

FEDERAL COURT OF AUSTRALIA

Pabai v Commonwealth of Australia (No 2) [2025] FCA 796

JUDGMENT SUMMARY

In accordance with the practice of the Federal Court in cases of public interest, importance or complexity, the following summary has been prepared to accompany the orders made today. This summary is intended to assist in understanding the outcome of this proceeding and is not a complete statement of the conclusions reached by the Court. The only authoritative statement of the Court's reasons is that contained in the published reasons for judgment which will be available on the internet on the Court's website. This summary is also available there.

The Torres Strait Islands, or the *Zenadth Kes*, are a cluster of islands located in the Arafura and Coral Seas between Cape York in far northern Australia and Papua New Guinea. Many of the islands, including those that are inhabited, are coral cays or very low-lying sand or mud islands.

The Torres Strait Islands have in recent years been ravaged by the impacts of human-induced climate change. Rising sea levels, storm surges and other extreme water level events have resulted in flooding and seawater inundation on many of the islands. Trees are dying and previously fertile areas have been adversely affected by salination and are no longer suitable for growing traditional crops. Rising sea levels and storms have led to the erosion and depletion of beaches and the salination of tidal wetlands. Warmer ocean temperatures and ocean acidification have caused coral bleaching and the loss of seagrass beds. Totemic sea creatures like dugong and turtles, once abundant in the region, have become scarce. Seasonal patterns have changed, as have the migratory patterns of birdlife.

The impacts of climate change on the land and marine environment of the Torres Strait Islands have had a profound impact on the customary way of life of the inhabitants and traditional owners of the Torres Strait Islands. They are finding it increasingly difficult to practise and observe the body of customs, traditions and beliefs, known generally as *Ailan Kastom*, which has sustained them for generations. Sacred sites, including burial and ceremonial sites, have been damaged and are constantly at risk of further inundation. The traditional owners who reside on the islands are increasingly unable to source traditional foods or engage in certain cultural ceremonies, particularly those involving hunting and gathering. Changing seasonal,

migratory and stellar patterns make it increasingly difficult for elders to pass-on traditional knowledge to the next generations.

Climate change poses an existential threat to the whole of humanity. The wellbeing and way of life of many, if not most, communities in Australia are vulnerable to the impacts of climate change. The Torres Strait Islands and their inhabitants are, however, undoubtably far more vulnerable to the impacts of climate change than other communities in Australia. The many low-lying islands in the Torres Strait are particularly prone to damage and destruction caused by rising sea waters and extreme weather events. The region's ecosystems are also far more prone to damage and destruction caused by increasing ocean temperatures and ocean acidification. To make matters worse, most Torres Strait Islanders and their communities are socially and economically disadvantaged, at least compared to other Australians and their communities, and often lack access to appropriate resources, infrastructure and services which would enable them to protect themselves from, or adequately adapt to, the impacts of climate change. They understandably feel powerless when it comes to protecting themselves against climate change and its impact on their islands and traditional way of life.

There could be little, if any, doubt that the Torres Strait Islands and their traditional inhabitants face a bleak future if urgent action is not taken to address climate change and its impacts.

Mr Pabai Pabai, the first applicant in this proceeding, is from the Guda Maluyligal nation. He is 53 years old and has lived almost his entire life on Boigu, a small low-lying island that is closer to Papua New Guinea than it is to mainland Australia. He is a leader in his community. He has witnessed firsthand the impacts of climate change on Boigu in recent times and has experienced the resulting community sadness and loss of Ailan Kastom. He fears that, if something is not done about climate change and its impacts on the Torres Strait Islands, Boigu will lose its ancestral, sacred, and ceremonial sites and he will lose his connection to country and culture.

Mr Guy Paul Kabai, the second applicant, is also from the Guda Maluyligal nation and has lived most of the 55 years of his life on Saibai. Saibai, like Boigu, is a tiny low-lying island very close to the coast of Papua New Guinea. Like Mr Pabai Pabai, he is an elder who has observed the damage wrought by climate change on his island and the traditional way of life of its peoples. He too is worried that, if nothing is done in respect of climate change, his community will lose its sacred places, culture and traditions, and he will lose his country and his identity.

The Torres Strait Islands are, both literally and figuratively, a world away from Canberra, the home of the Commonwealth Parliament. That is where many of the most important decisions are made about the nation's response to climate change and its impacts. While there may have been, and perhaps still are, some climate change doubters and deniers among the politicians and bureaucrats who are responsible for making those decisions, it is tolerably clear that the Commonwealth Government has for some time known about the perils of, and ongoing risks posed by, climate change. It has also recognised that it must play a part in the global response to climate change. The Commonwealth has also known and appreciated that the Torres Strait Islands and Torres Strait Islanders are particularly vulnerable to the impacts of climate change. But has the Commonwealth's response to climate change been reasonable and adequate to protect Torres Strait Islanders and their traditional way of life from the ravages of climate change?

Mr Pabai Pabai and Mr Kabai contended that the Commonwealth's response to climate change had been, and continues to be, inadequate and that it has not done enough to protect them and other Torres Strait Islanders from the impacts of climate change. In this representative proceeding, which they commenced both on their own behalf, and on behalf of the traditional inhabitants of the Torres Strait Islands, they claimed, in broad terms, that the Commonwealth had breached, and continues to breach, the duty of care that they say the Commonwealth owes them and other Torres Strait Islanders to take reasonable steps to protect them from the impacts of climate change. They sought various forms of relief from the Commonwealth, including damages to compensate them for, among other things, their collective loss of fulfilment of Ailan Kastom.

As explained in considerably more detail in the Court's reasons for judgment, the applicants' primary case against the Commonwealth focussed on the greenhouse gas emissions reduction targets that the Commonwealth set and communicated to the United Nations Framework Convention on Climate Change in 2015, 2020, 2021 and 2022. The applicants' alternative case focussed on the Commonwealth's actions in respect of the funding of an important infrastructure project in the Torres Strait Islands which involved the construction of seawalls on some of the islands that were seen to be the most vulnerable to rising sea levels and extreme sea level events.

The cause of action in both the applicants' primary and alternative cases was the cause of action in the common law tort of negligence. For the benefit of non-lawyers, it should be noted that,

to make out a case in negligence, an applicant must, in simple terms, establish three things: first, that the respondent (in this case the Commonwealth) owed them a duty of care not to cause them any loss or damage; second, that the respondent breached that duty of care by failing to live up to the standard of care required by the duty; and third, that the respondent's breach of the duty of care caused them loss or damage.

The applicants' primary case

In their primary case, the applicants alleged that the Commonwealth owed a duty of care to all Torres Strait Islanders to take reasonable steps to protect them, their traditional way of life, and the Torres Strait and its marine environment, from what were said to be the current and projected impacts of climate change on the Torres Strait Islands. The current impacts of climate change were said to include, among other things: the increase in global average surface temperature; ocean acidification; the increase in ocean temperature; sea level rise; flooding and coastal erosion; the increase in the size and frequency of extreme weather events; the harm and destruction of ecosystems and non-human species; and harm to human health.

As for the standard of care that the Commonwealth was required to meet to fulfil that duty of care, the applicants alleged, in summary, that the Commonwealth was required to take reasonable steps to ensure that, having regard to the best available science, it identified greenhouse gas emissions reduction targets which would prevent or minimise the current and projected impacts of climate change on the Torres Strait Islands, and also implement such measures as were necessary to reduce Australia's greenhouse gas emissions consistent with those targets.

The applicants alleged, in essence, that emissions reduction targets which met those requirements were targets which, having regard to the best available science, were consistent with Australia reducing its greenhouse gas emissions to levels within scientifically calculated amounts which were consistent with a global objective of holding the increase in the global average temperature to 1.5°C above pre-industrial levels. That global objective, which was itself rooted in the best available science, was effectively enshrined in the Paris Agreement, an important international agreement to which Australia was a party. The best available science clearly indicated that holding the increase in global average temperature to that level was a critical step in avoiding some of the worst impacts of climate change.

Critically, the applicants claimed that, when it set greenhouse gas emissions reduction targets in 2015, 2020, 2021 and 2022, the Commonwealth failed to meet that standard of care and accordingly breached the duty of care it owed to Torres Strait Islanders. They alleged in that regard that, when it set Australia's emissions reduction targets in those years, the Commonwealth failed to give any real or genuine consideration to what the best available science said concerning the critical importance of reducing greenhouse gas emissions to a level consistent with holding the increase in global average temperature to 1.5°C above pre-industrial levels. They contended, in simple terms, that the targets that were set by the Commonwealth were not consistent with Australia reducing its greenhouse gas emissions to a level which would ensure that Australia was playing its part in achieving the global objective of holding global temperature increase to that level. The applicants' case in that regard was based on and supported by the expert opinion evidence of eminent internationally respected climate scientists.

In relation to loss and damage, the applicants claimed that the Commonwealth's breach of its duty of care in respect of the setting of emissions reduction targets had materially contributed to the harm that they and other Torres Strait Islanders had suffered from the impacts of climate change in the Torres Strait Islands. Ultimately their claims in that regard focussed mainly on the loss of fulfilment of Ailan Kastom that they claimed to have suffered in recent times as a result of climate change. They alleged, in that regard, that climate change related flooding and inundation events had damaged their sacred sites and the burial grounds of their ancestors, that as a result of climate change they were unable to engage in many of their traditional ceremonies and customs, and that they were no longer able to engage in many of their traditional and life-sustaining activities, including hunting, gathering and gardening. Above all, they claimed that climate change had effectively severed important aspects of their close connection with their traditional lands and seas.

As discussed in detail in the judgment, I have found that the applicants succeeded in establishing many of the factual allegations that underpinned their primary case. In particular, I have found that, when the Commonwealth identified and set Australia's greenhouse gas emissions reduction targets in 2015, 2020 and 2021, it failed to engage with or give any real or genuine consideration to what the best available science indicated was required for Australia to play its part in the critically important global objective, enshrined in the Paris Agreement, of significantly reducing greenhouse gas emissions and thereby moderating global warming and reducing the prospects of the worst and most dangerous impacts of climate change.

The best available science was and is patently clear. To prevent the worst and most dangerous impacts of climate change, it was and is imperative for every country to take steps to drastically reduce their greenhouse gas emissions so as to ensure that the increase in the global average temperature is held to well below 2°C above pre-industrial levels, and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels. As discussed in detail in the reasons for judgment, the evidence in this case clearly indicated that the emissions reduction targets set by the Commonwealth in 2015, 2020 and 2021 were not consistent with the need for Australia to drastically reduce its greenhouse gas emissions consistently with the recognised scientific imperative of keeping the global average temperature increase to those specified levels. In short, the evidence revealed that when it set Australia's greenhouse gas emissions targets in those three years, the Commonwealth paid scant if any regard to the best available science.

It is important to note, however, that I have found that, when the Commonwealth, under a new government, reset Australia's emissions reduction target in 2022, it did have some regard to the best available science. While the target that was set by the Commonwealth in that year perhaps did not go as far as some climate scientists would consider was necessary for Australia to play its part in the global objective of holding global average temperatures to 1.5°C above pre-industrial levels, that emissions reduction target was significantly higher and more ambitious than the targets set by the previous government. The new target appeared to be based, at least in part, on what the best available science revealed about the emissions reductions that Australia would have to achieve for Australia to meet its obligations under the Paris Agreement.

As I have already made clear, and as is discussed in detail in the reasons for judgment, I have also found that the Torres Strait Islands have been, and continue to be, ravaged by climate change and its impacts. The evidence indicated that the damage being wrought on the Torres Strait Islands by climate change, including the flooding and inundation of townships, extreme sea level and weather events, severe erosion, the salination of wetlands and previously arable land, the degradation of fragile ecosystems, including the bleaching of coral reefs, and the loss of sea life, has become more frequent and more severe in recent times. There could also be no doubt that those and other impacts of climate change have had a significant adverse impact on the traditional way of life of many Torres Strait Islanders and have resulted in Torres Strait Islanders collectively suffering a loss of fulfillment of Ailan Kastom.

The projected future impacts of climate change in the Torres Strait Islands also paint a very bleak picture indeed. The Torres Strait Islands and their traditional inhabitants are quite literally at the very frontline of climate change and its devastating impacts. Unless something is done to arrest global warming and the resulting escalating impacts of climate change, there is a very real risk that the applicants' worst fears will be realised and they will lose their islands, their culture and their way of life and will become, as it were, climate refugees. That would, of course, be a devastating outcome.

As Mr Pabai Pabai said in his evidence:

If Boigu was gone, or I had to leave it, because it was underwater, I will be nothing. I will have nothing behind my back. I will not be able to say I am a Boigu man anymore. How will I be able to say where I come from? I will become nobody. I will have no identity.

Mr Kabai's evidence was to similar effect:

... we won't have our culture because culture will be Saibai, so if Saibai goes under water we lose everything, our culture, our identity, our livelihood. It will be all [be] gone

There could be no doubt that other Torres Strait Islanders feel the same way.

Despite the findings that I have made concerning the Commonwealth's emissions reduction targets and the impacts of climate change on the Torres Strait Islands, I have nevertheless found that the applicants have not succeeded in making out their primary case in negligence. The detailed reasons for judgment explain why that is so. In short summary, the critical findings that I have made which are essentially fatal to the applicants' case primary case are as follows.

First, the Commonwealth did not, and does not, owe Torres Strait Islanders the duty of care alleged by the applicants in support of their primary case. Decisions of appellate courts in respect of the law of negligence, by which I am clearly bound, establish that governmental conduct and decisions which involve matters of high or core government policy are not properly or appropriately made the subject of common law duties of care. That is because the reasonableness or unreasonableness of conduct or decisions of that nature are generally considered to be unsuitable for determination by courts of law, essentially because there is no proper criterion by reference to which a court can make such determinations. The reasonableness of decisions of that nature are ordinarily to be decided through political processes, not by judges. The decisions involved in the setting and communication of Australia's greenhouse gas emissions reduction targets, pursuant to its international obligations or otherwise, are highly political in nature and almost self-evidently involve matters of high or

core government policy. They are accordingly not properly subjected to a common law duty of care of the sort contended by the applicants. It was not open to me on the current state of the law to conclude otherwise.

As explained in detail in the reasons for judgment, there were various other considerations which weighed against the imposition of the alleged duty of care concerning the setting of emissions reduction targets. The fact that the alleged duty involved matters of high or core government policy was, however, the primary impediment to the imposition of the duty.

Second, and relatedly, I have found that if the Commonwealth did owe Torres Strait Islanders a duty of care which concerned the setting and communication of greenhouse gas emissions reduction targets, the standard of care required of the Commonwealth was not, as the applicants effectively alleged, one that required the Commonwealth to set the targets solely by reference to the best available science. As has already been noted, the setting of emissions reduction targets involves the making of policy and political decisions and choices. There is no sound basis for concluding that it was or would necessarily be unreasonable for a responsible government in the position of the Commonwealth, when setting greenhouse gas emissions reduction targets, to have regard not only to the best available science, but also broader economic, social and political considerations.

Third, I have found that even if the Commonwealth was subject to and breached a duty of care of the sort alleged by the applicants in their primary case, it cannot be concluded on the available evidence that any such breach materially contributed to the harm suffered by Torres Strait Islanders from the impacts of climate change. While Australia is a comparatively large emitter of greenhouse gas, particularly on a per capita basis, its emissions make up only a relatively small proportion of the global greenhouse gas emissions that induce climate change. More significantly, the scientific evidence indicated that any additional greenhouse gases that might have been emitted by Australia as a result of the low emissions reduction targets set by the Commonwealth in 2015, 2020 and 2021 would have caused no more than an extremely small and almost immeasurable increase in global average temperature. While it was open to conclude that the extremely small increase in temperature would have had some climate change impact, including in the Torres Strait Islands, it was not open on the evidence for me to conclude that any such impact *materially* contributed to any harm that has, or was being, suffered by Torres Strait Islanders.

I should emphasise that the findings I have made in respect of causation cannot and should not be construed as somehow sanctioning or justifying the unquestionably modest and unambitious greenhouse gas emissions reduction targets that were set by the Commonwealth in 2015, 2020 and 2021. It is one thing to say that those low targets cannot be proved to have materially contributed to the impacts of climate in one small region during one short period of time. It is entirely another thing to say that the targets were somehow justified or justifiable because of the applicants' inability to prove their precise causal effect, and notwithstanding the scientifically demonstrated need for nations to drastically reduce their greenhouse gas emissions. That point was emphasised by one of the leading climate scientists who gave evidence in this case. When pressed about the impacts of the Commonwealth's emissions reduction targets in the Torres Strait, he employed the following metaphors to illustrate what he called the "tragedy of the commons":

I think your question exactly highlights the tragedy of the commons where every single contributor's effect is very, very, very, very small and probably can't individually be detected. Yet, overall, in terms, we cause a problem. And it's the same – like, the taxpayer say[ing], "Is the Australian Federal Government detecting in its day-to-day business whether I pay taxes or not?" "No, they wouldn't notice so why should I pay taxes." "Is there additional wear and tear on the roads and I drive around?" "No, there isn't. So why should I be subjected to any tax that is causing that?" So it's always the – I think there is a fundamental problem of tragedy of the commons, environmental, global problems.

The fourth finding that I have made which is essentially fatal to a significant element of the applicants' case is that the common law of negligence in Australia does not currently support the proposition that harm in the nature of loss of fulfilment of Ailan Kastom is a compensable species of harm. The loss of fulfilment of culture, customs, observances, beliefs and traditions, either by an individual or collectively by a community, is not currently a recognized category of actionable damage in tort. While I have considerable sympathy for the applicants' contention that Ailan Kastom should be recognised as capable of protection by law, I do not consider that it is open to me, sitting as a single judge of this Court, to recognise, for the first time, that participation in, or enjoyment or observance of, customs, traditions, observances and beliefs, can constitute or comprise rights or interests capable of protection by law. I should note, in this context, that this finding does not relate to any claims that may be available in respect of the loss of or interference with native title rights under the *Native Title Act 1993* (Cth). The applicants' case did not include any claim in respect of damage to their native title rights.

Having regard to those four critical findings, a verdict must be entered in favour of the Commonwealth in respect of the applicants' primary case in negligence against the Commonwealth.

The applicants' alternative case

In their secondary or alternative case, the applicants alleged that the Commonwealth owed a duty to Torres Strait Islanders to take reasonable care to avoid causing property damage, loss of fulfilment of Ailan Kastom and injury arising from a failure to adequately implement adaptation measures to prevent or minimise the current and projected impacts of climate change in the Torres Strait Islands. While the applicants' case concerning the duty in respect of adaptation measures was initially couched in very broad and expansive terms, it was ultimately confined to the taking of reasonable steps in respect of the funding of a key infrastructure project in the Torres Strait Islands that was known as the Seawalls Project. That project concerned the construction, or planned construction, of seawalls (including wave return walls and bunds) on the islands of Sabai, Boigu, Poruma, Iama, Masig and Warraber. As events transpired, the Seawalls Project was jointly funded by the Commonwealth and Queensland Government.

The applicants' central contention was that the duty of care that the Commonwealth owed Torres Strait Islands in respect of adaptation measures required the Commonwealth to take reasonable steps to do two things in the context of the Seawalls Project: first, to provide access to predictable funding, including additional funding as required, that was sufficient to construct seawalls on the islands in question; and second, to lead, coordinate and establish a coherent plan for the provision of funding for the protection of the Torres Strait Islanders from the adverse effects of sea level rise, inundation and erosion through the construction of seawalls.

As described in detail in the reasons for judgment, in late 2011, the Torres Strait Islands Regional Council sought funding of \$5 million for the Seawalls Project from the Commonwealth Government through a competitive grants program. The Council had succeeded in obtaining \$19 million in funding for the Seawalls Project from the Queensland Government and sought funding from the Commonwealth to complement that funding. The Council's funding application under the Commonwealth's grants program was ultimately successful and the Commonwealth eventually provided the \$5 million funding, though that funding was not finally approved and provided until 2014.

The funding sought and eventually obtained by the Council from the Commonwealth and Queensland Governments turned out to be insufficient to complete the construction of the seawalls that were part of the Seawalls Project. The Council accordingly sought and obtained additional funding from both governments for a second stage of the project. Each government provided \$20 million in further funding. Unfortunately, that funding also turned out to be insufficient to complete the construction of all the planned seawalls on all the islands in question.

The applicants alleged that the Commonwealth breached its duty of care in respect of adaptation measures. Ultimately their case in that regard came down to the proposition that, while the Commonwealth eventually provided all the funding that the Council had sought from it, the funding was delayed, unpredictable and inadequate. The applicants also claimed that the Commonwealth's breach of duty in that regard caused them to suffer loss and damage, though their case in that respect essentially reduced to the claim that the breach of duty caused them to suffer harm in the form of loss of fulfilment of Ailan Kastom.

I have found that the applicants have not succeeded in making out their alternative case in negligence against the Commonwealth. The detailed reasons for judgment explain why that is so. In short summary, the critical findings that I have made which are effectively fatal to the applicants' alternative case are as follows.

First, the Commonwealth did not owe Torres Strait Islanders the duty of care alleged by the applicants in support of their alternative case. As explained in detail in the reasons for judgment, the alleged duty of care concerning the funding of adaptation measures involved decisions and conduct concerning matters of core government policy. Those policies included policies about how governmental responsibilities in relation to the adaptation to climate change should be allocated between the three tiers of government (local, state and federal) in Australia, and the Commonwealth's policies and processes concerning the appropriation of public monies and the budgetary allocation of its available resources. As explained earlier in the context of the applicants' primary case, the law of negligence that I am bound to apply is such that decisions and conduct of that nature are not properly subjected to common law duties of care.

Second, even if the Commonwealth owed Torres Strait Islanders a duty of care in respect of the funding of adaptation measures, the evidence did not support the applicants' case that the Commonwealth breached that duty. The Commonwealth eventually provided all the funding that the Council sought from it in respect of the Seawalls Project. While it may perhaps be

accepted that the Council's funding application was not approached with the degree of urgency or haste that might reasonably have been expected given what the Commonwealth plainly knew about the risk of inundation and flooding on the Torres Strait Islands, the Commonwealth was not responsible for all the relevant delay. I was also not persuaded that the evidence supported the proposition that the approach to funding taken by the Commonwealth was unpredictable, including because the Council's funding application was initially made pursuant to a competitive grants program. As for the contention that the funding was inadequate, the evidence tended to suggest that the funding turned out to be inadequate mainly because of cost overruns and the overall administration of the project by the Council. I was not persuaded that the inadequacy of the funding was due to any carelessness on the part of the Commonwealth.

Third, the evidence did not in any event support a finding that any breach by the Commonwealth of the alleged duty of care concerning the funding of the Seawalls Project caused or contributed to any compensable harm suffered by the applicants or Torres Strait Islanders. As has already been noted, the applicants' case in respect of loss and damage caused by breach of this duty of care ultimately reduced to a claim concerning loss of fulfilment of Ailan Kastom. As I indicated earlier in the context of the applicants' primary case, I have found that the common law of negligence in Australia which I am bound to apply, does not currently support the proposition that harm in the nature of loss of fulfilment of Ailan Kastom is a compensable species of harm. I was not otherwise persuaded that the evidence established that any breach by the Commonwealth of the alternative duty of care caused the applicants to suffer any loss or damage.

Having regard to those findings, a verdict must be entered in favour of the Commonwealth in respect of the applicants' alternative case in negligence.

The Common Questions

As this was a representative proceeding, the parties agreed on the questions common to all group members that the Court could and should answer at this stage of the representative proceeding. The common questions and my short answers to them are annexed to this judgment summary. The short answers to the common questions in the annexure contain references to paragraphs in the reasons for judgment which detail the Court's reasoning and findings in respect of the common questions. As was noted at the outset, the published judgment is the authoritative statement of the Court's reasons for judgment, not this short judgment summary.

The Outcome

I do not propose to make dispositive orders at this point in time. I will rather direct the parties to provide the Court with agreed or competing draft orders which give effect to the judgment. If the orders are not agreed, the parties should provide short written submissions concerning their proposed orders, including whether it will be necessary to have a further hearing to determine the appropriate orders.

Finally, it would be remiss of me not to make the following brief observation concerning the outcome of this proceeding.

It will be apparent that the main reason for the failure of the applicants' primary case was not that they were unable to prove the main factual elements of their case against the Commonwealth. Indeed, as I have already explained, I have accepted many of the key factual allegations upon which the applicants' case was based. In particular, I accepted the scientific and other evidence adduced by the applicants concerning the devastating impacts that human-induced climate change has had, and continues to have, on the Torres Strait and on the traditional inhabitants of the Torres Strait Islands and their culture and way of life. I also accepted the evidence that indicated that, when it set and communicated Australia's greenhouse gas emission reduction targets in 2015, 2020 and 2021, the Commonwealth did not engage with or give real or genuine consideration to the best available science. I have found that the targets that were set by the Commonwealth in those years were not based on, and were not consistent with, what the best available science said about the size of the emissions reductions that would be necessary for Australia to achieve for it to play its part in meeting the global objective of holding the increase in global average temperature to 1.5°C above pre-industrial levels.

The applicants' primary case against the Commonwealth failed not so much because there was no merit in their factual allegations concerning the Commonwealth's emissions reduction targets. Rather, it failed essentially because the common law of negligence in Australia was not a suitable legal vehicle through which the applicants could obtain effective relief in respect the type of harm they claim to have suffered as a result of the type of governmental action or inaction which was in issue in this case. That is not intended to be a criticism of the applicants, or their case, or their legal advisers. The reality is that the law in Australia as it currently stands provides no real or effective legal avenue through which individuals and communities, like those in the Torres Strait Islands, can claim damages or other relief in respect of harm that they

claim to have suffered as a result of governmental decisions and conduct which involve matters of high or core government policy, including in respect of the responses to climate change and its impacts. That will remain the case unless and until the law in Australia changes, either by the incremental development or expansion of the common law by appellate courts, or by the enactment of legislation. Until then, the only real avenue available to those in the position of the applicants and other Torres Strait Islanders involves public advocacy and protest, and ultimately recourse via the ballot box.

JUSTICE MICHAEL WIGNEY

15 July 2025

JUDGMENT EXTRACT - ANSWERS TO THE COMMON QUESTIONS

Duty of care

- 1 **Common question 1:** Has climate change had and does it continue to have any or all of the impacts described in paragraph [57] of the 3FASOC and the particulars thereto (the Current Impacts of Climate Change in the Torres Strait)?

Answer: Yes. See paragraphs [528], [522], [560]-[561], [566]-[567], [570], [581] and [713]-[714] above.

- 2 **Common question 2:** Will climate change in the future have any of the impacts described in paragraph [59] of the 3FASOC and the particulars thereto (the Projected Impacts of Climate Change in the Torres Strait) if Global Temperature Increase exceeds the Global Temperature Limit?

Answer: Yes. See paragraphs [721], [723]-[726], [730], [735], [738], [740]-[741], [744], [746]-[752] and [759] above.

- 3 **Common question 3:** At any relevant time, did or does the Commonwealth owe a duty of care to Torres Strait Islanders to take reasonable steps to:

- (a) protect Torres Strait Islanders; and/or
- (b) protect Torres Strait Islanders' traditional way of life, including taking steps to preserve Ailan Kastom; and/or
- (c) protect the marine environment;
- (d) from the Current Impacts of Climate Change in the Torres Strait Islands and the Projected Impacts of Climate Change in the Torres Strait Islands?

Answer: No. See paragraphs [977]-[978] above

- 4 **Common question 4:** If the answer to question 3 is 'yes', did or does any such duty of care require the Commonwealth to take reasonable steps to ensure that, having regard to the Best Available Science, it:

- (a) identifies the Current Impacts of Climate Change in the Torres Strait Islands and the Projected Impacts of Climate Change in the Torres Strait Islands;

- (b) identifies the risk, scope and severity of the Current Impacts of Climate Change in the Torres Strait Islands and the Projected Impacts of Climate Change in the Torres Strait Islands;
- (c) identifies the Global Temperature Limit necessary to prevent or minimise many of the most dangerous Current Impacts of Climate Change in the Torres Strait Islands and the Projected Impacts of Climate Change in the Torres Strait Islands;
- (d) identifies a Best Available Science Target reflecting the Global Temperature Limit identified at subparagraph (c) above to prevent or minimise the Current Impacts of Climate Change in the Torres Strait Islands and the Projected Impacts of Climate Change in the Torres Strait Islands; and
- (e) implements such measures as are necessary to reduce Australia's GHG emissions consistent with a Best Available Science Target identified at subparagraph (d) above?

5 **Answer:** Unnecessary to answer. If, however, the answer to 3 was 'yes', the answer to this question would be 'no'. See paragraph [1010] above.

Alternative duty of care

6 **Common question 5:** At any relevant time, did or does the Commonwealth owe a duty of care to Torres Strait Islanders to take reasonable care to protect against marine inundation and erosion causing:

- (a) property damage;
- (b) loss of fulfilment of Ailan Kastom; and/or
- (c) injury, disease or death?

Answer: No. See paragraphs [1186]-[1187] above.

7 **Common question 6:** If the answer to question 5 is 'yes', did or does such duty of care require the Commonwealth to take reasonable steps to:

- (a) provide access to predictable funding, including additional funding as required, that was sufficient to construct seawalls on the Torres Strait Islands;
- (b) lead and coordinate and establish a coherent plan for the provision of funding for the protection of the Torres Strait Islanders from the adverse effects of sea level rise,

inundation and erosion through the construction of seawalls - as part of the Seawalls Project Stage 1 and Stage 2 on Saibai, Boigu, Poruma, Iama, Masig and Warraber (the Seawalls Projects).

(Note: seawalls includes bunds, wave return walls, geotextile bags and associated coastal protection infrastructure)

- 8 **Answer:** Unnecessary to answer. If, however, the answer to 5 was ‘yes’, the answer to this question would be ‘no’.

Breach of duty of care

- 9 **Common question 7:** If the answer to questions 3 and 4 is ‘yes’, did the Commonwealth breach the duty of care by failing to take any, or any reasonable steps to ensure that, having regard to the Best Available Science, it:

- (a) identified the Current Impacts of Climate Change in the Torres Strait Islands and the Projected Impacts of Climate Change in the Torres Strait Islands;
- (b) identified the risk, scope and severity of the Current Impacts of Climate Change in the Torres Strait Islands and the Projected Impacts of Climate Change in the Torres Strait Islands;
- (c) identified the Global Temperature Limit necessary to prevent or minimise many of the most dangerous Current Impacts of Climate Change in the Torres Strait Islands and Projected Impacts of Climate Change in the Torres Strait Islands;
- (d) identified a Best Available Science Target reflecting the Global Temperature Limit identified at subparagraph (c) above to prevent or minimise the Current Impacts of Climate Change in the Torres Strait Islands and the Projected Impacts of Climate Change in the Torres Strait Islands; and
- (e) implemented such measures as are necessary to reduce Australia’s GHG emissions consistent with a Best Available Science Target identified at subparagraph (d) above;

when:

- (f) setting and maintaining Australia’s 2030 Target;
- (g) setting and maintaining Australia’s Re-affirmed 2030 Target;

(h) setting and maintaining Australia's 2050 Target;

(i) setting and maintaining Australia's Updated 2030 Target?

Answer: Unnecessary to answer. If, however, the answer to 3 and 4 was 'yes', the answer to (f) would be 'yes', the answer to (g) would be 'yes' and the answer to (h) would be 'no'. See paragraphs [1020], [1024], [1029] and [1033] above.

10 **Common question 8:** If the answer to question 7 is 'yes', is there an ongoing breach of the duty of care?

11 **Answer:** Unnecessary to answer. If, however, the answer to 7 was 'yes', the answer to this question would be 'no'. See paragraphs [1034] above.

Breach of alternative duty of care

12 **Common question 9:** If the answer to questions 5 and 6 is 'yes', did the Commonwealth breach the alternative duty of care by failing to take any, or any reasonable steps to:

(a) provide predictable funding necessary to complete all planned seawalls projects;

(b) lead and coordinate and establish a coherent plan for the provision of funding for the protection of the Torres Strait Islanders from the adverse effects of sea level rise, inundation and erosion through the construction of seawalls; as part of the Seawalls Project Stage 1 and Stage 2 on Saibai, Boigu, Poruma, Iama, Masig and Warraber (the Seawalls Projects)?

13 **Answer:** Unnecessary to answer. If, however, the answer to 5 and 6 was 'yes', the answer to this question would be 'no'. See paragraph [1220] above.

14 **Common question 10:** If the answer to question 9 is 'yes', is there an ongoing breach of the alternative duty of care?

15 **Answer:** Unnecessary to answer.

Causation, loss, and damage

16 **Common question 11:** If the answer to question 7 is 'yes', was the breach of the duty of care a cause of Torres Strait Islanders collectively suffering loss of fulfilment of Ailan Kastom arising from damage to or degradation of the land and marine environment of the Torres Strait

Islands? (Note: this question does not address any specific claims of loss or damage that the applicants or any specific group member may have)

Answer: Unnecessary to answer. If, however, the answer to 7 was ‘yes’, the answer to this question would be ‘no’. See paragraph [1134] above.

- 17 **Common question 12:** If the answer to 8 is ‘yes’, will the ongoing breach of the duty of care, if not restrained, continue to be a cause of Torres Strait Islanders collectively suffering loss of fulfilment of Ailan Kastom arising from damage to or degradation of the land and marine environment of the Torres Strait Islands? (Note: this question does not address any specific claims of any ongoing loss or damage that the applicants or any specific group member may have)

Answer: Unnecessary to answer.

- 18 **Common question 13:** If the answer to question 9 is ‘yes’, was the breach of the alternative duty of care a cause of Torres Strait Islanders collectively suffering loss of fulfilment of Ailan Kastom arising from damage to or degradation of the land and marine environment of the Torres Strait Islands? (Note: this question does not address any specific claims of loss or damage that the applicants or any specific group member may have)

Answer: Unnecessary to answer. If, however, the answer to 9 was ‘yes’, the answer to this question would be ‘no’. See paragraph [1234] above.

- 19 **Common question 14:** If the answer to question 10 is ‘yes’, will the ongoing breach of the alternative duty of care, if not restrained, continue to be a cause of Torres Strait Islanders collectively suffering loss of fulfilment of Ailan Kastom arising from damage to or degradation of the land and marine environment of the Torres Strait Islands?

Answer: Unnecessary to answer.

Relief

- 20 **Common question 15:** What statutory law applies to the claims of the applicants and group members?

- 21 **Answer:** The substantive law of the Australian Capital Territory applies to the applicants’ and group members’ claims relating to both the targets duty of care and the alternative duty of care. Those laws include the *Limitation Act 1985* (ACT). However, the *Civil Law (Wrongs) Act 2002*

(ACT) does not apply to the Commonwealth. Accordingly, the common law applies to the applicants' and group members' negligence claims. See paragraphs [82]-[87] above.

- 22 **Common question 16:** Is the loss of fulfilment of Ailan Kastom, arising from damage to or degradation of the land and marine environment of the Torres Strait Islands compensable under the law of negligence?

Answer: On the current state of authority, the answer to this question is 'no'. See paragraphs [1131]-[1132], [1223], [1232] and [1234] above.

- 23 **Common question 17:** Can the declaratory and injunctive relief sought by the applicants be granted and, if so, should it be granted?

Answer: No. See paragraphs [1240]-[1241] and [1243]-[1244] above.