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TRANSCRIPT OF PROCEEDINGS

O/N H-1681415

FEDERAL COURT OF AUSTRALIA

VICTORIA REGISTRY

MORTIMER J

No. VID 622 of 2021

PABAI PABAI and ANOTHER

and

COMMONWEALTH OF AUSTRALIA

MELBOURNE

9.17 AM, THURSDAY, 17 MARCH 2022

MS F. McLEOD SC appears with MS L. BARRETT and MS S. MARTIN for the applicant

MS MAUD appears with MS LYONS for the respondent

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5 HER HONOUR: You're on mute, Ms McLeod, I think.

MS F. McLEOD SC: Thank you, your Honour. Good morning, your Honour, I appear with MS BARRETT and MS MARTIN for the applicants.

10 HER HONOUR: Thank you.

MS MAUDE: If the court pleases, I appear with MS LYONS for the respondent.

HER HONOUR: Thanks, Ms Maude. And I thank the parties for their issues list and their proposed orders. You won't be surprised - - -

15 MS McLEOD: Before we - - -

HER HONOUR: - - - to hear I've got a few comments, so I think - - -

20 MS McLEOD: Yes, your Honour.

HER HONOUR: - - - the easiest thing might be, Ms McLeod, if you just want to work through the matters and I will make my comments as we go.

25 MS McLEOD: Yes, your Honour. Before I turn to the joint list of issues and the proposed orders, your Honour, on the last occasion your Honour invited the applicant to make some general opening remarks in relation to the case and we've had – we now have the Commonwealth defence which was filed on 25 February. I would seek leave to make those opening remarks today if that's convenient to your Honour.

30 HER HONOUR: Yes, I think that's a good idea and that might segue into the issue – two issues I want to raise, one about concise statements and one about creating an online file for this matter.

35 MS McLEOD: Yes, your Honour. The applicants – Pabai Pabai and Paul Kabai are men of the Torres Strait Islands. They're holders of native title rights and interests to the lands and waters of Boigu and Saibai, respectively, in the Torres Strait. Those rights and interests include recognised distinct cultural rights known as Ailan Kastom which encompass the unique spiritual and physical connect of Torres Strait Islander
40 people so their lands and surrounding waters. They bring this proceeding on their behalf and on behalf of other Torres Strait Islander peoples. Their homelands, the islands, reefs and open waters of the Torres Strait are especially vulnerable to the impact of climate change. They already experience regular sea level rises, storm surges, coastal erosion, inundation and flooding of their villages, contamination of
45 freshwater sources with saltwater and observe the effects of ocean warming and acidification, coral bleaching and degradation of the marine environment.

They observe changes to the land and marine environments upon which they depend. They experience and will continue to experience the likelihood of disease, injury and death due to extreme weather events, diminished food production, food and water-borne and vector-borne diseases. These changes have impacted upon the
5 sustainability of their island life, including damage to infrastructure, the loss of culturally significant places and detrimental changes to the land, inland waterways and marine environment. They have and will continue to experience direct health, social, economic and cultural impacts. In this case, it is alleged that the Commonwealth has a duty of care to the Torres Strait Islander peoples. It is a duty,
10 we allege, that arises from the terms of the Torres Strait Treaty to which the Commonwealth is a party, obliging it to protect the Torres Strait Islander people, their customary way of life and marine environment in the protected region of the Torres Strait, namely, all the land, sea, airspace, seabed and subsoil within the Torres Strait Islands.

15 The protected zoned was established in accordance with Article 10 of the Torres Strait Treaty, principally to acknowledge and protect the traditional way of life and livelihood of the traditional inhabitants and also to protect and preserve the marine environment and indigenous flora and fauna in the vicinity of the protected zone.
20 Under Article 13 of the Torres Strait Treaty, the Commonwealth is required to take legislative and other measures necessary to protect and preserve the marine environment in and in the vicinity of the protected zone including taking into account internationally agreed rules, standards and recommended practices, and to take measures for the prevention and control of pollution or other damage to the marine
25 environment for all sources and activities under its jurisdictional control, including in particular measures to minimise to the fullest extent the release of toxic, harmful or noxious substances including those from land-based sources from or through the atmosphere.

30 The duty of care of the Commonwealth is a duty, we allege, that arises in the context of the Commonwealth commitments to the United Nations Framework on Climate Change Convention and Paris Agreement and its commitment to an undertaking of climate change mitigation measures in the Torres Strait, including the construction of an ineffective seawall on the island of Saibai. The duty of care arises further by
35 reason of the native title rights and interests of the applicants and the vulnerability to climate change, the risk of damage to them and the Commonwealth's knowledge and control of that risk. As Nettle J said in *Love v Commonwealth*:

40 *Consistently, therefore, with its recognition of Aboriginal societies as the source and sanctuary of traditional laws and customs, the common law must be taken always to have comprehended the unique obligation of protection owed by the Crown to those societies and to each member in his or her capacity as such.*

45 We allege that the Commonwealth's failure to take any or any reasonable steps to prevent or minimise the current and projected impacts of climate change in the Torres Strait Islands also affects the Torres Strait Islanders within the meaning

of the Native Title Act because sea level rises, inundation and coastal erosion will extinguish certain rights and interests over the Torres Strait Islands. It is a duty that arises in the circumstances of the real and immediate existential threat to the Torres Strait Islander peoples, a risk recognised, controlled and inadequately responded to
5 by the Commonwealth and the reliance of the Torres Strait Islander peoples upon the Commonwealth to protect them from harm. In this case, it is alleged that the Commonwealth has, since at least 2014, failed to have regard to the best available science in assessing and responding to those risks.

10 The Commonwealth, we allege, has failed to have regard to the Australian Climate Change Authority when setting its 2030 greenhouse gas emissions target which falls below the lower end of the emissions range which the authority advised was necessary to limit global temperature increases to three degrees Celsius above pre-
15 industrial levels, noting that if it increases beyond 1.5 degrees Celsius the impacts to the Torres Strait Islands will be catastrophic. We note that by its defence the Commonwealth does not dispute the availability of and its knowledge of the best available science on climate change. The Commonwealth does not dispute that climate change has impacted and will impact the Torres Strait Islands. So those are the matters I wanted to address in opening, your Honour, which may, of course, feed
20 into your Honour's remarks about the concise statement.

HER HONOUR: Yes, thank you, Ms McLeod. Ms Maude, is there anything you want to say on behalf of the Commonwealth? It's not obligatory.

25 MS MAUDE: Not at this stage, your Honour. We will have, obviously, things to say in due course.

HER HONOUR: All right. Thank you. Well, picking up on that, Ms McLeod, there's no doubt that this is a proceeding of great public interest and it seems to me it
30 is appropriate – and I've had a look at the parties' pleadings and while I mean no disrespect by what I'm about to say, in a proceeding of this nature, it's going to be difficult, I think, for members of the public to understand what the position of each party is just by looking at the pleadings or there's also perhaps a potential for misunderstanding, and so I think it would be helpful if the parties were prepared to
35 file a concise statement on your clients' behalf, Ms McLeod, and a response, Ms Maude, on your client's behalf in accordance with the court's practice notes. It may also be a helpful discipline for the parties and of great assistance to me in resolving matters going forward if the parties' cases were reflected in a document of that nature. Now, what do you both have to say about that proposal?
40

MS McLEOD: We don't have any objection to a concise statement for that purpose, your Honour. In fact, we started to draft one but then wanted to clarify the purpose of it. Our only concern would be that the concise statement not be a substitute for the pleadings that are filed in this case.
45

HER HONOUR: Yes, well, I think that's a position that's fairly well articulated in the court now, except in cases where the proceeding is commenced only by a concise statement, but that's not this case. Ms Maude.

5 MS MAUDE: Your Honour, I think we indicated on the last occasion that, given that there are pleadings that are not overly long, that concise statements may not be necessary, but if your Honour thinks they will be useful, we are, of course, content to respond to a concise statement from the applicants. Does your Honour have in mind the usual five-page limit?

10 HER HONOUR: I do. I do. And the usual sort of lack of technicality and the usual focus on what's really in dispute between the parties, what might not be in dispute between the parties, matters which the pleadings have clarified to some extent now. So I think those - - -

15 MS MAUDE: Yes.

HER HONOUR: I would find a document like that of great assistance and, given the nature of the proceeding, I think it's appropriate. I'm happy to be flexible about the timing of them although now that the pleadings are done, it seems to me they shouldn't take too long to prepare and, of course, I'd be happy or it to be – the orders about them to be sequential, Ms Maude, so you can ensure yours is truly responsive. Ms McLeod, how long would you need to prepare one?

25 MS McLEOD: I will just seek some instructions, your Honour. We're just looking at the discovery orders and seeing whether it is appropriate to have some sequencing there but I will just seek some instructions. We were going to suggest two weeks, your Honour, for us to file a concise statement for the applicants.

30 HER HONOUR: Sorry, just let me get my calendar. So 31 March.

MS McLEOD: Yes, your Honour.

35 HER HONOUR: How's that? Ms Maude, what about your client?

MS MAUDE: Your Honour, we could respond within two weeks so I think that would take us to 14 April.

40 HER HONOUR: 14 April. Okay. Thank you. Good. Now, along the same lines, I would be inclined to consider it's appropriate in this case for there to be an online file that's accessible by members of the public. Let me just clarify that one of the things that does is it reduces some of the burden on the court's registry in terms of dealing with requests for access, and nothing goes on the online file without the consent of the parties. So, for example, at the moment what I propose is that the statement of claim and the defence go up and that when the concise statements are in
45 they go up, and from there on we can continue to have discussions about what

documents in the case should or shouldn't go up on the online file. Ms McLeod, do you have a view about that?

5 MS McLEOD: In our submission, it's appropriate there's a publicly accessible online file, your Honour. Our only hesitation would be to make sure that evidence is not included until it's read or until there's discussion about anything that might be sensitive.

10 HER HONOUR: Yes.

MS McLEOD: I don't imagine there is. But I'm just noting that reservation.

15 HER HONOUR: Yes. Look, in other cases where I've adopted this practice there can be some quite nuanced discussions even once expert evidence is read whether it goes up or it doesn't go up, and we can come to those matters when we need to. Ms Maude.

20 MS MAUDE: Your Honour, I don't anticipate there will be any issue with that. I'm just hoping I will get some instructions to confirm that position.

25 HER HONOUR: All right. Thank you. And, look, I might add I was notified that the live stream of this proceeding this morning didn't work to start with, and so there – people may have missed the start, in particular your opening statement, Ms McLeod. So what I might do if the parties are otherwise agreeable to an online file is I might put the transcript from today's case management hearing on the online file as well. But if either of you have got a difficulty with that, let me know. Now, Ms Maude - - -

30 MS McLEOD: No problem from our end. Yes.

HER HONOUR: Thanks, Ms McLeod. Ms Maude, when you get your instructions you can let me know about that.

35 MS MAUDE: Thank you, your Honour.

HER HONOUR: All right.

40 MS McLEOD: So, your Honour, that brings us to discovery, and after some discussion we've agreed on a two-step process, as you will see in the draft orders. And this – the intention of this two-step process is to avoid the need for general discovery. The two-stage process involves first the applicants providing proposed discovery categories by reference to issues in dispute by 14 April and then a response where the parties endeavour to agree on discovery categories, and we will take the opportunity if the court is available to refer to Judicial Registrar Stride with any
45 issues by 26 May.

HER HONOUR: Yes. All right. That – subject to a couple of matters, I don't have any difficulty with that. What I would like – and, Ms Maude, if I just set out my thoughts, and then I will ask you to respond generally. I would like to put in a date by which any mediation about discovery would be completed so that we know we've
5 got an endpoint to that mediation process and then a provision for the court to be notified of any outstanding discovery issues that need to be adjudicated and also a notification to the court possibly by way of proposed consent orders about a date by which the initial discovery is to be completed. So I just want to have those milestones notified reasonably quickly after 26 May.

10 In terms of the way they might be framed by orders, I'm happy to leave the drafting to the parties at the first instance. So what we might do at the end of this case management hearing is I might ask my associate to distribute a draft of these proposed orders, and you can fill in how you want some of these matters expressed
15 and some dates. But I would just like to put a little bit more timing around some of the discovery issues. So perhaps, Ms McLeod, I will ask you to comment on that before I go to Ms Maude.

MS McLEOD: No problem with that, your Honour. We were going to suggest the
20 mediation be concluded – any mediation be concluded within four weeks of that date. But we haven't had a conversation about that, obviously. So if there's an issue with four weeks Ms Maude and I can discuss that.

HER HONOUR: Well, we might – and we will also have to check with Judicial
25 Registrar Stride about what her availability is at that time of year.

MS McLEOD: Yes, of course.

HER HONOUR: All right. Thanks. Ms Maude.
30

MS MAUDE: Your Honour, the proposed orders were agreed, and I see no
difficulty with the additional orders your Honour has mentioned. We had, of course, anticipated that in agreeing the discovery orders the parties would be both agreeing
35 to categories and timeframes for tranches of discovery. So as part of those discussions both of those issues will be addressed. So that should be no issue to - - -

HER HONOUR: All right.

MS MAUDE: - - - give the court those dates.
40

HER HONOUR: Okay.

MS MAUDE: Four weeks seems perfectly adequate. It's hard to say at this point
45 the extent of any dispute. So it may turn out to be more than is required. But it seems like a reasonable outer limit.

HER HONOUR: And does – but I noted in your client’s defence, Ms Maude, that there were some parameters by way of dates put around some of the pleading.

MS MAUDE: Yes.

5

HER HONOUR: And I would expect Ms McLeod, unless you’re going to tell me otherwise, that the discovery is going to proceed according to those parameters. Are they – I didn’t understand they would be in dispute. But they might be, are they?

10 MS McLEOD: That’s correct, your Honour. There is some discussion about the date or the start date of the allegations in some cases and – in the correspondence, and they may be things that we pick up later in an amended pleading. But, as I will come to, we don’t anticipate amending the pleading at this stage. We will pick those up after discovery so that we only have to amend once if we’re going to amend. So,
15 yes, there has been discussion about dates. You will see at the introduction to the defence that is reflected in the opening paragraph of the defence, and those dates and things like that will frame the scope of the discovery.

20 HER HONOUR: All right. Thank you. All right. Well, subject to a little – a few additions to the orders about discovery, I don’t have any difficulties with those. Thank you.

MS McLEOD: So I have jumped over, you will see, pleading amendments and the opt out in the joint list of issues, your Honour. I haven’t – we haven’t proposed any
25 orders about those issues at the moment, and, as I’ve indicated, we propose to make any amendments to the pleading that are going to be made and, I guess, flow-on amendments to the concise statement after discovery is completed noting that the respondent’s reservation that if the amendments are substantial that might affect discovery and so we might be back having a discussion about that as well.

30

HER HONOUR: All right. I wondered – one thing I wondered about in terms of those two issues, opt-out processes and amendments to pleadings, is whether what might be – it would certainly be helpful from my perspective if, before the next case management hearing, the parties were to file some kind of joint report which set out
35 what, if any, steps along those lines you plan to take, like, whether there were going to be pleadings, amendments, what the timing was likely to be, what the applicant was proposing in relation to opt out. And I’ve also just noticed that you’ve said case management after 17 June. But if we allow four weeks for any mediation I just wonder if we should put that back to basically a month after 26 May, so perhaps case
40 management after the week commencing – well, how about in the week commencing 27 June?

MS McLEOD: In the week commencing 27 - - -

45 HER HONOUR: June. Are either of you in a position to tell me how – we don’t need to set a date in that week, but just whether you’ve got - - -

MS McLEOD: Yes.

HER HONOUR: - - - some availability that week.

5 MS McLEOD: I would need to check that. At the moment, it seems clear, your Honour. But if I can - - -

HER HONOUR: Ms Maude, do you know? Ms Maude, do you know whether you're available?

10

MS MAUDE: I was just doing a quick look at my diary. I think I will actually be away. But I anticipate someone from the Commonwealth's team will be available. So - - -

15 HER HONOUR: All right. I'm pretty keen on it being that week because I don't have a lot of availability. Well, I don't have any availability the following week. So perhaps if you can both let my associate know. If your instructors can let my associate know if we can put in week commencing 27 June into the orders in due course. As I said, I will - we will circulate a draft of the orders before they're made.
20 So you will have time to advise.

MS McLEOD: That timing will actually work out well for us, your Honour, and it relates to something I was going to tell you about the opt out. Our preference - we don't propose any orders about opt out at this stage. But we are doing some
25 community consultation in the first week or so of June, and that will inform the way in which we frame the opt out material. The preparatory work we've done on distribution of notices, advertisements and things like that will be informed by that visit. So we should be in a position by the week of 27 June to give you that structure as well and those proposals.

30

HER HONOUR: All right. Thank you. All right. So that's opt out notices and pleading amendments. What's the next matter, Ms McLeod?

MS McLEOD: The next issue is the trial date, your Honour, and whether your
35 Honour is minded to set some time aside now for a trial date anticipating that a trial - the parties would be ready for trial in the first half of next year, and we're estimating as best we can at this stage that the evidence and submissions would take roughly four weeks. We anticipate that the - a view or a visit to the Torres Strait will be something we will ask the court for, and so that would include a trip to the Torres
40 Strait to have that view or other visit or visit for other purposes.

HER HONOUR: Does that - and I know these are not - these plans are embryonic at the moment. But is there consideration being given on your side, Ms McLeod, to whether some people might give evidence from the Torres Strait and it's - that it's
45 more than a view in that sense or are you - is your - are your clients anticipating a - just a view and evidence being given somewhere else?

MS McLEOD: I expect a decision about that will be made when we have these trip – this trip in early-June as to whether – as to how to manage that. My preference at this stage – and, as your Honour said, it’s embryonic – is to have your Honour hear some evidence in the Torres Strait.

5

HER HONOUR: All right. Is there any – and, again, just to try and tease some of these matters out before I ask Ms Maude about them do you have any conception of, even in a proportion sense, what proportion of the evidence might be lay evidence and what proportion might be expert evidence?

10

MS McLEOD: Well, at this stage our group of applicants is two, that is, the named applicants. There may be sample group members. There may be other lay individuals we seek to call. I expect that roughly – very roughly, your Honour, it would be about 50/50 lay and expert, I think - - -

15

HER HONOUR: All right.

MS McLEOD: - - - depending on the scope of the Commonwealth evidence that’s to be called, and a number of the issues aren’t substantially in dispute. So that might reduce the time.

20

HER HONOUR: All right. And is it envisaged that the lay evidence will be by affidavit in chief or a combination of affidavit and oral evidence in chief or have any thought about that?

25

MS McLEOD: We’re anticipating a combination.

HER HONOUR: Right. Right. Okay. Okay.

MS McLEOD: So we will prepare a witness statement as such. Whether it’s a sworn affidavit or not, I don’t have a view at the moment. But that means the Commonwealth will have notice of the scope of that evidence before the hearing, and then we might supplement that with, for example, evidence on country. We might supplement that with an elaboration of that evidence. But certainly the anticipation is that the Commonwealth will have notice of the scope of the type of issues to be raised and the scope of that evidence before the hearing.

35

HER HONOUR: All right. Are we going to need interpreters?

MS McLEOD: Not for the applicants, your Honour. But it depends on who else is called to give evidence.

40

HER HONOUR: All right. All right. Just probably worth thinking just given my – some earlier experience I’ve had, worth thinking about that sooner rather than later, Ms McLeod, in terms of cause there’s – who is an appropriate interpreter up there can be quite a complicated question.

45

MS McLEOD: Yes.

HER HONOUR: So just worth bearing that in mind, if I might say so respectfully.

5 MS McLEOD: Just pardon me for a moment, your Honour. I might just get some instructions. Thanks, your Honour. We will give some thought to that, but not for the applicants.

10 HER HONOUR: All right. All right. And what about venue? I'm continuing to be optimistic and assume that by the middle – earlier to middle next year we won't be having to think too hard about whether we can have an in-person hearing. So I'm assuming it can be an in-person hearing. Do your clients have any proposals about venue?

15 MS McLEOD: Not yet, your Honour, in terms of hearings in the Torres Strait. I'm hoping that we can sort those issues out when we

HER HONOUR: No, sorry, I meant more generally.

20 MS McLEOD: For the hearing generally? Yes. No, I don't have a view about that or instructions about that at the moment, your Honour. But given the population hubs and your Honour's reference to Cairns last time it might be appropriate here. But we haven't really given that some thought – a great deal of thought.

25 HER HONOUR: Yes. Well, again, I think it's worth a little bit of thought going into that because if it's – I mean, Brisbane is another option that might be more convenient for people to get to than Melbourne, and that needs less lead time, obviously because the court has got a registry there. But Cairns requires liaising with
30 the state courts in order to find a venue, particularly if we're looking at using the Supreme Court building there. So that also might be worth giving some thought to. I'm quite – I think it's appropriate to try and fix some dates if we can and not necessarily right this moment but to talk about it now and before the orders are
35 finalised to have some dates in the orders for trial because I would like everybody to be focused on their trial preparation planning with dates in mind, and it's going to be very helpful for my calendar, which does get filled up at least a year in advance often.

40 So it's necessary to block out some time. So we can talk about some of those details at the next case management hearing. But probably by the next case management hearing we will need to be discussing more seriously venue in particular, I think. Now, Ms Maude, what – I'm sorry, Ms McLeod.

MS McLEOD: Sorry. I was just going to say, your Honour, does your Honour
45 fixing a date now in your diary need to depend on venue or - - -

HER HONOUR: No.

MS McLEOD: Okay.

HER HONOUR: No. It's just about blocking out that time so that I don't list any other matters during that time. Ms Maude.

5

MS MAUDE: Your Honour, the Commonwealth has some concerns about whether it's realistic that this matter could be ready for a trial in the first half of next year if we're not going to have discovery categories potentially agreed until the end of June, unless discovery is very confined, it's very difficult to see how that could be finished before the end of this year. So we're certainly content for your Honour to pencil in some time so that we have a point that we're working towards, but we do have a concern about the stage at which this proceeding is at, the numbers of issues which are really at quite an embryonic stage of thinking, and whether the first of half of next year is realistic.

15

HER HONOUR: Well, I certainly wasn't thinking that it was going to be ready early next year. Really, I was thinking that an appropriate date might be towards the middle of the year, so around June – that kind of time. Now, as I say, I do want to fix it. And there's a real risk, if we don't, that we just won't find the time. And this ought to be heard next year. That's – I don't see any reason why it can't be, and it's always easier, I think, for parties – even in complicated litigation, for parties to work to specific dates. So, Ms McLeod, I do think probably earlier in the year might be a little ambitious – too much earlier – but around June, perhaps, might be – should be achievable. I don't know what you – if you want to - - -

25

MS McLEOD: If your Honour has capacity in June, we would be content with that. My observation is that parties tend to use the time available, whatever it is, so if we had a June date to work towards, that would be suitable for us.

30 HER HONOUR: Yes. And it is, of course, going to be the case that some discipline will need to be applied about discovery on both sides for it to be achievable, because - - -

35 MS MAUDE: Your Honour, can I also say, given that amendment of the pleadings after discovery has also been flagged, that's also another issue. To maintain a middle-of-the-year hearing date, we would expect that any amendments would be minimal, if they're to occur after discovery.

40 HER HONOUR: Yes. Well, I think that's a fair comment, Ms McLeod. And you may not be in a position to give any assurance about that, but I did notice in the material that I think it's quite reasonable for the Commonwealth to have asked for some advance notice, at least as between the applicant and the Commonwealth, about that as soon as you're able to give it.

45 MS McLEOD: Sorry. We will do that, your Honour. The intention is of course to provide any draft amendments to the Commonwealth so that they can reflect on those before we come and ask your Honour for leave to amend, if leave is needed at the

time we do that. So I don't see any difficulty with that. Of course, whatever is thrown up by discovery might change the position, so subject to – what we don't know, we don't know. At the moment, it is my intention to only make relatively minor changes to the pleading.

5

HER HONOUR: Yes. All right. Well, I think that's – that issue means that it is important that in – I would like to have a report filed ahead of the next case management hearing, and I think in that report, Ms McLeod, it's going to be important for the applicant to at least describe the scope of any proposed pleading amendment, so that there's something on the record and I understand what the likely scope of those amendments is to be. Ms Maude and her instructors may have had more detailed notice through correspondence, but I would like something – no, I mean ahead of the next case management hearing.

10

15 MS McLEOD: Understood.

HER HONOUR: All right. So – Ms Maude, I didn't ask you, and I know it is a little – I accept it's difficult for you to perhaps feel informed enough to say anything about this, but Ms McLeod's estimate of four weeks: how is that sounding? I should have asked you about likely witness evidence on behalf of the Commonwealth, as I asked Ms McLeod.

20

MS MAUDE: Your Honour, I'm not in a position to really give your Honour any assistance as to what our evidence may look like at this point in time. Four weeks as an outer limit seems reasonable; whether it ultimately requires four weeks, it's just too premature for me to really give any sort of confident assessment.

25

HER HONOUR: All right.

30 MS MAUDE: But certainly, we don't say your Honour needs to set aside more than four weeks.

HER HONOUR: All right. And obviously that would be on the basis that that would be four weeks for the evidence, and then submissions and whatever would come at some point after that. I wouldn't be proposing that the submissions be encompassed in that time. Ms Maude, are you in a position to say whether the commonwealth is likely to call any expert evidence?

35

MS MAUDE: It may. We're certainly giving it active consideration, so I wouldn't want to rule that out at this early stage.

40

HER HONOUR: All right. Thank you. Well, perhaps if the parties can have – do you want an opportunity to have some discussions about dates in June or are you happy if I just fix it, let's say, for four weeks commencing 6 June, which is a Tuesday – 6 June 2023?

45

MS McLEOD: I'm content with that, your Honour.

MS MAUDE: Thank you, your Honour. I have no issue with that.

HER HONOUR: All right. Well, we will make an order in that form and put that in the draft orders. Yes.

5

MS McLEOD: And then, the only matter, coming back to the draft orders, your Honour, was to adjust the date in our minute – order 4 – to 27 June.

HER HONOUR: Yes.

10

MS McLEOD: And then, of course, to pick up the other orders that your Honour has made about statements and so on.

HER HONOUR: Yes. All right. Good. I don't think there's anything else that I wanted to cover. Was there anything else that either counsel wanted to cover?

15

MS McLEOD: Not for our part, your Honour.

MS MAUDE: Your Honour, can I just say that the applicants, on the orders as they're presently proposed, have about a month to give us their proposed discovery categories. Of course, if that could happen faster, then we will be in a position to start considering it and we can move all of the discovery discussions forward. So I just flag that.

20

HER HONOUR: Yes. Well, obviously, Ms McLeod, that would be helpful. Even, I don't know – Ms Maude, are you suggesting that even if there are some categories that can be nominated, even if it's not a complete list, that your clients would like those as soon as possible?

25

MS MAUDE: Yes. I have no objection to dealing with things on an iterative basis.

30

MS McLEOD:

HER HONOUR: All right. Well, how about – I might also just ask Judicial Registrar Stride to get in touch with the parties and see if there's anything that she can assist with in terms of facilitating those discussions and identification of categories as soon as possible. Yes. Ms McLeod, I'm just being reminded about some evidence I heard in the other Torres Strait matter – well, not evidence, but some information we had about timing of being up in the Torres Strait – and on your instructions, June is fine?

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MS McLEOD: Just pardon me, your Honour.

HER HONOUR: Yes. Thank you.

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MS McLEOD: June should be fine for travel, your Honour.

HER HONOUR: Okay. Thank you. Thank you. All right. Well, we will have a draft of those orders circulated, and once they're settled and made, unless the parties object, I might also put those up on the online file. All right.

5 MS McLEOD: Your Honour pleases.

HER HONOUR: That's all right from your perspective, Ms McLeod?

MS McLEOD: Yes, that's fine, your Honour.

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HER HONOUR: Ms Maude?

MS MAUDE: Yes, your Honour. No objection to that.

15 HER HONOUR: Okay. Thank you. Well, look, thank you both for your assistance. Please adjourn the court.

MATTER ADJOURNED at 9.59 am ACCORDINGLY