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Federal Court of Australia VID1479/2025

District Registry: Victoria

Division: General

On appeal from the Federal Court

Pabai Pabai and another

Appellants

Commonwealth of Australia

Respondent

Appellants' Reply

Filed on behalf of (name & role of party) Pabai Pabai and Gai Paul Kabai, the Applicants / Appellants

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I Ground 1 – Justiciability

1 The Commonwealth contends the primary judge's approach is "entirely consistent" with the decision in *Sharma*[1] "concerning the same issue of climate policy" and that the reasoning of the majority in *Sharma* is directly applicable here: **RS [15], [24]** and **[26]**.[2] Framed at that level of generality the implication is any alleged duty of care concerning an executive government's response (either by positive act or omission, and whether by statutory or other power) to the mitigation of climate change is beyond curial assessment. That is not a correct reading of the reasoning of Allsop CJ and Wheelahan J in *Sharma*.

2 ***The decision in* Sharma:** The issue concerning the posited duty in *Sharma* was whether the Minister in the exercise of her powers under ss 130 and 133 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the **EPBC Act**) had a duty to take reasonable care in respect of an approval of a particular coal mine, the combustion of the coal from which would contribute carbon dioxide emissions into the atmosphere.[3] Allsop CJ addressed in detail the Minister's statutory powers under ss 130 and 133 within the context of that statutory scheme. His Honour found, properly construed, those statutory powers were confined in scope.[4] In that regard, his Honour placed emphasis upon the evaluative task of the Minister pursuant to s 136(1) of that Act in exercising the approval power, the concern of the EPBC Act not being generally for the protection of the environment or a response to global warming and climate change;[5] and the role of the responsible State Minister under the State scheme (that relevantly did consider the impacts of greenhouse gas emissions from the mine).[6] That analysis is a core plank of his Honour's reasons.[7] Wheelahan J similarly based his reasoning on a detailed analysis of the Minister's function under ss 130 and 133 of the EPBC Act observing at the outset that "an examination of the legislation is of critical importance to determining" whether the posited duty of care attaches to the Minister's statutory obligations.[8] His Honour reasoned the Minister's statutory function would not make it feasible to establish an appropriate standard of care.[9] The posited duty and the evaluative task here is different

1 *Minister for Environment v* ***Sharma*** (2022) 291 FCR 311.
2 Respondent's written submissions dated 10 July 2026 (**RS**).
3 *Sharma* (2022) 291 FCR 311, [10]–[11], [15].
4 *Sharma* (2022) 291 FCR 311, [81]–[87], [90] (Allsop CJ).
5 *Sharma* (2022) 291 FCR 311, [101]
6 *Sharma* (2022) 291 FCR 311, [90].
7 *Sharma* (2022) 291 FCR 311, [346].
8 *Sharma* (2022) 291 FCR 311, [839]–[850], [757], [836].
9 *Sharma* (2022) 291 FCR 311, [757].

from *Sharma*: **AS [11], [14] [20]**. The Commonwealth's attempts to cast the issues in both cases as the same should be rejected: **RS [26]**.

3 The Commonwealth also sidesteps the submission that the procedural posture of *Sharma* was important to the Court's approach to duty (**RS [23]**). This overlooks key passages in the reasoning of each of Allsop CJ,[10] Wheelahan J[11] and Beach J[12] addressing the difficulties and "unusualness" with disaggregating duty of care from the other elements of the claim. It is apparent, and consistent with orthodox principles addressed in *Sharma*, that disaggregation constrained and complicated the Court's task on determining the issues raised on appeal concerning duty. The Appellants' approach does not "hollow out the duty analysis" (cf **RS [23]**), rather it starts from the proposition that it was not correct to label the posited duty pleaded in this case as "core" or "high level" policy without focusing on whether the pleaded negligence is unable to be practically and appropriately adjudicated upon: **AS [18]**.[13]

4 Further, at the level of principle, the Commonwealth's approach to the issues of justiciability raised by Ground 1 is not consistent with the Australian common law system. That system is the "product of incremental adjustments to traditional practice that have occurred over the better part of a millennium without the system being mapped out in advance".[14] That system has repeatedly faced, and responded to, novel and disruptive challenges and retained the integrity of the common law process.[15] The Australian common law tort of negligence does not stand in a special position: cf **RS [41]**. To the contrary, the tort has subsumed within it principles and rules developed prior to the modern law of negligence.[16] In particular, the High Court's rejection of the rule in *Rylands v Fletcher*[17] was expressly informed by there being no reason in principle or policy for the preservation in Australia of the *ignis suus* rule formulated

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10 *Sharma* (2022) 291 FCR 311, [298]–[299], [328].

11 *Sharma* (2022) 291 FCR 311, [756]

12 *Sharma* (2022) 291 FCR 311, [538].

13 *Smith v Fonterra Co-Operative Group Ltd* [2024] NZSC 5; *Verin KlimaSeniorinnen Schweiz and Others v Switzerland* (Judgment) (European Court of Human Rights, Grand Chamber, Application No 53600/20, 9 April 2024 at [548], [550].

14 Gageler, 'Just v Quick: Constructivist and Ecological Rationality in a Common Law System (2021) 45(2) *Melbourne University Law Review* at 836–837.

15 Gageler and Winkelmann, 'Hale and Mansfield: Common Law Resilience and Common Law Innovation' (2026) 100 Australian Law Journal 57, 66–67; Lord Sales, 'Climate change and the future of tort law: responding to systemic risk and expanding liability' (Speech to Planning and Environment Bar Association Annual Conference, 9 May 2025).

16 See e.g. ***Burnie Port Authority*** *v General Jones Pty Ltd* (1994) 179 CLR 520; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [85], [125]–[126] (Gaudron, McHugh and Gummow JJ), discussing the alternative formulations of the issue in *Hargrave v Goldman* (1963) 110 CLR 40; aff'd *Goldman v Hargrave* (1966) 115 CLR 458; [1967] 1 AC 645. See, generally, *Fleming's Law of Torts* (7th ed), pp. 93–94.

17 (1868) LR 3 HL 330; UKHL 1.

in the historical context of mediaeval England where the escape of domestic fire "rivalled plague and war" as a cause of "general catastrophe".[18] As the primary judge recognised in this case, climate change "poses an existential threat to the whole of humanity" and the Torres Strait Islands and their inhabitants are "undoubtedly far more vulnerable to the impacts of climate change than other communities in Australia": J [5]. The Commonwealth's approach to justiciability prevents the natural and evolutionary development of the Australian common law to address new challenges such as the existential threat of climate change and would inhibit the Court's role of oversight of the exercise of executive power.

5 ***Commonwealth framing of "high level" policy beyond curial assessment is overbroad*** (**RS [10], [20] [24]**). It is said to follow that it would be "plainly" inappropriate for the court to pass judgments on the impugned actions: **RS [10], [20] [24]**. That ignores a key premise of the Appellants' case: the Commonwealth voluntarily entered into the Paris Agreement. Under Art 2 of the Paris Agreement the Commonwealth, as a party, agreed to the temperature goal: a key objective of the agreement: J [393]. The compliance of parties with their obligations of conduct under the Paris Agreement is "assessed on the basis of whether the party in question exercised due diligence and employed best efforts by using all the means at its disposal in the performance of that obligation".[19] That includes the obligation to communicate NDCs and pursue domestic mitigation measures under Art 4 of the Paris Agreement.[20] The Commonwealth took positive acts to operationalise these international obligations domestically. Those domestic acts are matters that may appropriately be a focus of curial assessment. This case does not require curial assessment of an act of foreign relations (cf J [1016]–[1030]) (and, in that regard, the Commonwealth's submission at **RS [92]** is overbroad). The primary judge considered there was sufficient documentary evidence and testimony (including evidence led by the Commonwealth) to assess whether the Commonwealth had regard to the best available science in formulating each NDC, notwithstanding claims of cabinet privilege which courts routinely address (cf **RS [25]**).[21]

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18 *Burnie Port Authority* (1994) 179 CLR 520 at 534 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

19 *Advisory Opinion on the Obligations of States in Respect of Climate Change*, 23 July 2025, dated 23 July 2025, [2025] ICJ Reports, [229] ***(ICJ Advisory Opinion*)**.

20 *ICJ Advisory Opinion,* [240].

21 J [463]-[470], [475]-[481], [484]-[488], [490]-[499], [506]-[516] referring to, for example, 22 November 2023, Ms Kelly Pearce, T1515.43-1517.15 (Appeal Book (**AB**) Pt B Tab 55), Setting Australia's Post-2020 Target for Reducing Greenhouse Gas Emissions: Final Report (AB Pt B Tab 34.2), Meinshausen Report [73]-[74] (AB Pt B Tab 2 [#A45]), 20 November 2023, Ms Julia Gardiner, T1351.5-10, T1365.15-23 and T1366.15-30 (AB Part B Tab 53, Australia's Nationally Determined Contribution Communication 2021 at .0263 (AB Pt B Tab 31.11), Affidavit of Julia Gardiner, [52]-[57] (AB Pt B Tab 25), Powering Australia at .1875 (AB Pt B Tab 31.15), Australia's Nationally Determined Contribution Communication 2022

II Ground 2 – Duty of Care

6 ***Salient features*:** The Commonwealth at **RS [32]–[33]** submits that the Appellants' case on Ground 2 proceeds on a mischaracterisation of the reasons. It is plain from his Honour's reasons, however, that the other features were, on balance, in favour of the relationship between the parties. The analysis (that the Appellants impugn) treated "control" as effectively outweighing the other salient features of the relationship between the plaintiff and the Commonwealth: J [949]. Contrary to **RS [34](a)**, the Appellants contend the finding at J [912] was relevantly affected by his Honour's reasoning on control (Ground 2(e)(i)) and challenge his Honour's findings on causation which are relied upon to support the finding at J [912].

7 ***Control*:** At the heart of the Appellants' argument on control is that the nature and degree of control over risks related to climate change require a different form of analysis from more traditional risks of harm: **AS [35]**. In that regard, the contentions that it is "fanciful" (at **RS [40]**) that the Commonwealth exclusively held control for the purposes of the salient features analysis under the Australian tort of negligence or that this approach leads to every individual polluter having the requisite control (**RS [41]**) miss the point given the undisputed facts about the causes of climate change, the international response to climate change and, in particular, the critical role of national governments in ensuring emissions are reduced: **RS [40]-[41]**. Only the Commonwealth had the power and ability to control the impugned tasks, namely, the setting of Australia's targets. The Commonwealth government has, in this context, a special measure of control over the risk of harm sufficient to ground liability.[22] The degree of control in this case is not analogous to *Sharma*. There Allsop CJ reasoned that the extent to which the Minister in approving a coal mine had control was too remote in circumstances where the intervening conduct included those who decided to buy and use that coal and their national governments who permit it within their obligations under international agreement to be responsible for Scope 3 emissions.[23] As discussed above, the control in that case is of a different character. In any case, the fact that others also contributed to harm in this case is not a basis to reject the existence of a duty.

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at .0274 (AB Pt B Tab 31.14), 14 November 2023, Mr Malte Meinshausen, T1147.1-16 (AB Pt B Tab 50), 21 November 2023, Dr Josep Canadell, T1398.23-34 and T.1399.9-19 (AB Pt B Tab 54).

[22] ***Graham Barclay Oysters*** *Pty Ltd v Ryan* (2002) 211 CLR 540, [154] (Gummow and Hayne JJ).

[23] *Sharma* (2022) 291 FCR 311, [334]–[337].

III Ground 3 – Standard of Care/Breach

8 ***Criteria for assessment:*** The Commonwealth places significant weight in its response to Grounds 1 and 3 that there is no criterion upon which to judge the government's action: **RS [30], [60]**. That contention requires careful scrutiny having regard to the findings of the primary judge on the content of the best available science and what it requires in the facts and circumstances as pleaded.

9 *First*, it was accepted that the Intergovernmental Panel on Climate Change (the **IPCC**) reports form part of, contain or reproduce, the best available science in respect of climate change and its impacts: J [379]. The objective of the IPCC is to provide governments at all levels with scientific information for them to use to develop policies: J [378].

10 *Second*, the Commonwealth conceded the IPCC reports formed part of, or contained, the best available science and that it had knowledge of those reports at the time they were published: J [445].

11 *Third*, the IPCC 5th Assessment Report (published in stages between September 2013–April 2014) contained calculations relating to CO_2 budgets consistent with limiting global warming to less than 2°C above pre-industrial levels: J [382], [446]. Those calculations were specifically included in the IPCC Reports to provide States with a range of possible pathways to meet temperature goals.[24]

12 *Fourth*, following the adoption of the Paris Agreement, the parties resolved to invite the IPCC to provide a special report on the impacts of global warming of 1.5°C and the related emissions pathways that would meet the temperature goal in Art 2: J [399], [409], [410].

13 *Fifth*, it was common ground that the scientific community had broadly identified three different methodologies to allocate between nations the remaining cumulative greenhouse gas emissions which would be consistent with a CO_2 budget to limit global temperature increase to 1.5°C (J [328]) and the primary judge accepted Professor Meinshausen's evidence that the targets set by the Commonwealth in 2015 and 2022 were not consistent with Australia

[24] IPCC Working Group I contribution to the Fifth Assessment Report 'Climate Change 2013: The Physical Science Basis', 27-28 and 1112-1113 (AB Pt B Tab 2 [#A55, Item 65 of Appellants' Unconditional Tender List at Annexure A of the order of Justice Wigney dated 8 July 2024]).

remaining within its allocations according to his calculations using even the most generous of the methodologies: J [365]–[366].

14 *Sixth*, as is made clear in the expert evidence accepted by the primary judge, there remains discretion afforded to States to decide which allocation methodology and which emissions pathways to adopt to meet the 1.5°C temperature goal: J [328]-[332] and [358]. [25]

15 The Appellants' case is that the best available science provides a standard capable of judicial assessment and the Commonwealth conducted its defence on the same basis.[26] In that context, the Appellants contend the best available science provides a range of ways to set an emissions reduction target consistent with the temperature goal and allowing for the Commonwealth to incorporate economic, social and political factors apart from best available science in setting an emissions reduction target. That was the acceptable minimum standard of care considering all the relevant facts and circumstances and it is a standard capable of curial assessment: **AS [52], [54**]; cf J [1007], [1013].

IV Ground 4 – Causation

16 It would be open to this Court to determine whether the Appellants' case falls within the principle identified in ***Bonnington*** *Castings Ltd v Wardlaw* [1956] AC 613, notwithstanding that the primary judge expressed only a tentative view (at J [1076]) that the Appellants' case was "at least capable" of doing so. It is not necessary to remit the matter to the primary judge to determine that issue: cf **RS [69]**.

17 ***Causal link*:** The Appellants' counterfactual case below included that, if the Commonwealth had set NDC targets consistent with the best available science, it would also exercise the powers available to it to implement those targets. The Commonwealth's submission at **RS [86]** that "it cannot be assumed that, just because such a target was announced in 2015, compliance with that target would actually be achieved" is at odds with how the Commonwealth itself viewed the target and its impact. The evidence was that the Commonwealth had commissioned economic modelling for the purposes of setting the target in 2015 and that modelling indicated that a higher (45%) target would reduce Australia's GDP by 0.5% to 0.7% whereas the lower (26%) target would reduce GDP by 0.2-0.3%: J [997]. In other words, when setting the target, the Commonwealth itself proceeded on the assumption

[25] Expert Report of Prof. Meinshausen at [72] (AB Pt B Tab 2 [#A45]).

[26] For example, at J [475], regarding the Commonwealth's submission about the 2015 target.

that it would be implemented, hence the need to consider the potential economic impacts. Further, as noted earlier, the primary judge accepted Professor Meinshausen's evidence that the targets set by the Commonwealth in 2015 and 2022 were not consistent with Australia remaining within its remaining cumulative greenhouse emissions allocations which would be consistent with a CO_2 budget to limit the global temperature increase to 1.5°C: J [366]. Again, that evidence proceeded on the assumption that the targets would have some bite. It was plainly open to the primary judge to draw an inference that if the targets had been set in accordance with the pleaded duty of care, the Commonwealth would have taken steps to implement them; otherwise, the targets would be meaningless and Australia would not be acting consistently with its core obligation under Art 4.4(2) of the Paris Agreement to "prepare, communicate and maintain successive nationally determined contributions *that it intends to achieve*": J [396]. In light of the Commonwealth's obligations under the Paris Agreement, it would be counterintuitive to assume that emissions targets set by the Commonwealth were either not implemented or were implemented without effect. The Commonwealth did not lead evidence that explained why a target that was set by the Commonwealth pursuant to the Paris Agreement would not be implemented. As a matter of common sense, it follows that a higher target would result in a commensurate reduction in GHG emissions (cf **RS [83]**; J [1055]-[1056], [1062]), notwithstanding that the setting of the target would not directly cause (emit) emissions: cf **RS [80]**.

18 ***Contribution not* de minimis:** A contribution may be material even if the loss would have been incurred in any event.[27] In *Strong v Woolworths Ltd* (2012) 246 CLR 182 at [22], the High Court traced the extension of responsibility in cases based on material contribution to a Scottish decision in which several factories had contributed to the polluted state of a river. There it was held that liability for nuisance did not require the act of any single factory to have been itself *necessary* for the nuisance.[28] An act or omission may play "some part" in contributing to the loss and therefore be material[29] even if the extent of the contribution cannot be measured or observed and even if other factors or conditions played a more significant role in producing the loss or damage:[30] cf **RS [90]–[92]** and **[96]**. The Commonwealth's focus on what would have made a "discernible" impact on the loss or "measurable difference to global

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[27] See ***Lewis*** *v Australian Capital Territory* (2020) 271 CLR 192, [152] (Edelman J); see also *Amaca Pty Ltd v Booth* (2011) 246 CLR 36, [70], quoting *Wakelin v London & South Western Railway Co* (1886) 12 App Cas 41 at 47.

[28] *Lewis* (2020) 271 CLR 192, [152] (Edelman J), citing *Duke of Buccleuch v Cowan* (1866) 5 M 214.

[29] *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, [45]; *Lewis* (2020) 271 CLR 192, [152] (Edelman J).

[30] *Henville v Walker* (2001) 206 CLR 459 at [106]; cf at [97]; cf **RS [75]** and **[90]**.

temperature" is too narrow and not supported by the broad statements of principle in the authorities cited at **RS fn 225**. The fact that the overall increase in temperatures is itself small (and therefore any contribution by the Commonwealth would be significantly smaller) does not itself indicate that the Commonwealth's contribution is *de minimis*: cf **RS [93]**.

19 Contrary to **RS [91],** this case is analogous to *Bonnington* because the excess GHG emissions that occurred as a result of the Commonwealth's breach of duty contributed to, and was *a* cause, of the damage itself. There is a clear analogy between this case and *Bonnington*, where exposure to silica dust from poorly maintained equipment contributed to the plaintiff's pneumoconiosis, despite other (and much larger) quantities of silica dust being produced by other activities that did not involve negligence. The medical evidence was that pneumoconiosis is caused by a gradual accumulation of silica particles inhaled over several years.[31] The disease was caused by the *whole* of the noxious material inhaled.[32] While the total amount from both sources of the dust in the atmosphere was small at any one time, the *combined effect* over eight years caused the employee's disease.[33] The House of Lords found that the swing grinders contributed a quota of silica dust which was not negligible to the employee's lungs and therefore "helped to produce the disease",[34] notwithstanding that the "quota of silica dust" was not quantified. There was no evidence and no finding that the silica from the poorly maintained equipment could *itself* have caused the disease.[35] As in *Bonnington*, this is a case where the Court could overcome any "evidential gap" by drawing inferences from established facts as to the cumulative effects of GHG emissions.[36]

20 Further, if an injury occurs within an area of foreseeable risk, in the absence of evidence that the breach had "no effect" or that the injury would have occurred even if the duty had been performed, it will be taken that the breach of the common law duty caused or "materially

[31] *Bonnington* [1956] AC 613 at 621.
[32] *Bonnington* [1956] AC 613 at 621.
[33] *Bonnington* [1956] AC 613 at 623.
[34] *Bonnington* [1956] AC 613 at 623.
[35] See also ***East Metropolitan Health Service*** *v Ellis (by his next friend Christopher Graham Ellis)* [2020] WASCA 147, [603].
[36] See *East Metropolitan Health Service* [2020] WASCA 147, [604]; as to drawing inferences, see also *Bonnington* [1956] AC 613 at 623 per Lord Tucker and at 626-627 per Lord Keith of Avonholm ("The inference, of course, would have been different if it could be shown that the pursuer could not have inhaled any particles given off from the swing grinding operations, or that the particles negligently released from the swing grinding operations were released at intervals so infrequent, or in quantities so insignificant, even if taken cumulatively, as to make it unreasonable to regard them as a material contributing cause of the pursuer's disease. But that, in my opinion, the defenders are unable to show.")

contributed" to the injury.[37] At the very least, the risk of increased temperatures from failing to set targets in accordance with the best available science was foreseeable and it cannot be said that the breach had "no effect" on increased temperatures.

V Ground 5 – Loss and Damage

21 At **RS [110], [115]-[120]** the Commonwealth appears to submit that the statutory concept of native title exhausts or confines the ambit of Australian law's recognition of Indigenous rights, law and custom in Australian law. If that is the contention, it should be rejected. Insofar as it is a descriptive submission, it is inaccurate; the fact or prospect of Indigenous "cultural loss" has been recognised by courts and parliaments to be sufficient to attract legal protection or remedy regardless of whether that cultural loss might also qualify as an extinguishment of native title rights (contra J [1122]).[38] Perhaps more fundamentally, while native title is recognised by the common law, it is not sourced in or created by it.[39] There is no principled basis nor policy reason that Australian law cannot recognise traditional laws and customs in other contexts. As Brennan J said in *Mabo (No 2)*, "it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination".[40] An approach which seeks to limit the Appellants' claim for loss of fulfilment of *Ailan Kastom* to Indigenous persons who hold native title rights is at risk of running foul of that imperative, bearing in mind that not all Indigenous persons have recognised native title rights. Further, it is important to bear in mind that the *Native Title Act 1993* (Cth) provides a mechanism for the recognition of communally held native title. It does not operate to deprive individual members of those communities of their rights and interests or the experience of the aspects of their

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[37] *Bennett v Minister for Community Welfare* (1992) 176 CLR 408 at 420–421 (Gaudron J), citing (among other cases) *McGhee v National Coal Board* [1972] AC 1, where the Plaintiff developed dermatitis following exposure to brick dust in a kiln and it was impossible for medical science to establish whether the dermatitis had been caused by the initial lawful exposure rather than by the dust that remained on his skin as a result of the Board's failure to provide showers. The medical evidence showed that the longer his skin was exposed to the dust, the greater the *chance* of developing dermatitis. The House of Lords held that, since the failure to provide the showers had materially increased the risk of the pursuer developing dermatitis, the Board was liable; there was no substantial difference between the breach martially increasing the risk of injury, and the breach materially contributing to the injury: see particularly at [12] (Lord Wilberforce).

[38] See, e.g., *Human Rights Act 2019* (Qld) s 28, discussed in Chief Justice Helen Bowskill, 'The Interaction of Aboriginal and Torres Strait Islander Customary Law with Some Aspects of the Law of Equity: Is the View Any Different Through the Lens of the Human Rights Act?' (2024) 43(3) *University of Queensland Law Journal* 403. See also *Fisheries Act 1994* (Qld) s 14; *Aboriginal and Torres Strait Islander Act 2005* (Qld) ss 4 and 142A(1)(a); *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020* (Qld) s 8; *Nature Conservation (Animals) Regulation 2020* (Qld) reg 32.

[39] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (***Mabo (No 2)***), [58] (Brennan J), [88] and [110] (Deane and Gaudron JJ); see also ***Love*** *v Commonwealth* (2020) 270 CLR 152 at [34] (Kiefel CJ); *Commonwealth of Australia v* ***Yunupingu*** (2025) 99 ALJR 519 at [60], [61] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

[40] *Mabo (No 2)* (1992) 175 CLR 1 at 41-42; see also *Love* (2020) CLR 152 at [450] (Edelman J).

identity, lives and practices and hurt suffered through loss of fulfilment. Rather, the Act co-exists with and expressly intends to advance those rights and interests.[41]

22 The "deeper" or "fundamental" truth recognised by *Mabo (No 2)* and subsequent cases is that the enduring, substantial and significant spiritual and cultural connection of Indigenous persons with the lands and waters that make up Australia has not been severed or extinguished by European settlement. That connection is not dependent on the identification of legal title under native title law in respect of particular land or waters, because an Indigenous person's unique relationship with the land and waters exists irrespective of whether those proprietary native title rights and interests are recognised within the framework of the *Native Title Act 1993* (Cth).[42] Understood in this context, there is no impediment to the Australian law of negligence developing to recognise loss of fulfilment of *Ailan Kastom* as a compensable loss felt both individually and communally notwithstanding the claims for loss of fulfilment of *Ailan Kastom* do not arise from and are not connected with or dependent upon any native title right: cf **RS [105], [119]**.

VI Ground 6 – Relief

23 If the Court is satisfied that one or more of the substantive grounds of appeal have been made out, and the Appellants succeed on the corresponding common questions, the question of what relief should be granted is a matter to be developed with the benefit of the Court's reasons.

24 The Appellants accept that if the appeal is allowed the appropriate course in relation to relief might be to have the matter remitted to the primary judge,[43] in circumstances where: (a) the proceeding is a representative proceeding and the claims of group members other than the Applicants have not been finally determined; and, (b) due to the findings on causation and loss of fulfilment of *Ailan Kastom* not being compensable (J [1097], [1132]), there are insufficient findings to determine the appropriate relief in respect of Appellants' and group members' claims.

Fiona McLeod AO SC Sera Mirzabegian SC Julian Murphy Courtney Raad Selena Bateman

[41] See *Native Title Act 1993* (Cth), s 3 ("Objects"), United Nations Declaration on the Rights of Indigenous Peoples Arts 9 and 33, International Covenant on Economic, Social and Cultural Rights Art 15 and Gen Comment 21. See also Explanatory Memorandum to the *Native Title Bill 1993* (Cth), p 11.

[42] As to the rights and interests being proprietary, see, for example, *Yunupingu* (2025) 99 ALJR 519 at [50], [53].

[43] Proposed Order 2(d) in the Amended Notice of Appeal filed 22 June 2026 (AB Pt A Tab 8: p. 1 (F1), p. 504 (F2)).