NOTICE OF FILING

Details of Filing

Document Lodged:	Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	10/07/2026 4:54:05 PM AEST
Date Accepted for Filing:	13/07/2026 8:46:29 AM AEST
File Number:	VID1479/2025
File Title:	PABAI PABAI & ANOR v COMMONWEALTH OF AUSTRALIA
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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

Federal Court of Australia
District Registry: Victoria
Division: General

VID1479/2025

On appeal from the Federal Court

Pabai Pabai and another

Appellants

Commonwealth of Australia

Respondent

RESPONDENT'S SUBMISSIONS

Filed on behalf of the Respondent

File ref: 24008733

Prepared by: Grace Ng
AGS lawyer within the meaning of s 55I of the *Judiciary Act 1903*

Address for Service:
The Australian Government Solicitor
Level 10, 60 Martin Place, Sydney NSW 2000
grace.ng@ags.gov.au

Telephone: 02 9581 7320
Lawyer's Email:
grace.ng@ags.gov.au
Facsimile: 02 9581 7650

Introduction

1 By an amended notice of appeal filed on 22 June 2026,[1] the appellants appeal from orders made by Wigney J on 14 October 2025, the reasons for which are found in *Pabai v Commonwealth of Australia (No 2)* (2025) 264 LGERA 230; [2025] FCA 796 (**J** or **Judgment**).[2] The appellants' written submissions of 29 May 2025 (**AS**) address six grounds, each of which must be rejected for the reasons developed below.

2 There was no dispute below that climate change is a serious global threat, and that the Commonwealth, as Australia's national government and a responsible nation State, should do what it can to reduce greenhouse gas (**GHG**) emissions. Relevant to this appeal, the issue before the primary judge was whether the Commonwealth was liable in negligence to a subset of the Australian population for failing to adopt particular emissions reduction targets. The appellants' case sought to impose liability for the Commonwealth's policy choices concerning climate change. The unchallenged evidence at trial was that those choices have wide-ranging implications across Australian society. The primary judge held that the Commonwealth was not liable in negligence for such decisions. The Commonwealth respectfully submits that conclusion was plainly correct.

Ground 1 – Justiciability

3 The appellants contend that the primary judge made three errors in his approach to justiciability. Those submissions are based on a misreading and mischaracterisation of his Honour's reasons. It is therefore necessary to begin by accurately summarising those reasons.

Primary judge's reasons

4 The primary judge accurately summarised the case law on justiciability at J [106]-[136].[3]

5 As the primary judge observed, the alleged duty of care (referred to as the "*alleged targets duty*") was framed in the appellants' Third Further Amended Statement of Claim (**3FASOC**)[4] at "*a very high level of abstraction*": J [822].[5] His Honour said it was therefore "*necessary to have regard to other factual allegations in order to ascertain the nature and extent of the alleged duty*": J [823]; see similarly J [820], [839].[6] His Honour proceeded to consider first the matters alleged to give rise

---

1 Appeal Book (**AB**) Format 1 (**F1**) Part A, Tab 8; AB Format 2 (**F2**) Part A at 504-516.
2 AB F1 Part A Tab 6; AB F2 at 124-495.
3 AB F1 Part A Tab 6 at 39-50; AB F2 at 172-183.
4 AB F1 Part A Tab 4; AB F2 at 33.
5 AB F1 Part A Tab 6 at 233-234; AB F2 at 366-367.
6 AB F1 Part A Tab 6 at 234; AB F2 at 367. See similarly AB F1 Part A Tab 6 at 233; AB F2 Part A at 366 and AB F1 Part A Tab 6 at 236; AB F2 Part A at 369.

to the duty (at J [824]-[838]);[7] then the reasonable steps alleged to be required to discharge the duty (at J [839]-[842]);[8] and then the alleged breach (at J [843]-[844]).[9]

6 As to the first, his Honour noted that the duty was said to arise "*by reason of the above matters*" in 3FASOC [81],[10] which matters appeared to comprise seven key allegations that were outlined earlier in the pleading: J [824].[11] Relevantly, his Honour observed (at J [830]-[831])[12] that two of the "*above matters*" were: *sixth*, the Commonwealth's abilities to set and meet a "*Best Available Science Target to hold Global Temperature Increase to the Global Temperature Limit*" and to control its own emissions and greenhouse gas emissions generally through existing statutes and regulations (3FASOC [76]);[13] and *seventh*, the Commonwealth's knowledge of the impacts of climate change, the Global Temperature Limit, the need to hold Global Temperature Increase to that limit, the Best Available Science to hold temperatures to that limit and that Torres Strait Islanders are vulnerable to the Commonwealth's failure to take reasonable measures to limit Global Temperature Increase to the Global Temperature Limit, including by setting and meeting a Best Available Science Target (3FASOC [77]-[79]); J [830]-[831]).[14] His Honour accordingly concluded that, if the key allegations and defined terms were unpacked and simplified, the "*central allegation*" in respect of the duty "*is that the Commonwealth had both the knowledge and ability to set greenhouse gas emissions reduction targets for Australia which, having regard to the best available science, would see Australia play its part in limiting global temperature increase to 1.5°C above pre-industrial levels and thereby prevent or minimise the prospect of Torres Strait Islanders suffering the more serious projected impacts of climate change in the future*": J [838].[15]

7 As to the alleged steps required to discharge the duty, the primary judge observed that the pleaded standard of care required the Commonwealth to take steps to protect Torres Strait Islanders, which included "*in essence, the identification of an emissions reduction target which, having regard to the best available science, would hold average global temperature increases to below 1.5°C above*

---

7 AB F1 Part A Tab 6 at 234-236; AB F2 Part A at 367-369.
8 AB F1 Part A Tab 6 at 236-238; AB F2 Part A at 369-371.
9 AB F1 Part A Tab 6 at 238; AB F2 Part A at 371.
10 AB F1 Part A Tab 4 at 44; AB F2 Part A at 77.
11 AB F1 Part A Tab 6 at 234; AB F2 Part A at 367.
12 AB F1 Part A Tab 6 at 234-235; AB F2 Part A at 367-368.
13 AB F1 Part A Tab 4 at 40; AB F2 Part A at 73.
14 AB F1 Part A Tab 4 at 41-44; AB F2 Part A at 74-77. AB F1 Part A Tab 6 at 234-235; AB F2 Part A at 367-368.
15 As an aside, it may be observed that there are in fact more than seven "matters above" that are apparently relied on as giving rise to the alleged targets duty (see 3FASOC [64]-[75] at AB F1 Part A Tab 4 at 36-40; AB F2 Part A at 69-73), but that does not detract from the primary judge's reasoning. It rather reinforces his Honour's conclusion, given that those other matters include detailed pleadings about the Commonwealth's alleged obligations under international climate change treaties, both in Part IV "Duty of Care" itself (3FASOC [64]-[67] at AB F1 Part A Tab 4 at 36-37; AB F2 Part A at 69-70, [68] at AB F1 Part A Tab 4 at 36-37; AB F2 Part A at 69-70) and earlier at 3FASOC [32]-[49] (at AB F1 Part A Tab 4 at 17-22; AB F2 Part A at 50-55).

pre-industrial levels and thereby prevent or minimise the most dangerous impacts of climate change in the Torres Strait Islands": J [841].[16]

8 As to the pleaded breach, the primary judge observed it was, in essence, "*that the four NDC targets which were set and communicated by the Commonwealth were not targets which, having regard to the best available science, would hold (or perhaps were not consistent with holding) average global temperature increases to below 1.5°C above pre-industrial levels and thereby prevent or minimise the most dangerous impacts of climate change in the Torres Strait Islands*". His Honour noted that the appellants did not allege breach of the "*implementation element*" of the duty or standard of care: J [844].[17]

9 Having set out these matters, the primary judge then considered whether the alleged duty of care should be rejected because it concerned matters of high or core government policy – that is, the "*justiciability*" issue – at J [846]-[866].[18] First, at J [847]-[851],[19] the primary judge considered the appellants' submission that it was more appropriate to consider the justiciability issue at the breach stage of the inquiry, and rejected that submission. In short, referring to ***Graham Barclay Oysters Pty Ltd*** *v Ryan* (2002) 211 CLR 540 and the Full Court's decision in *Minister for the Environment (Cth) v* ***Sharma*** (2022) 291 FCR 311, his Honour accepted that, in some cases, it may be appropriate to defer the justiciability issue to the breach stage, but this is not such a case because the justiciability issue "*is squarely raised by the way in which the alleged duty of care is framed in the applicants' pleading*" and "*it is apparent from the very nature of the alleged duty of care that the imposition of the duty would require the Court to consider and determine the reasonableness of government conduct involving matters of policy choice, or policymaking or political judgment*": J [848].[20] As to the appellants' reliance on Beach J's judgment in *Sharma*, his Honour observed that both Allsop CJ and Wheelahan J took a different approach, and in any case, Beach J's reasoning was distinguishable because the case did not involve the exercise of any specific statutory power: J [851].[21]

10 Finally, at J [852]-[866],[22] the primary judge explained in detail his reasons for concluding (at J [855], [865])[23] that the duty alleged here inevitably raised questions of high or core government policy. His Honour began by observing that the appellants' posited duty of care and the allegations of breach throw up questions about the Executive Government's policy response to the global threat of climate change, and its compliance with its treaty obligations, which are exactly the types of issues

---

16 AB F1 Part A Tab 6 at 237; AB F2 Part A at 370.
17 AB F1 Part A Tab 6 at 238; AB F2 Part A at 371.
18 AB F1 Part A Tab 6 at 239-246; AB F2 Part A at 372-379.
19 AB F1 Part A Tab 6 at 239-241; AB F2 Part A at 372-374.
20 AB F1 Part A Tab 6 at 239-240; AB F2 Part A at 372-373.
21 AB F1 Part A Tab 6 at 240-241; AB F2 Part A at 373-374.
22 AB F1 Part A Tab 6 at 241-246; AB F2 Part A at 374-379.
23 AB F1 Part A Tab 6 at 242; AB F2 Part A at 375. AB F1 Part A Tab 6 at 245-246; AB F2 Part A at 378-379.

the authorities indicate are non-justiciable by Courts, and to be decided at the ballot box: J [853]-[855], [865].[24] His Honour also observed that there was no criterion by which the Court could assess the weight to be given to the various economic, social and political factors apart from the Best Available Science in determining an emissions target: J [862]-[863].[25] His Honour noted that his approach was consistent with that of Allsop CJ and Wheelahan J in *Sharma* (at J [856]-[860])[26] and with the evidence of the appellants' expert: J [332], [864].[27]

The law on justiciability

11 Next, it is necessary to make three points by way of introduction on the law.

12 The *first* matter to note is that, although the policy/operational distinction has been subject to some criticism, it has never been doubted that there are *some* areas of policy or political decision-making that are unsuitable for curial assessment.[28] By way of shorthand, these submissions refer to those as matters of high or core government policy. At the very least, it is uncontroversial that such matters include legislative and quasi-legislative functions,[29] and matters arising out of the Executive's conduct of foreign relations.[30]

13 *Secondly*, contrary to AS [8], [12] and [15], there is no principle or presumption that whether a pleaded case is non-justiciable "*will almost always be best assessed at the breach stage*". Rather, the courts' approach where the facts raise matters of high or core government policy is typically to consider justiciability at the duty stage. This was the approach taken in *Graham Barclay Oysters* and *Crimmins* in relation to the quasi-legislative powers, and by Allsop CJ and Wheelahan J in *Sharma*.[31]

14 The cases cited by the appellants at AS [8]-[10] are not to the contrary. As to *Crimmins*, *Romeo* and *Day*, all those passages[32] acknowledge that there are areas of high or core government policy that may not be subject to a duty of care; the comments on which the appellants rely are in relation to

---

24 AB F1 Part A Tab 6 at 241-242; AB F2 Part A at 374-378. AB F1 Part A Tab 6 at 245-246; AB F2 Part A at 378-379.

25 AB F1 Part A Tab 6 at 244-245; AB F2 Part A at 377-378.

26 AB F1 Part A Tab 6 at 242-244; AB F2 Part A at 375-377.

27 J [332] at AB F1 Part A Tab 6 at 98; AB F2 Part A at 231. J [864] at AB F1 Part A Tab 6 at 245; AB F2 Part A at 378.

28 *Sutherland Shire Council v* ***Heyman*** (1985) 157 CLR 424 at 442 (Gibbs CJ, Wilson J agreeing at 471), 468-9 (Mason J), 500 (Deane J); *Pyrenees Shire Council v* ***Day*** (1998) 192 CLR 330 at [180], [182] (Gummow J); ***Romeo*** *v Conservation Commission* (1998) 192 CLR 431 at [139] (Kirby J); ***Crimmins*** *v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at [5] (Gleeson CJ), [27], [32] (Gaudron J), [87], [93] qu 5, [131] (McHugh J), [170] (Gummow J), [236] (Kirby J), [288], [291], [297] (Hayne J); ***Brodie*** *v Singleton Shire Council* (2001) 206 CLR 512 at [92] (Gaudron, McHugh and Gummow JJ), [234]-[235] (Kirby J); *Graham Barclay Oysters* at [6], [12]-[15], [27], [33], [36], [40] (Gleeson CJ).

29 *Heyman* at 500 (Deane J); *Day* at [180], [182] (Gummow J); *Crimmins* at [32] (Gaudron J), [87], [93] qu 5, [131] (McHugh J), [236] (Kirby J), [291]-[292] (Hayne J); *Graham Barclay Oysters* at [14] (Gleeson CJ); *Vairy v Wyong Shire Council* (2005) 223 CLR 442 at [86] (Gummow J). See also, *Bienke v Minister for Primary Industries and Energy* (1996) 63 FCR 567 at 596.

30 *Brodie* at [92] (Gaudron, McHugh and Gummow JJ), citing *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 367-73 (Gummow J).

31 *Crimmins* at [32] (Gaudron J), [131] (McHugh J), [236] (Kirby J), [288], [291] (Hayne J); *Graham Barclay Oysters* at [12]-[15] (Gleeson CJ); *Heyman* at 468-9 (Mason J), 500 (Deane J); *Sharma* at [7], [15], [236]-[238], [246]-[249], [346] (Allsop CJ), [866], [868] (Wheelahan J).

32 Being *Crimmins* at [6] (Gleeson CJ), [87] (McHugh J, Gleeson CJ agreeing at [3]); *Romeo* at [122], [139]; *Day* at [182]-[183] (Gummow J).

policy matters *outside* those areas. In *Crimmins*, the High Court held that there could be no duty of care in respect of the exercise of the quasi-legislative power under s 18 of the *Stevedoring Industry Act 1956* (Cth).[33] The general statement at [106] of *Brodie* – made in the very different context of liability of a local council for road maintenance – was likewise subject to a recognition that there are certain areas of high or core government policy that are non-justiciable, the plurality giving as an example the conduct of foreign relations.[34] Both Allsop CJ and Wheelahan J affirmed that [106] of *Brodie* did not deny the recognition that some areas of core policy are unsuitable for curial assessment.[35]

15 *Thirdly*, the primary judge's approach is entirely consistent with this Court's recent decision in *Sharma* concerning the same issue of climate policy. In that case, both Allsop CJ and Wheelahan J held that the Executive's climate policies are matters of high or core government policy and unsuitable for curial assessment, and for this reason there was no duty of care.[36] Contrary to AS [17], Wheelahan J did approach justiciability as a "*threshold issue*" (if by that, it is meant an issue relevant to duty of care): his Honour said "*[t]he nature of the issues raised by this particular case are not such that the matter can be left to the breach stage of the analysis*".[37] This was also plainly Allsop CJ's approach, though his Honour noted that, even at the duty stage, the question was whether 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 determination*".[38]

16 Contrary to AS [11], Beach J's reasoning in *Sharma* does not assist, for the reasons given by the primary judge (see at [9] above). Justice Beach expressly distinguished the principles in *Graham Barclay Oysters* and matters of quasi-legislative and "*core*" policy.[39]

Alleged error 1: "threshold approach"

17 Once the law, and the primary judge's reAasoning, are accurately summarised, it is evident that there are no errors as alleged by the appellants.

18 Beginning with the first alleged error, the primary judge did not, as asserted, apply a "*novel threshold approach*": cf AS [6], [14]. Rather, his Honour accurately summarised and applied the orthodox principles governing the justiciability of political or policy decisions set out above.[40] In particular, his Honour appreciated (as is accepted by the appellants: AS [13]), that justiciability

---

33 *Crimmins* at [32] (Gaudron J), [131] (McHugh J), [236] (Kirby J), [288], [291] (Hayne J).
34 *Brodie* at [92] (Gaudron, McHugh and Gummow JJ).
35 *Sharma* at [252] (Allsop CJ), [863] (Wheelahan J).
36 *Sharma* at [7], [15]-[17], [236]-[237], [246]-[249], [252], [346] (Allsop CJ), [757], [836], [859]-[868] (Wheelahan J).
37 *Sharma* at [868].
38 *Sharma* at [7], [15].
39 *Sharma* at [438]-[456], [611]-[617].
40 See also, Respondent's Closing Submissions before the primary judge at [47]-[79] and [601]-[610].

could arise at different levels of inquiry, including at the stage of breach: J [106],[41] [847]-[848],[42] but concluded that this was a case in which it was necessary to engage with the issue at the duty stage because the way in which the duty of care had been pleaded necessarily raised the issue: J [820]-[866].[43] That was correct, for the reasons given by the primary judge. That approach is also consistent with the High Court and Full Court authorities addressing matters of high or core government policy, as set out above.

19 The appellants do not engage with the primary judge's reasons for determining that the appellants' alleged duty did ensnare the court in this manner, other than in the most superficial way: at AS [16]. The appellants make two criticisms.

20 The *first* is that the duty of care as pleaded in 3FASOC [81] did not necessarily require the consideration of high or core government policy – it "*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*": at AS [16]. However, as the primary judge explained, the very pleading of the duty, in particular, the various "*above matters*" said to give rise to the duty and the pleaded standard of care, inevitably required the determination of matters of high or core government policy, namely, the Commonwealth's climate policies and its compliance with its treaty obligations. The primary judge's approach of considering not only the bare duty pleaded at 3FASOC [81] but also the factors said to give rise to the duty of care and the proposed standard of care in assessing justiciability was entirely orthodox. An applicant cannot avoid justiciability issues by pleading a duty of care at an unhelpful level of abstraction.[44] The authorities emphasise the importance of considering the existence of the duty of care in light of the scope of the duty and breach, and in light of the concrete facts.[45] In particular, considering the posited standard of care is necessary in determining whether there is some criterion by which the government's actions can be judged – a key touchstone of whether or not matters unsuitable for curial assessment are in play.[46]

21 In any case, the bare duty of care at 3FASOC [81] as pleaded is inapt as a duty of care in negligence. As the primary judge observed (at J [845];[47] see also J [89][48]), it is not pleaded by reference to the harm that ought to be avoided; it is rather a duty to protect a whole people and way

---

41 AB F1 Part A Tab 6 at 39; AB F2 Part A at 172.
42 AB F1 Part A Tab 6 at 239-240; AB F2 Part A at 372-373.
43 AB F1 Part A Tab 6 at 233-246; AB F2 Part A at 366-379.
44 See the authorities in the footnote below, and in particular, *Sharma* at [14] (Allsop CJ).
45 See, e.g. *Romeo* at [122] (Kirby J); *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at [103], [105] (Hayne J); *Agar v Hyde* (2000) 201 CLR 552 at [66] (Gaudron, McHugh, Gummow and Hayne JJ); *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469 at [1] (Gleeson CJ); *Sharma* at [8], [13]-[15] (Allsop CJ), [359], [536]-[538] (Beach J), [777] (Wheelahan J).
46 See, e.g.; *Graham Barclay Oysters* at [13]-[15], [27] (Gleeson CJ). See also, *Crimmins* at [5] (Gleeson CJ); *Sharma* at [236]-[237] (Allsop CJ), [627]-[628] (Beach J), [757], [836], [856], [864] (Wheelahan J).
47 AB F1 Part A Tab 6 at 238-239; AB F2 Part A at 371-372.
48 AB F1 Part A Tab 6 at 34; AB F2 Part A at 167.

of life and environment. Aside from such a pleading being defective as a matter of law, that is a duty of a governmental nature, and not one that could be imposed on any citizen.

22 Further, the appellants' "*mundane*" example is misconceived. A legal entrant at a Commonwealth-run facility on the islands would not need to resort to the novel duty alleged in this case, as they could rely on the Commonwealth's duty of care as an occupier. In the appellants' hypothetical, the issue would be whether the standard of care required erection of a shelter. If the fact that the Commonwealth is the occupier of the premises is removed from the hypothetical, the policy nature of the alleged duty becomes apparent: the question would be whether the Commonwealth is required to pay for someone else to erect a sun/rain shelter on their premises on the islands in order to protect Torres Strait Islanders from climate change. That is akin to the kind of duty the appellants relied on for the adaptation case, which the primary judge also rejected on the basis that it would require the Court to pass judgment on the reasonableness of policy decisions: J [1154].[49] The appellants do not challenge that conclusion.

23 The appellants' *second* criticism of the primary judge's approach is that 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, at J [853]-[855].[50] This criticism is unfounded. Even when justiciability is addressed at the duty stage, it must necessarily be done by reference to the kinds of questions that are *likely* to be thrown up at the breach stage. For example, as noted above, Allsop CJ in *Sharma* framed the justiciability issue at the duty stage as whether "the posited duty throws up for consideration at the point of breach matters that are core policy". There is no artificiality in addressing justiciability at the duty stage (cf AS [16]). The appellants' approach seeks to hollow out the duty analysis by framing the alleged duty at such a level of abstraction that there is no context for considering either the nature of the relationship or the function to which the duty is said to attach.

Alleged error 2: decision involved high or core government policy

24 By their second alleged error, the appellants submit that, whether justiciability is addressed at the stage of duty or breach, the issues in the case do not raise matters of high or core government policy. That submission need only be stated to be rejected. It is difficult to imagine a decision that is more squarely a matter of high or core government policy, for the reasons given by the primary judge at J [852]-[865][51] and by Allsop CJ in *Sharma*, especially at [7], [15], [227]-[228], [236]-[238], [246]-[249], [346]. The allegations of breach will inevitably challenge the climate policy of the Commonwealth Government, set by Cabinet, and – as accepted by the appellants below – set having

[49] AB F1 Part A Tab 6 at 328; AB F2 Part A at 461.
[50] AB F1 Part A Tab 6 at 241-242; AB F2 Part A at 374-375.
[51] AB F1 Part A Tab 6 at 241-244; AB F2 Part A at 374-378.

regard to multiple social, political and economic factors in addition to climate science, as well as by reference to Australia's treaty obligations. It would plainly be "inappropriate" or "impractical" for the court to pass judgment on the impugned decisions, which are policy and political matters reserved for the executive and legislative arms of government, and about which there is no criterion to weigh the competing public interest considerations.

25 The correctness of this conclusion is underscored by several matters. *First,* the impugned emissions reductions targets were set by Cabinet. The deliberations of Cabinet are subject to public interest immunity, which cannot be waived.[52] The facts that the decisions were made at the very highest level of government and that the court, if it is to adjudicate these issues, must do so without access to the key documents, are powerful indicators that the decisions at issue are matters of high or core government policy. *Secondly*, the appellants framed[53] (and continue to frame: see AS [44], [50]) the standard of care and breach inquiry as turning on what a "reasonable developed international state actor" would do: see, e.g. J [988]-[989].[54] That makes clear beyond argument that the case throws up high or core policy and political issues, and not merely "operational" type failures that a polity, like other "citizens", may be held liable for in negligence.[55] *Thirdly*, the Commonwealth's 2022 nationally determined contribution (**NDC**) was enshrined in the *Climate Change Act 2022* (Cth) (s 10(1): see J [517]-[518]).[56] Thus, if the appellants' case were accepted, the passage of that Act by the Parliament would amount to a breach of the posited duty. As set out above (at [12]), it is universally accepted in the case law that legislative and quasi-legislative powers cannot be subject to a duty of care.

26 The reasoning of the majority in *Sharma* is directly applicable, as the primary judge held: J [857]-[862].[57] The appellants assert at AS [20] that the duty in *Sharma* "*much more readily engaged 'core policy questions'*" than the alleged duty here, but do not explain why. Nor do the appellants explain how they could avoid this issue if, as they contend, the question of non-justiciability should be determined at breach. The appellants' breach case was that the Commonwealth should have set a different GHG emissions reductions target: 3FASOC [82]-[83].[58] As the primary judge observed, although the appellants at times sought to deny below that their case was that science was the sole consideration to which the Commonwealth could have regard when setting its emissions reductions targets, they failed to identify what other factors and considerations the Commonwealth could

52 *Sankey v Whitlam* (1978) 142 CLR 1 at 39; *Spencer v Commonwealth* (2012) 206 FCR 309 at [32] (Keane CJ, Dowsett and Jagot JJ). See also, Respondent's Closing Submissions at [605]-[607]; AB F1 Part B Tab 61 at T258.30-259.15 (Lloyd SC).
53 Applicants' Closing Submissions at [306]; Applicants' Reply Submissions at [140].
54 AB F1 Part A Tab 6 at 281-282; AB F2 Part A at 414-415.
55 *Graham Barclay Oysters* at [12]-[15] (Gleeson CJ); see similarly at [90]-[91] (McHugh J).
56 AB F1 Part A Tab 6 at 144; AB F2 Part A at 277.
57 AB F1 Part A Tab 6 at 242-245; AB F2 Part A at 375-378.
58 AB F1 Part A Tab 4 at 45-47; AB F2 Part A at 78-80.

reasonably take into account when setting targets, or what weight could be given to those matters: J [1012].[59] They do not grapple with these deficiencies on appeal: see AS [51]-[56], addressed at [57]-[62] below.

27 The appellants also contend that the reasoning in *Sharma* could be distinguished because of the "*procedural posture*" of the case; that is, because breach had not occurred. But that does not explain why the reasoning of Allsop CJ at [227]-[228] and [246]-[248] and Wheelahan J at [868], as applied at J [857]-[862],[60] was wrong or not applicable to this case.

28 The appellants' faint attempt at explaining why their case does not inevitably raise non-justiciable issues is to say that it does not concern the "*formulation*" of climate policy, but only the "*implementation or operationalisation of an earlier-formed policy decision*" to ratify the Paris Agreement: AS [19]. That submission is wrong. Article 2.1(a) of the Paris Agreement articulates a collective goal to "*[h]old ... the increase in the global average temperature to well below 2°C above pre-industrial levels and pursu[e] efforts to limit the temperature increase to 1.5°C above preindustrial levels*":[61] J [393].[62] By the later Articles, State Parties state that they will communicate NDCs and pursue mitigation measures aimed at achieving the objectives of their NDCs: J [394]-[396].[63] This includes an aim to peak GHG emissions as soon as possible and "*undertake rapid reductions thereafter in accordance with best available science…*": Article 4.1. These articles leave discretion to governments to determine exactly what NDCs they will communicate, how they will develop them and what mitigation measures they will take to achieve them. It was accepted by the climate science expert witnesses that the question of what targets countries implement was a matter of "*policy*" and "*value judgements*" and a "*normative question*"; not only a question of climate science.[64] It was also, and is still, accepted by the appellants that determining an emissions reductions target in pursuit of that obligation is a multifactorial exercise that requires consideration of "*competing resource and policy demands*".[65] Thus, it cannot seriously be disputed that the failures alleged by the appellants are policy and political failures, not "*technical failures to implement consensus scientific knowledge*": contra. AS [19].

Alleged error 3: inappropriate and impractical to pass judgment

---

59 AB F1 Part A Tab 6 at 290; AB F2 Part A at 423.
60 AB F1 Part A Tab 6 at 242-245; AB F2 Part A at 375-378.
61 AB F1 Part B Tab 31 'Exhibit JG-1' item 31.1.
62 AB F1 Part A Tab 6 at 113; AB F2 Part A at 246.
63 AB F1 Part A Tab 6 at 113-114; AB F2 Part A at 246-247.
64 Respondents' Closing Submissions at [236]-[237]; AB Part B Tab 46 at T889.24-25 (Karoly); AB Part B Tab 50 at T1126.20-34, 1128.14-20, 1136.37-1137.24 (Meinshausen); AB Part B Tab 54 at T1399.46-1400.3, 1401.14-1402.16 (Canadell).
65 AS [51]; Applicants' Closing Submissions at [304]; AB Part B Tab 59 at T56.29-35 (McLeod SC).

29 Finally, the appellants submit that the primary judge erred in concluding (at J [862])[66] that it was "*inappropriate and impractical*" to pass judgment on the Commonwealth's actions that were the subject of the alleged duty: AS [21]. The appellants submit that it was not in fact inappropriate and impractical because the primary judge was able to determine whether the targets were in fact in accordance with the Best Available Science, at J [993]-[1049].[67]

30 It may be accepted, as the primary judge did (at J [862]),[68] that "*the Court can appropriately make relevant findings about ... the best available science, and whether a particular emissions reduction target could be said to be consistent or compatible with what the best available science said about* CO_2 *budgets, and whether those budgets are likely to assist in limiting global temperature increases to within defined limits*", as his Honour then went on to do. However, the difficulty, as explained above, and at J [862]-[863],[69] is in assessing and weighing all the *other* economic, social and political factors that must be assessed and weighed in determining an emissions reductions target on behalf of the Commonwealth. Indeed, the question of what factors (including science) are to be considered in determining such targets is itself a matter unsuitable for curial assessment. As the primary judge observed in the context of considering the standard of care alleged to apply (in the event that his Honour was wrong on the duty question), the "*fundamental problem*" with the appellants' posited standard of care is that it would "*effectively require the Commonwealth to have regard only to the best available science when setting its greenhouse gas emission reduction targets*": J [1011].[70] The standard of care for which the appellants contend "*makes no provision for the Commonwealth to have regard to any other factors and considerations when setting emissions reduction targets, including factors such as the expense, inconvenience or difficulties that may be encountered in implementing measures to reduce emissions in line with the targets, or other competing or countervailing responsibilities that the Commonwealth might have*". The appellants do not offer – and cannot offer – any criterion by which the Court is to assess those matters. As the primary judge observed, if judgment is to be passed on those matters, it must be at the ballot box: J [865].[71]

Ground 2 – Duty of care / Salient Features

31 The second ground takes issue with the conclusion that the relationship between the Commonwealth and the appellants and Group Members was not one that was appropriate for the

66 AB F1 Part A Tab 6 at 244; AB F2 Part A at 377.
67 AB F1 Part A Tab 6 at 283-299; AB F2 Part A at 416-432.
68 AB F1 Part A Tab 6 at 244; AB F2 Part A at 377.
69 AB F1 Part A Tab 6 at 244-245; AB F2 Part A at 377-378.
70 AB F1 Part A Tab 6 at 290; AB F2 Part A at 423.
71 AB F1 Part A Tab 6 at 245-246; AB F2 Part A at 378-379. See also, *Graham Barclay Oysters* at [6], [15] (Gleeson CJ).

imposition of the alleged duty of care: AS [23]-[40]; J [941],[72] [949],[73] [978].[74] This was an independent reason for rejecting the posited duty of care to the reasoning the subject of Ground 1: J [867].[75] This ground comprises two complaints that follow preliminary submissions at AS [24]-[25] directed at positioning the ground as a viable pathway for the appeal. *First*, a complaint about the primary judge's analysis of "*control*" as a salient feature (AS [26]-[36]); and *secondly*, a complaint about an alleged failure to have regard to current impacts and risks in the salient features analysis (AS [37]-[39]). The appellants suggest his Honour should have concluded that the Commonwealth undertook a "*positive act*" that formed "*part of the acts contributing to the impacts of climate change*" and, as a result, found the alleged duty to exist (AS [23]). It is asserted the Commonwealth's "*degree of control over the risk*" was a factor that weighed in favour of the imposition of a duty: AS [27]. The ground should be rejected.

Salient features analysis

32 The law on novel duties was addressed at J [89]-[136].[76] As his Honour recognised (J [89]),[77] a duty of care is owed to a specified class "*to exercise reasonable care within a specified area of responsibility to avoid specified loss to [a] ... specified class*".[78] The postulated duty must be framed as a duty to avoid causing the applicant to suffer loss or damage of a particular, legally recognised, kind.[79] His Honour clearly recognised that, in novel cases, it was necessary to undertake a close analysis of the facts bearing upon the relationship between the parties by reference to "*salient features*" or "*factors*".[80] Ground 2 focuses upon one feature — control (Ground 2(d) and (e))[81] — but, as his Honour observed at J [92],[82] the inquiry is to be approached by reference to various considerations,[83] and the totality of the relationship: J [94].[84] The reasons disclose careful attention to the law concerning each salient features (J [92]),[85] including control (J [102]).[86] The cases on that factor emphasise the necessity of considering the "*degree and nature of control exercised by the [defendant] over the risk of harm that eventuated*".[87] They also emphasise the "*fundamental importance*" of the factor of control in discerning a common law duty of care on the part of a public

---

72 AB F1 Part A Tab 6 at 268; AB F2 Part A at 401.
73 AB F1 Part A Tab 6 at 270; AB F2 Part A at 403.
74 AB F1 Part A Tab 6 at 277; AB F2 Part A at 410.
75 AB F1 Part A Tab 6 at 246; AB F2 Part A at 379.
76 AB F1 Part A Tab 6 at 34-50; AB F2 Part A at 167-183.
77 AB F1 Part A Tab 6 at 34; AB F2 Part A at 167.
78 ***Brookfield** Multiplex Ltd v Owners Corporation Strata Plan* 61288 (2014) 254 CLR 185 at [169] (Gageler J).
79 *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Company Ltd (The Wagon Mound)* [1961] AC 388 at 425 (Viscount Simonds), cited in *Sharma* at [536] (Beach J); *Heyman* at 487 (Brennan J).
80 ***Caltex** Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649 at [102] (Allsop P, with whom Simpson J agreed).
81 AB F1 Part A Tab 8 at 3; AB F2 Part A at 507.
82 AB F1 Part A Tab 6 at 34-35; AB F2 Part A at 167-168.
83 *Caltex* at [103].
84 Referring to *Sharma* at [211]. AB F1 Part A Tab 6 at 35-36; AB F2 Part A at 168-169.
85 AB F1 Part A Tab 6 at 34-35; AB F2 Part A at 167-168.
86 AB F1 Part A Tab 6 at 37-38; AB F2 Part A at 170-171.
87 *Graham Barclay Oysters* at [149] (Gummow and Hayne JJ), referred to at J [102].

authority.[88] These propositions explain why his Honour's reasons dealt with the issue of control in the manner outlined below.

Primary judge's reasons

33 The appellants' submissions commence from the proposition that his Honour's analysis proceeded from the premise that "*it would only be appropriate to impose the duty if the Commonwealth exercises significant or material control over the risk of harm*": AS [23]. This premise is said to be evident from J [931],[89] [946][90] and [978][91] (AS [23], [27]), though: (1) that is not what those paragraphs say; and (2) the appellants' submissions themselves shift in their characterisation of the role that the factor played in his Honour's reasoning. At times, the submissions characterise "*control*" as "*the most important*" salient feature of the primary judge's analysis (AS [26]), and at others it is characterised as the premise of the primary judge's conclusion with respect to the "*relationship*" of the parties. On analysis, the appellants' case on Ground 2 proceeds on a mischaracterisation of the reasons.

34 Having spent several hundred paragraphs making detailed findings of fact, his Honour addressed salient features: at J [867]-[949].[92] That analysis began with a recognition of the need to consider the "*total relationship*" of the parties (J [868]).[93] The reasons disclose that a variety of factors influenced his Honour's conclusions on the salient features analysis (cf AS [38]).

(a) On *vulnerability*, his Honour drew attention to the incoherence of the pleaded duty: J [912].[94] The *relevant* question of whether the appellants and Group Members were vulnerable to the harms that might flow from the Commonwealth's *alleged negligence*, rather than harm they might suffer from climate change generally: J [912].[95] As his Honour observed, it was significant to the relationship analysis that the additional or incremental impacts from the Commonwealth's alleged failure to set and implement the posited targets were "*very small*" to the point of being "*effectively immeasurable*": J [912].[96] That conclusion, which is not challenged, was significant to the salient features analysis.

(b) On *reliance and assumption of responsibility*, his Honour (a) identified the difficulty that the appellants had relied on the Commonwealth only in a "*very generalised respect*" and had not established that they relied on the Commonwealth to "*set emissions reduction targets*

---

88 *Graham Barclay Oysters* at [150] (Gummow and Hayne JJ), referred to at J [102].
89 AB F1 Part A Tab 6 at 266-266; AB F2 Part A at 398-399.
90 AB F1 Part A Tab 6 at 269-270; AB F2 Part A at 402-403.
91 AB F1 Part A Tab 6 at 277; AB F2 Part A at 410.
92 AB F1 Part A Tab 6 at 246-270; AB F2 Part A at 379-403.
93 AB F1 Part A Tab 6 at 246; AB F2 Part A at 379.
94 AB F1 Part A Tab 6 at 260; AB F2 Part A at 393.
95 AB F1 Part A Tab 6 at 260; AB F2 Part A at 393.
96 AB F1 Part A Tab 6 at 260; AB F2 Part A at 393.

based on the best available science which would best protect them from the worse impacts of climate change, or that the Commonwealth had adopted any practice which could provide any reasonable basis for Torres Strait Islanders to rely on it": J [915].[97]

(c) On *control*, his Honour observed that the factor was "*of particular importance*" in determining if a public authority owes its constituents, or a class of them, a duty of care: J [917].[98] There are two points to be made about this at the outset. *First*, it is correct as a matter of well-established authority.[99] *Secondly*, the observation is inconsistent with the notion that the primary judge's conclusion was *premised* solely upon the factor of control. In dealing with the issue of control his Honour reasoned that the Commonwealth was able to exercise "*some*" degree of control over the risk of harm to Torres Strait Islanders from the impacts of climate change but found that the extent of the control was "*certainly not exclusive or extensive*" and "*in a practical sense*" was "*very minimal*": J [921];[100] cf AS [26].

35 Importantly, no challenge is made to the finding that the Commonwealth exercised *very minimal* control over the risk of harm: AS [26]; Ground 2(e).[101] Nor could it be, in light of the unchallenged factual findings upon which that conclusion was based: at J [931].[102]

Relationship between the Commonwealth and Torres Strait Islanders

36 As is evident from the summary above at [33]-[34], AS [26] oversimplifies the primary judge's reasons. Even if the factor of control assumed particular *importance* in Wigney J's reasoning on the salient features analysis (J [917]),[103] in reaching the ultimate conclusion that is the subject of challenge by Ground 2, his Honour weighed other factors, a number of which are unchallenged.

Alleged error 1: control analysis

37 The first complaint made by the appellants is that the primary judge: (a) reasoned that it was necessary for the Commonwealth to "*exercise significant or material control over the risk of harm*" (AS [27]); but that (b) this was the wrong test because the case involved "*a positive act*", being the setting of emissions reduction targets; and (c) it should not matter that other entities also contributed to the risk of harm or that the Commonwealth's contributions were not material or significant. There are at least seven responses to this line of argument.

---

97 AB F1 Part A Tab 6 at 261; AB F2 Part A at 394.
98 AB F1 Part A Tab 6 at 262; AB F2 Part A at 395.
99 His Honour identified the relevant principle at J [102] (AB F1 Part A Tab 6 at 37-38; AB F2 Part A at 170-171) (above at [30]), by reference to *Graham Barclay Oysters* at [150] (Gaudron, McHugh, Gummow and Hayne JJ): "*The factor of control is of fundamental importance in discerning a common law duty of care on the part of a public authority*"; see also *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551-552; *Crimmins* at [43]-[46], [104], [166], [227], [304], [357]; *Brodie* at [102].
100 AB F1 Part A Tab 6 at 262; AB F2 Part A at 395.
101 AB F1 Part A Tab 8 at 3; AB F2 Part A at 507.
102 AB F1 Part A Tab 6 at 265; AB F2 Part A at 398.
103 AB F1 Part A Tab 6 at 262; AB F2 Part A at 395.

38 *First*, it again mischaracterises the reasons. While his Honour observed at J [931] that it could not be said the Commonwealth had any "*significant or material control over the risk of harm*",[104] that observation was not posited as a standard as is suggested at AS [27]. Rather, it is a corollary of the factual finding that any degree of control was "*very minimal*": at J [948]-[949].[105]

39 *Secondly*, the suggestion that the case was a "*positive act*" case, which fell to be distinguished from nonfeasance cases in which the "*significant or material control*" test was appropriate is not supported by authority. The argument is largely put by reference to *Brodie, Graham Barclay Oysters* and *Electricity Networks*, though none of those cases supports it.

(a) Neither *Brodie* nor *Graham Barclay Oysters* supports the distinction and differential tests suggested at AS [28]. As the appellants note, in *Graham Barclay Oysters* "*the powers of the State and local council to control fisheries and pollution did not extend to control over the commercial activities of oyster farmers or the direct source of harm*": AS [28]. The same is true here when the pleaded harm (above at [5]) is properly isolated. The submission of an NDC by a single State in response to Article 4 of the Paris Agreement does not constitute having control over the Current and Projected Impacts of Climate Change in the Torres Strait Islands in the sense discussed in *Graham Barclay Oysters*.

(b) In *Electricity Networks*,[106] a statutory authority case upon which the appellants rely, the majority emphasised that: (1) there is "*no freestanding common law rule which fixes whether and when a common law duty of care upon a statutory authority might, or might not, arise*";[107] (2) in cases where it is alleged that a statutory authority has assumed a responsibility to exercise a power the factor of "*control*" has often been considered;[108] (3) in cases of omissions, "*control should not be treated as an overarching analytical tool*";[109] and (4) that in cases involving the exercise of statutory powers, it is necessary to consider the whole of the statutory regime.[110] The authority did not feature in his Honour's Judgment for good reasons. This is not a case involving the exercise of statutory powers (AS [29]) and neither party referred the Court to the decision below.

40 *Thirdly*, the notion that the case involves "*a positive (and exclusively held) act*" on the part of the Commonwealth grossly overgeneralises and obscures both the field of so-called "*exclusivity*" and the relationship between the act of communicating an NDC and the risk of harm. What his Honour

---

104 AB F1 Part A Tab 6 at 265; AB F2 Part A at 398.
105 AB F1 Part A Tab 6 at 270; AB F2 Part A at 403.
106 ***Electricity Networks*** *Corporation t/as Western Power v Herridge Parties* (2022) 276 CLR 271.
107 *Electricity Networks* at [19] (Kiefel CJ, Gageler, Gordon, Edelman and Steward JJ).
108 *Electricity Networks* at [23]-[24] (Kiefel CJ, Gageler, Gordon, Edelman and Steward JJ).
109 *Electricity Networks* at [25] (Kiefel CJ, Gageler, Gordon, Edelman and Steward JJ).
110 *Electricity Networks* at [26] (Kiefel CJ, Gageler, Gordon, Edelman and Steward JJ).

actually says at J [923],[111] in explaining the role of NDCs under the Paris Agreement, is that the Commonwealth has a power to "*set and communicate NDCs on behalf of Australia*": cf AS [29]. As is evident from J [370] and [392],[112] at the relevant time, Australia was one of 197 parties to the UNFCCC and 198 parties to the Paris Agreement. When it is appreciated that the relevant (pleaded) harm is the effects of "*the Current and Projected Impacts of Climate Change in the Torres Strait Islands*" the notion that the Commonwealth was engaged in an "*exclusively held*" positive act is fanciful. Although the Commonwealth exclusively communicates an NDC on behalf of Australia, the act is not exclusive in the sense that nearly two hundred other countries do the same thing. Moreover, each State, each and every person in the world, and many other entities (such as corporations) are involved in the emission of GHGs, and all these actors are similarly engaged in discrete positive acts that also contribute to the relevant risk of harm.

41 *Fourthly*, to the extent it is suggested that "*[i]t will be sufficient ... to impute a duty of care if the positive act or the exercise of power creates, increases or contributes to the risk of harm*", that statement is entirely unprincipled. No authority is cited for the proposition because it is anathema to the law of negligence. The very function of a duty of care is to limit the scope of tortious liability to an appropriately defined causal neighbourhood so that mere participation or involvement in a causal chain is insufficient to ground liability.[113] Nothing in *Sharma*[114] or *Electricity Networks*[115] lends support to the radical reformulation and reconceptualisation of the law of negligence floated at to AS [30]-[31]. In particular:

(a) AS [30] quotes selectively from *Electricity Networks* and generalises the reasoning in that case such that it bears little relationship to what was said. The comments of the majority regarding the exercise of power "*in a manner which created or increased the risk of harm*" were made in a context where the tortfeasor negligently exercised statutory powers directed for the operation and maintenance of electricity infrastructure, where the faulty power pole caused a bushfire. Indeed, in the next sentence of the judgment, the majority explained "*[t]he PA pole only posed the risk that it did because [the tortfeasor] had attached its live electrical apparatus to it*".

(b) The references in AS [30] and [31] to Beach J's judgment, which were not joined in by Allsop CJ or Wheelahan J and do not represent the law (J [928]-[929]),[116] were made in the context of an *approval* decision made under ss 130 and 133 of the *Environment Protection*

---

[111] AB F1 Part A Tab 6 at 263; AB F2 Part A at 396.
[112] AB F1 Part A Tab 6 at 108; AB F2 Part A at 241. AB F1 Part A Tab 6 at 113; AB F2 Part A at 246.
[113] *Donoghue v Stevenson* [1932] AC 562.
[114] *Sharma* at [657]-[660] (Beach J).
[115] *Electricity Networks* at [51] (Kiefel CJ, Gageler, Gordon, Edelman and Steward JJ).
[116] *Sharma* at [334]-[337] (Allsop CJ) and [838] (Wheelahan J). J [928]-[929] at AB F1 Part A Tab 6 at 264-265; AB F2 Part A at 397-398.

and Biodiversity Conservation Act 1999 (Cth). In this case, the action was the communication of an NDC directed at *reducing* emissions.

42 *Fifthly*, to the extent that it is suggested the present case bears some analogy with the circumstances in which the minority views of Beach J were expressed in *Sharma* (AS [32]), that suggestion should also be rejected. (1) As noted above, the "*positive*" act in this case (communicating an NDC) was essentially ameliorative in nature. As is evident from J [396],[117] Art 4 of the Paris Agreement contemplates that the actions by State Parties of preparing, communicating and maintaining NDCs, together with domestic mitigation measures, seeks to contribute to a *reduction* in emissions. (2) The act of communicating an NDC is not properly characterised as a "*power*" in the sense discussed in *Sharma* and *Electricity Networks*. As is evident from the terms of Art 4.2, it is a communication of a nation state that identifies a "*contribution that it intends to achieve*". The same article obliges parties to "*pursue*" domestic mitigation measures "*with the aim of achieving the objectives of such contributions*". Such international obligations are not equivalent, as a matter of domestic law, to powers of the kind that Beach J was addressing in *Sharma*: cf AS [32.1]-[32.2].

43 *Sixthly*, on analysis, the submissions at AS [32.3]-[32.6] when put in support of the "*positive act*" thesis, underscore the conceptual problems with the appellants' posited test. The appellants suggest that "*control*" may exist in a relevant sense in large part because each tonne or part thereof of CO_2 adds to global warming, there is a near linear relationship between global warming and adverse effects of climate change, "*[i]t is possible to determine*" a State's emissions and tipping points may trigger outsized impacts. But each element of that logic does not terminate at the boundaries of a State. It applies in relation to any person or entity. The emissions associated with a bus ride are capable of quantification, as are the emissions associated with a flight. This particular aspect of the appellants' logic applies across almost every aspect of life and to any person.

44 *Seventhly,* it is simply not correct that the "*global and diffuse nature of climate change and its causes*" 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: AS [33]. No aspect of the Commonwealth's case involves rejection of the notion that the common law cannot adapt to contemporary values: AS [34]. The common law does not strictly include a number of the European cases referred to in footnote 51, which were decided by reference to domestic laws and the *European Convention on Human Rights* and it is doubtful that it really embraces the New Zealand and Canadian authorities that were also decided in fundamentally different legal contexts. But dealing with the substance of the point at AS [33]-[35], it is a body of law that must be developed in a principled manner. The difficulty with the

[117] AB F1 Part A Tab 6 at 113-114; AB F2 Part A at 246-247.

ambitious case that was pleaded and pursued by the appellants in this proceeding is that it did not cohere with this body of principles for the reasons above.

Alleged error 2: impacts and risks

45 The second aspect of Ground 2 involves complaint about an alleged failure to have regard to current impacts and risks in the salient features analysis (AS [37]-[39]). This aspect of the ground is directed at the fundamental difficulty in the appellants' case on the second ground identified above at [34]-[36]. That is, by contending that the control reasoning was essentially determinative of the salient features analysis, and suggesting that all other factors weighed in favour of the imposition of a duty (AS [37]), the appellants must grapple with the parts of the reasons that are inconsistent with that characterisation of the reasons, which can be gleaned from AS [38] and the more detailed analysis above at [34].

46 The appellants attempt to deal with those various aspects of the reasons in a single paragraph at AS [39] by making a highly generalised submission, without reference to any authority, that "*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 feature analysis*" and suggesting that the primary judge adopted an "*artificial boundary*" between the impacts of climate change and emissions reduction targets. The precise logic of this aspect of the ground is obscure. Asserting that emissions reduction targets are a "*key*" or "*crucial*" measure does not address the logic of the findings outlined above at [34]. No real attempt is made in AS [39] to demonstrate why that is the case other than to assert that his Honour would have reached different conclusions.

47 In conclusion, Ground 2 discloses no error and the Court should not accept the appellants' invitation to make findings in the inherently problematic terms pleaded by the appellants: cf AS [40].

Ground 3 – Standard of care / Breach

48 The third ground takes issue with the conclusion that, in order to meet or discharge the alleged duty of care, the Commonwealth was not required to exercise the alleged standard of care: Ground 3;[118] AS [41]-[57]. The ground, as developed in the appellants' submissions, has two parts: AS [46]. *First*, a complaint that the primary judge erred in considering the negligence calculus by failing to have "adequate" regard to the Commonwealth's perception of the magnitude of the impacts and risks of harm at the relevant point in time (AS [47]-[50]). *Secondly*, a complaint that the primary judge erred by assuming that the posited standard might require the Court to adjudicate policy questions and thereby failed to evaluate the appropriateness of the standard on the facts (AS [51]-[56]).

Primary judge's reasons

[118] AB F1 Part A Tab 8 at 4; AB F2 Part A at 508.

49 The principles concerning the proper identification of a standard of care were addressed at J [137]-[142].[119] His Honour correctly identified the test as the two-stage test from *Shirt*,[120] being (1) whether a reasonable person in the respondent's position would have foreseen that the respondent's conduct involved a risk of injury to the applicant or a class of persons that included them; and (2) what a reasonable person would have done in response to that risk: J [138],[121] [981].[122] In that regard, his Honour expressly recognised that the factors that fell for consideration included "*the nature and extent of the risk of harm*", along with the "*expense and inconvenience of any action that might be taken to reduce the risk*" and "*whether the respondent [has] any competing or countervailing responsibilities*": J [138],[123] [140],[124] [981].[125] In this regard, the primary judge noted that, although the test in *Shirt* did not prescribe the weight to be given to the considerations, "*ordinarily the standard of care would be higher where ... the potential for harm was serious, or the magnitude of the risks was great*": J [141].[126] The relevant test was replicated in relevant civil liability legislation: J [142].[127]

50 The primary judge addressed the pleaded standard of care at J [840].[128] Like the alleged duty of care, the alleged standard incorporated many of the "*bewildering array of defined words and terms*" to which reference was made at J [833],[129] and was characterised as "*complex*": J [841].[130] It was suggested that the Commonwealth was required to follow a seven-step path of analysis, though two of the analytical steps were ultimately not pressed. Ground 3 takes issue with the first and last steps in that chain of analysis: Ground 3(a);[131] 3FASOC [82](a) and (f):[132] J [987]-[989].[133] As the Court noted, on the appellants' case, the standard required a developed state actor not only to identify a "*Best Available Science Target*", but also to set that target and implement policies to ensure that emissions were reduced in line with that target: J [989].[134] The posited standard also tended to suggest that the target the hypothetical state actor was required to set and meet was one based solely on the best available science and one that did not have regard to any other factors or considerations: J [989].[135] The considerations that were essentially rendered *unlawful* by the posited standard are summarised at J [990] and included macroeconomic impacts, society-wide impacts on wages and

---

119 AB F1 Part A Tab 6 at 50-51; AB F2 Part A at 183-184.
120 *Wyong Shire Council v* ***Shirt*** (1980) 146 CLR 40 at 47 (Mason J).
121 AB F1 Part A Tab 6 at 50; AB F2 Part A at 183.
122 AB F1 Part A Tab 6 at 278; AB F2 Part A at 411.
123 AB F1 Part A Tab 6 at 50; AB F2 Part A at 183.
124 AB F1 Part A Tab 6 at 51; AB F2 Part A at 184.
125 AB F1 Part A Tab 6 at 278; AB F2 Part A at 411.
126 AB F1 Part A Tab 6 at 51; AB F2 Part A at 184.
127 AB F1 Part A Tab 6 at 51; AB F2 Part A at 184.
128 AB F1 Part A Tab 6 at 237; AB F2 Part A at 370.
129 AB F1 Part A Tab 6 at 235; AB F2 Part A at 368.
130 AB F1 Part A Tab 6 at 237; AB F2 Part A at 370.
131 AB F1 Part A Tab 8 at 4; AB F2 Part A at 508.
132 AB F1 Part A Tab 4 at 45; AB F2 Part A at 78.
133 AB F1 Part A Tab 6 at 280-282; AB F2 Part A at 413-415.
134 AB F1 Part A Tab 6 at 281-282; AB F2 Part A at 414-415.
135 AB F1 Part A Tab 6 at 281-282; AB F2 Part A at 414-415.

standards of living, the views of stakeholders, and the impacts of the chosen target on foreign relations and trading partners.[136]

51 The relevant aspects of the primary judge's substantive analysis of that standard are at J [986]-[1013],[137] where the Court addressed the second limb of the *Shirt* test. In assessing the probability and magnitude of harm, the Court observed that the Commonwealth had accepted that harms had already occurred and there was a "*high probability*" of further harm and that the risks of climate change were significant for all people: J [991].[138] His Honour accepted that the Commonwealth knew of the harm that had been suffered in the past, including from rising sea levels, and knew that the appellants and Group Members were likely to suffer harm in the future and that the magnitude and frequency of those harms was likely to increase and intensify: J [992].[139] His Honour concluded that the risk of harm was of some significance and that the potential magnitude of the harm was not so miniscule that it could be disregarded or ignored: J [995].[140] The risk of harm that might be suffered from carelessness in the setting of targets (as opposed to the risk of harm associated with climate change) was not described as substantial, nor could the magnitude of harm that might directly flow from such carelessness be described as very serious: J [995].[141] However, his Honour readily accepted that the harm likely to be suffered as a result of climate change in the future was very serious: J [995].[142] AS [47] mischaracterises this aspect of his Honour's reasons by failing to recognise that his Honour was distinguishing between the extent of the risk of harm associated with the alleged breach, and the extent of the risk of harm associated with climate change more generally.

52 In applying the negligence calculus, the primary judge considered the expense, difficulty and inconvenience of taking action to alleviate the risk of harm: J [996]-[1003].[143] (1) The setting and implementation of targets undoubtedly had implications for Australia's Gross Domestic Product (**GDP**), with 2015 modelling indicating that an emissions reduction target of 26% below 2005 levels by 2030 target would reduce GDP by 0.2-0.3%, whereas a 45% target at the same base and end years would reduce GDP by 0.5-0.7%: J [997].[144] This was properly characterised as a significant and potentially adverse impact on the nation's economy, though modelling undertaken seven years later suggested that targets at that point might have a positive impact: J [998].[145] (2) The posited standard had direct costs in terms of emissions abatement. In this regard, modelling across a range of sectors

---

136 AB F1 Part A Tab 6 at 282; AB F2 Part A at 415.
137 AB F1 Part A Tab 6 at 280-291; AB F2 Part A at 413-424.
138 AB F1 Part A Tab 6 at 282; AB F2 Part A at 415.
139 AB F1 Part A Tab 6 at 283; AB F2 Part A at 416.
140 AB F1 Part A Tab 6 at 282-283; AB F2 Part A at 415-416.
141 AB F1 Part A Tab 6 at 282-283; AB F2 Part A at 415-416.
142 AB F1 Part A Tab 6 at 282-283; AB F2 Part A at 415-416.
143 AB F1 Part A Tab 6 at 284-287; AB F2 Part A at 417-420.
144 AB F1 Part A Tab 6 at 284-285; AB F2 Part A at 417-418.
145 AB F1 Part A Tab 6 at 285; AB F2 Part A at 418.

of the economy, including power, forestry, industry, building, agriculture and transport industries indicated that the total cost of implementing abatement opportunities by 2020 was $10.6 billion: J [1000].[146] (3) The primary judge acknowledged the potential for economic and social implications in other communities around Australia: J [1001].[147] For example, communities dependent upon coal, gas, mining, energy and manufacturing industries. His Honour concluded that it would not be said to be unreasonable for a developed state actor in the Commonwealth's position to have regard to other implications and impacts that might flow from the setting of a particular emissions reduction target, including macro and micro economic impacts and the overall feasibility of the implementation of the targets: J [1002].[148]

53 Finally, the primary judge considered the issue of competing and countervailing responsibilities: AS [1004]-[1009].[149] The primary judge started from the uncontroversial proposition that a democratically elected government has responsibilities to all of its citizens: J [1004].[150] A reasonable developed state actor could not be expected to focus solely or entirely upon the best available science or entirely on the risks faced by particular communities, even those communities that were particularly vulnerable to climate change: J [1004].[151] The posited standard would likely have broader implications and impacts on the Australian economy as well as economic and social impacts on other communities: J [1005].[152] Having referred to aspects of his earlier analysis, his Honour did not accept that a reasonable developed state actor would only have regard to the best available science (J [1009]) and reasoned that "*[o]ther competing and countervailing governmental responsibilities may well reasonably justify a different target*": J [1009].[153] The evaluation of each of the factors in the negligence calculus led the Court to reject the posited standard of care at J [1010]-[1013].[154]

Alleged error 1: Commonwealth's "perception" of the magnitude of impacts

54 The first complaint at AS [47] concerns the Court's reasoning at J [991]-[995] regarding the Commonwealth's knowledge of the magnitude of the impacts and risks of harm.[155] It is said that: (a) the primary judge summarised the Commonwealth's knowledge "*at a relatively high level of generality*" (AS [47]); (b) his Honour's analysis of the magnitude of the harm was not rationally supported by factual findings concerning anthropogenic causes of climate change and tipping points;

---

[146] AB F1 Part A Tab 6 at 285-286; AB F2 Part A at 418-419.
[147] AB F1 Part A Tab 6 at 286; AB F2 Part A at 419.
[148] AB F1 Part A Tab 6 at 286-287; AB F2 Part A at 419-420.
[149] AB F1 Part A Tab 6 at 287-289; AB F2 Part A at 420-422.
[150] AB F1 Part A Tab 6 at 287; AB F2 Part A at 420.
[151] AB F1 Part A Tab 6 at 287; AB F2 Part A at 420.
[152] AB F1 Part A Tab 6 at 287-288; AB F2 Part A at 420-421.
[153] AB F1 Part A Tab 6 at 289; AB F2 Part A at 422.
[154] AB F1 Part A Tab 6 at 289-291; AB F2 Part A at 422-424.
[155] AB F1 Part A Tab 6 at 282-284; AB F2 Part A at 415-417.

and (c) the proper approach required a precise identification of the knowledge of the Commonwealth "*at the material time*" concerning the magnitude and probability of the harm (AS [48]).

55 As to *sub-complaint (a)*, the submission ignores the detailed reasoning that appeared before J [991].[156] The primary judge addressed the Commonwealth's knowledge about climate change and its impacts at J [443]-[446],[157] before engaging on a longitudinal basis with reports of the Climate Change Authority at J [447]-[450].[158] His Honour then addressed the development of the 2015 intended NDC at J [451]-[474][159] and dealt with developments in the science in the context of later NDC communications (see, for example, J [446] and J [487]).[160] At J [760]-[763],[161] the primary judge dealt with the Commonwealth's knowledge, including by reference to CSIRO, Torres Strait Regional Authority and IPCC reports published throughout the relevant period, and statements made in a National Press Club address in June 2022.

56 As to *sub-complaint (b)*, the case now advanced by the appellants in relation to point in time reasoning (at AS [47]-[50]) is not an argument that emerged distinctly on its submissions on the requisite standard below.[162] As is evident from the paragraph references at AS [48]-[49], his Honour was aware of the features of the climate science upon which the appellants' submission is premised. The difficulty with the argument is that the propositions put at AS [50] are not identified instances of illogic, but rather an attempt to posit conclusions that ought to have been reached based on submissions that were not distinctly made by reference to the Commonwealth's knowledge at particular points in time. The appellants' attempts to impute a chain of reasoning to a body politic on appeal based on a patchwork of factual findings assembled from the judgment below should be rejected. In addition, it is not clear at all that the Court's conclusions regarding the magnitude of risk are inconsistent with what is put. For example, at J [992] the Court accepted a number of propositions about the Commonwealth's knowledge relevant to impacts of climate science before accepting that "*the best available science indicated that the average global temperature would continue to rise if urgent and significant steps, including steps taken by it, were not taken to reduce greenhouse gas emissions*": J [992].[163] These submissions do not disclose any clearly articulated error of law on the part of his Honour.

Alleged error 2: Posited standard might require adjudication of policy questions

---

[156] AB F1 Part A Tab 6 at 282; AB F2 Part A at 415.
[157] AB F1 Part A Tab 6 at 121-123; AB F2 Part A at 254-256.
[158] AB F1 Part A Tab 6 at 123-124; AB F2 Part A at 256-257.
[159] AB F1 Part A Tab 6 at 124-131; AB F2 Part A at 257-264.
[160] J [446] AB F1 Part A Tab 6 at 122; AB F2 Part A at 255. J [487] AB F1 Part A Tab 6 at 134-135; AB F2 Part A at 267-268.
[161] AB F1 Part A Tab 6 at 217-218; AB F2 Part A at 350-351.
[162] See Applicants' Closing Submissions at [276]-[347].
[163] AB F1 Part A Tab 6 at 283; AB F2 Part A at 416.

57 The second aspect of Ground 2 takes issue with the relative weighting given by his Honour to the issue of competing resource and policy demands: AS [51]-[56]. Again, it is difficult to discern precisely what legal error is asserted by the appellants. They accept that the standard of care may require judicial consideration of competing resource and policy demands (AS [51]) but contend that "*weighed with all relevant factors, this factor alone does not weigh against the imposition of the posited standard of care*": AS [51]. There are two points to be made about this submission.

58 The first is that, to the extent it is suggested that policy considerations were the *only* reason that the Court did not impose the posited standard of care, that suggestion is incorrect. For the reasons outlined above at [50]-[53], that is not a correct or plausible reading of his Honour's reasons, which identified a number of matters that weighed against acceptance of the posited standard of care.

59 As to AS [52], at this stage in the Court's negligence analysis, the Commonwealth was not asserting, and the primary judge did not accept, that it had some general immunity from the law of negligence. Nor did it assert that s 75(iii) of the Constitution put it in such a position. At the point of assessing the standard of care, the primary judge was engaged with questions of policy for the purposes of assessing the expense, difficulty and inconvenience associated with the posited standard (J [996]-[1003]) and the Commonwealth's competing or countervailing responsibilities (J [1004]-[1009]).[164] That analysis was entirely orthodox.

60 The submission at AS [54] should be rejected on the basis that it is inconsistent with the case that the appellants ran below and is illogical. As noted above at [50], the pleaded standard would have required to the Commonwealth not only to identify a "*Best Available Science Target*", but also to set that target and implement policies to ensure that emissions were reduced in line with that target: J [989].[165] In circumstances where such a target had an array of adverse economic and social consequences, it makes no sense to say that the standard does not demand that the Commonwealth not have regard to "*any*" macro and micro economic impacts and feasibility considerations. The submission is also inconsistent with the central thesis of the appellants' case. If all they were contending is that the Commonwealth ought to have *considered* science, but it was not required to set a target in accordance with it or implement such a target, they could have no coherent claim. The appellants pleaded case focussed upon the setting and meeting of a "*Best Available Science*" target "*to hold Global Temperature Increase to the Global Temperature Limit*", and the implementation of measures necessary to reduce GHG emissions consistent with the Best Available Science Target: see 3FASOC [76(a)] and [82].[166] While a duty to *consider* particular science might vindicate some policy

---

164 J [996]-[1003] AB F1 Part A Tab 6 at 284-287; AB F2 Part A at 417-420. J [1004]-[1009] AB F1 Part A Tab 6 at 287-289; AB F2 Part A at 420-422.
165 AB F1 Part A Tab 6 at 281-282; AB F2 Part A at 414-415.
166 3FASOC [76(a)] at AB F1 Part A Tab 4 at 40; AB F2 Part A at 73. 3FASOC [82] at AB F1 Part A Tab 4 at 45; AB F2 Part A at 78.

objective, it could not result in the appellants perfecting their cause of action because the alleged breach could not sound in any loss or damage, which is the essence of their claim.

61 As to AS [55]-[56], for the reasons outlined above, the primary judge's reasoning does not assume as a threshold matter that the imposition of the standard of care might require the Court to impermissibly adjudicate on executive action. Any fair reading of the reasons discloses that his Honour was squarely engaged with the appropriate test at the standard stage in that he was focussed upon particular established aspects of the negligence calculus.

62 Ground 3 should be dismissed.

Ground 4 – Causation

63 Next, the appellants appeal the primary judge's answer to the causation common question, CQ11. As noted at AS [58], CQ11 asked whether any breach of duty by the Commonwealth was "*a cause of Torres Strait Islanders <u>collectively</u> suffering loss of fulfilment of Ailan Kastom arising from damage to or degradation of the land and marine environment of the Torres Strait Islands*" (underlining added) – because the question of individual losses (like property damage) must be determined on an individual basis.

64 The primary judge answered CQ11 in the negative, for two key reasons: (1) the appellants did not establish a causal link between the setting of more ambitious targets in 2015, 2020 and 2021 and lower emissions over the relevant period; and (2) even assuming that was wrong, the Commonwealth's contribution to the impacts of climate change in the Torres Strait Islands were not "material" for the purposes of causation in the common law tort of negligence. The appellants contend his Honour erred in reaching each of those conclusions: AS [67]-[68]. Those contentions should be rejected.

The primary judge's reasoning

65 The primary judge began by noting that the appellants conceded that they were not able to establish causation on the "but for" test, but rather contended that this was an exceptional case where causation could be established in accordance with ***Bonnington Castings*** *v Wardlaw*[167] – that is, on the basis that the Commonwealth's breach made a material contribution to harm: J [1038].[168] The appellants submitted that they needed to establish at least seven steps to establish a causal chain from any breach to loss. Although the Commonwealth contested that these steps were sufficient to establish causation,[169] the primary judge proceeded on the basis that it was *at least* necessary for the

[167] [1956] AC 613.
[168] AB F1 Part A Tab 6 at 297; AB F2 Part A at 430.
[169] Respondent's Closing Submissions before primary judge at [765]-[770], [799], [801].

appellants to establish each of those matters to obtain a positive answer to CQ11: J [35]-[43],[170] [1039]-[1046],[171] and see J [1047],[172] [1075].[173]

66 The *sixth* step in the appellants' causal chain was that, had the Commonwealth not breached its duty of care, Australia's GHG emissions would have decreased: J [41],[174] [1045].[175] The appellants submitted that such a link could be inferred because the Commonwealth's emissions reduction targets were "*goals that determine the Commonwealth's plan of action to comply with its obligations under the Paris Agreement, and the outcome of its assessments of the risk of climate change*": J [1054].[176]

67 The primary judge rejected that submission. His Honour reasoned that, although it may "*readily be accepted*" that the Commonwealth had available various powers that could be exercised in an endeavour to reduce emissions, there was no evidence as to the actual exercise of those powers, the circumstances in which they could or would be exercised, or their effectiveness in reducing emissions in the short term. As such, there was no evidence capable of supporting an inference that the exercise of those powers would be effective in bringing emissions down in line with the more ambitious emissions reductions target contended for by the appellants: J [1056],[177] [1062].[178]

68 In support of that conclusion, the primary judge noted several matters: (1) The evidence of the appellants' own expert was that there was typically a lag between the setting of a target and the policies to implement it, and "*it is quite logical that the policies currently in place don't get us to… the targets of the countries*": J [1056].[179] (2) The appellants' expert also gave evidence that countries typically "*ratchet[ed] up*" their policies over time and were not obliged or expected to meet those targets in a "*straight-line path*": J [1057].[180] (3) There was also some statistical evidence that suggested that the setting of a higher or more ambitious target did not necessarily mean that policy measures put in place to meet that target would succeed: J [1058].[181] (4) Further, there was evidence that a modest target might be beaten – including that, in October 2021, the Commonwealth was projected to beat its 2015 NDC: J [1059]-[1060].[182] (5) Finally, given his Honour's conclusion (at J [1031]-[1033],[183] not challenged on appeal) that the 2022 NDC was consistent with Best Available Science, there was "*a very narrow window during which the postulated chain of causation operated*",

---

170 AB F1 Part A Tab 6 at 18-19; AB F2 Part A at 151-152.
171 AB F1 Part A Tab 6 at 297-298; AB F2 Part A at 430-431.
172 AB F1 Part A Tab 6 at 298; AB F2 Part A at 431.
173 AB F1 Part A Tab 6 at 306-307; AB F2 Part A at 439-440.
174 AB F1 Part A Tab 6 at 19; AB F2 Part A at 152.
175 AB F1 Part A Tab 6 at 298; AB F2 Part A at 431.
176 AB F1 Part A Tab 6 at 300; AB F2 Part A at 433.
177 AB F1 Part A Tab 6 at 301; AB F2 Part A at 434.
178 AB F1 Part A Tab 6 at 303; AB F2 Part A at 436.
179 AB F1 Part A Tab 6 at 301; AB F2 Part A at 434.
180 AB F1 Part A Tab 6 at 302; AB F2 Part A at 435.
181 AB F1 Part A Tab 6 at 302; AB F2 Part A at 435.
182 AB F1 Part A Tab 6 at 302-303; AB F2 Part A at 435-436.
183 AB F1 Part A Tab 6 at 295-296; AB F2 Part A at 428-429.

particularly in respect of the alleged breaches in 2020 and 2021 – meaning that, by reason of the lag between any target and implementation, it was at best unlikely that Australia's emissions between 2020 and 2021 were higher than they would have been if more ambitious policies had been set: J [1061].[184]

69 The *seventh*, and critical, step in the appellants' causal chain was that any difference in emissions materially contributed to the harm suffered by Torres Strait Islanders from the impacts of climate change: J [42],[185] [1046].[186] In this regard, the primary judge began by considering whether the case fell within the *Bonnington Castings* or *Fairchild v Glenhaven Funeral Services Ltd* [2002] 1 AC 32 line of authority – that is, whether the causal chain contended for by the appellants established a material contribution to harm or a material increase in risk: J [1063]-[1076].[187] His Honour "*incline[d] towards the view*" that the appellants' case was "*at least capable*" of falling within the *Bonnington Castings* principle, but, given the other difficulties and complexities in the appellants' case on causation, did not consider it necessary or possible to reach a definitive conclusion in that regard: J [1076];[188] see also at J [1095]-[1096].[189] If Ground 3 is upheld, it will be necessary to consider whether the matter should be remitted to enable the primary judge to determine this issue on which only a tentative view was expressed: J [1076].[190]

70 On the assumption that this case fell within the *Bonnington Casting* principle, the primary judge proceeded to consider the critical issue of materiality. His Honour observed that there was no dispute between the experts that any avoided temperature increase from a higher target (assuming, contrary to J [1054]-[1062],[191] that it could be inferred that measures would have been implemented to reduce emissions from 2015 onwards in accordance with that target) would have been "*extremely small such that it could not be measured by any existing scientific instrument*", and that any climate impacts arising therefrom could not be modelled, measured or "*scientifically observed*" (let alone observed or felt by a human): J [1084].[192] The calculated avoided temperature increase from achieving the minimum Best Available Science Target for the 2015 NDC (being a 47% reduction over 2005 levels by 2025) was calculated to be 0.000218°C (with an uncertainty range of 0.00013-0.00030°C): J [361]

---

184 AB F1 Part A Tab 6 at 303; AB F2 Part A at 436.
185 AB F1 Part A Tab 6 at 19; AB F2 Part A at 152.
186 AB F1 Part A Tab 6 at 298; AB F2 Part A at 431.
187 AB F1 Part A Tab 6 at 303-307; AB F2 Part A at 436-440.
188 AB F1 Part A Tab 6 at 307; AB F2 Part A at 440.
189 AB F1 Part A Tab 6 at 313-314; AB F2 Part A at 446-447.
190 AB F1 Part A Tab 6 at 307; AB F2 Part A at 440.
191 AB F1 Part A Tab 6 at 300-303; AB F2 Part A at 433-436.
192 AB F1 Part A Tab 6 at 309; AB F2 Part A at 442.

– the impacts of which could not be demonstrated or measured,[193] and was dwarfed by natural variability: J [362]-[363].[194]

71 His Honour therefore concluded that any change to climate change impacts in the Torres Strait Islands could not be considered material: J [1084].[195] In accordance with the case law, his Honour observed that, to be material, it must be able to be said that the respondent's negligent act "*play[ed] some part*"[196] in contributing to the applicant's loss. That could not be said when the contribution is so small that it cannot be modelled, measured or observed: J [1085];[197] such a conclusion would not be consistent with a commonsense approach: J [1086].[198]

72 His Honour went on to address the appellants' policy arguments as to why the Commonwealth's contribution should be considered material, concluding in essence that, though such arguments explained why it was necessary for all nations, and all people, to play their part in reducing emissions, they did not alter the conclusion that causation was not established for the purposes of the Australian common law of negligence: J [1089]-[1094].[199]

The legal principles

73 Although most of the legal principles are not in dispute: see J [143]-[162];[200] AS [60], it is useful to emphasise some matters.

74 *First*, the law of the ACT applies to the appellants' targets case, which means the question of causation is governed by the common law: J [78]-[82],[201] [84]-[85],[202] [87].[203]

75 *Secondly*, causation is concerned with whether it is appropriate to attribute legal responsibility for the harm suffered by a plaintiff to a defendant in negligence.[204] As such, the legal concept of causation differs from philosophical and scientific notions of causation.[205] Under the common law, as laid down in *March v Stramare*, the question of causation is determined by asking whether, as a

---

193 AB F1 Part A Tab 6 at 106; AB F2 Part A at 239.
194 AB F1 Part A Tab 6 at 106; AB F2 Part A Part A at 239.
195 AB F1 Part A Tab 6 at 309; AB F2 Part A at 442.
196 ***Hunt & Hunt*** *Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 at [45] (French CJ, Hayne and Kiefel JJ).
197 AB F1 Part A Tab 6 at 309-310; AB F2 Part A at 442-443.
198 AB F1 Part A Tab 6 at 310; AB F2 Part A at 443.
199 AB F1 Part A Tab 6 at 310-313; AB F2 Part A at 443-446.
200 AB F1 Part A Tab 6 at 51-57; AB F2 Part A at 184-190.
201 AB F1 Part A Tab 6 at 31-32; AB F2 Part A at 164-165.
202 AB F1 Part A Tab 6 at 33; AB F2 Part A at 166.
203 AB F1 Part A Tab 6 at 33; AB F2 Part A at 166.
204 ***Wallace v Kam*** (2013) 250 CLR 375 at [11] (French CJ, Crennan, Kiefel, Gageler and Keane JJ). See also, ***Chappel v Hart*** (1998) 195 CLR 232 at [6]-[7] (Gaudron J), [62] (Gummow J), [93] (Kirby J); *Tabet v Gett* (2010) 240 CLR 537 at [113] (Kiefel J).
205 ***March v Stramare*** (E & M H) Pty Ltd (1991) 171 CLR 506 at 509 (Mason CJ), 522 (Deane J); *Chappel v Hart* at [6]-[7] (Gaudron J), [62] (Gummow J); *Adeels Palace v Moubarak* (2009) 239 CLR 420 at [55] (per curiam); ***Henville v Walker*** (2001) 206 CLR 459 at [97] (McHugh J). See also, *Sharma* at [305] (Allsop CJ).

matter of common sense, the tribunal of fact is satisfied that the defendant's breach of duty was a cause of the harm.[206] Thus, as McHugh J stated in *Henville v Walker*:[207]

> *The common law concept of causation looks backward because its function is to determine whether a person should be held responsible for some past act or omission. Out of the many conditions that combine to produce loss or damage to a person, the common law is concerned with determining only whether some breach of a legal norm was* ***so significant that, as a matter of common sense, it should be regarded as a cause of damage****. As Lord Wright pointed out [in* Liesbosch Dredger (Owners of) v Owners of SS Edison*]:*[208]
>
>> *"The law cannot take account of everything that follows a wrongful act ... In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons.'"*

76 The causal inquiry has also been described as the search for the "*direct*" or "*proximate*" or "*real effective*" cause of the plaintiff's harm, though those terms are now out of favour.[209]

77 The causal inquiry includes consideration of two questions: (a) a question of historical fact as to how the particular harm occurred ("*factual causation*"); and (b) a normative question as to whether legal responsibility for that particular harm occurring in that way should be attributed to a particular person,[210] though at common law the inquiry is an integrated one.[211]

78 *Thirdly*, factual causation is typically determined by application of the "*but for*" test.[212] If that test is not satisfied, it is unlikely that there is the necessary causal connection.[213] However, in some circumstances, causation may still be established if the defendant's breach of duty made a "*material contribution*" to the harm suffered. The seminal case on "*material contribution*" is *Bonnington Castings*. In that case, Lord Reid described "*material*" contribution as one that is not *de minimis*.[214] In *Hunt & Hunt*, French CJ, Hayne and Kiefel JJ said that a *"[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*":[215] see also, AS [63].

No causal link between setting of NDC targets and increased emissions

79 As noted above, the appellants first assert that the primary judge erred in concluding (at J [1054]-[1062])[216] that there was no causal link between a higher (or more ambitious) emissions reduction target and a reduction in emissions in accordance with that target: AS [67].

---

206 *March v Stramare* at 515 (Mason CJ), 522 (Deane J), 524 (Toohey J).
207 *Henville v Walker* at [97]. See similarly, *March v Stramare* at 522 (Deane J).
208 [1933] AC 449 at 460; also citing Windeyer J in *Kavanagh v The Commonwealth* (1960) 103 CLR 547 at 584.
209 See *March v Stramare* at 509-510 (Mason CJ).
210 *Wallace v Kam* at [11] (French CJ, Crennan, Kiefel, Gageler and Keane JJ); *March v Stramare* at 515 (Mason CJ).
211 As established in *March v Stramare* at 515-516 (Mason CJ).
212 *March v Stramare* at 515-6 (Mason CJ).
213 *Chappel v Hart* at [117] (Hayne J). See also ***Amaca*** *Pty Ltd v Booth* (2011) 246 CLR 36 at [47]-[48] (French CJ); *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 6 (Deane, Dawson, Toohey and Gaudron JJ) and 20 (McHugh J).
214 *Bonnington Castings* at 621. See also *March v Stramare* at 532 (McHugh J); *Sharma* at [305] (Allsop CJ).
215 *Hunt & Hunt* at [45].
216 AB F1 Part A Tab 6 at 300-303; AB F2 Part A at 433-436.

80 There is no error in that conclusion. It is no doubt important for all nations, including the Commonwealth, to set ambitious targets. However, the setting by a nation of a target does not directly either cause or reduce emissions. If an overly ambitious target is set, it may not be met. Alternatively, if a lower target is set, it may be exceeded, or it may be changed. Either way, the target does not directly cause (emit) emissions and therefore does not make a direct "contribution" to global temperature increase and any climate impacts caused thereby.

81 The appellants contend, to the contrary, that the requisite causal link "*can be inferred because NDC targets represent binding commitments at international law under the Paris Agreement, and the Commonwealth undisputably has a number of powers to achieve those commitments*": AS [67], [69].

82 At AS [70], the appellants state that 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];[217] and (b) the possibility that emissions reductions would exceed the target if a less ambitious target were set: J [1059].[218] However, that does not accurately summarise the primary judge's reasons for rejecting the appellants' contention. As is evident from [67] above, the primary conclusion (at J [1056] and [1062])[219] was that there was no evidence capable of supporting an inference that the exercise of the Commonwealth's powers would necessarily be effective in bringing down emissions in line with a more ambitious target, at least in the short time period in which the causal chain operated. The matters referred to at AS [70(a) and (b)] were two of the reasons given for that conclusion, but not the conclusion itself – nor all the reasons given for that conclusion.

83 The primary judge's conclusion that there was no evidence capable of supporting the inference that a higher target would result in a commensurate reduction in emissions, and therefore, that he could not draw that inference, was correct. The appellants bore the onus of establishing all the elements of their cause of action, including causation. They adduced no evidence in support of this necessary step in their causal chain. That step, which concerned technical matters of climate science, practical implementation and political will, could not be inferred.[220] That is enough to dispose of the point.

84 However, the judge went further and observed, for the five reasons summarised at [68] above, that what evidence there was, pointed *against* the reasonableness of such an inference. That is a further, though strictly unnecessary, reason why causation cannot be inferred.

---

217 AB F1 Part A Tab 6 at 301; AB F2 Part A at 434.
218 AB F1 Part A Tab 6 at 302; AB F2 Part A at 435.
219 J [1056] at AB F1 Part A Tab 6 at 301; AB F2 Part A at 434. J [1062] at AB F1 Part A Tab 6 at 303; AB F2 Part A at 436.
220 See, e.g. *Amaca* at [64], [67]-[69] (Gummow, Hayne and Crennan JJ) .

85 In any case, the criticism of the primary judge's conclusion that the evidence showed there was likely to be a lag between the announcement of a target and the implementation of measures to achieve it, should be rejected. Contrary to AS [71], Professor Meinshausen was not speaking of countries globally – he was speaking of *every* country. He said "there's *always* going to be a l[a]g between what the ambition of the target is versus what is the ambition of the policies to reach the target" (emphasis added): J [1056].[221] That is logical – given the nature of policy changes required to effect significant reductions in a country's emissions over the relevant timeframes, there will be a gap in time between a target being announced, then policies being developed to reach that target, then those policies being implemented, and then the benefits of those policies coming to fruition. To the extent the appellants criticise the lack of specific evidence about a lag in the Australian context,[222] that is a deficiency in the appellants' own evidence, as they bore the onus on causation.

86 As to AS [72]-[73], it is not controversial that, if a target requiring a 47% reduction over 2005 levels by 2025 had been announced in 2015 *and* measures had been taken immediately to reduce emissions in a straight line in accordance with that target, less emissions would have been emitted: see Dr Canadell's calculations at J [361].[223] But for the reasons given by the primary judge, and by Professor Meinshausen, referred to above, the latter cannot be assumed. That is, it cannot be assumed that, just because such a target was announced in 2015, compliance with that target would actually be achieved – even by a "reasonable developed international state actor" acting reasonably in the Commonwealth's circumstances. The causal chain is thus incomplete.

87 In short, it was the appellants' onus to make out their case on causation, as on all other elements of their case. Had the appellants adduced evidence on this sixth step, that evidence, or responsive evidence, may have shown that it was impractical – even impossible – for Australia to achieve emissions reductions in line with the alleged Best Available Science Target from 2015, in light of various logistical, economic and other factors, such that the pleaded targets breach could never have had any real-world impact. Having failed to adduce any evidence in support of this critical causal step, the appellants cannot now say it should be inferred.

Any contribution of the Commonwealth's alleged breach to pleaded harm not material

88 The appellants also contend that the primary judge erred in concluding (at J [1084]-[1088], [1093]-[1094])[224] that the Commonwealth's contribution to any climate effects experienced in the

221 AB F1 Part A Tab 6 at 301; AB F2 at 434.
222 Though there was evidence that emissions do not necessarily match targets in the Australian context, summarised in the Respondent's Closing Submissions before primary judge at [778]; and see also J [1058] at AB F1 Part A Tab 6 at 302; AB F2 Part A at 435.
223 AB F1 Part A Tab 6 at 106; AB F2 Part A at 239.
224 J [1084]-[1088] at AB F1 Part A Tab 6 at 309-310; AB F2 Part A at 442-443. J [1093]-[1094] at AB F1 Part A Tab 6 at 312-313; AB F2 Part A at 445-446.

Torres Strait Islands was *de minimis* and therefore not a material contribution to the harm alleged to be suffered by Group Members (being loss of fulfilment of *Ailan Kastom*): AS [68]. The appellants' argument appears to be that: (1) what is *de minimis* is a question of legal policy and is "*concerned with extremes*": AS [76]; (2) a contribution will only be *de minimis* if it is small *relative* to the contributions of others: AS [78]-[79]; and (3) therefore, "*any contribution to GHG emissions on a national scale cannot be disregarded as* de minimis": AS [68], and certainly Australia's contribution cannot be disregarded as *de minimis*: AS [81].

89 This reasoning must be rejected. It is inconsistent with the case law on causation, the nature of the tort of negligence and with logic and commonsense. It is not controversial that global action is required in order to have a meaningful impact on climate change, and that each nation should take ambitious action to mitigate climate change. However, the question here is whether the Commonwealth's failure to communicate a higher NDC made a material contribution to the harm suffered by Torres Strait Islanders as a result of climate change, for the purposes of holding the Commonwealth liable – solely liable – for that harm in negligence.

90 Dealing then with the appellants' particular arguments as outlined in paragraph 88 above, as to (1), it may be accepted that what is *de minimis* is a question of policy; a line must be drawn somewhere. However, as explained at [75] above, the causal inquiry is concerned with whether the respondent's action, *as a matter of common sense*, is a cause of the loss; that is, whether the respondent's breach was "*so significant that, as a matter of common sense, it should be regarded as a cause of damage*". Thus, the question of whether a contribution is "*material*" or *de minimis* must be answered – the line must be drawn – by reference to that guiding principle.

91 A contribution cannot, as a matter of common sense, be regarded as a "cause" of the relevant loss where the contribution was so small that whether it occurred or not had absolutely no discernible impact on the loss;[225] nor in those circumstances can it sensibly be said to have "played some part" in that loss: see at [78] above. This is not a case like *Bonnington Castings*, where the contribution of the dust from the swing grinders could very well have caused the damage itself. In that case, Lord Reid said that "*there is no evidence to show that [the] hammer gave off noxious gas so frequently or that the concentration of noxious dust above it when it was producing dust … could be said to be substantially the whole cause of his disease*".[226] The reverse is true here. This is a case where the respondent's contribution had no scientifically measurable impact, let alone an impact that could be

[225] See, e.g. *Chappel v Hart* at [93.5] (Kirby J), citing, respectively, *Hotson v East Berkshire Area Health Authority* [1987] AC 750 and *Lawson v Lafferière* [1991] 1 SCR 541; (1991) 78 DLR (4th) 609, and *Daniels v Anderson* (1995) 37 NSWLR 438 at 539.
[226] See *Bonnington Castings* at 622 (Lord Reid, Viscount Simmons agreeing).

discerned by humans. Although the Commonwealth does not necessarily accept that the concept of *de minimis* must be limited to *"extremes",* this is clearly an extreme case.

92 As to (2), there is no justification in the case law for limiting the *de minimis* principle to a relative inquiry. Rather, the case law is to the effect that, to be material, a contribution must "*play some part*" in the loss. A contribution that does not "*play some part*" in the loss cannot be material, regardless of what might be said about any other contribution. That is, although the *de minimis* principle may in appropriate cases have a relative aspect, it also has an absolute aspect. This must be so, given the purpose of the causal inquiry is to assign causality *for the purposes of assigning liability in negligence*. It is not appropriate to assign liability in negligence to a defendant whose contribution made no discernible difference one way or the other to the plaintiff's loss.

93 Alternatively, even if "relative" contribution is the touchstone, that is not determined by comparing the Commonwealth's recent total emissions against those of other nations. The correct inquiry is what is the contribution to loss of the respondent's alleged breach of duty relative to the contribution of other sources: see similarly, J [1090].[227] In this regard, it must be remembered that the impacts of climate change in the Torres Strait Islands are not just the result of events since the alleged breach in 2015, but of the cumulation of all human-caused GHG emissions over time: see, for example, J [39].[228] There was no evidence of the total temperature increase in the Torres Strait Islands referable to human-induced climate change, but the evidence was that average land temperatures across Australia had increased by 1.47 ± 0.24°C since high quality national records began in 1910: J [556].[229] At most, the Commonwealth's alleged breach of duty has contributed one 6,743rd (being 0.000218°C divided by 1.47°C) to that temperature increase. That is a very small contribution relative to other sources – more than 1,000 times smaller than the sensitivity on the increase itself. That contribution is appropriately characterised as *de minimis*.

94 As to (3), there is no basis, consistent with logic or with the nature of negligence, for holding that the contributions *of nations* must always be material, but the contributions of others will not be: see also AS [84]. Questions of causation are not to be determined by reference to the identity of the wrongdoer, but rather by reference to the nature of the contribution made by the wrongdoer. In particular, when considering the tortious liability of governments, the "*first principle*" is that that liability is "*as completely as possible*" to be "*assimilated to that of citizens*".[230] There may be limits to the extent to which that is possible, but negligence is *not* concerned with establishing rules for

---

[227] AB F1 Part A Tab 6 at 311; AB F2 Part A at 444.
[228] AB F1 Part A Tab 6 at 19; AB F2 Part A at 152.
[229] AB F1 Part A Tab 6 at 154; AB F2 Part A at 287.
[230] *Graham Barclay Oysters* at 556 (Gleeson CJ).

liability that *only* operate to hold governments liable but will not render other actors liable in similar circumstances.

95 As to AS [59], the appellants say that "*a material contribution need not be measurable*". To the extent this is a criticism of the primary judge's reasons, his Honour did not hold to the contrary. If the evidence establishes that a contribution is material, though it cannot be exactly measured, it may be that causation is established. But where a contribution is so small as to be below the threshold for scientific measurement, let alone human perception, as the primary judge observed at J [1085],[231] it is difficult to see how it could be considered material.

96 As to AS [77] and [81], it may be accepted that, if the notion of "material" has any real work to do, in some cases, a respondent who breached a duty of care to an applicant will not be held responsible for the applicant's loss. That does not suggest a problem that needs to be fixed; that is the very purpose of the causal inquiry – to ensure that liability attaches only when the breach, as a matter of common sense, actually *caused* loss: see at [75]-[76] above. The fact that no country could alone have made a measurable difference to global temperature by adopting a straight-line trajectory to net-zero emissions between 2014 to 2024 (AS [81]) merely reflects a difficulty with the appellants' case, which sought to attach liability to conduct since 2015 for a situation that has been many decades in the making.

97 It may also be accepted that the tort of negligence is not the legal vehicle for responding to all "*collective action problems*". That is the purpose of legislation and treaties – those are the legal mechanisms that address the problems of highway wear-and-tear and aerosol use that Professor Meinshausen was referring to, cited at AS [77]. Those are also the mechanisms that are being mobilised to address the serious, global threat of climate change. Addressing "*collective action problems*" *per se* is not the purpose, or remit, of the law of negligence.

98 The cases at AS [79], [83] and [84] do not assist. The first two cases in AS [79] are from civil law countries, which do not have a tort of negligence. The case from the Supreme Court of Montana is in the context of a challenge to certain State laws as contrary to the right in the Montana Constitution to "*a clean and healthful environment*". The Australian case at AS [83] concerns an appeal under the *Environmental Planning and Assessment Act 1979* (NSW) of the Minister's refusal of consent to a new open cut mine. The New Zealand case quoted at AS [84] concerns the tort of public nuisance, and the ICJ Opinion concerns international law. It may be accepted that different legal systems, and different causes of action or doctrines within a legal system, might approach this

[231] AB F1 Part A Tab 6 at 309-310; AB F2 Part A at 442-443.

issue differently. However, this Court is concerned with the common law tort of negligence in Australian law.

99 In conclusion, a finding that the Commonwealth caused the appellants' loss in this case is inconsistent with the overarching test, and the underlying purpose of the causal inquiry. It would hold the Commonwealth wholly responsible for harm that it could not be said to have "caused" on any commonsense notion, and which it could not stop or control. It would also hold the Commonwealth solely responsible for harm that has been contributed to by almost every single person, company and nation in the world. Furthermore, accepting that such a relatively "tiny" contribution to harm or risk constitutes a "material" contribution would essentially remove any *de minimis* limitation, and mean that any contribution to harm, whether or not material, is sufficient to establish causation. This would dramatically change the test for causation and dramatically expand the scope of liability in negligence.

Ground 5 – Loss and Damage

100 The fifth and penultimate ground takes issue with the primary judge's conclusion that loss of fulfilment of *Ailan Kastom* is not compensable under the law of negligence (AS [86]-[102]). At the outset, it is important to appreciate two points about the parameters of the claim advanced below: *first*, the claim for compensation for loss of fulfilment of *Ailan Kastom* was advanced in a way that disavowed any reliance upon native title rights; and *secondly*, the claim was prosecuted on the basis that the entitlement to relief arose from loss of fulfilment *per se*, and not as an aspect or species of loss or damage for breach of some other personal or proprietary right. On appeal, the appellants contend that the Court ought to develop the common law of Australia to recognise a novel form of loss: AS [102].

Procedural history

101 Before addressing the primary judge's reasoning and the appellants' arguments, it is necessary to identify certain features of the procedural history of this matter that are significant. The pleading initially contained a number of allegations concerning rights held by the applicants and Group Members under the *Native Title Act 1993* (Cth) (**NTA**) and at common law,[232] and alleged that loss and damage suffered by the applicants and group members included loss of native title rights.[233] However, the group member definition has never encompassed prescribed bodies corporate (**PBCs**) that hold relevant native title rights and interests or registered native title bodies corporate (**RNTBCs**).

---

[232] 3FASOC at [3] (AB F1 Part A Tab 4 at 3; AB F2 Part A at 36), [4] (AB F1 Part A Tab 4 at 3; AB F2 Part A at 36), [6](c) (AB F1 Part A Tab 4 at 3; AB F2 Part A at 36), [54](c) (AB F1 Part A Tab 4 at 25-26; AB F2 Part A at 58-59), [62A] (AB F1 Part A Tab 4 at 35; AB F2 Part A at 68), [67A] (AB F1 Part A Tab 4 at 37; AB F2 Part A at 70), [81A](c) (AB F1 Part A Tab 4 at 44; AB F2 Part A at 77), [82A](c)(ii) (AB F1 Part A Tab 4 at 46; AB F2 Part A at 79), [84] (AB F1 Part A Tab 4 at 47-48; AB F2 Part A at 80-81) and [85] (AB F1 Part A Tab 4 at 48; AB F2 Part A at 81).

[233] 3FASOC at [86](c) (AB F1 Part A Tab 4 at 49; AB F2 Part A at 82).

102 Prior to the resumed hearing of the matter in November 2023, an issue arose as to whether the native title aspects of the claim could proceed as then pleaded by the applicants following correspondence from Gur A Baradharaw Kod Sea and Land Council Torres Strait Islander Corporation (**GBK**), which is the peak body for the PBCs in the Torres Strait.[234] As a result of that issue having been raised, shortly prior to the resumption of the hearing, the applicant sought to "*take off the table their claims in relation to native title rights*" and confirmed that their "*claims for property damage and loss of fulfilment of Ailan Kastom … do not involve any claim for loss of native title rights*".[235] This was formalised by the filing of the 3FASOC by the applicants on 3 November 2023.

103 This position was confirmed during a hearing in November 2023.[236] The applicants made clear that they were "*not making a claim for loss of native title … in respect of any group member*".[237] They did, however, clarify that "*the associated cultural practices … and the family connection*" were said to be compensable.[238] It was then said that the applicants "*broadly view the loss of [Ailan Kastom] as a head of damage, not as arising from or connected to the native title right, not dependent on that native title right*".[239] The 3FASOC that was filed on 3 November 2023 maintained some of the references to native title rights,[240] but struck out various paragraphs that related to the claim for loss and damage associated with native title rights,[241] in addition to paragraphs that had been deleted in an earlier iteration of the pleading.[242] The primary judge's reasons with respect to the compensability of the loss of fulfilment of *Ailan Kastom* must be understood in this context and his Honour adverted to this circumstance at J [1109]-[1119].[243]

Primary judge's reasons

104 The primary judge dealt with the issue of the compensability of *Ailan Kastom* at J [1104]-[1132].[244] At AS [93], it is suggested that his Honour regarded himself as constrained by *Cattanach v Melchior*[245] to hold that, in order 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

234 Transcript of CMH on 9 October 2023, T3.27-.29 (Lloyd SC), T11.13-.30 (McLeod SC).
235 Transcript of CMH on 30 October 2023,T6.32-T7.7 and T11.46 (Murphy).
236 AB Part B Tab 55 at T1523.12-T1527.27; AB Part B Tab 56 at T1538.3-37, T1544.3-.20 (Lloyd).
237 AB Part B Tab 55 at T1525.46-T1526.5.
238 AB Part B Tab 55 at T1526.29-.39.
239 AB Part B Tab 56 at T1544.16-.18.
240 3FASOC at [3] (AB F1 Part A Tab 4 at 3; AB F2 Part A at 36), [4] (AB F1 Part A Tab 4 at 3; AB F2 Part A at 36), [54](c) (AB F1 Part A Tab 4 at 25; AB F2 Part A at 58), [62A] (AB F1 Part A Tab 4 at 35; AB F2 Part A at 68) and [67A] (AB F1 Part A Tab 4 at 37; AB F2 Part A at 70).
241 3FASOC at [54](c) (definition and particulars) (AB F1 Part A Tab 4 at 25; AB F2 Part A at 58), [81A](c) (AB F1 Part A Tab 4 at 44; AB F2 Part A at 77), [82A](c)(ii) (AB F1 Part A Tab 4 at 46; AB F2 Part A at 79) and [86](c) (AB F1 Part A Tab 4 at 49; AB F2 Part A at 82).
242 3FASOC at [6](c) (AB F1 Part A Tab 4 at 3; AB F2 Part A at 36), [84] (AB F1 Part A Tab 4 at 47; AB F2 Part A at 80) and [85] (AB F1 Part A Tab 4 at 48; AB F2 Part A at 81).
243 AB F1 Part A Tab 6 at 317-319; AB F2 Part A at 450-452.
244 AB F1 Part A Tab 6 at 316-322; AB F2 Part A at 449-455.
245 (2003) 215 CLR 1, [23] (Gleeson CJ).

capable of protection by law: J [1129]-[1131].[246] While that was certainly an aspect of his Honour's reasoning, three other features of his Honour's reasoning warrant attention.

105 *First*, as is noted above at [103], there was a significant degree of imprecision in the articulation of what constituted *Ailan Kastam*, in circumstances where the appellants made a forensic decision to abandon reliance on the NTA and common law rights. This led his Honour to observe that "*the alleged loss of fulfilment of Ailan Kastom is very wide ranging and includes some very abstract and intangible elements*": J [1118].[247]

106 *Secondly,* while Wigney J acknowledged the significance of *Ailan Kastom* to the appellants, his Honour referred to many of the authorities relied upon by the appellants in the present appeal and concluded that they did not provide much support for the proposition that loss of fulfilment of *Ailan Kastom* was compensable under the Australian law of negligence: J [1121]-[1122].[248] In brief terms: (1) *Timber Creek*[249] was distinguished on the basis that it was concerned with compensation for the loss, diminution, impairment or other effect of an act on native title rights and interests under the NTA and the appellants had abandoned any such claim: J [1123].[250] (2) Most of the other cases were cases where a defendant's tortious acts had been found to have caused the plaintiff to suffer personal injury and the award of damages included an amount referable to loss of enjoyment of life, pain and suffering, or loss of amenities, that incorporated monetary amounts for a loss of ability to participate in, or fully participate in, certain cultural practices: J [1124].[251] (3) Further observations in *Cubillo*[252] were based upon the personal injury cases and did not assist: J [1126]. (4) *Milpurrurru*[253] did not assist the appellants owing to the nature of the particular statutory cause of action under the *Copyright Act 1968* (Cth) at issue in that case: J [1127]. (4) The appellants reliance upon *Smith*[254] and *Tipakalippa*[255] was not developed but in neither case was it immediately apparent how the relevant authority provided support for the relevant argument: J [1128].[256]

107 *Thirdly*, his Honour made the observation at J [1130] that, in each of the cases relied upon by the appellants (being recognised categories of actionable damage including physical injury, property

---

246 AB F1 Part A Tab 6 at 322; AB F2 Part A at 455.
247 AB F1 Part A Tab 6 at 319; AB F2 Part A at 452.
248 AB F1 Part A Tab 6 at 319-320; AB F2 Part A at 452-453.
249 *Northern Territory of Australia v Griffiths* (2019) 269 CLR 1 (***Timber Creek***).
250 AB F1 Part A Tab 6 at 320; AB F2 Part A at 453.
251 J [1124] at AB F1 Part A Tab 6 at 320; AB F2 Part A at 453. *Roberts v Devereaux* (unreported, Supreme Court of the Northern Territory 22 April 1982); *Napaluma v Baker* (1982) 29 SASR 192; *Dixon v Davies* (1982) 17 NTR 31; *Weston v Woodroffe* (1985) 36 NTR 34; *Namala v Northern Territory of Australia* (1996) 131 FLR 468; *Trevorrow v South Australia (No 5)* (2007) 98 SASR 136.
252 J [1125] at AB F1 Part A Tab 6 at 320-321; AB F2 Part A at 453-454. ***Cubillo*** *v Commonwealth of Australia (No 2)* (2000) 103 FCR 1.
253 J [1127] at AB F1 Part A Tab 6 at 321; AB F2 Part A at 454. ***Milpurrurru*** *v Indofurn Pty Ltd* (1994) 54 FCR 240.
254 ***Smith v Fonterra*** *Cooperative Group Limited & Ors* (2024) NZSC 5.
255 *Santos N A Barossa Pty Ltd v* ***Tipakalippa*** (2022) 296 FCR 124.
256 AB F1 Part A Tab 6 at 321; AB F2 Part A at 452

damage, and in some circumstances pure economic loss), there was some "*loss or harm caused to a person's property, or their person (that is, physical injury)*" which involved "*an interference with 'a right or interest recognised as capable of protection by law'*".[257]

108 It was only after making the above points that, at J [1129]-[1132],[258] his Honour reasoned by reference to *Cattanach v Melchior* that the alleged species of loss was not compensable at common law: cf AS [93].

Appellants' case on appeal

109 The appellants' case on appeal involves an invitation to this Court to revisit Wigney J's reasoning without substantive engagement with either: (1) the forensic decisions that led the appellants to the point where they were advancing a claim for loss and damage in respect of "*very abstract and intangible elements*" (J [1118]),[259] rather than by reference to actual rights or interests that many of them may have held; or (2) the limits on the permissible scope of loss and damage that emerge from the authorities traversed by the primary judge in his reasons.

110 Accepting for the moment, and for the purposes of this aspect of the argument, what is put at AS [94]-[96], the difficulty for the appellants here is that there are sound reasons of "*legal policy*", "*justice*" and "*the coherence of the law*" in the sense discussed at AS [96] for choosing not to extend the law of negligence as proposed. That is because it was open to the appellants to proceed with their NTA and common law-based claim but they chose not to do so.

111 The submission at AS [99] by reference to *Timber Creek* fails to engage with the Court's reasoning in relation to that case: see J [1123].[260] In *Timber Creek*, the High Court was concerned with the amount of compensation payable by the Northern Territory to the Ngaliwurru and Nungali Peoples pursuant to Pt 2 of the NTA for loss, diminution, impairment or other effects of certain acts on their native title rights and interests over lands in the area of Timber Creek.[261] In that case, the majority of the compensable acts were previous exclusive possession acts (**PEPAs**) within the meaning of s 23B of the NTA, the validation of which resulted in extinguishment of native title under s 23E.[262] There were also a number of Category D past acts within the meaning of s 232 of the NTA, most of which were followed by subsequent PEPAs affecting the same lots, which extinguished native title over those lots.[263]

---

[257] AB F1 Part A Tab 6 at 322; AB F2 Part A at 455.
[258] AB F1 Part A Tab 6 at 321-322; AB F2 Part A at 454-455.
[259] AB F1 Part A Tab 6 at 319; AB F2 Part A at 452
[260] AB F1 Part A Tab 6 at 320; AB F2 Part A at 453.
[261] *Timber Creek* at [1].
[262] *Timber Creek* at [35].
[263] *Timber Creek* at [36].

112 Section 23J(1) of the NTA relevantly provided that native title holders were entitled to compensation in accordance with Div 5 for the extinguishment under Div 2B of their native title rights and interests by an act (here, relevantly, the PEPAs). As a result, in relation to the PEPAs, the native title holders were entitled to compensation in accordance with Div 5 of the extinguishment of their native title rights and interests.[264] For the Category D past acts, which were *not* followed by subsequent PEPAs, the native title holders were entitled to compensation under s 20 (in Div 2 of Pt 2), which in turn provided that they were entitled to compensation under ss 17(1) or (2) on the assumption that s 17 applied to those Category D past acts.[265]

113 Where an entitlement to compensation was established under Div 2, Div 2A, Div 2B, Div 3 or Div 4 of Pt 2, compensation was payable in accordance with Div 5 by virtue of s 48. Section 51 of the NTA identified the criteria for determining compensation.[266] Section 51(1) relevantly provided that the entitlement to compensation "*is an entitlement on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests*".[267]

114 The concepts of native title and "*native title rights and interests*" are relevantly defined in s 223 of the NTA. The language of ss 223(1)(a) and (b) is plainly based on what was said by Brennan J in *Mabo (No 2)*.[268] Section 223(2) relevantly provides that the reference to "*rights and interests*" in s 223(1) includes "*hunting, gathering, or fishing, rights and interests*". Sections 223(3), (3A) and (4) contain further provisions relevant to the concepts defined in s 223(1). The definition in s 223 must be understood in light of:

(a) the objects of the NTA in s 3, which include providing for "*the recognition and protection of native title*";

(b) s 10 of the NTA, which provides that "*[n]ative title is recognised, and protected, in accordance with this Act*"; and

(c) the existing common law with which the NTA engaged.

115 As the plurality observed in *Yorta Yorta* (emphasis in original):[269]

> *Mabo (No 2) decided that certain rights and interests relating to land, and rooted in traditional law and custom, survived the Crown's acquisition of sovereignty and radical title in Australia. It was* ***this*** *native title that was then 'recognised and protected' in accordance*

264 *Timber Creek* at [37].
265 *Timber Creek* at [38].
266 *Timber Creek* at [40].
267 *Timber Creek* at [41].
268 *Western Australia v* ***Ward*** (2002) 213 CLR 1 at [16] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), referring to *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (***Mabo (No 2)***) at 70 (Brennan J).
269 *Members of the* ***Yorta Yorta*** *Aboriginal Community v State of Victoria* (2002) 214 CLR 422 at [75]-[77] (Gleeson CJ, Gummow and Hayne JJ).

with the Native Title Act and which, thereafter, was not able to be extinguished contrary to that Act".

116 The Court's judgment in *Timber Creek*, must be understood within the statutory context outlined above. The High Court was concerned with compensation for the loss, diminution, impairment or other effect of an act on "*native title rights and interests*" within the meaning of s 223(1) of the NTA in the context of the provisions outlined above at [111]-[113].

117 In discussing s 51(1) of the NTA, the majority observed that the task of assessment under that section "*is necessarily undertaken in the particular context of the Native Title Act, the particular compensable acts and the evidence as a whole*".[270] The task required "*a number of separate but inter-related steps: identification of the compensable acts; identification of the native title holders' connection with the land or waters by their laws and customs; and then consideration of the particular and inter-related effects of the compensable acts on that connection*".[271] In *Timber Creek*, consideration of the native title holders' connection with the relevant land and waters by their laws and customs represented a step in the process of determining the existence of, and the extent of the effect of the relevant act on the native title group's native title rights and interests.

118 The majority also observed, in the course of its reasons, that loss or diminution of "*traditional attachment*" to land or connection to country, or the loss of rights to gain spiritual sustenance from the land was referred to by the parties and the Courts below as "*non-economic loss*" or "*solatium*" but that it was better expressed as "*cultural loss*".[272] For that reason, the appellants' appeal to the "*increasing cognizance of non-economic loss*" in tort law (at Applicants' Closing Submissions before primary judge [521]) is inapt.

119 In light of the statutory context in which *Timber Creek* was decided, it provides limited assistance to the appellants. The appellants' claims for loss of fulfilment of *Ailan Kastom* do not arise from and are not connected with or dependent upon any native title right.

120 The same is true of the reference to Gordon J's reasons in *Yunupingu* at AS [99].[273] There, her Honour was similarly speaking of the kinds of interests discussed above that are capable of satisfying the definition of native title rights within the meaning of s 223 of the NTA. The submission at AS [100] is answered by Wigney J's existing analysis which is outlined above at [104]-[108]. Equally, to the extent any reliance is ultimately placed on *McArthur River*,[274] those proceedings must be

---

[270] *Timber Creek* at [218].
[271] *Timber Creek* at [218].
[272] *Timber Creek* at [1], footnote 102; see also [53]-[54].
[273] *Commonwealth v Yunupingu* (2025) 99 ALJR 519. See, e.g., [143] (Gordon J).
[274] *Davey on behalf of the Gudanji, Yanyuwa and Yanyuwa-Marra Peoples v Northern Territory of Australia (No 5)* [2026] FCA 153 (***McArthur River***) (Banks-Smith J).

understood in light of the particular rights established by the *McArthur River Project Agreement Ratification Act 1992* (NT).

121 For the reasons given above, this ground should also be rejected.

Ground 6 – Declaratory Relief

122 The final ground takes issue with the primary judge's conclusion that it would have been inappropriate to make either of the declarations sought by the appellants: AS [103]-[104]. The complaints are: *first*, that his Honour erred in finding that the declarations were too general and abstract; and *secondly*, that his Honour erred in finding that the declarations would lack utility. These complaints should be rejected because: (1) the finding regarding impermissible generality and abstraction was plainly correct and consistent with principle; and (2) the utility posited by the appellants on appeal tends to conflate the making of declaratory relief with the usual step of providing answers to the common questions stated by the parties or Court for the purposes of ss 33Z and 33ZB of the *Federal Court of Australia Act 1976* (Cth) at the conclusion of Part IVA representative proceedings. The Commonwealth did not, and does not, take issue with the Court providing answers to common questions. What it took issue with below, and takes issue with on appeal, is the declaratory relief sought by the appellants.

Alleged error 1: generality and abstraction of declarations

123 In their Amended Originating Application filed on 7 October 2022, the appellants sought two declarations: (1) a declaration that the Commonwealth owes a duty of care to Torres Strait Islanders, including the appellants and Group Members, 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 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); and (2) a declaration that the Commonwealth was in breach of the Duty of Care. His Honour correctly observed at J [1239] that:[275] (a) framed at this level of generality, the declarations sought were so general and abstract that they were effectively meaningless and lacked any utility; and (b), in any case, it was doubtful that it would be appropriate to declare the existence of a duty and its breach in the absence of any finding that a breach caused compensable loss and damage. Both proposition (a)[276] and proposition (b)[277] were plainly consistent with authorities

---

275 AB F1 Part A Tab 6 at 353; AB F2 Part A at 486.

276 *Sharma* at [761]-[773] (Wheelahan J); *Perrre v Apand Pty Ltd* (1999) 198 CLR 180 at [80] (McHugh J); *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at [14] (Gleeson CJ) and [103] (Hayne J); *Cole v South Tweed Heads Rugby league Football Club Ltd* (2004) 217 CLR 469 at [1] (Gleeson CJ). See also, *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582.

277 *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317 at [142]-[143] (Hayne and Callinan JJ, with whom Heydon J agreed at [177]); *Sharma* at [780]-[782] (Wheelahan J); *Graham Barclay Oysters* at [128] (Gummow and Hayne JJ).

relied upon by the Court at J [1240]-[1241] and no attempt is made at AS [103] to engage with those authorities.[278] There is also no good reason to revisit the primary judge's exercise of discretion.

Alleged error 2: utility

124 The second alleged error misunderstands the nature of the debate about declaratory relief below. At no point has the Commonwealth contended that the Court lacks the power to provide answers to common questions, and that is not the question Wigney J was determining at J [1238]-[1241].[279] The question for his Honour was whether to make the exceedingly broad declarations sought by the appellants. To the extent reliance is placed upon *Zonia*[280] for the proposition that the Court may make a declaration in the absence of loss or damage, that submission misses the point. The reason that it is inappropriate to make a declaration of duty and breach in a negligence case is that loss and damage is the gist or point of the action.[281] This stands in stark contrast to a statutory cause such as a continuous disclosure contravention under s 674 of the *Corporations Act 2001* (Cth), where proceedings (and particularly regulatory proceedings) are capable of being directed at the vindication of a statutory norm. Even there, it is well established that declarations must be informative as to the basis for the contravention.[282]

125 This ground also fails.

Conclusion

126 For the reasons outlined above, the appeal should be dismissed. Consistent with the position taken below, the Commonwealth does not seek its costs of the appeal.

10 July 2026

Stephen Lloyd SC **Zoe Maud SC** **Matt Sherman** **Alicia Lyons**

....

Grace Ng
AGS lawyer
for and on behalf of the Australian Government Solicitor
Lawyer for the Respondent

---

[278] J [1240]-[1241] at AB F1 Part A Tab 6 at 353-354; AB F2 Part A at 486-487.

[279] AB F1 Part A Tab 6 at 353-354; AB F2 Part A at 486-487.

[280] *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Ltd (No 2)* [2025] FCAFC 123 at [6]–[11] (Murphy, Moshinsky and Button JJ), noting the grant of special leave at [2026] HCATrans 008.

[281] *John Pfeiffer Pty Ltd v Canny* (1981) 148 CLR 218 at 241-242 (Brennan J); *Graham Barclay Oysters* at [128] (Gummow and Hayne JJ).

[282] See, eg, *ASIC v Blue Star Helium Ltd (No 4)* (2021) 158 ACSR 196 at [38] (Banks-Smith J).