

On appeal from the Federal Court

Pabai Pabai and another

Appellants

Commonwealth of Australia

Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Preliminary matters (Stephen Lloyd)

- 1 The appellants invite the Court to change the law of negligence in dramatic ways that are inconsistent with its purpose and well-established principle.
- 2 The appellants' case on appeal differs from their case at trial: 3FASOC (Pt A, Tab 4) at [81], [82], [83]; Closing (Pt C, Tab 9) at [305], [307], [346]-[347], [376]-[382], [464].
- 3 The duty is too abstract and indeterminate: *Modbury* (2000) 205 CLR 254 at [13]-[16], [100]-[105]; *Cole* (2004) 217 CLR 469 at [1].

Ground 1: Justiciability — RS [3]-[30] (Stephen Lloyd)

- 4 The appellants do not allege any error in the primary judge's statement of principles concerning justiciability (J [106]-[136]), and fail to identify any error in their application: J [818]-[845].
- 5 There is no principle that non-justiciability will almost always be addressed at breach (cf AS [8]-[10]): *Crimmins* (1999) 200 CLR 1 at [5], [87] [JBA, Tab 13]; *Romeo* (1998) 192 CLR 431 at [122], [139] [JBA, Tab 53]; *Brodie* (2001) 206 CLR 512 at [92], [106] [JBA, Tab 5]. Beach J's judgment in *Sharma* is distinguishable: J [851].
- 6 There was no error in addressing it at the duty stage given the parties' positions and the development of argument (cf AS [13]-[14]): Defence (Pt A, Tab 5) at [81]-[82]; Closing (Pt C, Tab 10) at [47]-[49], [51]-[79], [580]-[610]; J [846]-[852].
- 7 The alleged duty clearly raised issues of core policy and there were no criteria to judge whether a target should be set solely by reference to science (cf AS [21]): 3FASOC (Pt A, Tab 4) at [81]; *Sharma* (2022) 291 FCR 311 at [15], [868] [JBA, Tab 44]; J [854]-[866].
- 8 The appellants' case on the Paris Agreement differs from the case run below (cf AS [19]): Closing (Pt C, Tab 9) at [304]; T56.29-.35 (Pt C, Tab 50); AS [51].
- 9 The communication of an intended Nationally Determined Contribution (NDC) prior to entry into the Paris Agreement engaged economic and social considerations: J [464], [862].

- 10 Australia's entry into the Paris Agreement did not necessitate the adoption of the posited BAS Target as a matter of domestic or international law (cf AS [19]): Paris Agreement (Pt C, Tab 20), Articles 2, 3 and 4; *Dietrich* (1992) 177 CLR 292 at 305 [JBA, Tab 16].

Ground 2: Duty of care, salient features — RS [31]-[47] (Stephen Lloyd)

- 11 There was no error in the primary judge's reasoning on the salient features and duty of care: J [89]-[94], [96], [100]-[102], [867]-[868], [870]-[875], [889]-[894], [911]-[931].
- 12 His Honour's analysis must be understood in light of the appellants' case below: Closing (Pt C, Tab 9) at [226], [240], [476.1], [540], [633]; J [931], [941]-[947], [977]-[978].
- 13 The appellants' *positive act* thesis pays insufficient regard to the nature of a NDC, which is essentially ameliorative in nature.
- 14 The appellants' *control* thesis pays insufficient regard to the nature of international climate frameworks and the terms of the Paris Agreement: (Part C, Tab 20), Article 4.

Ground 3: Standard of care, breach — RS [48]-[62] (Stephen Lloyd)

- 15 There was no error in the primary judge's reasoning on the standard of care: J [137]-[142], [979]-[990], [991]-[995], [996]-[1003], [1004]-[1009], [1010]-[1013].
- 16 The primary judge's reasoning addressed the case advanced by the appellants: T.48.1-.5, T50.15-.37, T51.40-.9, T57.5-.13 (Pt C, Tab 50).
- 17 The primary judge considered the three categories of factors appropriate to the negligence calculus, and the second two spoke strongly against the pleaded standard of care: J [991]-[995]; AS [45].
- 18 The primary judge had adequate regard to the probability and magnitude of harm from climate change, and the Commonwealth's knowledge of the same: J [4], [54], [443]-[474], [487], [760]-[763], [991], [995]; cf. AS [46.1].
- 19 The primary judge was correct to reject the appellants' standard of care, based only on science, and to find that questions of standard of care and breach raised policy issues: J [1007]-[1010]; cf. AS [46.2]; see also AS [51].

Ground 4: Causation — RS [63]-[99] (Zoe Maud)

- 20 The primary judge did not err in finding the appellants had not established a causal link between the setting of NDC targets and increased emissions [ground (di)]; J [1062]:
- (a) This was a critical step in their causal chain: 3FASOC (Pt A, Tab 4) [45], [82]-[83], [86]; J [1038]-[1047], esp. at J [1045]; Applicants' Closing (Pt A, Tab 9) at [445].
 - (b) There is no domestic law or international obligation to meet NDCs: Paris Agreement (Pt C, Tab 20), Art 2.1(a), 4.1-2.
 - (c) There is no evidence that a reasonable developed State actor in the Commonwealth's position could or would have complied with a higher target, or taken a straight line path to that target: J [326]-[332], [1055]; Meinshausen Report (Pt C, Tab 23) [58]-[71]; Meinshausen T1126-1132, 1143, 1162-1163 (Pt C, Tab 44).
 - (d) The Court cannot infer the causal link in the circumstances, including where the evidence was to the contrary: J [1056]-[1062].

- (e) If, as the appellants now appear to contend, their case is that the Commonwealth only needed to “consider” (not implement) BAS, causation cannot be established.
- 21 The primary judge did not err in finding that any contribution of the Commonwealth to harm (or risk) was not material [ground (dii)]; J [1084]:
- (a) Focus is the harm that is alleged to have occurred after the breach. If compensable, loss of fulfilment of *Ailan Kastom* is not an indivisible form of harm, rather it comprises different components that are impacted by climate change in different ways: J [1107], [1115]. To establish causal connection, must show specific aspects of *Ailan Kastom* harmed after the relevant breach, and that Commonwealth’s breach materially contributed to that harm. Appellants failed to identify any particular climate change related event(s) that caused them harm: J [1075].
 - (b) The primary judge correctly concluded in the circumstances that the Commonwealth’s contribution to harm was *de minimis* where it could not be scientifically modelled, measured or observed: J [1084]-[1088].
 - (c) At its highest, exceedingly small contribution of relevant breaches to global temperature increase are not capable of constituting a material contribution: *Bonnington* [1956] AC 613 at 615, 621-623, 626 [JBA Tab 4].
- 22 The primary judge did not proceed on the basis that the Court needed to find that the Commonwealth’s contribution to harm was measurable to be material [NOA ground (diii)], though that was a factor in his Honour’s reasoning here: J [1084]-[1088].
- 23 *Fairchild* is not part of Australian law [ground (div)]: J [158], [1095]-[1096].

Ground 6: Declaratory Relief — RS [122]-[125] (Zoe Maud)

- 24 There was no error in the primary judge’s conclusions regarding the appropriateness of declaratory relief in the circumstances of the case.
- 25 The declarations sought were too abstract and general: RS [123].
- 26 The declarations sought lacked utility in the context of the common questions: RS [124].

Ground 5: Loss and damage — RS [100]-[121] (Stephen Lloyd)

- 27 The concept of *Ailan Kastom* overlaps with native title: J [1112].
- 28 The appellants disavowed any reliance on native title rights: 3FASOC (Pt A, Tab 4) at [3], [4], [54], [55], [56], [62A], [67A], [81], [81A], [82A], [85], [86]; Pt C, Tab 46, 3007 and 3015; Pt C, Tab 47, 3024, 3029.
- 29 In those circumstances, there was no error in the primary judge rejecting the appellants’ claims: J [1104], [1106]-[1125], [1131].
- 30 The expansion of the law proposed by the appellants is unprincipled and unjustified: *Timber Creek* (2019) 269 CLR 1 at [54], [304] [JBA, Tab 48].

29 July 2026

Stephen Lloyd SC

Zoe Maud SC

Matt Sherman

Alicia Lyons