour also accepted extensive and undisputed evidence that the Torres Strait Islands have been significantly adversely impacted by the impacts of climate change: J [314], [521], [713]–[714], [756]–[759]. His Honour found that, if (contrary to his holding) the requisite standard of care in negligence required the Commonwealth to set its emissions reductions targets in accordance with the best available science, it breached that standard: J [1020], [1024], [1029].
- 5 The primary judge held, however, that those facts did not give rise to a cause of action in negligence. In summary, the primary judge made the following errors of law:

¹ Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and Related Matters [1985] ATS 4 (**Torres Strait Treaty**) (Appeal Book (**AB**) Pt B Tab 2 [#A55, Item 10 of **Appellants' Unconditional Tender List** at Annexure A of the order of Justice Wigney dated 8 July 2024]).

- 5.1 **Ground 1 – justiciability:** The primary judge treated the issue of whether the alleged duty of care impermissibly concerned matters of high or core government policy as a threshold matter going to the existence of the duty. Instead, his Honour ought to have considered whether the cause of action required the Court to pass judgment on government policy decisions as a part of the salient features analysis and at the stage of considering the conduct alleged to breach the duty of care. Further, his Honour was wrong to characterise the issues as involving “matters of high or core government policy and political judgment” in respect of which it was “inappropriate and impractical” for the Court to pass judgment.
- 5.2 **Ground 2 – duty of care:** The primary judge erred in concluding that the relationship between the Commonwealth and Torres Strait Islanders was not appropriate for the imposition of the alleged duty of care. The salient features, particularly the nature of the relationship between the Commonwealth and Torres Strait Islanders, and the fact that the Commonwealth’s breach was conduct, not omission, point to recognition of the pleaded duty of care.
- 5.3 **Ground 3 – standard of care:** The primary judge erred in holding that the pleaded standard of care was inappropriate. In light of the harms at stake and the fact that Australia’s climate change policy was largely embodied by entry into the Paris Agreement, the appropriate standard of reasonable care was to set GHG emissions targets consistent with the best available science and for the Commonwealth to implement measures to reduce GHG emissions consistent with that target.
- 5.4 **Ground 4 – causation:** The primary judge erred in holding that there was no causal link between the Commonwealth’s emissions reductions targets under the Paris Agreement and actual emissions; and that any emissions resulting from the Commonwealth’s 2014–21 targets caused only a *de minimis* contribution to the impacts of climate change on the Torres Strait. The inference ought to have been drawn that Australia’s emissions would fall roughly in line with targets set by the Commonwealth, and, had that occurred, emissions that were of significant scale (in light of the global context of GHG emissions) would have been avoided. The established links between GHG emissions and global temperature increase show there is a causal link between all GHG emissions and losses suffered as a result of the impacts of climate change in the Torres Strait. The excess emissions as a result

of the Commonwealth's breach of its duty of care therefore ought be regarded as a material contribution to the cause of loss, in accordance with the approach to causation set out in *Bonnington Castings Ltd v Wardlaw*.²

5.5 **Ground 5 – compensable damage:** The primary judge erred in holding that loss of fulfilment of Ailan Kastom is not compensable damage at common law. The Appellants invite this Court to reach the novel conclusion that the interests represented by the practice and enjoyment of Ailan Kastom by Torres Strait Islanders are of a kind that the common law can recognise as warranting protection, vindication and remedy.

5.6 **Ground 6 – relief:** If the Appellants obtain favourable answers to any (or all) of the common questions regarding duty, breach, causation and compensable damages, declarations should follow accordingly. Even if the Appellants are not wholly successful, they have a real and not hypothetical interest in being vindicated by even partial declaratory relief.

II Ground 1 – Justiciability

6 The Appellants allege 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. To develop that argument, the Appellants first set out how justiciability is dealt with in the authorities and identify the correct approach and then submit that the primary judge pursued an entirely novel 'threshold' approach without support in the authorities. We further submit that – whatever approach is taken – his Honour was wrong to characterise the issues as involving “matters of high or core government policy and political judgment” in respect of which it was “inappropriate and impractical” for the Court to pass judgment: J [865], [977].

II.A The preferred approach to justiciability

7 An allegation that a particular act or omission was negligent will not be justiciable if the allegation is not “capable of judicial determination”.³ The description of something as *incapable* of judicial determination is grounded in concerns about legitimacy, where

² [1956] AC 613.

³ *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339, [26] (French CJ, Kiefel, Bell and Keane JJ) (citations omitted).

“legitimacy involves questions of practicality and appropriateness”.⁴ Focussing on these key considerations avoids unprofitable⁵ taxonomical debates about whether a particular government action may be characterised as ‘policy’ or ‘operational’ (J [112], [118]), and related labels (to be returned to below) of ‘core’ or ‘high’ policy.

- 8 So understood, whether a pleaded case in negligence is non-justiciable will almost always be best assessed at the breach stage. That is because it will (almost always) only be at that stage that a conclusion can be reached that it is impracticable and inappropriate for a court to pronounce upon the reasonableness of government conduct. This accords with the observations of Gleeson CJ and McHugh J in *Crimmins*⁶ and Kirby J in *Romeo*.⁷
- 9 The judgment of Gummow J in *Pyrenees* provides further support for this approach. His Honour considered that the law of negligence could not be applied to “quasi-legislative activity of public authorities”.⁸ However, “questions of resource allocation and diversion, and budgetary imperatives should fall for consideration along with other factual matters to be ‘balanced out’ when determining what should have been done to discharge a duty of care”.⁹ A consequence of this approach is that the standard of care “owed to a plaintiff by a government agency may be less than that which would be owed by a private party”.¹⁰
- 10 Justice Gummow’s approach in *Pyrenees* is consistent with that later taken by four members of the High Court in *Brodie v Singleton Shire Council* who said: “it is no answer to a claim in tort against the Commonwealth ... that its wrongful acts or omissions were

⁴ *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, [15] (Gleeson CJ).

⁵ *Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd* (2009) 77 NSWLR 360. See also *Anns v London Borough of Merton* [1978] AC 728, 754 (Lord Wilberforce); *Rowling v Takaro Properties Ltd* [1988] AC 473, 501 (Lord Keith of Kinkel); *Stovin v Wise* [1996] AC 923, 951 (Lord Hoffmann); *Pyrenees Shire Council v Day* (1998) 192 CLR 330, [68] (Toohey J), [181]–[182] (Gummow J); *Romeo v Conservation Commission of the Northern Territory* (1992) 192 CLR 431, [166] (Hayne J); *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, [84]–[90], [131] (McHugh J, Gleeson CJ agreeing at [3]); *Minister for Environment v Sharma* (2022) 291 FCR 311, [866] (Wheelahan J).

⁶ *Crimmins*, [5] (Gleeson CJ) (emphasis added), [87] (McHugh J, Gleeson CJ agreeing at [3]). See also the authorities and scholarship cited by McHugh J, *Just v British Columbia* [1989] 2 SCR 1228, 1244; *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 737; Todd, ‘Liability in Tort of Public Bodies’ in Mullany and Linden (eds), *Torts Tomorrow – A Tribute to John Fleming* (1998) 36, 46–7.

⁷ *Romeo*, [122], [139] (Kirby J), citing, amongst other authorities, *Cekan v Haines* (1990) 21 NSWLR 296.

⁸ *Pyrenees*, [182] (Gummow J). See also *Vairy v Wyong Shire Council* (2005) 223 CLR 422, [86] (Gummow J), citing *Crimmins*, [292] (Hayne J); *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 500 (Deane J); *Graham Barclay Oysters*, [84] (McHugh J).

⁹ *Pyrenees*, [183] (Gummow J), quoting *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47–48 (Mason J) and referring to *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241, 285–286 (McHugh J) and cf *Dietrich v The Queen* (1992) 177 CLR 292, 312 (Mason CJ and McHugh J). See also *Sharma*, [861] (Wheelahan J).

¹⁰ *Pyrenees*, [183] (Gummow J), citing *Just v British Columbia* [1989] 2 SCR 1228, 1243–1244 (Cory J).

the product of a ‘policy decision’ taken by the Executive Government; still less that the action is ‘non-justiciable’ because a verdict against the Commonwealth will be adverse to that ‘policy decision’.”¹¹ The foundation for that reasoning was that: “citizens, corporations, governments and public authorities generally are obliged to order their affairs so as to meet the requirements of the rule of law in Australian civil society”.¹² This reflects “the first principle ... that the tortious liability of governments is, as completely as possible, assimilated to that of citizens”.¹³

- 11 In *Sharma* – a case that is ultimately distinguishable but with instructive passages – Beach J invoked these considerations.¹⁴ His Honour accepted that that case involved ‘policy questions’ but considered that they could be dealt with at the breach stage.¹⁵ Beyond the rule of law considerations identified in *Brodie*, three other matters referred to by Beach J are presently relevant. First, despite his Honour’s eschewal of the policy/operational distinction, it remained important to his Honour that the government action in that case was not ‘quasi-legislative’.¹⁶ Second, his Honour doubted, as practical matter, whether one could say confidently that “core policy considerations will arise” simply “by reason of how the posited duty has been framed”.¹⁷ His Honour considered that it was likely to be easier to identify and account for any policy questions by looking at the actual exercise of power impugned. Third, in rare cases, it may be appropriate to assess ‘policy’ and thus justiciability at the duty stage, in particular in the salient features analysis. That will be so in cases where the very terms of the duty allow a conclusion that *any* allegation of breach is likely to raise ‘policy’ considerations. Justice Beach’s analysis of coherence between the EPBC Act and the alleged duty is an example of this.¹⁸
- 12 Consistently with those considerations, and with the long history in this country of striving towards equality in the enforceability of obligations owed by the state and subject

¹¹ (2001) 206 CLR 512, [106] (Gaudron, McHugh and Gummow JJ), [193] (Kirby J).

¹² *Brodie*, [106] (Gaudron, McHugh and Gummow JJ).

¹³ Cf *Graham Barclay Oysters*, [12] (Gleeson CJ).

¹⁴ *Sharma*, [630]–[631].

¹⁵ *Sharma*, [633], see also [622]. See also *Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd* (2009) 77 NSWLR 360, [286] (Campbell JA, McColl JA agreeing). As to consideration of resource allocation at the breach stage, see *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330, [72] (Gummow J), [273] (Callinan J); *Brodie*, [104] (Gaudron, McHugh and Gummow JJ), citing *Hill v Commissioner for Main Roads* (1989) 68 LEGRA 173, 181; *Gloucester Shire Council v McLenaghan* (2000) 109 LGERA 419, 423.

¹⁶ *Sharma*, [619].

¹⁷ *Sharma*, [622], cf [261] (Allsop CJ).

¹⁸ *Sharma*, [545]–[549]. See also *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, [112] (Gummow, Hayne and Heydon JJ).

alike,¹⁹ the preferable approach to concerns of justiciability is that they be given effect to by setting a standard of care that imposes “a high threshold that accommodates decisional freedom”.²⁰ The Appellants accept that, in practice, this approach will often make it more difficult for a claimant to make out a claim of negligence against a public authority where the alleged breach is said to entail policy considerations. But the difficulty of making out a particular breach of duty does not deny the existence of the duty in the first place.²¹

II.B The primary judge’s ‘threshold’ approach

- 13 Although the primary judge acknowledged that justiciability could arise for consideration “at different levels of inquiry” (J [106]), his Honour treated justiciability as a “key threshold issue” framed as “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]. Having posed the threshold question, his Honour answered it in the affirmative (J [865], see also J [977]) and accordingly held that the Commonwealth did not owe the alleged duty of care: J [866]. That reasoning involved three errors.

1 Threshold approach

- 14 The primary judge appears to have drawn the threshold approach from the judgments of Gleeson CJ and Gummow and Hayne JJ (with whom Gaudron J agreed)²² in *Graham Barclay Oysters* and those of Allsop CJ and Wheelahan J in *Sharma*: J [119], [127]–[133], [848]. Those authorities do not support the threshold approach, and his Honour was wrong to treat justiciability as a threshold issue.
- 15 The primary judge was correct (J [122]) that the judgments in *Graham Barclay Oysters* recognise the concern of justiciability to arise where a pleaded case of negligence would require the court to pass judgment on the reasonableness of competing public interests in circumstances where there is no criterion by which that reasonableness can practically and appropriately be adjudicated by a court.²³ However, as Gleeson CJ recognised in *Graham Barclay Oysters*, such a conclusion should be drawn on analysis of “the inaction

¹⁹ Mark Leeming, ‘Colonial Innovation in the Australian Law of Torts’ in D Rolph, J Eldridge and T Pilkington (eds), *Australian Tort Law in the 21st Century* (Federation Press, 2024) 3-18.

²⁰ Cf *Sharma*, [853] (Wheelahan J), drawing an analogy with administrative law by reference to *Minister for Home Affairs v DUA16* (2020) 385 ALR 212, [26] (Kiefel CJ, Bell, Keane, Gordon and Edelman JJ).

²¹ In support of this conclusion, in addition to the authorities discussed in the text at fn 19 *Vernon Knights Associates v Cornwall Council* [2014] Env. L. R. 6, [49(iii)] (Jackson LJ, Dyson MR and Burnton J agreeing); Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (2002) [10.26].

²² The primary judge also referred to McHugh J’s judgment in *Graham Barclay Oysters*: J [125].

²³ *Graham Barclay Oysters*, [13]–[15] (Gleeson CJ).

of which complaint is made”.²⁴ That is to say, a conclusion that a pleaded case in negligence will require the Court to make impractical and inappropriate judgments requires an analysis not just of the alleged duty but also of the alleged breach (and, the Appellants submit, the standard of care). As a matter of logic, that will almost always be the case; because an alleged duty of care can be breached in different ways, a conclusion that adjudicating a particular case will require the court to pass inappropriate and impractical judgments requires identification of the conduct on which the court will be passing judgment (i.e. the alleged breach). In the absence of identifying the conduct the subject of the alleged breach, the question of its reasonableness does not arise for determination; nor does the question of whether there is no criterion by reference to which that reasonableness can practically and appropriately be assessed.

- 16 As acknowledged above, in some cases a duty may be pleaded in terms which reveal that any and all allegations of breach will ensnare the court in inappropriate and impractical adjudication. If his Honour characterised the Appellants’ alleged duty as such (J [848], [861]), that was both erroneous and inconsistent with his Honour’s subsequent reasoning. *First*, the alleged duty does not necessarily or inherently require engagement with “policy or political” matters. Rather, the duty is, *inter alia*, to protect Torres Strait Islanders, their traditional way of life, and the environment in which they live from the current and projected impacts of climate change in the region: 3FASOC [81], J [29]. That duty could theoretically have been breached by something as mundane as failing to erect a sun and rain-shelter at a Commonwealth-run facility on the Islands. *Second*, the analysis in support of the posited non-justiciability of the duty proceeded by reference to the conduct the subject of the alleged breach – the setting of emissions targets: J [853]–[855]. Thus, in support of the conclusion that it was necessary at the ‘threshold’ stage to deny a duty, his Honour considered matters relating to breach and the standard. This highlights the artificiality of addressing justiciability as a ‘threshold’ issue.
- 17 Properly understood, the judgments in *Sharma* confirm the above analysis. Chief Justice Allsop’s conclusion on justiciability was framed with regard to the alleged breach. His Honour said: “the posited duty throws up for consideration at the point of breach matters that are core policy questions unsuitable in their nature and character for judicial

²⁴ *Graham Barclay Oysters*, [15] (Gleeson CJ).

determination”.²⁵ Justice Wheelahan did not approach justiciability as a threshold issue; his observations on justiciability ‘reinforce[d]’ a conclusion otherwise reached on the basis of other salient features.²⁶ While his Honour considered justiciability concerns to weigh against the recognition of a duty of care, he partially²⁷ grounded those concerns in the difficulty of framing “an appropriate standard of reasonable care”.²⁸ He recognised that a conclusion that no appropriate standard of care could be identified required analysis of the link between the “act of negligence” and the policy or political consideration at issue (there, illegality).²⁹ Thus, his Honour recognised that a standard of care may be applicable to some government decisions but not others.³⁰ Like Allsop CJ’s approach, Wheelahan J’s approach requires identification of the act or decision alleged to have been done in breach of the pleaded duty. Where the reasonableness of that act or decision cannot be adjudicated by reference to a practical and appropriate standard, the alleged negligence might be non-justiciable. Justice Beach’s approach in *Sharma* has already been discussed and provides no support for the ‘threshold’ approach to justiciability.

2 High or core government policy and political judgment

- 18 Labelling something as ‘core’ or ‘high level’ policy is conclusory and of little assistance.³¹ The focus should be on whether the pleaded negligence is unable to be practically and appropriately adjudicated upon by a court. But even if the labels are used, at trial the Appellants alleged negligent acts and omissions *in a policy context* but that did not themselves constitute the formulation of ‘core’ or ‘high level’ policy.
- 19 The Appellants’ case was that the Commonwealth’s negligence turned on its failure to have regard to, and act in accordance with, the best available science in respect of what was required to achieve the temperature goal: 3FASOC [39]–[50], J [10]. This was in the context of the Commonwealth having committed, in the Paris Agreement, to pursuing efforts to achieve that goal: 3FASOC [36], J [392]–[395]. Thus, the Commonwealth’s negligence was in the implementation or operationalisation of an earlier-formed policy

²⁵ *Sharma*, [7] (emphasis added).

²⁶ *Sharma*, [853], see also, [868].

²⁷ Justice Wheelahan also framed the inquiry in terms of ‘coherence’, although that framing is less relevant to the present discussion: *Sharma*, [855], referring to *Miller v Miller* (2011) 242 CLR 446, [54], [72], [93] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

²⁸ *Sharma*, [854].

²⁹ *Sharma*, [854], quoting *Jackson v Harrison* (1978) 138 CLR 438, 457 (Jacobs J).

³⁰ *Sharma*, [856], quoting *Heyman*, 469 (Mason J).

³¹ *Sharma*, [615] (Beach J). See also *Graham Barclay Oysters*, [321] (Callinan J).

decision, by which it agreed to be bound in international law and in circumstances where it had assumed special responsibilities to Torres Strait Islanders in the Torres Strait Treaty. The alleged negligence in this case was not in policy formulation or quasi-legislative function; it was in technical failures to implement consensus scientific knowledge that was readily ascertainable (and essentially proved by the Appellants by reliance on a single expert).

- 20 In *Sharma*, Allsop CJ held that the posited duty in that case would throw up for consideration (at the breach stage) “core policy questions” which counted against the recognition of the duty.³² That conclusion must be understood in light of the particular duty alleged in that case, which was “a duty of care owed by the Minister to exercise her powers under ss 130 and 133 of the EPBC Act with reasonable care so as not to cause [children] harm”.³³ That duty much more readily engaged ‘core policy questions’ than the duty alleged in the present case. That does not make ‘policy’ irrelevant, but any considerations of ‘policy’ should ordinarily be dealt with at the breach stage by asking whether there is a practical and appropriate standard by which to adjudge the impugned acts or omissions. Further bases to distinguish *Sharma* arises because of the procedural posture of that case, the indeterminacy of the allegedly affected class, and the relief sought. The primary judge in *Sharma* had been asked to injunct the Minister on the basis of an *apprehended* breach of duty. Thus, the Court was unable to defer consideration of justiciability to the breach stage and necessarily had to focus on the question of the justiciability of the duty abstracted from the other elements of the cause of action for a completed tort.

3 Inappropriate and impractical to pass judgment

- 21 Finally, although it is doubtful that it was an independent strand of the primary judge’s reasoning, his Honour erred in concluding that it was “inappropriate and impractical” to pass judgment on the reasonableness of the Commonwealth’s actions that were the subject of the alleged duty. His Honour’s own reasoning contradicted that conclusion because he was able to, and did determine, that the impugned emissions targets in 2015, 2020 and 2021 were not set having regard to, and in accordance with, the best available science (J [993]–[1049]). His reasons and conclusions on this topic did not require his

³² *Sharma*, [7].

³³ *Sharma*, [104] (Allsop CJ), see also [868] (Wheelahan J).

Honour to trespass into territory exclusively occupied by the political branches of government: J [1016]–[1030]. Rather, it involved the familiar judicial task of fact-finding and inference-drawing on the evidence and, ultimately, a consideration of the facts so found against a judicially manageable duty and standard of care.

II.C Conclusion on ground 1

- 22 For the above reasons, the Court should uphold ground 1. If the Court upheld this ground and ground 2, it would set aside the primary judge’s answer to common question 3 and substitute the answer: ‘Yes.’

III Ground 2 - Duty of care / salient features

- 23 The primary judge erred in concluding that the relationship between the Commonwealth and Torres Strait Islanders was not appropriate for the imposition of the alleged duty of care: J [941], [949], [978]. The premise of this finding – it would only be appropriate to impose the duty if the Commonwealth exercises significant or material control over the risk of harm and the Commonwealth exercised no such control – was flawed. The correct position is that the Commonwealth undertook a positive act in setting emissions targets and thereby engaged in conduct that formed part of the acts contributing to the impacts of climate change on Torres Strait Islanders. The primary judge should have found that the salient features analysis results in the recognition of a duty by the Commonwealth to protect Torres Strait Islanders from the impacts of climate change having regard to the Commonwealth’s acts (correctly understood) and the undisputed factual findings concerning the impacts of climate change on Torres Strait Islanders, their vulnerability to those impacts, reasonable foreseeability and knowledge of the Commonwealth.

III.A Relationship between the Commonwealth and Torres Strait Islanders

- 24 The starting point for any novel duty of care is the relationship between the plaintiff and the putative tortfeasor. Novel duties are developed by considering the facts bearing on that relationship by reference to salient features that inform the appropriateness of imposing a duty of care: J [90], [94], [868].³⁴ We therefore first describe the nature of the relationship between the Commonwealth and Torres Strait Islanders.

³⁴ See also *Caltex Refineries (Qld) Pty Ltd v Stavara* (2009) 75 NSWLR 649 at [102]–[105] (Allsop P, Simpson J agreeing); *Sharma*, [121], [207], [211]–[213] (Allsop CJ).

- 25 The primary judge found that the relationship between the Commonwealth and Torres Strait Islanders extends beyond a relationship between the governing and the governed in a democratic polity: J [877], [880], [942]. Torres Strait Islanders are a group of people who could reasonably be considered to be deserving of particular protection from the impacts of climate change by the Commonwealth: J [882], [946]. The contextual matters that inform the nature of this relationship include: (a) Torres Strait Islanders are a small, discrete and unique group of Indigenous people who have inhabited the Torres Strait Islands for thousands of years and have a deep spiritual connection with their land and surrounding environment; (b) Torres Strait Islanders are especially vulnerable to the impacts of climate change because of the lands they inhabit and their relative socio-economic disadvantage, and they may rely on the Commonwealth to protect them in a generalised respect from climate change; and (c) the Commonwealth has international legal obligations to protect the lands, territories, and resources of Indigenous peoples, including Torres Strait Islanders and protect against the deprivation of their culture:³⁵ J [878]–[883], [914]–[916], [943]–[944].³⁶ The Appellants’ also relied upon a further matter – being the historical nature of the relationship between the Commonwealth and First Nations people – but the primary judge was not prepared to go so far as to accept a “special protective relationship”: J [871]–[872], [877].

III.B The primary judge erred in the analysis of ‘control’

- 26 The most important feature of the primary judge’s salient features analysis was control: J [947], [949]; see also J [948], [978]. The primary judge found the Commonwealth’s ability to set and implement emissions reduction targets gives it, in a practical sense, very minimal control over the relevant risk of harm: J [921], [925], [927], [931], [946], [948]–[949], [978]. (The relevant risk of harm is the risk that Torres Strait Islanders may suffer harm, including loss of fulfilment of Ailan Kastom, arising from the impacts of climate change: J [918]; see also J [838], [931].) This minimal control outweighed the salient features of the relationship between the Commonwealth and Torres Strait Islanders which weighed in favour of the existence of the duty, including the relative vulnerability of Torres Strait Islanders to the impacts of climate change and their general reliance on the Commonwealth to protect them from those impacts: J [949].

³⁵ Torres Strait Treaty, Preamble, Articles 10(3)–10(4), 11(1), 12, 13(1)–(2), 14(1)–(2) (AB Pt B Tab 2 [#A55, Item 10 of Appellants’ Unconditional Tender List]).

³⁶ See also J [314], [411]–[417], [428]–[436], [521], [713]–[714], [716], [756]–[759], [894]–[898], [911].

- 27 The premise of the primary judge’s finding was that it would only be appropriate to impose the duty if the Commonwealth exercises significant or material control over the risk of harm (**significant or material control premise**): see especially J [931], [946], [978]. That premise was wrongly applied in this case because this case involves a positive act – setting emissions reduction targets – and the premise has been applied to cases involving a failure to act. Having regard to the nature of the risk of harm (discussed below at [32]–[35]), the correct conclusion is that the Commonwealth’s degree of control over the risk was a factor weighing in favour of imputing the duty. It does not matter that the Commonwealth’s contribution may not have been material or significant, or that other entities also contributed to the risk. There are five reasons in support of this submission.
- 28 **First**, the significant or material control premise is applied in cases involving a failure to act. The premise underpinned the reasoning in *Brodie* and *Graham Barclay Oysters*, which involved the putative tortfeasor not exercising its powers. In *Brodie*, the Court found the council exercised a sufficient degree of control over the relevant risk, but in *Graham Barclay Oysters*, the Court found that neither the State nor the council had a sufficient degree of control. The point of difference was that in *Brodie*, the council had exclusive physical control over the source of the risk of harm (the condition of roads),³⁷ while in *Graham Barclay Oysters*, the powers of the State and local council to control fisheries and pollution³⁸ did not extend to control over the commercial activities of oyster farmers, or the direct source of harm to consumers (the oysters).³⁹
- 29 **Second**, the primary judge likened the position of the Commonwealth to the council in *Graham Barclay Oysters*: J [930]–[931]. However, unlike that case, this case does not involve the conferral of a power on the Commonwealth that gave it the ability to exercise some degree of control and the failure to exercise that power. This case involves a positive (and exclusively held) act of the Commonwealth – setting emissions reduction targets in 2015, 2020, 2021 and 2022 in the exercise of executive power: J [923].
- 30 **Third**, the significant or material control premise is not appropriate in cases involving positive acts or exercises of power. It will be sufficient (and appropriate in this case

³⁷ *Brodie*, [50], [64], [102]–[103], [140] (Gaudron, McHugh and Gummow JJ). See also *Electricity Networks Corporation t/as Western Power v Herridge Parties* (2022) 276 CLR 271, [24] (the Court).

³⁸ *Graham Barclay Oysters*, [92], [94], [96] (McHugh J), [164], [166]–[173], [177]–[180] (Gummow and Hayne JJ).

³⁹ *Graham Barclay Oysters*, [93]–[96] (McHugh J), [152]–[154], [184] (Gummow and Hayne JJ, Gaudron J agreeing).

having regard to other salient features) to impute a duty of care if the positive act or exercise of power creates, increases or contributes to the risk of harm. It does not matter if the Commonwealth's contribution is not material or significant, or that other entities also contribute to the risk. In other words, the conduct can be part of the causal chain, which can include the acts of third parties.⁴⁰ The rationale for this approach is that the putative tortfeasor, by intervening in a field of activity, *increases* the risk of harm.⁴¹

- 31 Justice Beach's judgment in *Sharma*⁴² illustrates the application of this principle.⁴³ In *Sharma*, Beach J characterised the positive act of approving the extension of coal mines as "ignit[ing] the hypothesised causal chain" or creating the danger.⁴⁴ In such circumstances "control is more readily seen as sufficient to impose a duty of care to exercise that power with reasonable care".⁴⁵ His Honour added: "control need not be exclusive [a point accepted by the primary judge at J [102]. One or more entities may have control to varying degrees over the risk of harm. And a duty may be imposed on a public authority even if a private entity has more control than such an authority".⁴⁶
- 32 **Fourth**, contrary to the suggestion at J [929], the reasoning of Beach J on control in *Sharma* (as outlined above at [30]) is apposite here. That is because the proper characterisation of the conduct in this case is that it consists of a positive act or exercise of power, albeit one that falls short of the alleged standard of care. The Commonwealth took the positive act of setting emissions reductions targets not in accordance with the best available science. By undertaking this act, the Commonwealth entered the field of acts that contribute to the risk that Torres Strait Islanders will suffer harm arising from the impacts of climate change. This arises from the nature of emissions reduction targets and their impact on climate change as follows:

32.1 The Commonwealth set the emissions reduction targets in response to Article 4.2 of the Paris Agreement, which requires each party to prepare, communicate and maintain successive nationally determined contributions (NDC) that it intends to

⁴⁰ *Sharma*, [657]–[660] (Beach J).

⁴¹ *Electricity Networks Corporation*, [51] (the Court) (in the context of finding that the exercise of a statutory corporation's exercise of powers created a relationship between it and all other persons within the vicinity of its electricity distribution system).

⁴² *Sharma*, [658]–[660].

⁴³ See also *Howard v Jervis* (1958) 98 CLR 177, 183 (Dixon CJ, Fullagar and Taylor JJ).

⁴⁴ *Sharma*, [658], [659].

⁴⁵ *Sharma*, [659].

⁴⁶ *Sharma*, [660].

achieve, and Article 4.9 of the Paris Agreement, which requires each party to submit an NDC every five years: J [396]–[397], [443], [474], [482]–[483], [489], [504]. The Paris Agreement aims to strengthen the global response to the threat of climate change, including through measures designed to achieve the temperature goal: Article 2; J [393]–[394].

- 32.2 Emissions targets, or NDCs, must be capable of making an adequate contribution to the achievement of the temperature goal.⁴⁷ The discretion of parties in preparing NDCs is limited. They are “obliged to exercise due diligence and ensure that their NDCs fulfil their obligations under the Paris Agreement and thus, when taken together, are capable of achieving the temperature goal ... as well as the overall objective of the ‘stabilization of [GHG] concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system’”.⁴⁸ Each party must “do its utmost to ensure that the NDCs it puts forward represent its highest possible ambition in order to realize the objects of the Agreement”.⁴⁹
- 32.3 There is a near linear relationship between cumulative anthropogenic CO₂ emissions and the global warming that they cause: J [231], [260]. Every tonne or part thereof of CO₂ that is emitted into the atmosphere will add to global warming: J [232], [266].
- 32.4 It is possible to determine each State’s total contribution to global emissions, taking into account both historical and current emissions.⁵⁰
- 32.5 There is a near linear relationship between global warming and most adverse climate impacts, though the scale of the linearity may vary between different geographic locations: J [284], [287].
- 32.6 Certain tipping points, if passed or triggered, would be likely to have a significant impact on the low-lying islands in the Torres Strait: J [293]–[299], [753]–[755]. The risk of triggering a tipping point increases with global temperature increase and

⁴⁷ *Advisory Opinion on the Obligations of States in Respect of Climate Change*, 23 July 2025, dated 23 July 2025, [2025] ICJ Reports, [242] (*ICJ Advisory Opinion*). Adopted by UN General Assembly, Resolution Adopted by the General Assembly on the Obligations of States in Respect of Climate Change, U.N. Doc. A/RES/80/L.65, 20 May 2026 (endorsed by Australia).

⁴⁸ *ICJ Advisory Opinion*, [245].

⁴⁹ *ICJ Advisory Opinion*, [246], [270].

⁵⁰ *ICJ Advisory Opinion*, [429].

the triggering of one or more tipping points would have catastrophic impacts on the Torres Strait Islands: J [755].

- 33 **Fifth**, the global and diffuse nature of climate change and its causes (see J [925], [931], [946], [948], [978]) do not mean that the nature and degree of control of the Commonwealth over the relevant risk of harm is insufficient to ground the duty.
- 34 The common law has only recently started to grapple with the existential and unprecedented threat to the whole of humanity posed by climate change.⁵¹ However, it can and should. Appreciation of contemporary values and the implications of change have a role to play in the development of the common law.⁵² And the common law has, in the past, responded to dramatic changes in society.⁵³
- 35 The common law should develop to recognise that the nature and degree of control over risks related to the impacts of climate change will necessarily be limited because of the global nature of the problem and because climate change is a consequence of continuum of human activities.⁵⁴ However, that does not pose an obstacle to the imposition of a duty of care. Rather the salient features approach should be applied recognising that the nature and degree of control over the risk of harm will not be the same as in more traditional risks of harm.

⁵¹ *Smith v Fonterra Co-Operative Group Ltd* [2024] NZSC 5, [156], see also [157]; *Juliana v United States*, 947 F 3d 1159 (9th Cir, 2020); *Mathur v Ontario* [2024] ONCA 762 (Court of Appeal for Ontario). Cf *Urgenda Foundation v The State of the Netherlands* (2015) ECLI:NL:RBDHA:2015:7196 (official translation) (District Court), [4.54], [4.83] and [4.93] (upheld in *Netherlands v Urgenda Foundation* (2018) Case No 200.178.245/01 (official translation) (Hague Court of Appeal) and *State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda* (2019) ECLI:NL:HR:2019:2007 (official translation) (Supreme Court of the Netherlands, Civil Division)); *Milieudefensie v Royal Dutch Shell* [2021] ECLR:NL:RBDHA:2021:5339 (official translation) (District Court), [4.4.32] – [4.4.39] (overturned in *Milieudefensie v Royal Dutch Shell* [2024] ECLI:NL:GHDHA:2024:2100 (unofficial translation) (Hague Court of Appeal) but not in respect of the general proposition that Shell is obliged to make an appropriate contribution to preventing dangerous climate change and to reduce its omissions, [7.79] and [7.81]); *VZW Klimaatzaak v Kingdom of Belgium & Others* [2021] Belgium, Court of First Instance of Brussels (unofficial translation), 79 and 83 (upheld in *VZW Klimaatzaak v Kingdom of Belgium & others* [2023] Belgium, Court of Appeal of Brussels (unofficial translation), [227]); *Notre Affaire à Tous and Others v France* (2nd Decision) [2021] No 1904967 1904968 1904972 19049764-1 Unoff Transl (Administrative Court of Paris), 28.

⁵² *Theophanous v The Herald & Weekly Times Limited* (1994) 182 CLR 105, 142 (Brennan J).

⁵³ See, e.g., *Smith v Fonterra*, [156], [157]; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 534 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

⁵⁴ *Smith v Fonterra*, [155].

- 36 For the reasons above, the primary judge erred in finding that the Commonwealth's ability to exercise some degree of control over the relevant risk of harm (J [921], [923]–[924], [948]) was insufficient to impute the duty.

III.C The primary judge erred in failing to have regard to the current impacts and risks posed to Torres Strait Islanders and Torres Strait Islands from climate change in the salient features analysis

- 37 The primary judge's findings relating to reasonable foreseeability, knowledge, vulnerability and reliance weighed in favour of imputing a duty of care: J [949]. Those findings were: (a) there was a reasonably foreseeable possibility that a failure by the Commonwealth to set higher emissions reduction targets which were consistent with the best available science might cause, or materially contribute, harm to Torres Strait Islanders arising from the escalating impacts of climate change (J [887]–[889]); (b) the Commonwealth was aware that the Torres Strait Islands and Torres Strait Islanders were particularly vulnerable to climate change and its impacts and were likely to suffer harm if those impacts were exacerbated (J [889]–[890]);⁵⁵ (c) Torres Strait Islanders were particularly vulnerable to the escalating impacts of climate change and are more likely to rely on the Commonwealth for protection: J [894]–[898], [908], [911], [944]; see also [I.A] above; (d) Torres Strait Islanders may have relied on the Commonwealth in respect of the impacts of climate change in a generalised respect: J [914]–[916].
- 38 However, in respect of knowledge, vulnerability and reliance, the primary judge did not accept certain matters in relation to the setting of emissions reduction targets specifically:
- 38.1 the primary judge did not accept that the Commonwealth had actual or constructive knowledge that if it did not set its emissions reductions targets in accordance with the best available science, that was likely to result in Torres Strait Islanders suffering harm from any resulting exacerbated impacts of climate change: J [893];
- 38.2 the primary judge was not persuaded that Torres Strait Islanders are vulnerable to the harm that may result from any want of care on the part of the Commonwealth in setting emissions reductions targets because the additional or incremental impacts of climate change that have flowed, and are likely to continue to flow, from the Commonwealth's alleged failure to set and implement adequate emissions

⁵⁵ See also J [443]–[446], [760]–[763], [891]–[892], [914].

reductions targets are very small to the point of being effectively immeasurable: J [912], [945];

38.3 it was doubtful that Torres Strait Islanders relied 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 [914]–[916], [945].

39 The primary judge erred in making the findings at [38] above because the nature of the risk of harm the subject of the alleged duty should inform the assessment of knowledge, vulnerability and reliance in the salient features analysis and the primary judge did not do this. Rather, in assessing knowledge, vulnerability and reliance, the primary judge adopted an artificial boundary between the impacts of climate change and emissions reduction targets. However, emissions reductions targets are a key measure in curbing the impact of climate change. If there are lower GHG emissions, human-caused climate change will be lower in the near future: J [237]. As set out above at [32.1]–[32.2], emissions reductions targets are a critical measure to achieve that goal. The setting of emissions reductions targets by the Commonwealth contributes to the risk that Torres Strait Islanders may suffer harm arising from the impacts of climate change for the reasons set out above at [32]. Had the primary judge considered the relationship between the impacts of climate change and emissions reduction targets, his Honour would have arrived at findings opposite to those above at [38].

III.D Conclusion to ground 2 – the Commonwealth owes the Targets Duty of Care

40 Following a finding of error, the Court must determine for itself whether the Commonwealth owes a duty of care to Torres Strait Islanders to take reasonable steps to protect (i) Torres Strait Islanders; and/or (ii) Torres Strait Islanders’ traditional way of life; and/or (iii) the marine environment in and around the Protected Zone, including the Torres Strait Islands from harm suffered as a result of the Current and Projected Impacts of Climate Change (see J [70]–[71], [834]–[835]) in the Torres Strait Islands.⁵⁶ This duty should be imputed to the Commonwealth if the error regarding control is corrected and having regard to the primary judge’s findings regarding reasonable foreseeability,

⁵⁶ See in a different context *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at [17]–[18] (Kiefel CJ), [32], [40]–[41] (Gageler J), [85] (Nettle and Gordon JJ), [153] (Edelman J).

knowledge, vulnerability and reliance. If the Court upheld this ground and ground 1, it would set aside the answer to common question 3 and substitute the answer: ‘Yes.’

IV Ground 3 - Standard of care and breach

- 41 The primary judge found that the pleaded standard of care is not appropriate (J [1010]) but, given the possibility of an appeal, determined whether the Commonwealth breached the standard of care: J [1014]–[1034]. His Honour would have accepted that the Commonwealth did not exercise the standard of care when it set its emissions reduction targets in 2015, 2020 and 2021 (J [1020], [1024], [1029]) but would not have made such a finding in relation to setting the emissions reduction target in 2022 (J [1033]; answer to common question 7).
- 42 If the Court accepts the primary judge erred in failing to impose the pleaded standard of care on the Commonwealth, it may determine for itself whether the Commonwealth was in breach by reference to common question 7. That inquiry requires examination of the facts and circumstances of this case.⁵⁷ The Appellants contend the approach and findings of the primary judge at J [1014]–[1034] are correct. For completeness, the Appellants do not ask this Court on appeal to disturb the primary judge’s finding that the Commonwealth was not in breach when it set the 2022 emissions reduction target: J [1035]. No issue of ongoing breach of the duty arises on appeal: J [1034].

IV.A The primary judge’s reasons on the standard of care

- 43 The primary judge addressed the two-stage analysis described by Mason J in *Shirt*.⁵⁸ On the first question, his Honour correctly observed that the focus must be on the foreseeability of harm as a result of carelessness on the part of the Commonwealth in fixing its emissions reduction targets: J [982]; and J [138]. Consistent with his finding on reasonable foreseeability at the duty stage (see above [37]), his Honour found that it was reasonably foreseeable that any failure by the Commonwealth to set emissions reduction targets that did not have regard to the best available science might materially contribute to the harm suffered by the Torres Strait Islanders from climate change impacts, such that the risk was not far-fetched or fanciful: J [984]–[985].

⁵⁷ *Brodie*, [163] (Gaudron, McHugh and Gummow JJ).

⁵⁸ (1980) 146 CLR 40, 47-48.

- 44 On the second question required by *Shirt*, the primary judge acknowledged that the question – what would a reasonable person in the Commonwealth’s position (that is, a reasonable developed international state actor J [987]) have done in the response to the risk – is ordinarily addressed by considering and weighing relevant factors that are likely to have a bearing on the question (often referred to as ‘the negligence calculus’). As acknowledged by the primary judge, evaluating these factors is not a mechanistic or prescriptive exercise: J [141].⁵⁹ Each case requires evaluation of all the relevant facts and circumstances that bear upon the question for the tribunal of fact to “confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant’s position”.⁶⁰
- 45 The primary judge considered (a) the probability and magnitude of harm to Torres Strait Islanders (J [991]–[995]); (b) expense, difficulty and inconvenience; (c) competing or countervailing responsibilities – but placed considerable weight on the last factor. His Honour reasoned that, in the circumstances, it would be inappropriate to impose the posited duty of care because it would throw up core policy questions unsuitable in their nature and character for judicial determination (J [1007], [1013]) and countervailing governmental responsibilities may need to be considered such that a decision to set an emissions reduction target could not only have regard to the best available science: J [1002], [1008]. That approach to the evaluative exercise led him to conclude that an appropriate standard of care did not require the Commonwealth to set that best available science target and then implement measures to reduce Australia’s GHG emissions consistent with that target: J [1010].
- 46 For reasons developed below, the Appellants contend the primary judge erred in this evaluative exercise by:
- 46.1 *First*, failing to have adequate regard to the magnitude of the impacts and future risks of harm that the reasonable defendant in the Commonwealth’s position knew at the relevant point in time; and
- 46.2 *Second*, placing too much weight and/or treating as a threshold issue that the standard of care required consideration of policy questions and was therefore inappropriate.

⁵⁹ *Shirt*, 48.

⁶⁰ *Shirt*, 48; *Graham Barclay Oysters*, [192] (Gummow and Hayne JJ; Gaudron J agreeing).

IV.B The primary judge erred in considering the negligence calculus by failing to have adequate regard to the perception of the defendant of the magnitude of the impacts and risks of harm at the relevant point in time

47 The primary judge addressed the magnitude of harm and probability of the risk eventuating from the Commonwealth's carelessness in setting emissions reductions targets (J [991]) and summarised at a relatively high level of generality the Commonwealth's knowledge of these impacts: J [992]. He reasoned that he would not have described the magnitude of the harm as "very serious" but would have "readily describe[d] the harm likely to be suffered *in the future* [from climate change] as very serious" (J [995]) (emphasis added). That reasoning is not rationally supported by the factual findings concerning the anthropogenic causes of climate change and the impacts and risks of more serious climate harm and of triggering tipping points with every increment of warming.

48 The proper approach required a precise identification of the knowledge of the Commonwealth, at the material time, concerning the magnitude and the probability of the harm. Given the causes and nature of climate change, the temporal focus is important to determining the perception of a reasonable State actor's response to the magnitude and seriousness of the risk of harm on the available scientific evidence. Relevantly, from at least 2014 (i.e. the period leading up to the setting of Australia's NDC target in 2015), the Commonwealth knew that (J [443]–[446]):

48.1 the global mean temperature had warmed between 0.65-1.06⁰C above the global mean pre-industrial levels and that the rate of warming was increasing.⁶¹ The impacts of climate change to threatened ecosystems and the risks of climate change from extreme weather events were moderate to high at temperatures 1⁰C to 2⁰C above pre-industrial levels: J [390];

48.2 there is a near linear relationship between emissions of CO₂ and global mean warming. Accordingly, every tonne of CO₂ emitted globally increases the global mean temperatures and increases them by roughly the same amount: no matter where the CO₂ emissions occur or when they occur: J [318], [391];

⁶¹ The Commonwealth had this knowledge from the date of publication of the Intergovernmental Panel on Climate Change (IPCC) Working Group I contribution to the Fifth Assessment Report 'Climate Change 2013: The Physical Science Basis', 5 (AB Pt B Tab 2 [#A55, Item 65 of Appellants' Unconditional Tender List]).

- 48.3 further increases in temperature will likely trigger critical tipping points, such as sea level rises, that, if triggered, would be likely to have a significant impact on the Torres Strait Islands: J [299]. The resulting sea level rise would continue for centuries to millennia and would be ‘irreversible’: J [299];
- 48.4 the risk of triggering any of the critical tipping points is much lower where global temperatures are less than 1.5⁰C warmer than the baseline average and the risk of reaching these tipping points is greater for every increase in global temperatures from 1.5⁰C warmer than baseline: J [298].
- 49 At all material times, the Commonwealth also knew that the causes of anthropogenic climate change are a global problem the mitigation of which requires a global response and co-operation to achieve the temperature goal: J [326]–[328]. (The international response of State actors is outlined at [32.1–32.2] above). Australia was a relatively high emitter of GHG emissions and one of the largest global emitters on a per capita basis: J [520]. It also knew there was a real risk that the failure of equivalent State actors to take steps domestically to set appropriate emissions reduction targets was likely to have implications in respect of emissions reductions targets set by other countries: J [994].⁶² ⁶³
- 50 A logical consequence of this body of knowledge is that a reasonable developed state actor in the position of the Commonwealth knew that:
- 50.1 this was a critical period in which to identify an emissions reduction target, having regard to the best available science, consistent with achieving the temperature goal (1.5⁰C) to implement measures to reduce emissions in accordance with that target;
- 50.2 this period is significant because once emitted into the atmosphere, the danger to the Torres Strait Islands is created from each further increment of warming above the current average global temperature (even from small increases);

⁶² At all material times, the Commonwealth also knew that various impacts of climate change had occurred and would continue to occur in Australia and that Torres Strait Islanders were specifically vulnerable to such impacts: IPCC Working Group II Contribution to Fifth Assessment Report, Climate Change 2014: Impacts, Adaptation, and Vulnerability – Part B: Regional Aspects (AB Pt B Tab 2 [#A55, Item 17 of Appellants’ Unconditional Tender List]); CSIRO and BOM, ‘State of the Climate Report’ 2010, 2012, 2014 (AB Pt B Tab 2 [#A55, Items 1-3 of Appellants’ Unconditional Tender List]); Ramasamy Suppiah. et al. ‘Observed and Future Climates of the Torres Strait Region’ (CSIRO, 2010) (AB Pt B Tab 2 [#A55, Item 92 of Appellants’ Unconditional Tender List]); Hughes Report (AB Pt B Tab 2 [#A43]).

⁶³ The Commonwealth did not consider or otherwise have regard to the best available science in setting the 2015, 2020 and 2021 NDC targets: J [463]–[470]; J [475]–[481]; J [482]–[488]; J [482]–[488]; J [492]–[499].

- 50.3 a positive act to set an emissions reduction target that did not have regard to the best available science, increased both the magnitude of the harm from the current and future impacts of climate change and the probability that future impacts and risks of climate change would be both irreversible and catastrophic to the Torres Strait Islands and Torres Strait Islanders;
- 50.4 any emissions of GHGs causes radiative forcing, and, in aggregate, cause global warming with various regional climate impacts.⁶⁴ (Any difficulties in attributions are not appropriately analysed at the breach stage).

IV.C The primary judge erred by assuming that the posited standard of care might require the Court to adjudicate policy questions and thereby failed to evaluate the appropriateness of the standard on the facts

- 51 The Appellants accept that the standard of care may require judicial consideration of competing resource and policy demands.⁶⁵ However, weighed with all relevant factors, this factor alone does not weigh against the imposition of the posited standard of care, or prohibit the Court from adjudicating the claim.
- 52 As addressed above in ground 1, public authorities are not immune from the obligations imposed by the law of negligence and, in particular, the requirement to take reasonable care to avoid harm to those with whom the public authority stands in a special or neighbourly relationship. The Commonwealth by virtue of s 75(iii) of the Constitution is in no special position.⁶⁶ Even in a case of non-feasance, the question remains what is the acceptable minimum that should have been done in response to the risk,⁶⁷ or, whether the Commonwealth's failure to further act when action was called for, was negligent.⁶⁸ The Appellants contend the acceptable minimum standard considering all the relevant facts and circumstances was to have regard to the best available science when setting the emissions reduction target and to take measures necessary to reduce emissions in line with those targets during the relevant period (3FASOC [82]).⁶⁹ This was a practical and appropriate standard to adjudge the impugned acts or omissions.

⁶⁴ J [367].

⁶⁵ *Brodie*, [104] (Gaudron, McHugh and Gummow JJ); *Pyrenees*, [183]–[184] (Kirby J), referring to *Just v British Columbia* [1989] 2 SCR 1228, 1243–1244 (Cory J)

⁶⁶ *Sharma*, [4] (Allsop CJ); *Brodie*, [106] (Gaudron, McHugh and Gummow JJ).

⁶⁷ *Pyrenees*, [172] (Gummow J).

⁶⁸ *Brodie*, [85] (Gaudron, McHugh and Gummow J), referring to *Hargrave v Goldman* (1963) 110 CLR 40.

⁶⁹ AB Pt A Tab 4: p 46 (Format 1), p 78 (Format 2).

- 53 It may be accepted that setting a target that had regard to the best available science would have broader social and economic implications (J [996]), but given his Honour’s reasoning, it is important to have regard to what the standard of care requires in this case.
- 54 *First*, the posited standard of care does not demand that a defendant in the position of the Commonwealth take the positive step to set an emissions reduction target that does not have any regard to macro and micro economic impacts and feasibility of implementation. As was clear on the evidence,⁷⁰ and in the primary judge’s findings concerning the 2022 target,⁷¹ the best available science did not dictate an emissions reduction target but rather provided a reasonable state actor in the position of the Commonwealth with a range of methodologies by which a target could be set and emissions be reduced to increase the likelihood that global mean temperature would not exceed 1.5⁰C. There is a difference between taking reasonable steps “having regard to” the best available science, which is how the Appellants put their case on the standard of care in 3FASOC [82], and taking reasonable steps having regard to *only* the best available science.
- 55 *Second*, the standard of care and alleged breaches are temporally focused. This is significant on the facts of this case given the causes and nature of the impacts and risks caused by climate change to the Torres Strait Islanders. Relevantly, the Appellants’ case does not necessitate a conclusion that a reasonable state actor in the position of the Commonwealth must in all circumstances and at all times act in accordance with the best available science when setting emissions reductions targets and generally responding to climate change: cf J [1002], [1004], [1008]. Such a contention would be contrary to the common law method and would raise insurmountable justiciability arguments.
- 56 When this is acknowledged it follows that the primary judge erred by concluding that the standard of care is not appropriate. The crux of the error is the reasoning assumes as a threshold matter (or a matter upon which excessive weight was placed) that the imposition of the standard of care might require the Court to impermissibly adjudicate upon executive action thereby impermissibly fettering political activity in relation to responses to climate change. In so doing, the primary judge failed to correctly evaluate the standard of care having regard to all relevant factors on the facts established by the evidence.

⁷⁰ J [512]–[515].

⁷¹ J [516], [1030]–[1033].

IV.D Conclusion on ground 3

57 If the Court upheld this ground, it would set aside the primary judge's answer to common question 4 and substitute the answers: 'Yes.'

V Ground 4 - Causation

58 **The issue.** Once a duty of care is established and breach of the standard of care is proved, a cause of action in negligence is complete upon proof that the breach caused *some* compensable damage to the plaintiff.⁷² The issue of causation was framed in a limited way for the purpose of the initial trial before Wigney J. Common question 11 focussed only on causation of Torres Strait Islanders' collective suffering of loss of fulfilment of Ailan Kastom. The question did not concern whether the Commonwealth's breaches of duty caused any damage (whether personal injury, property or any other kind) to any individual group member.⁷³

59 **Summary: a material contribution need not be measurable.** The Appellants submit that the Commonwealth's breaches of duty in setting the 2015, 2020 and 2021 NDC targets caused *some* damage to the Appellants' collective interests in *Ailan Kastom*. (Whether damage to those interests should be recognised as compensable under the common law is the subject of ground 5 and addressed in Section VI below.) The essence of the Appellants' case is that it is undisputed that all global GHG emissions contribute to the effects of climate change, and it is undisputed that the Torres Strait Islands have suffered impacts from the effects of climate change. Even though the excess emissions that resulted from the Commonwealth's breaches of duty are a small proportion of total historical emissions, the amount of emissions is measurable, and the consequential incremental temperature increase can be estimated. The emissions therefore constitute a material contribution to the harms suffered by Torres Strait Islanders. That is so even though the *incremental* contribution of the excess emissions to any specific climate impacts was, at the time the evidence was given, unable to be measured.

60 **Principles.** The Appellants do not take issue with the primary judge's statement of the general principles: J [143]–[162]. We summarise them briefly.

⁷² *Lewis v Australian Capital Territory* (2020) 271 CLR 192, [31] (Gageler J).

⁷³ There was, however, some evidence that Uncle Pabai and Uncle Kabai suffered some minor property damage: J [1098]–[1102].

- 61 At common law, causation is established by proof that the defendant’s conduct is *a cause* of the plaintiff’s compensable injury.⁷⁴ Causation is a “link between a physical event and a physical outcome”.⁷⁵ The nature of that link depends on the circumstances of the case. In most cases, whether the defendant’s negligent act was a cause of the plaintiff’s injury can be determined by asking whether the injury would have occurred without — ‘but for’ — the negligent act. But it has long been acknowledged that the ‘but for’ test can be inadequate where many facts contribute to damage, and it is impossible to isolate one or more of those facts in order to include or exclude others as causes.⁷⁶ For this reason, the common law of Australia recognises that a finding of factual causation can be made if the plaintiff proves that the defendant’s negligent act “caused or materially contributed to” damage suffered by the plaintiff, even if the negligent act was not a *necessary* condition of the occurrence of the damage.⁷⁷
- 62 The foundational modern case is *Bonnington*. The House of Lords held a factory liable for failing to use dust extractors on one device. That failure caused a material contribution to the plaintiff’s illness, even though the plaintiff had been exposed to dust by using another device for which the factory had no duty to install extractors.⁷⁸ Lord Reid held that “any contribution” to the disease that was not *de minimis* “must be material”.⁷⁹
- 63 The reasoning in *Bonnington* has been accepted and applied in Australia.⁸⁰ In *Strong v Woolworths Ltd*, the High Court described *Bonnington* as exemplifying cases where damage results from “the cumulative operation of factors ... in circumstances in which the contribution of each factor to that harm is unascertainable”.⁸¹ The law was synthesised by French CJ, Hayne and Kiefel JJ in *Hunt & Hunt v Mitchell Morgan Pty Ltd*,⁸² there their Honour’s concluded that “[m]aterial contribution has been said to require only that the act or omission of a wrongdoer play some part in contributing to the loss”.

⁷⁴ *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, 510–14 (Mason CJ), 530–32 (McHugh J).

⁷⁵ *Lewis*, [151] (Edelman J).

⁷⁶ *March*, 514–15 (Mason CJ); *Amaca Pty Ltd v Booth* (2011) 246 CLR 36, [70] (Gummow, Hayne and Crennan JJ).

⁷⁷ *March*, 515–16 (Mason CJ), 522 (Deane J), 524 (Toohey J), 525 (Gaudron J).

⁷⁸ *Bonnington*, 614–15.

⁷⁹ *Bonnington*, 621.

⁸⁰ See, e.g., *March*, 514 (Mason CJ), citing *Duyvelshaff v Cathcart & Ritchie Ltd* (1973) 47 ALJR 410, 417 (Gibbs J); *Tubemakers of Australia Ltd v Fernandez* (1976) 50 ALJR 720, 724 (Mason J).

⁸¹ (2012) 246 CLR 182, [25] (French CJ, Gummow, Crennan and Bell JJ).

⁸² (2013) 247 CLR 613, [45] (citations omitted).

- 64 Accordingly, the Appellants will succeed on factual causation if they establish that the Commonwealth's negligent setting of the NDC targets "play[ed] some part in contributing to" the loss of fulfilment of *Ailan Kastom*. For legal responsibility to attach to the defendant's conduct, the damage suffered by the plaintiff as a matter of fact must also be within the scope of the defendant's liability. That determination requires a value judgment based in legal policy having regard to the nature of the liability rule invoked.⁸³
- 65 **The causal chain.** As the primary judge correctly stated (J [35]–[42]), the Appellants' case is that causation can be established by the following seven steps. *First*, there is a near-linear relationship between increased global emissions of GHGs and global temperature increases. *Second*, at relevant timescales, a tonne of CO₂ or CO₂ equivalent GHG contributes to global temperature increases irrespective of when, where or by whom it was emitted. *Third*, the cumulative effect of global GHG emissions causes global temperature increase. *Fourth*, the impacts of climate change in the Torres Strait Islands are caused by global temperature increase. *Fifth*, emissions from Australia have contributed to global GHG emissions, and therefore contributed to global temperature increases. *Sixth*, if the Commonwealth had not failed to set emissions targets based on the best available science, Australia's GHG emissions would have decreased, which in turn would have lessened its causal contribution to the impacts of climate change on the Torres Strait Islands. *Seventh*, the Commonwealth's negligent setting of emissions reductions targets therefore materially contributed to the harm suffered by Torres Strait Islanders from the impacts of climate change in the form of loss of fulfilment of *Ailan Kastom*.
- 66 **The scope of the dispute.** Only the sixth and seventh steps are in dispute. Steps 1–4 were undisputed and accepted by the primary judge: J [1040]–[1043]. The fifth step was disputed in the context of whether the contribution to global GHG emissions as a result of the Commonwealth's breaches of duty was material for the purpose of the seventh step.
- 67 **The primary judge's errors.** The primary judge made two errors. *First*, as to step six, the primary judge erred in finding that there was no causal link between the setting of NDC targets by the Commonwealth and increased GHG emissions than would otherwise be the case: J [1054]–[1062]. The causal link can be inferred because NDC targets

⁸³ *Wallace v Kam* (2013) 250 CLR 375, [23] (the Court); *Waller v James* (2015) 90 NSWLR 634, [167]–[184] (Beazley P); see generally *March*, 510 (Mason CJ); 531 (McHugh J); *Tabet v Gett* (2010) 240 CLR 537, [112] (Kiefel J).

represent binding commitments at international law under the Paris Agreement, and the Commonwealth undisputedly has a number of powers to achieve those commitments.

- 68 *Second*, as to step seven, the primary judge erred in finding that the excess GHG emissions that occurred as a result of the Commonwealth’s breach of duty were *de minimis*, and therefore not a material contribution to the harm suffered by the Appellants: J [1084]–[1088], [1093]. The Commonwealth’s contribution was material because, in the context of global GHG emissions (which result from the cumulative actions of all nations), *any* contribution to GHG emissions on a national scale cannot be disregarded as a *de minimis* contribution to the effects of climate change.

V.A The Commonwealth’s setting of NDC targets in 2015, 2020 and 2021 affected GHG emissions

- 69 The Appellants’ case was that, if the Commonwealth had set NDC targets in 2015, 2020 and 2021 that were consistent with the best available science, Australia’s GHG emissions would have been lower than they were from those points in time. That counterfactual proposition can be inferred from two facts that are not in dispute. First, the core obligations assumed by the Commonwealth under the Paris Agreement are for each state party to set emissions reduction targets –NDCs – and to pursue mitigation measures with the aim of achieving them.⁸⁴ Second, the Commonwealth admitted, and the primary judge accepted, that Commonwealth agencies and Ministers have a range of powers that may be exercised so as to reduce GHG emissions from the Commonwealth itself and from activities undertaken by other entities in Australia (J [1055]). If the Commonwealth had set NDC targets consistent with the best available science, it should be accepted that it would also exercise the powers available to it to implement those targets.
- 70 The primary judge refused to draw that inference for two reasons: (a) the possibility of a ‘lag’ between the setting of a more ambitious target and the implementation of policies to achieve it (J [1056]); and (b) the possibility that emissions reductions would *beat* the target if a less ambitious target was set: J [1059].

⁸⁴ *Paris Agreement*, opened for signature 22 April 2016, [2016] ATS 24 (entered into force 4 November 2016) art 7, s 2: “Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions” (AB Pt B Tab 2 [#A55, Item 21 of Appellants’ Unconditional Tender List]). See further above at [34].

- 71 The first reason should not have been given decisive weight. In describing the possibility of a time lag, Professor Meinshausen was speaking of the behaviour of countries globally, and commenting that policies put in place to meet targets generally follow the exercise of target-setting.⁸⁵ Professor Meinshausen was not asked about Australia’s policy-setting mechanisms or whether he would expect any meaningful lag in emissions reductions.
- 72 The second reason can be disregarded entirely. The Commonwealth’s expert, Dr Canadell, identified precisely the differences between Australia’s *actual* GHG emissions from 2014 to 2021 and the counterfactual emissions assuming a straight-line trajectory to 47% reduction by 2025 (i.e., the no-breach scenario).⁸⁶ The difference is some 485.75 megatons of CO₂-equivalents (**MtCO₂e**). Clearly, from 2014 to 2021, actual emissions came nowhere close to a scenario in line with the best available science.⁸⁷
- 73 The primary judge was correct to note that, based on his findings on breach, the Appellants’ causal pathway operated only from 2014 to 2021: J [1061]. However, hundreds of megatons were emitted that, on a straight-line emissions reduction assumption,⁸⁸ would have been avoided but for the Commonwealth’s breaches of duty. As submitted next, that of itself is sufficient to establish causation.

V.B The excess GHG emissions under the 2015, 2020 and 2021 NDC targets played some part in contributing to loss of *Ailan Kastom*

- 74 **Context.** It is undisputed that climate change has had, and will continue to have, serious impacts on the Torres Strait Islands. The primary judge conducted a detailed evaluation of the scientific and lay evidence regarding the present impacts of climate change on the Torres Strait Islands: J [521]–[712]. Based on that evaluation, his Honour drew “clear and compelling” inferences that “[c]limate change has had, and is continuing to have significant and deleterious impacts on the Torres Strait Islands”: J [713]. The only question regarding causation is whether the Commonwealth is responsible for its contribution to it.

⁸⁵ J [1056], quoting 14 November 2023, Professor Meinshausen, T1162.32—11163.7 (AB Pt B Tab 50).

⁸⁶ Supplementary Canadell Report, 2 (AB Pt B Tab 2 [#R21, Item 37]); see also Meinshausen Report, 30 (AB Pt B Tab 2 [#A45]).

⁸⁷ Supplementary Canadell Report, 2 (AB Pt B Tab 2 [#R21, Item 37]); see also Meinshausen Report, 30 (AB Pt B Tab 2 [#A45]).

⁸⁸ Canadell Report, 7–8 (AB Pt B Tab 2 [#R13]).

- 75 The evidence establishes that the Commonwealth’s breaches of duty in setting the 2015, 2020 and 2021 NDCs resulted in an estimated 485.75 MtCO_{2e} of excess emissions.⁸⁹ It is common ground that those excess emissions would cause a small but estimable incremental increase to global mean surface temperature compared to the counterfactual.⁹⁰ While it is common ground that it was not possible to attribute any *specific* climate impacts to that small incremental temperature increase,⁹¹ Dr Canadell accepted that Australia’s contributions to global GHG emissions were causally linked to the impacts of climate change in the Torres Strait.⁹² The inability to attribute specific events to Australia’s incremental contributions is not to the point: the Appellants’ case is not that the Commonwealth’s actions have led to any specific impact as a portion of a divisible harm (nor does the Appellants’ case need to be so framed as a matter of principle in order to succeed on causation). Rather, the Appellants’ case is that the Commonwealth can and should be held liable for the impacts of climate change on *Ailan Kastom* because the excess emissions are contributions to the cumulative cause of those impacts (global GHG emissions), and those contributions are of a scale too large to be described as *de minimis* in the context of attribution of responsibility for the effects of climate change.
- 76 ***De minimis* is a matter of legal policy.** It is impossible “to define, in quantitative terms, what for the purposes of the application of any principle of law, is *de minimis*”.⁹³ In *Bonnington*, Lord Keith said that that a *de minimis* contribution to the cumulative cause is one “so insignificant ... as to make it unreasonable to regard [it] as a material contributing cause” of disease.⁹⁴ In dissent in *Fish & Fish Ltd v Sea Shepherd UK*, Lord Sumption JSC said that the *de minimis* principle is “concerned with extremes. It refers to some fact which is in principle legally relevant but is so trivial or negligible as to be no fact at all in the eyes of the law”.⁹⁵
- 77 The principle recognised in *Bonnington* concerns harms that are caused by a cumulative phenomenon to which there have been many contributors. The instinct in such a case might be to assign responsibility only to the very largest contributors (if any can be

⁸⁹ Supplementary Canadell Report, 2 (AB Pt B Tab 2 [#R21, Item 37]).

⁹⁰ Supplementary Canadell Report, 1 (AB Pt B Tab 2 [#R21, Item 37]).

⁹¹ See Supplementary Meinshausen Report, [3]–[8] (AB Pt B Tab 2 [#A46]).

⁹² 21 November 2023, Dr Canadell, T1397.30–1398.6 (AB Pt B Tab 54).

⁹³ *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10, [108] (Lord Phillips).

⁹⁴ *Bonnington*, 627.

⁹⁵ [2015] 1 AC 1229, [50].

identified), while relieving those who contributed the proverbial ‘drop in the ocean’. But there are two difficulties with that approach. *First*, as Professor Meinshausen eloquently explained by reference to the collective responsibility of road users to pay taxes (even though any one road user’s wear-and-tear cannot be identified),⁹⁶ collective-action problems are not usefully analysed by focussing on the identifiable consequences of any individual contribution to the problem. *Second*, a conceptual level, Professor Wright has given an example showing the limits of that thinking for the purpose of identifying relevant causes of events in the world:⁹⁷

David Fischer also objects to the proliferation of causes and questions the validity of recognising trivial contributions as causes — e.g., a teaspoon of water added to a flooding river or a match added to a raging forest fire. Yet the teaspoon of water and the match contributed to and are part of the flood and forest fire, respectively. What if the same flood or fire were caused by a million (or many more) different people all contributing a teaspoonful of water or a single match? Denying that any of the teaspoonfuls or matches contributed to the destruction of the property that was destroyed by the flood or fire would leave its destruction as an unexplained, non-caused miracle. What is driving the intuition of no causation is the judgment regarding attributable responsibility ... [.]

- 78 Implicit, therefore, in a finding that an identified (indeed, measurable) contribution to the cumulative phenomenon is *de minimis* is that the contribution does not warrant legal consequences because it is trivial *relative to the contributions of others*.
- 79 An approach based on the *relative*, rather than *absolute*, contributions to a cumulative cause finds support in decisions of foreign courts considering civil claims for climate-related losses. In *Lliuya v RWE AG*, a decision of a German domestic court held that a coal power company could be held liable for its contributions to climate change based on its significant contributions to global GHG emissions as a proportion of the total contributions of the largest industrial GHG emitters.⁹⁸ In *Asmania et al. v Holcim AG*, a Swiss cantonal court upheld the viability of a claim by residents of an Indonesian coastal town against a major Swiss cement manufacturer for compensation arising from climate-related impacts. The Court held that the fact that no single actor was responsible for the claimed harms does not itself release the defendant from its individual responsibility.⁹⁹

⁹⁶ 14 November 2023, Professor Meinshausen, T1154.31–45 (AB Pt B Tab 50).

⁹⁷ Richard Wright, ‘The NESS Account of Natural Causation: A Response to Criticisms’, in *Perspectives on Causation* (Goldberg (Ed), Hart Publishing, 2011), 305.

⁹⁸ Case No 2 O 285/15, 28 May 2025, 46 (English translation available at https://cdn.climatepolicyradar.org/navigator/DEU/2015/luciano-lliuya-v-rweag_e585fec2553b5e2374b8a576e43d07ce.pdf).

⁹⁹ Case no A1 2023 9 (Cantonal Court of Zug, 17 December 2025).

To similar effect, in invalidating a measure that prevented an environmental authority from considering the impacts of GHG emissions, the Supreme Court of Montana held that the plaintiffs had established redressable harm even though the impacts of climate change would “still be a problem if the rest of the world [had] not reduced its emissions”.¹⁰⁰ That was because a “reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere”.¹⁰¹

80 At the international level, the *ICJ Advisory Opinion* recognised that “individual conduct leading to emissions” can “give rise to the obligation to prevent significant transboundary harm even if such activity is environmentally insignificant in isolation”.¹⁰²

81 **A significant contribution justifying responsibility.** Professor Meinshausen illustrated the relative contributions of certain nations to cumulative GHG emissions by identifying the emissions from the nations representing the largest total emissions. He also estimated the emissions that would have been avoided had each nation in 2014 embarked on a straight-line trajectory to net-zero emissions by 2024.¹⁰³ This analysis shows three things. *First*, not even the total emissions of the highest emitter (China) in isolation cause a measurable difference in global temperature.¹⁰⁴ *Second*, Australia was the 17th largest absolute contributor to GHG emissions in the period 2014–21, and 11th per capita. *Third*, it follows that a counterfactual reduction in emissions (in the example, to net zero by 2024) would similarly rank highly among 205 nations. If Australia had embarked on that path, 1413 MtCO_{2e} would have been avoided.¹⁰⁵

82 These contributions need to be assessed in the context where incremental increases in global average surface temperature in excess of the temperature limit raise the probability that the climate system will reach ‘tipping points’. Tipping points are parts of the Earth’s climate system that are sensitive to temperature variations and which “may reach a threshold where the change of the state happens rapidly”,¹⁰⁶ resulting in a cascade of mutually reinforcing, and largely irreversible, impacts on the climate.¹⁰⁷

¹⁰⁰ *Held v. Montana*, MT 312 (2024) at ¶49.

¹⁰¹ *Ibid* at ¶63, citing *Massachusetts v. EPA*, 549 U.S. 497,525–26 (2007).

¹⁰² *ICJ Advisory Opinion*, [277].

¹⁰³ Supplementary Meinshausen Report, [14]–[28] and Table 1 (AB Pt B Tab 2 [#A46]).

¹⁰⁴ Supplementary Meinshausen Report, [25] (AB Pt B Tab 2 [#A46]).

¹⁰⁵ Supplementary Meinshausen Report, Table 1, Column C (AB Pt B Tab 2 [#A46]).

¹⁰⁶ 8 November 2023, Professor Karoly, T.879 (AB Pt B Tab 46).

¹⁰⁷ Karoly Report at [119]–[126] (AB Pt B Tab 2 [#A40]); 8 November 2023, Professor Karoly, T.879–880 (AB Pt 2 Tab 46).

- 83 The excess emissions of around 485 MtCO₂e that resulted from the Commonwealth's breaches of duty are therefore no 'drop in the ocean'. In *Gloucester Resources Ltd v Minister for Planning*, Preston CJ (LEC) said, of the future emissions from a proposed coal mine, that it "matters not that this aggregate of the Project's GHG emissions may represent a small fraction of the global total of GHG emissions. The global problem of climate change needs to be addressed by multiple local actions to mitigate emissions by sources and remove GHGs by sinks".¹⁰⁸ His Honour accepted expert evidence that all "emissions are important because cumulatively they constitute the global total of [GHG] emissions ... Just as many emitters are contributing to the problem, so many emission reduction activities are required to solve the problem". The evidence in that case was that the mine would generate at least 37.8 MtCO₂e.
- 84 What work, then, does the *de minimis* principle do in this context? It is still necessary and possible to draw a principled distinction between emissions that are of a scale warranting legal significance, and those that are not. As the Supreme Court of New Zealand said in reinstating a public nuisance claim based on the impacts of climate change, "ordinary domestic activities involving individuals travelling, warming their houses and cooking food ... may be *de minimis*, albeit collective actions of individuals are causative of climate change".¹⁰⁹ In this context, Australia's contributions cannot be said to be *de minimis*.

V.C Conclusion on ground 4

- 85 Climate change is the quintessential flood caused by innumerable teaspoons. The contribution that Australia should have avoided by setting its 2015, 2020 and 2021 NDCs in accordance with the best available science is not trivial in the context of Australia's disproportionately large contributions to global GHG emissions. The primary judge erred in holding that the causal contribution was *de minimis*. If the Court upheld this ground, it would set aside the answer to common question 11 and substitute the answer: 'Yes.'

VI Ground 5 – Compensable Damage

- 86 The primary judge erred in finding that loss of fulfilment of *Ailan Kastom* is not compensable under the common law of negligence. We explain, with reference to the

¹⁰⁸ [2019] NSWLEC 7, [515].

¹⁰⁹ *Smith v Fonterra*, [168].

evidence, what *Ailan Kastom* is, how the primary judge approached it, and why that approach was in error.

VI.A Understanding *Ailan Kastom*

- 87 We first outline the concept of *Ailan Kastom*, to inform the argument as to why the common law of negligence should now be held to be capable of compensating for loss of its fulfilment. As Jagot J has said extra-curially in a related context: “it is important that the labels of ‘cultural loss’ and ‘spiritual loss’ not become matters for recitation obscuring whatever underlying reality might be exposed by the evidence in the particular case”.¹¹⁰ In so doing, we acknowledge that the judgment (and the conduct of the proceedings, particularly on-Country) demonstrated a recognition of, and respect for, the depth and complexity of *Ailan Kastom* and an appreciation of its fundamental importance to the Appellants and group members (see, e.g., J [186]–[188]).
- 88 *Ailan Kastom* was described by various witnesses as an essential part of their ‘identity’.¹¹¹ Although difficult to disaggregate, important parts of *Ailan Kastom* are connection to the land and sea, connection to ancestors, and cultural knowledge and its transmission.¹¹²
- 89 **Connection to land:** Aunty Jen said: “The centre of my universe connects me to the sky, the land and the sea”.¹¹³ Uncle Pabai said, “My identity is connected to Boigu”.¹¹⁴ His brother, Uncle Fred, echoed this connection, “I belongs to this island”.¹¹⁵ Uncle Pabai gave similar evidence: “All of our stories are connected to specific places on the land. They tell the story of my people”.¹¹⁶ The Torres Strait Regional Authority summarised the position as: “The interconnection between *Ailan Kastom* and healthy land and sea are integral to spiritual and cultural identity”.¹¹⁷ As a consequence of this interconnection, damage to and degradation of the physical environment can cause damage to, or loss of

¹¹⁰ Justice Jayne Jagot, ‘Native Title Compensation for Economic Loss’ (National Judicial College of Australia’s 30th Anniversary of Mabo Conference on the Sunshine Coast on 3 June 2022).

¹¹¹ Affidavit of **Uncle Pabai** Pabai, [194] (AB Pt B Tab 3); 6 June 2023, **Uncle Fred** Pabai, T140:4-5 (AB Pt B Tab 39); Affidavit of **Uncle Laurie** Nona, [98] (AB Pt B Tab 12).

¹¹² Other important parts of *Ailan Kastom* that were the subject of evidence included traditional foods and gardening, camping and community gathering, ceremony and hunting.

¹¹³ Affidavit of Aunty Jenneifer Enosa (**Aunty Jen**), [5] (AB Pt B Tab 7).

¹¹⁴ Affidavit of Uncle Pabai, [194] (AB Pt B Tab 3).

¹¹⁵ 6 June 2023, Uncle Fred, T140:4-5 (AB Pt B Tab 39).

¹¹⁶ Affidavit of Uncle Pabai, [15] (AB Pt B Tab 3); 5 June 2023, Uncle Pabai, T42:1-7 (AB Pt B Tab 38); Affidavit of Uncle Guy Paul Kabai (**Uncle Paul**), [153] (AB Pt B Tab 5); 5 June 2023, Uncle Fred, T91:40-45 (AB Pt B Tab 38).

¹¹⁷ TSRA, Climate Change Strategy 2014-2018 [_0022] (AB Pt B Tab 2 [#A55, Item 44 of Appellants’ Unconditional Tender List]).

fulfilment of, *Ailan Kastom*. Uncle Pabai provided an example of this when he gave evidence about the prospect of losing the sacred island of Warul Kawa, off the Western coast of Boigu (see also J [606], [638], [678]): “[losing] our spiritual connection to the ancestors. We wouldn’t be able to do our spiritual business anymore. It would be like losing our version of heaven. It would be like killing all the people in the community and their spiritual ancestors”.¹¹⁸

90 **Connection to ancestors:** The reverence held for ancestral spirits was clear from the evidence, which included: “The ancestors give birth to our land;”¹¹⁹ “My ancestors are laid to rest here on Boigu. Talking to my ancestors is a big part of my culture”.¹²⁰ The connection to ancestors means that community cemeteries are particularly important cultural places in the Torres Strait: J [604]. The Court heard and saw evidence of these cemeteries being damaged, and bones being washed away, by rising sea levels: J [604], [619], [622], [646], [651], [662], [665], [666], [685]–[686], [689], [694], [1198]. The result of this physical damage has been psychic. Uncle Pabai described the harm to the cemetery in Boigu: “Flooding and erosion of the cemetery causes a lot of sadness in the community. If we do not know where our ancestors are, we cannot talk to them properly. We are worried that our ancestors won’t be safe to rest in the future”.¹²¹ The Court had the opportunity to see this damage during a view.¹²² At a more practical (but no less important) level, families have been unable to know exactly where someone is buried due to shifting markers¹²³ and there have been difficulties with burials due to the rising water tables filling graves prior to burials.¹²⁴

91 **Cultural knowledge and its transmission:** Ailan Kastom is rooted in storytelling and oral traditions. As Uncle Herbert explained: “The details of my culture are depicted in songs. I call language the soul of Saibai; all of these things are locked in the language”.¹²⁵ Importantly, this cultural knowledge is “a gift to pass on”; it exists not just for the

¹¹⁸ Affidavit of Uncle Pabai, [191] (AB Pt B Tab 3). See also Affidavit of Uncle Pabai [192] (AB Pt B Tab 2), Affidavit of Uncle Fred, [51] (AB Pt B Tab 4) and below at paragraph [91].

¹¹⁹ 5 June 2023, Uncle Pabai, T60:1-14 (AB Pt B Tab 38).

¹²⁰ Affidavit of Uncle Pabai, [194] (AB Pt B Tab 3). See also 13 June 2023, Aunty Jen, T569:26-30 (AB Pt B Tab 43).

¹²¹ Affidavit of Uncle Pabai, [88] (AB Pt B Tab 3). See also Affidavit of Uncle Mark Herbert Warusan (**Uncle Herbert**), [53] (AB Pt B Tab 6).

¹²² Record of views, photos 10-15.

¹²³ 12 June 2023, Uncle Paul, T466.16-47 (AB Pt B Tab 42).

¹²⁴ 5 June 2023, Uncle Pabai, T61.8-43 (AB Pt B Tab 38); 15 June 2023, **Uncle Gerald** Bowie, T728.13-45 (AB Pt B Tab 44).

¹²⁵ Affidavit of Uncle Herbert, [52] (AB Pt B Tab 6).

repository but for future generations.¹²⁶ But, changes in the physical environment have undermined the ability to pass on such cultural knowledge and thereby compromised customary teacher roles,¹²⁷ and climate change has detrimentally impacted teaching *Ailan Kastom*.¹²⁸ For example, Uncle Laurie gave evidence: “When this cultural education system has been undermined and threatened by climate change, we lose our power as teachers. I can see that in the future, when kids think about culture it will be just like an echo, not important. They will think ‘Oh yeah, culture’ but they won’t really know culture”.¹²⁹

- 92 In summary, the evidence established that climate-driven changes to the physical environment, ecosystem and communal property (cemeteries, gardens) of the Torres Strait has caused and is causing cultural loss aptly described as “loss of fulfilment” of *Ailan Kastom*, in language echoing “loss of enjoyment of life”.¹³⁰ The primary judge did not deny the utility of this label, although his Honour did observe that it included some “intangible elements”: J [1118].

VI.B Primary judge’s approach to compensable loss

- 93 At trial, the Appellants’ primary argument on loss was that they had suffered a loss of fulfilment of *Ailan Kastom*.¹³¹ While expressing “considerable sympathy” for the Appellants’ argument, his Honour did not consider that it was open to him, as a single judge, to find that the loss of fulfilment of *Ailan Kastom* is compensable under the Australian common law of negligence: J [1131], [1134]. Constrained by the current state of authority, his Honour applied *Cattanach v Melchior*¹³² to hold that to be compensable under the Australian common law of negligence, loss of fulfillment of *Ailan Kastom* had to be a right or interest that was recognised as capable of protection by law: J [1130]–[1131], see also J [1135].

¹²⁶ 8 June 2023, Uncle Laurie, T205:6-14 (AB Pt B Tab 40).

¹²⁷ Affidavit of Uncle Laurie, [97]–[98], see also [46], [47] (AB Pt B Tab 12).

¹²⁸ Affidavit of Uncle Paul, [113] (AB Pt B Tab 5); Affidavit of Uncle Pabai, [118] (AB Pt B Tab 3); Affidavit of Uncle Boggo Billy, [42] (AB Pt B Tab 10); Affidavit of Uncle Gerald, [16] (AB Pt B Tab 8); 5 June 2023, Uncle Fred, T95:45-T96:6 (AB Pt B Tab 38).

¹²⁹ Affidavit of Uncle Laurie, [98] (AB Pt B Tab 12). See also Affidavit of Aunty Jen, [48], [56] (AB Pt B Tab 7).

¹³⁰ See generally *Sharman v Evans* (1977) 138 CLR 563.

¹³¹ The Appellants also contended that they had suffered property damage as a result of the Commonwealth’s alleged breach of duty. The primary judge rejected the latter contention on the facts, and there is no appeal from that finding.

¹³² (2003) 215 CLR 1, [23] (Gleeson CJ).

VI.C The correct approach to the identification of novel types of compensable damage

- 94 Unlike most other torts, the tort of negligence did not develop to vindicate a particular right or interest such as reputation (defamation), bodily integrity (assault and battery), liberty (false imprisonment) and proprietary interests in land (trespass) and chattels (trespass to goods, detinue, conversion, asportation). Rather, the law of negligence is grounded in the neighbourly principle that operates as a more general and flexible¹³³ injunction to take care to avoid reasonably foreseeable harm to others with whom one stands in a special relationship. Of course, the generality and flexibility of the law of negligence creates a danger of unpredictability and the overextension of liability. The jurisprudence has built controls, including judicial caution before recognising new types of harm, to account for this danger.
- 95 Because negligence is not actionable *per se*, liability depends on the identification of loss or damage caused by the breach of duty. But not any loss or damage will do.¹³⁴ For example, distress or hurt feelings will not, on their own, support a conclusion of liability and sound in damages; by contrast, personal injury and damage to property or other interference with proprietary rights will. These examples are not exhaustive. The categories of harm cognisable by the law of negligence are not closed.¹³⁵ If it were otherwise, this would not only lead to a deficiency in the protective and remedial functions of the law of negligence in response to newly recognised harms, but also to incoherence in the law because harms (and corresponding interests) newly recognised to be legally valuable and compensable in other contexts would remain anomalously unrecognised by the law of negligence.
- 96 Where a novel harm is relied upon the analysis must proceed, consistently with the common law method,¹³⁶ by incremental analogy with already recognised categories of harm and by orientation to the twin purposes of negligence: remedy and deterrence.¹³⁷ Like other interrogations of judicially imposed limits on the scope of liability, the analysis

¹³³ *Tame*, [185] (Gummow and Kirby JJ).

¹³⁴ In *Donoghue v Stevenson* (1932) AC HL 31, Lord Atkin expressed the requirement as ‘an injury to the consumer’s life or property’.

¹³⁵ *Cattanach*, [64] (McHugh and Gummow JJ).

¹³⁶ See, in respect of the incremental approach to duties, *Heyman*, 481 (Brennan J).

¹³⁷ *Tame v New South Wales* (2002) 211 CLR 317, [185] (Gummow and Kirby JJ). Cf *Perre v Apand Pty Ltd* (1999) 198 CLR 180, [334] (Hayne J), who identifies ‘spreading loss’ as another purpose ‘reflected in the law of negligence’. While it is possible to identify other purposes of the law of negligence – or to abstract the two identified purposes to higher levels of generality – they have by far the most support in the authorities and suffice for present purposes.

is answered by reference to considerations of “legal policy”, “justice” and “the coherence of the law”.¹³⁸ To similar effect, “the preferred approach to defining the limits of liability in negligence” is one that “takes as its starting point, not merely the actions of the defendant, but the interests which are sufficient to attract the protection of the law in this field”.¹³⁹

- 97 An illustration of that approach is the process by which the law of negligence came to recognise “nervous shock” (more aptly, “psychiatric injury”) as damage that could ground liability.¹⁴⁰ That process was marked by the influence of “compassion and human sympathy to override the older doctrine, draconic and arbitrary”.¹⁴¹ The reference to arbitrariness is important, it underscores the importance of coherence to the analysis.
- 98 Against that background assistance *can* be drawn from other cases in which awards of damages have, in various contexts, recognised the loss that is entailed when a person is unable to practice their culture: cf J [1122].
- 99 In *Northern Territory of Australia v Griffiths*,¹⁴² the High Court upheld an award of \$1.3 million in damages for non-economic/cultural loss of the Ngaliwurru and Nungali Peoples for infringement to native title rights and associated loss of cultural fulfillment. The Court found that the task of assessing cultural loss required it “to translate the spiritual hurt from compensable acts into compensation”.¹⁴³ The test involved an assessment of “the amount which society would rightly regard as an appropriate award for the loss”. *Timber Creek* involved the assessment of compensation for breach of a statutorily recognised right (which is not the case here), but the decision illustrates the law’s capacity to assess cultural loss and compensating it in monetary terms. The High Court in *Commonwealth of Australia v Yunupingu*¹⁴⁴ has also confirmed cultural connections to land and sea are capable of being protected as ‘property’ within the meaning of s 51(xxxi) of the *Constitution*. In circumstances where the Appellants at trial

¹³⁸ *McFarlane v Tayside Health Board* [2000] 2 AC 59, 108, quoted with approval in *Cattanach*, [70] (McHugh and Gummow JJ).

¹³⁹ *Tame*, [183] (Gummow and Kirby JJ) (emphasis added), citing *Perre v Apand*, [191] (Gummow J).

¹⁴⁰ See generally *Tame*, [170]–[185] (Gummow and Kirby JJ).

¹⁴¹ *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 404 (Windeyer J). Fleming rationalised this development as consistent with the law of negligence’s protection of ‘personal security’, which the Appellants would submit also provides an appropriate rationale to recognise loss of fulfilment of *Ailan Kastom*, given its fundamental connection to personal identity: Fleming, *The Law of Torts* (1957), 169.

¹⁴² (2019) 269 CLR 1 (*Timber Creek*).

¹⁴³ *Timber Creek*, [155] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

¹⁴⁴ (2025) 99 ALJR 519. See, e.g., [143] (Gordon J).

disclaimed reliance on native title rights, the relevance of *Timber Creek* and *Yunupingu* is to underscore the various prisms that cultural connections to land and sea are recognised by the law of Australia.

- 100 In other Australian cases, awards of damages have included a component referable to cultural loss.¹⁴⁵ Underlying these cases is a recognition of the interest of Indigenous persons in the fulfilment of their traditional culture. Such interests – that is, “interests ... which arise from traditional cultural connection with the sea [and, it would follow, land], without any proprietary overlay” – have recently been described by the Full Court of this Court as “well known to contemporary Australian law”.¹⁴⁶ The High Court has explained: “Spiritual connection identifies and refers to a defining element in a view of life and living. It is not to be equated with loss of enjoyment of life or other notions and expressions found in the law relating to compensation for personal injury. Those expressions do not go near to capturing the breadth and depth of what is spiritual connection with land”.¹⁴⁷
- 101 There are, thus, compelling reasons for loss of fulfilment of *Ailan Kastom* to now be recognised as capable of being compensable under the law of negligence.

VI.D Conclusion on ground 5

- 102 The primary judge erred in failing to hold that loss of *Ailan Kastom* is compensable under the law of negligence. If the Court upheld this ground, it would set aside the primary judge’s answer to common question 16 and substitute the answer: ‘Yes.’

VII Ground 6 – Relief

- 103 The Appellants sought declarations regarding the existence and breach of the targets duty of care. The primary judge made two errors in refusing those declarations. *First*, the judge incorrectly held that the declarations were too general and abstract to have utility. Duties of care in tort are necessarily general; it is in their breach that they find specificity. In any event, if this Court finds that the duty and breach are established, it is open to the Court

¹⁴⁵ Outside of the Australian case, the Appellants relied below on *Smith v Fonterra* where the Supreme Court of New Zealand recognized the potential for tort law to compensate for ‘tikanga-based’ harm, where ‘tikanga’ broadly translates to Maori customs and values: [182],[188]. The primary judge considered this case provided ‘no real support’ for the Appellants: J [1128].

¹⁴⁶ *Santos NA Barossa Pty Ltd v Tipakalippa* (2022) 296 FCR 124, [68] (Kenny and Mortimer JJ). The primary judge considered this case provided ‘no real support’ for the Appellants: J [1128].

¹⁴⁷ *Timber Creek*, [187] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

to mould the consequential declaratory relief in a way that conforms to the Court's findings, or to remit the issue of relief.¹⁴⁸

104 *Second*, the judge incorrectly concluded that declarations would lack utility. This is a Part IVA proceeding. Answers to the common questions regarding duty and breach will bind the Commonwealth and group members who have not opted out under s 33ZB of the *Federal Court of Australia Act 1976* (Cth). Declaratory relief in the same form as the answers to the common questions will serve the additional purpose of declaring the law as applied to the facts as found in the trial of common issues. Declarations regarding duty and breach will have utility in this case because even if the Applicants fail to establish an element of their individual claims, other group members may be able to establish loss and the declarations will form part of the basis of their claims. Further, a purpose of the class action regime is to facilitate access to justice and to deter unlawful conduct. In *Zonia (No 2)*, the Full Court declared that the respondent had contravened a statute even though no loss was established.¹⁴⁹ That declaration was appropriate because it “vindicate[d] the appellants’ case on this important point and serve[d] the purpose of promoting compliance” with the statutory regime. So too here the Appellants’ claims in tort.

29 May 2025

Fiona McLeod AO SC
Sera Mirzabegian SC
Christina Trahanas
Julian R Murphy
Tom Rawlinson
Selena Bateman
Counsel for the Appellants

Phi Finney McDonald
Solicitors for the Appellants

¹⁴⁸ The Appellants intend to seek leave to rely on an amended notice of appeal in the form annexed to these submissions.

¹⁴⁹ *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Ltd (No 2)* [2025] FCAFC 123 at [6]–[11].

Amended 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]

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
Tel (03) 9134 7100 Fax _____
Email Brett.spiegel@phifinneymcdonald.com
Address for service
(include state and postcode) Level 24, 500 Bourke Street, Melbourne VIC 3000

Date:

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

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 did not consider the magnitude or risk of harm as substantial or very serious, but would have described the likely harm to be suffered in the future from climate change as very serious: J [995].
- d. 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 standard of care: J [1010].
- e. In so reasoning, the primary judge erred in:
 - i. failing to have adequate regard to the magnitude of the current and future impacts and risks of harm ~~current impacts and risks posed~~ to the Torres Strait Islands and Torres Strait Islanders from climate change that the reasonable defendant in the Commonwealth’s position knew at the material times 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



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 seawalls 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.