

Federal Court of Australia

District Registry: Victoria

Division: General

No. VID 1479 of 2025

Pabai Pabai and Guy Paul Kabai

Appellants

Commonwealth of Australia

Respondent

APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

DAY 1

1. Introduction and outline of uncontested matters:
 - a. His Honour's findings [Part A, Tab 6 (**PJ**)]:
 - i. the relationship between the Commonwealth and Torres Strait Islanders PJ [877], [880], [883], [942];
 - ii. group members are deserving of particular attention PJ [882], [946];
 - iii. all greenhouse gas emissions contribute to global temperature increase PJ [211], [224]-[237] [266];
 - iv. the Commonwealth had knowledge of the best available science including IPCC reports J [245]-[246], [397], [443], [891] and the need for urgent and significant steps PJ [992], including by limiting global temperature increase by 1.5°C as a critical target to limit many of the most dangerous and harmful impacts of climate change PJ [758];
 - v. the Torres Straits have been and will be significantly adversely affected by climate change PJ [314], [521], [713]-[714], [728]-[759];
 - vi. there is ample evidence of vulnerability PJ [314], [386], [387], [436], [521], [760]-[761], [889];
 - vii. Australia is a relatively high emitter in global terms and one of the largest emitters on a per capita basis PJ [520];
 - viii. in the years 2015, 2020 and 2021 the Commonwealth did not set its emission reduction targets by reference to, and consistently with the best available science PJ [480], [486], [488], [492], [498], [1020], [1024], [1029]
 - b. Overview 3FASOC [81] and [83] and temporal focus 2014-2022. The Commonwealth knew from 30 September 2013 (the date of publication of IPCC AR5 WG1) that global mean temperature had warmed .65-1.06°C AB [Pt C Tab 16 pp. 1033 / AB Pt B Tab 2] and knew of the vulnerability of the Torres Strait Islands from climate change from every incremental increase of greenhouse gas emissions: PJ [891]-[892].

- c. Paris Agreement art 2 and 4 and the 1.5°C temperature goal PJ [393] and [395].
- d. Brief introduction of climate concepts: all GHG emissions matter PJ J [211], [224]–[237], [266]; IPCC modelling; global carbon budgets PJ [317], [332]; exceedance by Australia PJ [345],[349], [366] and material contribution; loss of fulfillment of *Ailan Kastom* PJ [1107].
- e. ICJ Advisory Opinion 23 July 2025 [Tab 98 of JBA]: paras [236], [245]–[246], [457],

2. **Ground 1– Justiciability**

- a. Amended Notice of Appeal [Part A Tab 8, p. 504-516]: Ground 1 particular (a), (d)(iii) error in holding the duty should be rejected as a threshold issue; particular 9 (d)(i) and/or (ii) wrong characterisation as matter involving high or core policy not suitable for the Court.
- b. PJ threshold approach: PJ. [106]–[136], [437]–[499] [846]–[866], [977];
- c. Guiding principles: *Pyrnees Shire Council* [Tab 50 of JBA]; *Vairy* [Tab 68 of JBA]; *Graham Barclays Oysters* [Tab 28 of JBA] and *Sharma* [Tab 44 of JBA];
- d. Error of threshold approach and conclusions.

3. **Ground 2– Duty of Care**

- a. PJ findings: PJ [443]–[446], [760]–[763], [877]–[883], [889]–[898], [911]–[916], [942]–[945], [1271]–[1272];
- b. Requirements of salient features analysis;
- c. Emphasis on control of the risk of harm PJ [947]–[949], [978] [978];
- d. Significant or material control premise flawed: AS [25]–[33]: *Brodie* [Tab 5 of JBA], *Graham Barclay Oysters* [Tab 28 of JBA], *Sharma* [Tab 44 of JBA]; *Electricity Networks* [Tab 21 of JBA];
- e. Features of relationship support alternate findings: PJ [887]–[890]; J [893]–[898], [908], [911]–[916], [944]–[945]
- f. Conclusion to ground 1 and 2 – common question 3.

4. **Ground 3– Standard of Care**

- a. The pleaded standard of care: the interrelated steps, the “Best Available Science Target” and its relationship with the “Global GHG Budget” ([TFASOC 43A], [45], [82]);
- b. PJ’s application of the two-stage *Shirt* test [Tab 74 of JBA]: reasonable foreseeability of risk of harm (PJ [982]–[985]) and the negligence calculus;
- c. The first error in the application of the negligence calculus: PJ failed to have adequate regard to the magnitude of harm to Torres Strait Islanders and the future risks of harm known by the Commonwealth (PJ [991]–[995]).

DAY 2

5. **Ground 3** (continued)

- a. The second error in the application of the negligence calculus: PJ erred in finding that the standard of care was inappropriate because it required consideration of policy questions (PJ [1010]-[1013]).

6. **Ground 4– Causation**

- a. Appellants' primary case on causation (*Bonnington Castings* [Tab 4 of JBA]) and the relevance of the alternative causation case (*Fairchild* [Tab 23 of JBA]);
- b. PJ's error on the causal link between the targets and actual emissions (PJ [1054]-[1062]): inference of causal link available and supported by Commonwealth's expert evidence;
- c. PJ's error in finding that the Commonwealth's breach did not materially contribute to the harm (PJ [1084]-[1093]):
 - i. The parallels between this case and *Bonnington Castings* [Tab 4 of JBA];
 - ii. Evidence of the avoided temperature increase compared to: the nature and context of global warming, the relative warming and emissions impact of the Commonwealth's breach and the uncontested facts on the causes and impacts of global warming.

7. **Ground 5– Loss and damage**

- a. The significance of *Ailan Kastom* at trial;
- b. The content of *Ailan Kastom* as pleaded, proven and found: PJ [4], [184], [624], [714];
- c. PJ's reasoning on question 16 and why this Court should reach a different conclusion;
 - i. Critical question: PJ [1131], referring to *Cattanach* [Tab 8 of JBA];
 - ii. Method: AS [95]-[96] & RS [110], referring to *Cattanach* [Tab 8 of JBA], *Tame* [Tab 64 of JBA] and *Perre v Apand* [Tab 49 of JBA];
 - iii. Consideration of authorities: PJ [1121]-[1128];
 - iv. Prudence/caution: PJ [1131], [1267];
 - v. Observations about 'difficulty' of native title 'overlap': PJ [1105], [1109], [1112].

8. **Ground 6– Relief**

- a. PJ's reasoning on question 17 and declarations re duty and breach: PJ [1238]-[1241];
- b. If Appellants successful on other grounds it follows duty and breach established in respect of *Ailan Kastom* – declarations can be appropriately tailored by this Court;
- c. Declarations would have utility, including to vindicate Appellants' case and promote compliance: *Zonia* [Tab 76 of JBA];
- d. Alternatively, remittal to primary judge appropriate.

DAY 4 - Reply