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Federal Court of Australia
District Registry: Victoria
Division: General

No. VID 622 of 2021

PABAI PABAI
First Applicant

GUY PAUL KABAI
Second Applicant

COMMONWEALTH OF AUSTRALIA
Respondent

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A. Introduction

1. It is not in dispute that climate change presents serious threats and challenges to the environment, the Australian community and the world at large. Nor is it in dispute that the Torres Strait Islands are vulnerable to certain impacts of climate change, and that some impacts have already been felt in that region.

2. The Commonwealth, as the national government of Australia and a responsible nation State, should do what it can to reduce greenhouse gas (**GHG**) emissions and prepare Australia and its citizens to adapt to climate change, consistent with Australia's national interests.

3. It is doing so. The Commonwealth has introduced a number of significant policies to facilitate reduction of Australia's GHG emissions and to support the Australian community to adapt to the impacts of climate change. The Commonwealth's policies have evolved over time, reflecting (amongst other things) the policy choices of different governments. Focusing on the period relevant to this case, the Commonwealth's policy response to climate change has included the establishment of the Emissions Reduction Fund in 2014, support for the National Climate Change Adaptation Research Facility, the establishment in 2019 of the National Centre for Coasts, Environment and Climate and numerous policies introduced in 2022, including the Powering Australia Plan, a suite of measures addressing the medium to long term changes necessary to transform the economy and electricity grid to meet the net zero target. These policies have been accompanied by very significant funding commitments.[1]

4. The issue raised by this proceeding is whether the Commonwealth is liable in negligence to a subset of the Australian population for failing to set particular GHG emissions reduction targets and take certain other steps to mitigate the impacts of climate change. In other words, the question is whether the Commonwealth is liable in negligence for making policy decisions in relation to

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[1] The Commonwealth, *Budget 2014-15 Budget Measures Paper No. 2 2014-15* (May 2014) at p 102 (.0796), p 106 (.0800) [EVI.2002.0004.0675]; The Commonwealth*, Budget 2019-20 Budget Measures Budget Paper No. 2 2019-20* (April 2019) at p 75 (.2046) [EVI.2002.0004.1956]; The Commonwealth*, Budget October 2022-23 Budget Measures Budget Paper No 2* (October 2022) at p 18 (.2255), p 46 (.2283), pp 69-70 (.2306-.2307), pp 72-73 (.2309-.2310), p 109 (.2346) [EVI.2001.0004.2224].

climate change with which the applicants and group members disagree. The Commonwealth submits it is not.

5. The applicants and group members contend that the Commonwealth owed, and breached, two duties of care in tort in making those policy decisions:

   a) the **Primary Duty**, essentially, to set a "best available science" (**BAS**) GHG emissions reduction target; and

   b) the **Alternative Duty** to fund certain adaptation measures to mitigate the impacts of climate change in the Torres Strait Islands.

6. To succeed in those claims for negligence, the applicants and group members must establish that the Commonwealth owed one or more of the alleged duties of care, which it breached, causing loss of a compensable kind – or else that the applicants are entitled to injunctive relief for imminent loss or damage. The applicants cannot establish any of those elements.

7. The Commonwealth will address each duty in turn.

A.1 The Primary Duty

8. **Did the Commonwealth owe the Primary Duty?** No. The threat of climate change is a global threat that can only be addressed by global co-ordinated action. The question of what measures the democratically elected representative government of Australia should take in response to that threat involves the weighing of a range of incommensurable values and interests that affect many aspects of Australian society and Australia's relations with foreign governments. Such decisions are quintessentially matters of high government policy, which are unsuited to curial assessment according to the standard of reasonableness, and in respect of which no duty of care can be owed. Further, a salient features analysis does not support the existence of a duty of care. In particular, the risk of harm from the Commonwealth's conduct is not reasonably foreseeable and the Commonwealth lacks the necessary control to give rise to a duty of care.

9. **If the Primary Duty were owed, did the Commonwealth breach any such duty?** No. The expert evidence is unanimous that the setting of a GHG emissions reduction target is a question of policy or a value judgement for each country, and there is no consensus approach. Certainly, there is no agreement that

a GHG emissions reduction target is to be set *only* by reference to BAS. Rather, countries do and must set their targets having regard to numerous factors, including the climate science but also economic, social, political and practical factors. The Commonwealth's targets were reasonable in light of those factors, and also within the spectrum of targets adopted by other States.

10. **If the Commonwealth had breached the Primary Duty, did that cause the applicants and group members to suffer the claimed loss or damage?** No. The applicants have not adduced any evidence to show that the targets caused more GHG emissions than would have occurred if an alleged "BAS" target had been set. This would require adducing expert evidence of the measures that the Commonwealth could, and should, have taken to meet those targets, which the applicants have not done. Even if they had, as recognised by the Full Court in *Minister for the Environment (Cth) v Sharma* (2022) 291 FCR 311 (***Sharma FC***), release of additional GHG emissions at most causes an increase in risk, and not a contribution to harm. Moreover, any contribution or increase in risk by any breach by the Commonwealth was not material – it cannot be measured by scientific instruments, let alone discerned by humans. Holding that the Commonwealth's contribution to the applicants' and group members' alleged loss or damage was "material" would deprive the requirement that there be a causal connection between a negligent act or omission and particular harm of all meaning. Such a step would constitute a dramatic expansion in the scope of liability in negligence, having consequences for the law of negligence generally, not just in relation to climate change litigation.

11. **If the breach of duty had caused the claimed loss or damage, is that loss or damage compensable?** No. The applicants have disavowed any claim for loss or damage based upon native title rights, therefore the particular complexities associated with the question whether such loss is compensable in a claim for negligence do not arise. Loss of fulfilment of *Ailan Kastom* is not compensable *per se* and a finding of liability for such loss would be contrary to principle. In any case, the applicants have not adduced evidence to establish damage to property, or personal injury, disease or death, and they have not sought to quantify their individual losses. As this is a full hearing of all common questions and the entirety of the applicants' claims, that means their claim for damages must fail.

12. **Are the applicants entitled to declaratory and injunctive relief?** No. By reason of the matters at [8]-[11] above, the applicants do not have any claim against the Commonwealth in negligence for breach of the Primary Duty. In any case, the Court could not grant the declaratory relief sought by the applicants. It is doubtful that the Court can make a declaration recording a finding that a duty was owed or breached in the absence of a finding that the relevant breach caused loss or damage, and in the present case questions of loss and damage are inherently likely to involve an individualised assessment. As such, the declaratory relief proposed is in the nature of an impermissible interlocutory declaration. The injunctive relief sought by the applicants could not be granted because of the subjective and imprecise terms of the proposed injunction, and the array of practical difficulties that would arise in seeking to identify the steps required for compliance and supervising adherence to the terms of the order.

A.2 The Alternative Duty

13. **Did the Commonwealth owe the Alternative Duty?** No. The Alternative Duty would impose obligations on the Commonwealth to take the lead on local climate change adaptation measures. This would be in tension with the policy framework agreed to by the Commonwealth and State and Territory governments regarding the roles each level of government will play in relation to climate change adaptation. It would also require the Court to assess the reasonableness of Commonwealth decision-making regarding the allocation of its budget. This raises questions of high policy in respect of which no duty of care can be owed, and which are unsuitable for determination by a court. Further, a salient features analysis does not support recognition of the duty, in particular because it would impose on the Commonwealth a duty to take positive action to protect group members from a risk of harm over which the Commonwealth does not have control.

14. **If the Alternative Duty were owed, did the Commonwealth breach any such duty?** No. If the Commonwealth owed the Alternative Duty, all that could be required of the Commonwealth, acting reasonably, was that it consider whether to provide funding for the seawalls project on Saibai, Boigu, Poruma, Warraber, Iama and Masig in accordance with the legal and policy framework applicable to the provision of Commonwealth funding, and provide funding up to the amount

sought, if it considered it appropriate to do so. The Commonwealth did both those things. Indeed, it provided the entire amount of funding sought from it for both Stage 1 and Stage 2 of the Seawalls Project (a total of $32 million) and is investigating whether further funding can be provided for a potential Stage 3 of that project.

15. **If the Commonwealth had breached the Alternative Duty, did that cause the applicants and group members to suffer the claimed loss or damage?** No. The applicants have not demonstrated that they have suffered any compensable loss or damage as a result of breach of the Alternative Duty. Therefore, there is no evidence of relevant loss or damage to which the principles of causation can be applied.

16. **If the breach of duty had caused the claimed loss or damage, is that loss or damage compensable?** No. The submissions at [15] are repeated.

17. **Are the applicants entitled to declaratory and injunctive relief?** No. By reason of the matters at [13]-[16] above, the applicants do not have any claim against the Commonwealth in negligence for breach of the Alternative Duty. Further, the submissions at [12] apply.

18. In summary, the applicants cannot establish any of the orthodox elements of a claim for negligence. To succeed, all elements of the cause of action would need to be dramatically refashioned in ways that would fundamentally alter the values inherent in the law of negligence, of neighbourhood, reasonableness and incrementalism. That is not a course that can or should be taken by this Court.

A.3 Structure of the submissions

19. These submissions are structured as follows:

    a) **Part B:** Applicable law;

    b) **Part C:** Legal principles – the elements of negligence;

    c) **Part D:** Factual background – including a summary of the lay and expert evidence;

    d) **Part E:** The Primary Duty case;

e) **Part F:** The Alternative Duty case; and

f) **Part G:** The Commonwealth's proposed answers to the common questions.

20. Where relevant, in the title to each Part (or sub-Part), the Commonwealth has identified the common question (**CQ**) relevant to the analysis therein.

B. The applicable law (CQ 15)

21. In order to address the legal principles that are applicable to the applicants' claims, it is first necessary to identify the applicable statute law. This issue is the subject of CQ 15. It is necessary for the Court to determine which of:[2]

a) Parts 3.2 and 7.1 of the *Civil Law (Wrongs) Act 2002* (ACT), Parts 2 and 3 of the *Civil Liability Act 2003* (Qld) (**CLA Qld**), or any other laws supply the principles that are relevant to the resolution of any personal injury or mental harm claims advanced by the applicants and group members; and

b) Sections 11 and 16B of the *Limitation Act 1985* (ACT), ss 10 and 11 of the *Limitation of Actions Act 1974* (Qld), or any other laws supply the limitation period applicable to the claims of the applicants and group members.

22. It is common ground that the law governing questions of substance in tort claims is the *lex loci delicti*,[3] or the place where the tort was allegedly committed. However, there is a dispute as to the application of that principle in this case.

23. The applicants contend that law of Queensland — as modified by the CLA Qld — applies on the basis that the cause of action arises "*in substance*" in the Torres Strait Islands, where loss is alleged to have been suffered and where the alleged negligence is said to have "*assume[d] significance*".[4] The Commonwealth

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2 See also Further Amended **Defence** filed 20 November 2023 at [1(b),(c)] and [86(e)] [CRT.2000.0003.0001].

3 AS [171]. See ***John Pfeiffer*** *Pty Ltd v Rogerson* (2000) 203 CLR 503 at [87], [102] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) [APP.0001.0020.0077].

4 AS [171], citing *Amaca v Frost* (2006) 67 NSWLR 635 at [15], [18] (Spigelman CJ) [APP.0001.0020.0008]; ***Distillers Co*** *(Biochemicals) Ltd v Thompson* [1971] AC 458 at 468 (*per curiam*) [APP.0001.0020.0045]; ***Voth*** *v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 567 (Mason CJ, Deane, Dawson and Gaudron JJ) [APP.0001.0020.0181].

submits that the law applying to the both the Primary and Alternative Duty cases is the law of the Australian Capital Territory (**ACT**).

24. In negligence, the tort is committed in the place where the alleged negligent act or omission of the respondent occurs, rather than the place the injury is suffered (to the extent there is a difference).[5] While it is generally possible to identify the place where a negligent act occurs, in cases of omissions it is "*possible to speak of the place of the act or acts of the defendant in the context of which the omission assumes significance and to identify that place as the place of the cause of complaint'*."[6]

25. In ***Roo Roofing*** *Pty Ltd v Commonwealth*, John Dixon J considered which law applied to a tort claim concerning an alleged duty on the part of the Commonwealth to avoid economic harm by designing, implementing or administering an economic policy concerning home insulation and making certain statements in relation to that program.[7] In that case, the relevant issue was whether the place of the tort was where each installer or manufacturer was located or Canberra, where the design, administration and implementation of the program took place.[8] In resolving that issue, his Honour observed that "*[w]hat must be determined is the essential act that caused the damage that gives the plaintiffs their cause for complaint in the particular circumstances of this case*" and that "*[t]he location where the damage was suffered is not determinative of the* lex loci delicti".[9] The Court found that the essential acts that gave the plaintiffs their cause of complaint occurred in the ACT.[10]

26. Neither of the two authorities relied upon by the applicants support the contention that the applicable law in this case is the law of Queensland:[11]

    a) In ***Voth*** *v Manildra Flour Mills Pty Ltd*, the respondent company (incorporated in NSW) sued an accountant practising in Missouri for

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5 *Electro Optic Systems Pty Ltd v New South Wales* (2012) 273 FLR 304 at [292]-[295] (Higgins CJ) [CTH.0001.0001.0668], quoting ***Dow Jones*** *& Co Inc v Gutnick* (2002) 210 CLR 575 at [42]-[44] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) [CTH.0001.0001.0588]. See also *Jackson v Spittall* (1870) LR 5 CP 542 at 552 (Brett J) [CTH.0001.0001.1053].

6 *Voth* at 567 (Mason CJ, Deane, Dawson and Gaudron JJ) [APP.0001.0020.0181].

7 [2019] VSC 331 at [1], [15] (John Dixon J) [CTH.0001.0001.1511].

8 *Roo Roofing* at [423]-[424] (John Dixon J) [CTH.0001.0001.1511].

9 *Roo Roofing* at [437] (John Dixon J) [CTH.0001.0001.1511].

10 *Roo Roofing* at [439] (John Dixon J) [CTH.0001.0001.1511].

11 See AS [171], footnote 330.

damages for professional negligence.[12] The claimant had sold starch products to a related entity in the United States, which became obliged to pay it interest. The claimant alleged that the accountant was responsible for a failure on the part of the related United States entity to make required deductions and payments of withholding tax. As a result, the claimant became liable to pay penalty interest in the United States and it also became liable to pay more Australian tax than it would have been liable to pay had the withholding tax been paid on time. The majority observed that "*in substance, the cause of complaint is the act of providing professional accountancy services on an incorrect basis*", before concluding that "*the act of the appellant giving the respondents their cause of action was committed in Missouri and thus the tort, if there was one, was committed in Missouri*".[13] The *lex loci delicti* was therefore the law of Missouri.[14]

b) In ***Distillers Co*** *(Biochemicals) Ltd v Thompson*, the respondent company (incorporated in the United Kingdom) manufactured a product that contained thalidomide acquired from German manufacturers and sold it in England to an Australian company which imported it and sold it to the plaintiff's mother in NSW.[15] The plaintiff's mother used the product while she was pregnant and the plaintiff was born with disabilities. The English company neither warned the Australian company, nor printed matter supplied with the drug that warned of the harmful effects of the drug if consumed during pregnancy. The Privy Council observed that, in the great majority of cases, the place where the defendant is negligent is the same as the place where the negligence causes damage to the plaintiff.[16] However, "*there may be a separation in time and place between the negligent behaviour of the defendant and the resulting damage to the plaintiff*".[17] The alleged negligence consisted of a failure to give a warning that the goods would be dangerous. While that warning might have been given by putting a warning on each package as it were

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12 *Voth* at 544-6 (Mason CJ, Deane, Dawson and Gaudron JJ) [APP.0001.0020.0181].
13 *Voth* at 567 (Mason CJ, Deane, Dawson and Gaudron JJ) [APP.0001.0020.0181].
14 *Voth* at 567 (Mason CJ, Deane, Dawson and Gaudron JJ) [APP.0001.0020.0181].
15 [1971] 1 NSWLR 83 at 463-465 (*per curiam*) [APP.0001.0020.0045].
16 *Distillers Co* at 89 (*per curiam*) [APP.0001.0020.0045].
17 *Distillers Co* at 90 (*per curiam*) [APP.0001.0020.0045].

made in England, it could also have been given by communication to persons in NSW (for example, through medical practitioners and chemists there). The Privy Council held that the plaintiff was "*entitled to complain of the lack of such communication in New South Wales as negligence by the defendant in New South Wales causing injury to the plaintiff there*".[18] That was found to be the act (or omission) which gave the plaintiff cause for complaint.

27. In *Voth* and *Distillers Co*, the High Court and Privy Council asked where the alleged negligent act or omission of the defendant occurred, not where the loss or damage occurred.

28. In light of the nature of the acts and omissions that the applicants allege were negligent, the relevant place for determining the *lex loci delicti* in respect of both the Primary Duty and Alternative Duty cases is the ACT. The ACT is the place where the Commonwealth made decisions regarding the setting of emissions reduction targets embodied in its Nationally Determined Contributions (**NDCs**), which is the conduct alleged to constitute the breach(es) of the Primary Duty. Likewise, the ACT is where the Commonwealth made decisions concerning national infrastructure expenditure, and therefore the ACT is where the acts or omissions alleged to constitute breach(es) of the Alternative Duty occurred.

29. The *lex loci delicti* having been identified, the next question is what substantive law applies within the ACT. Although the ACT has enacted the *Civil Law (Wrongs) Act 2002* (ACT), which generally applies to torts committed in that jurisdiction, s 27 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) provides that an enactment does not bind the Crown in right of the Commonwealth unless the regulations so provide. The *Civil Law (Wrongs) Act 2002* (ACT) is not so prescribed by the *Australian Capital Territory (Self-Government) Regulations 1989* (Cth) (now repealed) or the *Australian Capital Territory (Self-Government) Regulations 2021* (Cth), and accordingly does not apply to the Commonwealth. As a result, the common law applies to the applicants' claims.

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18 *Distillers Co* at 90 (*per curiam*) [APP.0001.0020.0045].

30. While the previous common law position was that limitation acts were regarded as procedural,[19] their characterisation as substantive laws is now secured by statute.[20] Consistent with *John Pfeiffer Pty Ltd v Rogerson*,[21] the limitation periods applying under ss 11 and 16B of the *Limitation Act 1985* (ACT) apply to the present case as an aspect of the *lex loci delicti*. The *Limitation Act 1985* (ACT) is an Act that binds the Crown in right of the Commonwealth, the *Limitation Ordinance 1985* (Cth) having been included in the Schedule to the *Australian Capital Territory (Self-Government) Regulations 1989* (Cth). The *Limitation Act 1985* (ACT) is included in the Schedule to the *Australian Capital Territory (Self-Government) Regulations 2021* (Cth).

31. In any case, in the Commonwealth's submission, no substantive issue in the case turns upon the applicable law.

C. Legal principles

32. This section identifies the legal principles applicable to a claim in negligence. Those principles are later applied to this case in Parts E and F of these submissions.

33. In order to succeed in a claim for negligence, an applicant must establish that:

    a) the respondent owed the applicant a duty to take reasonable care not to cause the applicant loss or damage of a kind that is recognised as legally compensable;

    b) the respondent breached that duty;

    c) the breach of duty caused loss or damage to the applicant of a kind recognised by the law as compensable; and

    d) the damage caused was a reasonably foreseeable consequence of the breach (that is, that the damage alleged was not too "remote").

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19 See, for example, *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 42-4 (Brennan, Dawson, Toohey and McHugh JJ) [CTH.0001.0001.1232].

20 See *Limitation Act 1985* (ACT) ss 55-57; *Choice of Law (Limitation Periods Act) 1993* (Vic) s 5; *Choice of Law (Limitation Periods Act) 1996* (Qld) s 5; see also ALRC Report No 58, *Choice of Law* at [10.33] [CTH.0006.0001.0115].

21 (2000) 203 CLR 503 at [102] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) [APP.0001.0020.0077].

34. Although these are generally treated as distinct elements when considering whether an applicant has a claim in negligence, the duty, breach and causation analyses are intertwined, and the analysis of each element interacts with and informs the analysis of each other element.[22]

35. In light of the Commonwealth's submissions as to the applicable law above, the submissions below address the elements of negligence primarily from the perspective of the common law. However, any material differences between the common law and the CLA Qld are noted.

C.1. Duty of Care

36. In order to be liable in negligence, a respondent must be found to owe an applicant a duty to take reasonable care not to cause the applicant loss or damage. As Gageler J (as his Honour then was) held in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288*,[23] a duty of care "*is a duty of a specified person, or a person within a specified class, to exercise reasonable care within a specified area of responsibility to avoid specified loss to another specified person, or to a person within another specified class*". Importantly, a duty of care is framed as a duty to avoid causing the applicant *loss or damage of a particular, legally recognised, kind*, because there can be no liability in negligence until the applicant has suffered damage.[24] As the applicants note (at AS [649]), a postulated duty of care must be stated by reference to the kind of damage that an applicant has suffered.[25]

37. In this case, the applicants allege that the Commonwealth owes Torres Strait Islanders two duties of care:[26]

    a) a duty to take reasonable steps to protect Torres Strait Islanders, their traditional way of life and the marine environment in and around the

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22 See *Minister for the Environment (Cth) v Sharma* (2022) 291 FCR 311 (***Sharma FC***) at [213] (Allsop CJ), [536] (Beach J) [APP.0001.0020.0101].

23 (2014) 254 CLR 185 at [169] [CTH.0007.0001.0001].

24 *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (**The Wagon Mound (No 1)**)* [1961] AC 388 at 425 (Viscount Simonds) [CTH.0001.0001.1295], quoted in *Sharma FC* at [536] (Beach J) [APP.0001.0020.0101]. This principle is explained further in Part C.4.1.

25 Referring to *Sutherland Shire Council v **Heyman*** (1985) 157 CLR 424 at 487 (Brennan J) [APP.0001.0020.0162].

26 See 3FASOC [81]-[81A] and also AS [175].

Protected Zone (including the Torres Strait Islands) from the impacts of climate change (that is, the Primary Duty); and

b) a duty to take reasonable care to avoid causing property damage, loss of fulfilment of *Ailan Kastom* and/or injury, disease or death arising from a failure to adequately implement adaptation measures to prevent or minimise the impacts of climate change (that is, the Alternative Duty).

38. Both alleged duties are novel. The applicants also allege that both novel duties extend to a duty to protect Torres Strait Islanders from loss or damage of various kinds, including a kind of harm that has never been recognised as legally compensable, namely a loss of fulfilment of *Ailan Kastom* (separate from a loss of or impairment to native title rights and interests).

39. The general principles about how courts approach the task of determining whether to recognise a novel duty of care are set out at AS [175]-[179], and are not contentious. In brief, the court is required to *"undertake a close analysis and evaluation of the facts bearing on the relationship between the applicant and putative tortfeasor by reference to salient or relevant features or factors affecting the appropriateness of imputing a legal duty to avoid harm*".[27] Because there is no precise test for determining when a novel duty of care should be recognised, the courts have urged that recognition of novel categories of duty of care should proceed incrementally and by analogy with existing categories of duty.[28]

C.1.1 The role of salient features

40. As the applicants correctly observe at AS [178]-[179], the role of salient features in this task is as an "*analytical tool*",[29] and what is required is consideration of the "*totality*" of the relationship between the applicant and the putative tortfeasor.[30]

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27 *Sharma FC* at [121] (Allsop CJ) [APP.0001.0020.0101].

28 See *Heyman* at 481 (Brennan J) [APP.0001.0020.0162]; *Hill v Van Erp* (1997) 188 CLR 159 at 178-179 (Dawson J) [CTH.0001.0001.0926]; *Pyrenees Shire Council v **Day*** (1998) 192 CLR 330 at [245] (Kirby J) [APP.0001.0020.0131]; *Perre v Apand* (1999) 198 CLR 180 at [93] (McHugh J), [333] (Hayne J), [405] (Callinan J) [APP.0001.0020.0123]; ***Crimmins** v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at [73] and [77] (McHugh J), [272] (Hayne J) [APP.0001.0020.0036].

29 *Sharma FC* at [211] (Allsop CJ) [APP.0001.0020.0101].

30 ***Graham Barclay Oysters** Pty Ltd v Ryan* (2002) 211 CLR 540 at [145] (Gummow and Hayne JJ) [APP.0001.0020.0065].

41. In ***Sharma FC***, Allsop CJ cautioned that the list of salient features is not "*a catalogue to be used in the manufacture of a relationship of neighbourhood piece by piece*". To do so risks ignoring the broader context of the relationship, which is of paramount importance in determining whether it is appropriate to recognise a legal duty of care. Rather, salient features "*are the frame of reference through which existing relationships, situated within their broader social and legal context, are to be examined*".[31]

42. The broader context of the relationship in respect of which it is sought to impose a legal duty of care is important because different types of relationship will raise different questions in determining whether it is appropriate to impose a duty of care. This was recognised in ***Sullivan v Moody***, where the High Court said as follows:[32]

> *Different classes of case give rise to different problems in determining the existence and nature or scope, of a duty of care. Sometimes the problems may be bound up with the harm suffered by the plaintiff… Sometimes they may arise because the defendant is the repository of a statutory power or discretion. Sometimes they may reflect the difficulty of confining the class of persons to whom a duty may be owed within reasonable limits. Sometimes they may concern the need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships. The relevant problem will then become the focus of attention in a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle.*

43. In reliance on this passage, Allsop CJ held in *Sharma FC*[33] that the inquiry into whether to impose a duty of care "*begins with an identification of the proper focus of attention or perspective to the relationship in question to make sense of the competing factors that may bear upon the relationship and upon the question whether a legal duty should be imposed*". His Honour held that consideration of the various applicable salient features without taking this initial step "*risks fragmentation and confusion by individual particular analysis of features, almost in the abstract and divorced from context, without a proper understanding of the possible interrelations between the various features attending the relationship and the legal system as a whole*". Salient features should therefore be understood as an "*analytical tool*" to "*assist an examination of a relationship to determine*

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31 *Sharma FC* at [211] (Allsop CJ); see also [362] (Beach J) [APP.0001.0020.0101].
32 (2001) 207 CLR 562 at [50] [CTH.0001.0001.2019].
33 *Sharma FC* at [211] (Allsop CJ) [APP.0001.0020.0101].

whether there exist in the relationship the requisite closeness, control and vulnerability for that relationship to warrant the imposition of a duty of care by reference to the legal conception of neighbourhood and whether the relationship was suitable for the imposition of a duty capable of founding liability judged by reference to judicial or curial determination". The analysis of salient features should not overlook "*[c]onsiderations of policy and of coherence*", which "*are normative, and go to whether an individual ought to meet the description (in a legal sense) of neighbour, even if the individual's actions may otherwise, seen through the analysis of individual salient features, seem sufficient*".

44. The way in which Allsop CJ considered the totality of the relationship between the parties in *Sharma FC* is instructive. His Honour considered that the trial judge, who had found the alleged duty of care to exist, had erred in examining individual salient features without regard to the broader constitutional and legal context within which the duty was alleged to arise.[34] Relevantly for present purposes, those contextual factors included the following:[35]

    a) *First*, the underlying danger said to give rise to the duty of care — rising GHG emissions and their impact on climate change — "*is one that can only be addressed by global co-ordinated policy and action, by countries around the world formulating and implementing effective policy measures to address the nature of the cause of the potential catastrophe*";

    b) *Secondly*, the development of that policy for individual nations and for nations collectively "*involves scientific, economic, social and political considerations, often depending on the nature and character of the countries in question, their populations and economies, including but not limited to industrial development and innovation in a decarbonised world and the development of energy sources alternative to fossil fuels*"; and

    c) *Thirdly*, the "*role of the judicial branch of government is to quell controversies between citizens or the state and citizens on the basis of evidence tendered by the parties, not on the basis of policy formulation by the court*". His Honour highlighted that this context "*gives content to the real nature of the relationship*" under consideration, namely, the

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[34] *Sharma FC* at [211] (Allsop CJ) [APP.0001.0020.0101].

[35] *Sharma FC* at [227]-[232] (Allsop CJ) [APP.0001.0020.0101].

relationship between "*the governing and the governed in a democratic polity*".

45. Although there is no dispute between the parties as to the proper role of salient features and the importance of the Court considering the totality of the relationship between Torres Strait Islanders and the Commonwealth, there is a dispute as to what relevant contextual factors should inform the Court's evaluation of that relationship.

46. The applicants submit that the relevant context in relation to both novel duties is the "*special relationship*" between the Commonwealth and Torres Strait Islanders (AS [180]-[190], [558]). The Commonwealth does not deny that any particular aspects of the relationship between the Commonwealth and Torres Strait Islanders is a relevant contextual matter and addresses the applicants' submissions on those matters in Parts E.3 and F.1 below. However, it submits that there are other important contextual matters that should inform the Court's consideration of whether to recognise the novel duties alleged, namely the kinds of matters Allsop CJ identified as important in *Sharma FC* (set out at [44] above).

C.1.2 The role of policy considerations

47. This case raises questions as to whether the alleged duties concern a class of government action over which it would be inappropriate to overlay the laws of negligence, and whether this is a matter the Court should take into account at the duty stage, as opposed to the breach stage, of the analysis.

48. The applicants deal with this issue by arguing that it is a question of justiciability, to be considered as one of several salient features (AS [261]-[271]). They acknowledge there is authority to suggest that there will be "*no duty of care to which a government will be subject if, in a given case, there is no criterion by reference to which a court can determine the reasonableness of its conduct*".[36] However, they argue that this issue raises the policy/operational distinction, which should be applied with caution, and that matters of policy are nevertheless more appropriately dealt with at the stage of considering the standard of care or breach of duty (AS [262]-[270], [356]-[364]).

[36] *Graham Barclay Oysters* at [15] (Gleeson CJ) [APP.0001.0020.0065], quoted at AS [261].

49. The Commonwealth submits that the nature of the relationship between the Commonwealth and Torres Strait Islanders — namely a relationship between "*the governing and the governed in a democratic polity*" — is an important contextual matter in light of which the salient features present in that relationship must be considered. That approach is consistent with that taken by Allsop CJ in *Sharma FC*. Further, the Commonwealth submits that Australian authorities, in conformity with authorities throughout the common law world, have long recognised that there are at least some classes of government action in respect of which a duty of care cannot be recognised. An overview of relevant authorities on this question makes plain that courts have encountered considerable difficulty in delineating this class of government action. However, that does not detract from the fact that Australian law recognises that such a class exists.

50. As the applicants' submissions note, this distinction has sometimes been drawn in the authorities as a distinction between matters of "policy" — in respect of which it would be inappropriate to recognise a duty of care — and "operational" matters — in respect of which a duty of care may be recognised. The policy/operational dichotomy can be traced to *East Suffolk Rivers Catchment Board v* ***Kent***, where Lord Romer held it would be inappropriate to submit to a tribunal of fact the question of whether a public authority had acted reasonably if this required it to consider matters of policy.[37]

51. This distinction between operational and policy matters was adopted by Lord Wilberforce (with whom Lord Diplock, Lord Simon of Glaisdale and Lord Russell of Killowen agreed) in ***Anns*** *v Merton London Borough Council*.[38] *Anns* involved an allegation that a council had negligently caused harm to lessees of a building by permitting that building to be constructed with defective foundations and failing to carry out inspections it had a discretionary statutory power to conduct. In considering whether the council owed the lessees a duty of care, Lord Wilberforce drew a distinction between "policy" matters, which were decisions for the public body, rather than the court to make, and "operational" matters.[39] His Lordship noted that, although the distinction between "operational" and "policy" matters was "*probably a distinction of degree*", he considered that the

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[37] [1941] AC 74 at 102-103 (Lord Romer) [APP.0001.0020.0051], quoting *Kent v East Suffolk Rivers Catchment Board* [1940] 1 KB 319 at 338 [CTH.0001.0001.1098].

[38] [1978] AC 728 [APP.0001.0020.0010].

[39] *Anns* at 754C-E [APP.0001.0020.0010].

more operational a power was considered to be, the easier it would be to superimpose upon it a common law duty of care.

52. Lord Wilberforce proceeded to identify that the matters of "policy" in the statute before him included the scale of resources the council should make available to carry out its functions, noting that "*public authorities have to strike a balance between the claims of efficiency and thrift ... whether they get the balance right can only be decided through the ballot box, not in the courts*".[40]

53. The difficulties in drawing a distinction between operational and policy matters was noted by the House of Lords in subsequent cases. For example, in ***Rowling*** *v Takaro Properties Ltd*, Lord Keith of Kinkel held that the distinction "*does not provide a touchstone of liability*".[41] However, his Honour proceeded to reiterate that it was nevertheless "*expressive of the need to exclude altogether those cases in which the decision under attack is of such a kind that a question whether it has been made negligently is unsuitable for judicial resolution*".[42] This passage was quoted with approval by Lord Hoffmann in *Stovin v Wise*, who proceeded to note that the distinction between policy and operational matters was "inadequate" and "often elusive".[43]

54. In ***Barrett*** *v Enfield London Borough Council*, the House of Lords affirmed that the policy/operational distinction is a valuable tool for discerning which government decisions attract tort liability, but considered that the ultimate test is one of whether the action is justiciable. This requires consideration of whether the court is institutionally capable of determining the question, or "*whether the court should accept that it has no role to play*".[44]

55. The policy/operational distinction was adopted in Australia by Mason J in *Sutherland Shire Council v* ***Heyman***. His Honour noted that the dividing line between policy and operational factors is "*not easy to formulate*", but considered that "*budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care*".[45] Gibbs CJ

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40 *Anns* at 754G-H [APP.0001.0020.0010].
41 [1988] AC 473 at 501B-D [APP.0001.0020.0145].
42 *Rowling* at 501B-D [APP.0001.0020.0145].
43 *Stovin v Wise* [1996] AC 923 at 951F-G [APP.0001.0020.0159].
44 ***Barrett*** *v Enfield London Borough Council* [2001] 2 AC 550 at 571 [CTH.0001.0001.0180].
45 *Heyman* at 469 [APP.0001.0020.0162].

agreed that the policy/operational distinction "*is a logical and convenient one*".[46] Justice Deane also recognised the distinction, at least where the relevant "*policy-making powers and functions*" involved were of a "*quasi-legislative character*".[47]

56. The High Court next had the opportunity to consider the policy/operational distinction in *Pyrenees Shire Council v **Day***.[48] That case concerned whether a local council was liable in negligence to tenants of a premises destroyed by fire and the owners of an adjoining shop that was also damaged by fire due to a latent defect in the chimney. The council, but not the occupants, were aware of the defect. The council had written a letter to a former tenant and one of the owners notifying them of the defect, which had been discovered in an inspection, but no further steps were taken by the council in relation to the fireplace. Justices Toohey, McHugh, Gummow and Kirby held that the council was in breach of a duty of care owed to the shop owners.

57. Justice Toohey acknowledged the policy/operational distinction but held that it was "*not particularly appropriate or helpful in determining the present appeals*" because no policy considerations were said to motivate the council's inactivity and no budgetary or other constraints stood in the way of it taking a further step.[49]

58. Justice Kirby considered that the policy/operational distinction had "*some validity*", even though it was "*far from perfect*", but noted that the council's actions in *Day* "*would certainly fall on the 'operational' side of the line*".[50]

59. Similarly, Gummow J held that the case was not *"within that 'core area' of policy making*" which in *Heyman* Mason J regarded as "*immune from any liability in negligence*", nor was it exercising policy-making powers and functions of a "*quasi-legislative character*" which Deane J had identified as immune in the same case.[51] His Honour proceeded to cast doubt on the utility of the policy/operational distinction but nevertheless considered that the class of case to which Deane J had referred in *Heyman* is "*not cognisable by the tort of negligence*".[52] It follows that, notwithstanding his doubts about the utility of the

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46 *Heyman* at 442 [APP.0001.0020.0162].
47 *Heyman* at 500 [APP.0001.0020.0162].
48 (1998) 192 CLR 330 [APP.0001.0020.0131].
49 *Day* at [68] [APP.0001.0020.0131].
50 *Day* at [253] [APP.0001.0020.0131].
51 *Day* at [180] [APP.0001.0020.0131].
52 *Day* at [182] [APP.0001.0020.0131].

policy/operational distinction, his Honour nevertheless accepted that there was a class of conduct in respect of which it would be inappropriate to recognise a duty of care. His Honour explained that this area of immunity (being activity of a "*quasi-legislative*" kind, as identified by Deane J in *Heyman*) would include activity of public authorities such as zoning prescriptions and intergovernmental dealings.[53] It should be noted that, in relation to cases that fell outside of this area of immunity, his Honour suggested that questions of resource allocation and diversion, as well as budgetary imperatives, should fall for consideration at the stage of determining the standard of care.[54]

60. The High Court once again had the opportunity to consider the policy/operational distinction in ***Romeo*** *v Conservation Commission of the Northern Territory*.[55] A young woman fell off the edge of an unfenced cliff in a reserve over which the Conservation Commission had statutory responsibility. Six justices (Toohey, Gaudron, McHugh, Gummow, Kirby and Hayne JJ) held that the Commission was under a duty to persons entering the reserve to take reasonable care to avoid reasonably foreseeable risks of injury, but Toohey, Gummow, Kirby and Hayne JJ held that the Commission had not breached that duty by failing to erect a fence or other barrier at the edge of the cliff.

61. Justices Toohey and Gummow considered that, given their conclusion that the applicant had failed to establish negligence, it was not necessary to consider the policy/operational distinction and the justiciability of such decisions.[56] Justice Hayne similarly considered that it was not necessary to determine whether a distinction between policy and operational decisions can be drawn.[57]

62. Justice Kirby noted that there was some authority in Australia to support a policy/operational distinction, but that it was a distinction which is not easy to apply.[58] His Honour noted that common law courts outside the United States have been reluctant to accept the submission that public authorities can conclusively and exclusively determine what is required to be done in the discharge of their powers. However, he noted that there are some authorities that

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53 *Day* at [182] [APP.0001.0020.0131].
54 *Day* at [183] [APP.0001.0020.0131].
55 (1998) 192 CLR 431 [CTH.0001.0001.1449].
56 *Romeo* at [58] [CTH.0001.0001.1449].
57 *Romeo* at [166] [CTH.0001.0001.1449].
58 *Romeo* at [139] [CTH.0001.0001.1449].

acknowledge that no such duty will arise from decisions on matters of pure policy on the part of public authorities, whereas other decisions have accepted that budgetary, political and other constraints within which such authorities must operate are factors to be taken into account in determining the scope of the duty of care.[59] In any event, his Honour considered that the question of whether a fence should have been installed concerned an operational matter, rather than a matter of policy or discretion.[60]

63. The policy/operational distinction also arose for consideration by the High Court in ***Graham Barclay Oysters*** *Pty Ltd v Ryan*.[61] In that case, a representative action was brought by a group of consumers who had contracted hepatitis A after eating oysters harvested from a contaminated lake, alleging that, amongst others, the local council and State government were liable in negligence. The Court held neither the State nor the local council owed a duty of care to consumers of the contaminated oysters.

64. In coming to that conclusion, Gleeson CJ held as follows:[62]

> *Citizens blame governments for many kinds of misfortune. When they do so, the kind of responsibility they attribute, expressly or by implication, may be different in quality from the kind of responsibility attributed to a citizen who is said to be under a legal liability to pay damages in compensation for injury. Subject to any insurance arrangements that may apply, people who sue governments are seeking compensation from public funds. They are claiming against a body politic or other entity whose primary responsibilities are to the public. And, in the case of an action in negligence against a government of the Commonwealth or a State or Territory, they are inviting the judicial arm of government to pass judgment upon the reasonableness of the conduct of the legislative or executive arms of government; conduct that may involve action or inaction on political grounds. Decisions as to raising revenue, and setting priorities in the allocation of public funds between competing claims on scarce resources, are essentially political. So are decisions about the extent of government regulation of private and commercial behaviour that is proper. At the centre of the law of negligence is the concept of reasonableness. When courts are invited to pass judgment on the reasonableness of governmental action or inaction, they may be confronted by issues that are inappropriate for judicial resolution, and that, in a representative democracy, are ordinarily decided through the political process. Especially is this so when criticism is addressed to legislative action*

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[59] *Romeo* at [139] [CTH.0001.0001.1449].
[60] *Romeo* at [140] [CTH.0001.0001.1449].
[61] (2002) 211 CLR 540 [APP.0001.0020.0065].
[62] *Graham Barclay Oysters* at [7] [APP.0001.0020.0065].

> *or inaction. Many citizens believe that, in various matters, there should be more extensive government regulation. Others may be of a different view, for any one of a number of reasons, perhaps including cost. Courts have long recognised the inappropriateness of judicial resolution of complaints about the reasonableness of governmental conduct where such complaints are political in nature.*

65. His Honour also noted that, although tortious liability of governments is, as completely as possible, assimilated to that of citizens, there are limits to the extent to which that is possible. These limits arise from the nature and responsibilities of governments, which are different to those of citizens. His Honour noted that such differences led to an attempt to distinguish between matters of policy and operational matters. His Honour held that, although the validity and utility of the distinction have been questioned, the idea behind it remained relevant such as in the case before him.[63]

66. In *Sharma FC*, Allsop CJ drew upon Mason J's judgment in *Heyman*. As Allsop CJ acknowledged, the so-called policy/operational dichotomy has been called into question in later cases, but that is not to deny the central proposition arising from Mason J's judgment in *Heyman*, namely that "*there will be in some decisions of a public authority factors that make the law of negligence an inapposite or unsuitable vehicle for examining the choices and judgements involved*".[64] As Allsop CJ acknowledged, the inappropriateness of recognising a duty of care in respect of certain policy decisions has been well-recognised in the case law.[65] His Honour explained the basis for that view:[66]

> *This is not an abrogation of judicial responsibility or the adoption of some governmental immunity. It is to recognise that decisions that involve certain types of policy and which may have important physical consequences upon the lives, health, well-being, property and economic interests of the polity which cannot be judged by a legal standard or the consideration of which cannot be reliably made in a curial environment of private litigation. There are choices to be made by government which may affect lives, health and property which are made by reference to expertise unavailable or less than satisfactorily available to courts, by reference to political and democratic choices involving relationships of interests incommensurable by reference to any legal standard and which are appropriate for democratic (that is*

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63 *Graham Barclay Oysters* at [12] [APP.0001.0020.0065].

64 *Sharma FC* at [238] (Allsop CJ); see also at [866] (Wheelahan J) [APP.0001.0020.0101].

65 *Sharma FC* at [236] (Allsop CJ) [APP.0001.0020.0101], and the cases cited therein.

66 *Sharma FC* at [236] (Allsop CJ) [APP.0001.0020.0101].

political) accountability, not by reference to monetary compensation where a legal standard to judge the choice is absent or faint.

67. His Honour held that the proposed duty in *Sharma FC* concerned matters of "core" policy — that is, if the duty were to be imposed, the courts would be required to evaluate the adequacy of national (and in that case, State) policies made within the framework of international agreements and determine whether the policy should persist or whether it should be made. His Honour held that:[67]

> *The evaluation of good or bad decision-making about greenhouse gas emissions and the risks of global warming is one to which the highest considerations of the welfare of the Commonwealth attend, by reference to a range of matters that involve scientific, social and economic considerations and ultimately democratic political choice. This can be called, at the very least, core governmental policy. It is perhaps better described as public policy of the highest importance.*

68. His Honour noted that the "*natural places*" for the development of policies of this kind were the executive and legislative branches of government, both of which have the ability to obtain all relevant up-to-date information bearing upon the policy, and both of which are responsible to the people of the polity.[68] By contrast, such decisions are not the province of the judiciary given its role of quelling private controversies, or controversies between individuals and the government.[69]

69. Chief Justice Allsop concluded that these considerations without more made clear the nature of the relationship said to give rise to a duty of care in *Sharma FC*: it was "*the relationship of the government or the governing with the governed*". His Honour considered any duty owed was properly characterised as a political duty, rather than a legal duty of care.[70]

70. Justice Beach took a different approach. At the outset of his Honour's reasons, he considered that, in the context of determining whether a duty of care is owed with respect to the exercise of a statutory power, three general scenarios may arise. Those scenarios are:[71]

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67 *Sharma FC* at [247] (Allsop CJ) [APP.0001.0020.0101].
68 *Sharma FC* at [250] (Allsop CJ) [APP.0001.0020.0101].
69 *Sharma FC* at [251] (Allsop CJ) [APP.0001.0020.0101].
70 *Sharma FC* at [266] (Allsop CJ) [APP.0001.0020.0101].
71 *Sharma FC* at [353]-[356] (Beach J) [APP.0001.0020.0101].

a) *First*, where there has been a failure to exercise a statutory power. The question that then arises is whether there was a duty to exercise the power.

b) *Secondly*, where there has been an exercise of a statutory power but the repository of the power has not gone far enough. The question that arises in that scenario is whether there was a duty of care to exercise that or other powers more than what was done.

c) *Thirdly*, where there has been an exercise of a statutory power which has created or exacerbated a risk of harm. The question in that scenario is whether there was a duty of care in the exercise of such a power to take into account that risk and to contemplate the interests of persons in the position of the applicant in that regard.

71. His Honour held that questions of policy may be highly significant in relation to the first two categories, but may have lesser significance in relation to the third scenario.[72] His Honour considered that the circumstances in *Sharma FC* were an example of the third scenario,[73] and distinguished it from *Graham Barclay Oysters* on that basis.[74] His Honour considered that the exercise of the Minister's discretionary power was neither the exercise of a quasi-legislative power nor a matter of "core" policy, although his Honour noted the difficulties in determining what is meant by "core policy".[75] Although he accepted that the Minister's decision was likely to involve questions of policy he considered that they could be adequately dealt with at the breach stage.[76] However, Beach J's reasons need to be understood in the context in which they were made — that is, in relation to what his Honour referred to as the third scenario outlined at [70] above.

72. The foregoing overview of the authorities makes plain that there has been continuous recognition by the High Court that there are some governmental actions in respect of which it is inappropriate to recognise a duty of care, namely matters of "core policy". The difficulty of delineating between matters of "core

72 *Sharma FC* at [355]-[356] (Beach J) [APP.0001.0020.0101].
73 *Sharma FC* at [360] (Beach J) [APP.0001.0020.0101].
74 *Sharma FC* at [623]-[629] (Beach J) [APP.0001.0020.0101].
75 *Sharma FC* at [613], [615]-[619] (Beach J) [APP.0001.0020.0101].
76 *Sharma FC* at [633] (Beach J) [APP.0001.0020.0101].

policy" and what might be called "operational" matters does not detract from that fact. The distinction continues to be applied in Australia.[77]

73. The above authorities also suggest that it would be inappropriate to recognise a duty of care in relation to the exercise of legislative or quasi-legislative powers. As the Full Court observed in *Bienke v Minister for Primary Industries and Energy*[78] "*in no case in Australia has a Minister of State or a public authority been held liable for the negligent proclamation of a policy or the making of an invalid rule or regulation or the issue of a plan for which statute makes provision*". The Court went on to conclude that "*there are very strong reasons of policy why the exercise of legislative or policy-making powers should not sound in damages though exercised negligently*".[79]

74. There are good reasons why courts continue to recognise that it is inappropriate to recognise that the government owes a legal duty of care to certain classes of persons in relation to decisions that concern matters of core policy.

    a) *First*, it recognises the institutional inappropriateness of having courts determine whether there has been a breach of such a duty. As Gleeson CJ explained in *Graham Barclay Oysters*, matters of policy will typically "*involve competing public interests in circumstances where, as Lord Diplock put it, 'there is no criterion by which a court can assess where the balance lies between the weight to be given to one interest and that to be given to another'*".[80] Determining the appropriate weight to give to competing public interest considerations is the essence of political judgment.

    b) *Secondly*, the nature of litigation is such that any question of reasonableness would have to be determined in an artificially constrained context. The court's consideration will necessarily be confined to the case

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[77] See *Day* at [253] (Kirby J) [APP.0001.0020.0131]; *Crimmins* at [27] (Gaudron J), [79], [87] (McHugh J, with whom Gleeson CJ agreed), [292] (Hayne J) [APP.0001.0020.0036]; *Graham Barclay Oysters* at [12] (Gleeson CJ) [APP.0001.0020.0065]; *Roads and Traffic Authority (NSW) v Refrigerated Roadways* (2009) 77 NSWLR 360 at [259(a)] (Campbell JA) [APP.0001.0020.0140]; *Roo Roofing* at [496] (Dixon J) [CTH.0001.0001.1511].

[78] (1996) 63 FCR 567 at 596.

[79] See also *James v Commonwealth* (1939) 62 CLR 339, in which Dixon J held that an invalid statute could not ground liability in tort.

[80] *Graham Barclay Oysters* at [13] [APP.0001.0020.0065], quoting *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004at 1067 [APP.0001.0020.0072].

and evidence before it, and without the benefit of the resources that support the policy making process in government. It is for this reason that courts in other common law jurisdictions have considered that they are "*incapable*" of, or "*unsuited to*", dealing with claims against government involving action or inaction on climate change.[81]

c) *Thirdly*, this principle is consistent with the constitutional setting in which the Commonwealth exercises its executive and legislative powers. Decision-making by elected officials at the highest levels of government commonly involves the weighing of policy considerations. These are matters which, in a representative democracy, are ordinarily determined through the political process.[82] Accountability for (otherwise lawful) decisions of the executive is primarily a political process. That is reflective of the fact that the Australian Constitution establishes a system of representative and responsible government by which the executive is responsible to the legislature, who is in turn answerable to the electorate.[83]

d) *Fourthly,* as Hayne J recognised in ***Crimmins*** *v Stevedoring Industry Finance Committee*, quasi-legislative functions *"must have a public rather than a private or individual focus. To impose a private law duty will (or at least will often) distort that focus*."[84]

75. Further, although the policy/operational distinction has been criticised in the United Kingdom, the United States and Canada (see AS [356]), each of those jurisdictions nevertheless continue to acknowledge that there are some classes of government action in respect of which it would be inappropriate to recognise a duty of care. As McLachlin CJ explained in *R v Imperial Tobacco*, after conducting a comprehensive review of case law on this issue in each of those jurisdictions and Australia, "*there is considerable support in all jurisdictions reviewed for the view that 'true' or 'core' policy decisions should be protected*

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81 See *Juliana v United States* 947 F 3d 1159 (9th Cir 2020) at [15]-[16] [CTH.0001.0001.1065]; *Cecilia La Rose by her Guardian ad litem Andrea Luciuk v Her Majesty the Queen in the Right of Canada* 2020 FC 1008 at [33] and [40] (Manson J) [CTH.0001.0001.0319]; *Lho'Imggin v Her Majesty the Queen in Right of Canada* 2020 FC 1059 at [19], [72] and [77] (McVeigh J) [CTH.0001.0001.1195].

82 *Graham Barclay Oysters* at [6] (Gleeson CJ); see also [15] [APP.0001.0020.0065].

83 Australian Constitution, ss 7, 24, 61, 64.

84 *Crimmins* at [292] (Hayne J) [APP.0001.0020.0036].

from negligence liability… the difficulty in defining such decisions does not detract from the fact that the cases keep coming back to this central insight”.[85]

76. The foregoing analysis shows that it is well-established that there are some categories of government action in respect of which it is inappropriate to recognise a duty of care. For the reasons outlined in Parts E.3 and F.1 below, the Commonwealth submits that both novel duties fall into this category. If those arguments are accepted then it follows that it is inappropriate for the Court to recognise either alleged duty, and the applicants' case must fail.

77. The applicants' invitation to the Court to defer consideration of matters of policy to the stage of considering the standard of care or breach is contrary to the authorities above, which recognise that there are certain categories of case in which it would be inappropriate to recognise a duty of care at all. None of the authorities relied on by the applicants suggest that it is appropriate, in such a case, to defer consideration of policy issues to the standard of care or breach stage:

   a) *First*, the applicants rely upon Beach J's judgment in *Sharma FC* (AS [268]). As noted at [70] above, his Honour's observations about policy matters being taken into consideration at the breach stage were made in the context of cases that fell into the third scenario, which his Honour considered did not raise matters of core policy and was distinguishable from *Graham Barclay Oysters* on that basis.

   b) *Secondly*, the applicants rely on *Crimmins* (AS [268]-[269]).[86] *Crimmins* concerned the question of whether the Australian Stevedoring Industry Authority, an authority required by statute to perform its functions with a view to ensuring the expeditious, safe and efficient performance of stevedoring operations, was liable in negligence for mesothelioma suffered by a waterside worker who had been exposed to asbestos whilst employed by various stevedores. A majority of the High Court held that the Authority owed the worker a duty of care. The comments of Gleeson CJ and McHugh J upon which the applicants rely need to be understood in the context of the circumstances of that case. Although their Honours considered that the policy considerations arose at the breach

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[85] *R v Imperial Tobacco* [2011] 3 SCR 45 at [85] [CTH.0001.0001.1374].

[86] (1999) 200 CLR 1 [APP.0001.0020.0036].

stage, that case did not concern core policy matters or the exercise of quasi-legislative powers. Indeed, McHugh J expressly acknowledged that functions and powers of that kind "*are not subject to a common law duty of care*".[87]

c) *Thirdly*, the applicants rely on the judgment of Kirby J in *Romeo* (AS [360]).[88] However, as noted at [62] above, his Honour considered that the exercise of power by the statutory authority in that case concerned an "operational" matter. His Honour, therefore, did not suggest that policy matters are appropriately deferred to the standard of care or breach stage when the duty is sought to be imposed over matters of core policy.

d) *Fourthly*, the applicants rely on the judgment of Gummow J in *Day* (AS [361]).[89] However, as noted, his Honour recognised that there were certain classes of case against the government which were "*not cognisable by the tort of negligence*". It was only in respect of cases that fell outside this category that matters of resource allocation and diversion should be considered at the breach stage.

e) *Finally*, the applicants rely on a passage from the judgment of Gleeson CJ in *Graham Barclay Oysters* (AS [362]).[90] It is not apparent how that passage assists the applicants to establish that matters of core policy can be appropriately addressed at the breach stage. In that case the Chief Justice concluded that there was no duty of care, relying on the political nature of the decision-making in respect of which the Court was being asked to recognise a duty of care.

78. For completeness, although the applicants do not specifically refer to ***Brodie** v Singleton Shire Council*[91] in this part of their submissions, the Commonwealth notes that in that case the High Court recognised that a local council with statutory power to maintain the roads owed a duty to take reasonable care to avoid harm to persons or their property by failing to exercise the power. It was suggested that it was open to the Court to adjudicate upon the reasonableness of the way in which the road authority had allocated its resources in relation to the

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87 *Crimmins* at [87]; see also [93]-[94] [APP.0001.0020.0036].
88 *Romeo* at [138]-[140] [CTH.0001.0001.1449].
89 *Day* at [183] [APP.0001.0020.0131].
90 *Graham Barclay Oysters* at [7] [APP.0001.0020.0065].
91 (2001) 206 CLR 512 [APP.0001.0020.0072].

exercise of the power.[92] However, in that case the Court was considering the reasonableness of the non-exercise of an essentially operational power. That is distinct from a case where an applicant seeks to impose a duty of care on a public authority in relation to the exercise of core policy functions, such that the Court would necessarily have to adjudicate upon the way in which matters of core policy were balanced. *Graham Barclay Oysters* makes plain that this is not a matter in respect of which it would be appropriate to recognise a duty of care.

79. Further, none of the applicants' arguments as to why matters of policy should be assessed at the standard of care or breach stage provide a compelling reason for this Court to recognise a duty:

    a) *First*, the applicants argue that taking policy matters into account at the standard of care and breach stages allows the Court to balance competing policy imperatives such that a government agency may owe a lesser standard of care than a private party (AS [264]). However, this overlooks the fact that it has been recognised, at least in respect of matters of core policy or the exercise of quasi-legislative power, that it is inappropriate for courts to attempt to weigh those policy considerations at all in determining the standard of conduct required of the government.

    b) *Secondly*, the applicants argue that refusing to find a duty on the basis that it relates to matters of policy "*puts the cart before the horse*" because it assumes the breach would entail policy considerations before that is known (AS [265]). However, as outlined in Parts E.3 and F.1 below, the way in which the novel duties are framed necessarily means that those duties could not be adjudicated without the Court determining the reasonableness of decisions of the Commonwealth government on matters of core policy and the exercise of quasi-legislative powers. It follows that it is inappropriate to recognise either duty of care.

    c) *Thirdly*, the applicants submit that a finding of non-justiciability at the duty stage is effectively a "*grant of immunity*" which would "*prevent any consideration of the governmental conduct in question, resulting in a dangerous limit on executive accountability*" (AS [266]). That is not so, as Allsop CJ has stated. There are well-established administrative law

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92 See *Brodie* at [162] (Gaudron, McHugh and Gummow JJ) [APP.0001.0020.0072].

avenues for ensuring that the executive acts within the limits of its power. Further, as noted above, as long as the executive acts within the limits of its power, accountability for its decisions (including whether it has struck an acceptable balance of public policy considerations) is primarily political, through the constitutional system of representative and responsible government.

d) *Fourthly*, the applicants submit that a consideration of justiciability at the breach stage is consistent with the approach to justiciability in administrative law (AS [267]). The applicants do not elaborate on this position, so the Commonwealth is not in a position to respond to it.

e) *Fifthly*, it is not to the point that there is in this case, unlike *Sharma FC*, an allegation of breach and loss (cf AS [270]). It is true that, in *Sharma FC,* the Court was asked to consider whether the Minister owed a duty of care in the absence of any allegation that she was liable for a breach of that duty. But the mere fact that the applicants in this case allege breach of and loss from both novel duties cannot cure the fact that recognising such duties would require ask the Court to adjudicate upon the reasonableness of matters of core government policy.

C.1.3 Salient features emphasised by applicants

80. The applicants' claim is based on the alleged presence of numerous salient features in the relationship between the Commonwealth and Torres Strait Islanders, which the applicants submit are to be assessed in light of the context of the special relationship between the Commonwealth and Torres Strait Islanders. Those salient features are: foreseeability, vulnerability and degree of harm, control and knowledge, reliance and assumption of responsibility, determinacy, coherence and justiciability. It is therefore necessary to set out briefly the principles relating to each of these salient features.

Foreseeability

81. The question whether a person has a claim in negligence requires the application of three variations of a "reasonable foreseeability" test: *first*, as a salient feature that assists in determining whether the relationship is one of sufficient closeness,

control and vulnerability to justify the imposition of a duty of care on the respondent; *secondly*, in assessing whether there has been a breach of that duty, and *thirdly*, when considering whether the damage allegedly suffered by reason of the respondent's breach of that duty is too remote to be compensable. In respect of each test the risk will be "foreseeable" if it is "*not far-fetched or fanciful*".[93]

82. There is no dispute between the parties as to the principles to be applied in determining reasonable foreseeability at the duty of care stage: the question is "*whether it is reasonably foreseeable as a possibility that careless conduct <u>of any kind</u> on the part of the defendant may result in damage of some kind*" to that class, here, Torres Strait Islanders (see AS [212]).[94] That is because the test of reasonable foreseeability at the duty of care stage is targeted at determining the class of people who might foreseeably be put at risk as a result of the putative tortfeasor's conduct. It is only at the breach stage that the focus of the question narrows to consider "*whether it is reasonably foreseeable as a possibility that <u>the kind of carelessness that the defendant is charged with</u> may result in damage of some kind to the person or property of the plaintiff*".[95]

Vulnerability and degree of harm

83. Although the applicants correctly note that "vulnerability" is concerned with whether an applicant has the capacity to protect themselves (AS [215]), they omit to note that this relates to an inability to protect themselves "*from the consequences of a defendant's want of reasonable care*".[96] This salient feature therefore requires consideration of both the danger that the Commonwealth's conduct poses to Torres Strait Islanders, and the extent to which Torres Strait Islanders can take steps to avoid those dangers. Further, in *Sharma FC*, Beach J held that, when one is focussing on vulnerability in a negligence case involving climate change, the question is not whether a class of persons is vulnerable in a

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93 Duty of care stage: *Sullivan v Moody* at [42] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ) [CTH.0001.0001.2019]; breach of duty stage: *Council of the Shire of Wyong v **Shirt*** (1980) 146 CLR 40 at 48 (Mason J) [APP.0001.0020.0191]; remoteness stage: *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd (**The Wagon Mound (No 2)**)* [1967] 1 AC 617 at 643 (Lord Reid) [CTH.0006.0001.0733].

94 *Sharma FC* at [417] (Beach J) (emphasis added) [APP.0001.0020.0101].

95 *Sharma FC* at [417] (Beach J) (emphasis added) [APP.0001.0020.0101].

96 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at [23] (Gleeson CJ, Gummow, Hayne and Heydon JJ) [APP.0001.0020.0189]. See also *Caltex Refineries (Qld) Pty Ltd v **Stavar*** (2009) 75 NSWLR 649 at [103] (Allsop P) [APP.0001.0020.0029].

generalised sense to climate change, but rather whether they are vulnerable to suffering the relevant (compensable) harm.[97]

Control and knowledge

84. The concept of "control" as a salient feature is a reference to the control over the *risk of harm* that the applicants are said to have suffered.[98] The factor of control is of "*fundamental importance*" in discerning whether a public authority owes a common law duty of care.[99] The fact that a public authority has control over some aspect of a physical environment is in itself unlikely to found a duty of care where the harm results from the conduct of a third party that is beyond the public authority's control.[100] That is, where control over the risk of harm is "fragmented" between many bodies or there are many intervening layers of decision-making between the applicant and the putative tortfeasor then this may suggest that it is not appropriate to impose a legal duty of care upon one of these bodies to take reasonable steps to avoid causing harm to those to whom it owes a duty of care.[101]

85. The Full Court in *Sharma FC* divided on the question of whether the Minister had "control" in the relevant sense over the risk of personal injury to Australian children caused by increased GHG emissions to which the expansion of the coal mine under consideration would contribute. Chief Justice Allsop considered that the Minister did not have sufficient control over the risk that Australian children would suffer personal injury by reason of GHG emissions resulting from the extension of the coal mine in question because the harm depended on the intervening conduct of many others (including those who decided to buy and consume the coal, and their national governments who permitted the consumption of such coal).[102] Justice Wheelahan similarly considered that there was no "control" because control of CO_2 emissions and the protection of the public from personal injury caused by the effects of climate change were not roles the Commonwealth Parliament had conferred on the Minister under the *Environment*

97 *Sharma FC* at [671] [APP.0001.0020.0101].
98 *Sharma FC* at [334] (Allsop CJ) [APP.0001.0020.0101].
99 *Graham Barclay Oysters* at [150] (Gummow and Hayne JJ) [APP.0001.0020.0065].
100 *Graham Barclay Oysters* at [152] (Gummow and Hayne JJ) [APP.0001.0020.0065].
101 *Graham Barclay Oysters* at [154] (Gummow and Hayne JJ) [APP.0001.0020.0065].
102 *Sharma FC* at [335]-[336] (Allsop CJ) [APP.0001.0020.0101].

Protection and Biodiversity Conservation Act 1999 (Cth).[103] By contrast, Beach J noted that the Minister "*controlled the trigger*" which would approve the expansion and set in motion a chain of events that would lead to increased GHG emissions.[104] His Honour considered that the Minister, therefore, had "control" in the relevant sense notwithstanding that there were numerous other actors whose actions similarly contributed to the risk of harm.[105] His Honour distinguished between cases such as *Sharma FC*, where it was the positive act of approving a coal mine that was said to give rise to the risk of harm, and cases where it is said that a failure to act (such as a failure to prohibit or regulate a particular activity) has given rise to a risk of harm, in which case "*the authority's control over the risk must be very significant*".[106]

86. As to knowledge, as Allsop P (as his Honour then was) indicated in *Caltex Refineries (Qld) Pty Ltd v* ***Stavar***, it is actual or constructive knowledge by the respondent *that the conduct will cause harm to the applicant* which is an indicator that the relationship is sufficiently close to recognise a legal duty of care.[107]

Reliance and assumption of responsibility

87. The applicants set out the relevant principles relating to these salient features at AS [243]-[244], which are not controversial. In addition, in *Sharma FC*, Allsop CJ held that "*general political reliance*" — that is, reliance on the government to the same extent as other members of the polity — is not sufficient to suggest that a legal duty of care is owed to a particular subset of that polity.[108]

Determinacy

88. The principles relating to this salient feature at AS [249] are not contentious. In addition, in *Sharma FC*, Beach J held that the question of whether a class is indeterminate can include consideration of whether the nature of the likely claims

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103 *Sharma FC* at [839] (Wheelahan J) [APP.0001.0020.0101].
104 *Sharma FC* at [641] (Beach J) [APP.0001.0020.0101].
105 *Sharma FC* at [660]-[662] (Beach J) [APP.0001.0020.0101].
106 *Sharma FC* at [658] (Beach J) [APP.0001.0020.0101].
107 *Stavar* at [103] [APP.0001.0020.0029].
108 *Sharma FC* at [340] (Allsop CJ) [APP.0001.0020.0101].

can be ascertained, as well as whether the time over which a person may suffer relevant loss, and therefore become a claimant, is uncertain.[109]

Coherence

89. A court will not recognise a duty of care where to do so "*would cut across other legal principles as to impair their proper application*".[110] That is, the court will not impose a duty of care where this would be incompatible with other duties owed by the putative tortfeasor.[111]

Justiciability

90. In addition to the applicants' submissions addressed at [47]-[79], the applicants make some general submissions about the concept of justiciability in contexts other than tort law (AS [349]-[355]). The Commonwealth submits that those authorities do not assist the Court with the task before it, which is to determine whether the novel duties alleged relate to functions of government in respect of which it is inappropriate to recognise a duty of care under the laws of negligence. The authorities that deal with that particular issue are set out at [47]-[79].

C.2. Breach of Duty

91. Assuming that the Commonwealth is found to owe one or both of the novel duties, the Court will then be required to consider whether the Commonwealth breached that duty. A duty of care is not *absolute* — rather, it requires that the person who owes the duty take reasonable precautions to avoid causing the person to whom the duty is owed harm.[112]

92. The breach element of the tort of negligence requires consideration of what precautions were reasonably required of the respondent (the "standard of care") and whether the conduct of the respondent fell below that standard. What is reasonably expected of the alleged tortfeasor is to be assessed as at the time of the

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109 *Sharma FC* at [706]-[712] [APP.0001.0020.0101].
110 *Sullivan v Moody* at [53] (*per curiam*) [CTH.0001.0001.2019].
111 *Sullivan v Moody* at [55] (*per curiam*) [CTH.0001.0001.2019].
112 *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 at [43] (Gummow J) [APP.0001.0020.0139].

alleged negligence.[113] At common law, the applicable standard of care is considered in two stages.

93. The first question is whether a reasonable person in the respondent's position would have foreseen that the respondent's conduct involved a risk of injury to the applicant or a class of persons involving the applicant.[114] A risk will be "*foreseeable*" for the purposes of the common law if it is "*not far-fetched or fanciful*".[115] As the applicants note at AS [273]-[274], the reasonable foreseeability test at the breach stage has a narrower focus than at the duty of care stage: the breach enquiry is focussed on "*whether it is reasonably foreseeable as a possibility that the kind of carelessness that the defendant is charged with may result in damage of some kind to the person or property of the plaintiff*".[116] If the risk of harm resulting from that kind of carelessness is foreseeable, then the second question needs to be considered. If it is not, it cannot be said that there has been a breach of duty.

94. The second question is what a reasonable person would have done by way of response to that risk — that is, whether such a person would have taken precautions to prevent or minimise the risk from eventuating, and, if so, what precautions that person would have taken. This requires regard to "*the magnitude of the risk and the degree of probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have*".[117] This is often referred to as the "*negligence calculus*".

95. The principles outlined by the applicants at AS [278] that should guide the Court's application of the negligence calculus are not contentious — that is, although the factors that weigh in the negligence calculus should not be applied mechanically, the standard of care called for is higher where there is:

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[113] See *Roe v Minister for Health* [1954] 2 QB 66 [APP.0001.0020.0144]; *Footner v Broken Hill Associated Smelters Pty Ltd* (1983) 33 SASR 58 [CTH.0002.0001.0339]; *Bond v South Australian Railways Commissioner* (1923) 33 CLR 273 at 282 (Isaacs J) [CTH.0002.0001.0076], referring to *Membrey v Great Western Railway Co* (1889) 14 App Cas 179 at 190 (Lord Herschell) [CTH.0002.0001.0375].

[114] *Shirt* at 47 (Mason J) [APP.0001.0020.0191].

[115] *Shirt* at 47 (Mason J) [APP.0001.0020.0191].

[116] *Sharma FC* at [417] (Beach J) (emphasis added) [APP.0001.0020.0101].

[117] *Shirt* at 47-48 (Mason J) [APP.0001.0020.0191].

a) a higher probability of the risk of harm eventuating;

b) a higher magnitude of harm (that is, more serious harm);

c) a lower burden of taking precautions against the risk of harm; and

d) a lower social utility of the activity creating the risk.

96. The test for determining the standard of care is now captured in State and Territory civil liability legislation, including the CLA Qld,[118] in substantially the same form as the common law test. As the applicants note, the statutory test imposes an additional requirement: the risk of harm that the putative tortfeasor must take reasonable steps to avoid must be "*not insignificant*".[119] However, this change is a subtle one and is likely to be indiscernible in most cases.[120] Further, the CLA Qld provides a non-exhaustive list of matters to be weighed in the negligence calculus.[121] Those factors overlap with the considerations referred to by Mason J in *Wyong*, but also expressly require consideration of the "*social utility of the activity that creates the risk of harm*".

C.3 Causation and remoteness

97. The next element an applicant must prove to establish a claim in negligence is that their loss or damage was *caused* by the respondent's negligence.

98. Causation is concerned with whether it is appropriate to attribute legal responsibility for the harm suffered by the applicant to a respondent who has breached their duty of care to the applicant.[122] As such, the legal concept of causation differs from philosophical and scientific notions of causation.[123] The

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118 See CLA Qld, s 9-10.

119 See CLA Qld, s 9(1)(b).

120 *Meandarra Aerial Spraying Ltd v GEJ & MA Geldard Pty Ltd* [2013] 1 Qd R 319 at [26] [CTH.0006.0001.0701].

121 See CLA Qld, s 9(2).

122 ***Wallace v Kam*** (2013) 250 CLR 375 at [11] (French CJ, Crennan, Kiefel, Gageler and Keane JJ) [APP.0001.0020.0182]. See also, ***Chappel v Hart*** (1998) 195 CLR 232 at [6]-[7] (Gaudron J), [62] (Gummow J), [93] (Kirby J) [CTH.0001.0001.0358]; ***Tabet v Gett*** (2010) 240 CLR 537 at [113] (Kiefel J) [CTH.0001.0001.2041].

123 ***March v Stramare*** *(E & M H) Pty Ltd* (1991) 171 CLR 506 at 509 (Mason CJ), 522 (Deane J) [APP.0001.0020.0092]; *Chappel v Hart* at [6]-[7] (Gaudron J), [62] (Gummow J) [CTH.0001.0001.0358]; ***Adeels Palace*** *v Moubarak* (2009) 239 CLR 420 at [55] (*per curiam*) [CTH.0001.0001.0001]; ***Henville v Walker*** (2001) 206 CLR 459 at [97] (McHugh J) [APP.0001.0020.0068]. See also, *Sharma FC* at [305] (Allsop CJ) [APP.0001.0020.0101].

inquiry "*invites a comparison between a plaintiff's present position and what would have been the position in the absence of the defendant's negligence*".[124]

99. Under the common law, as laid down in ***March v Stramare** (E & M H) Pty Ltd*,[125] the question of causation is determined by asking whether, as a matter of common sense, the tribunal of fact is satisfied that the respondent's breach of duty was a cause of the harm. Thus, as McHugh J stated in *Henville v Walker*:[126]

> *Out of the many conditions that combine to produce loss or damage to a person, the common law is concerned only whether some breach of a legal norm was so significant that, as a matter of common sense, it should be regarded as a cause of damage.*

100. It is recognised under the common law[127] (and civil liability legislation), that the causal inquiry requires consideration of two questions:

    a) a question of historical fact as to how the particular harm occurred (often referred to as "**factual causation**"); and

    b) a normative question as to whether legal responsibility for that particular harm occurring in that way should be attributed to a particular person (often referred to as the "**scope of liability**").

101. This is reflected in s 11 of the CLA Qld, which is extracted at AS [418].[128] The Commonwealth also notes s 12 of the CLA Qld, which provides that the applicant bears the onus of proving causation. That reflects the position at common law.

102. For analytical clarity, and in light of the parties' competing submissions in relation to the applicable law (addressed in Part B above), these submissions set out the principles that apply in relation to factual causation and scope of liability separately, noting that, for any part of the claim where the Court determines the

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124 *Tabet v Gett* at [140] (Kiefel J) [CTH.0001.0001.2041].

125 *March v Stramare* at 515 (Mason CJ), 522 (Deane J), 524 (Toohey J) [APP.0001.0020.0092]. See also, *Sharma FC* at [305] (Allsop CJ) [APP.0001.0020.0101].

126 *Henville v Walker* at [97] [APP.0001.0020.0068].

127 *Wallace v Kam* at [11] (French CJ, Crennan, Kiefel, Gageler and Keane JJ) [APP.0001.0020.0182]. See also *March v Stramare* at 515 (Mason CJ) [APP.0001.0020.0092]; *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 412-3 (Deane and Toohey JJ) [APP.0001.0020.0022]; *Amaca Pty Ltd v **Booth*** (2011) 246 CLR 36 at [64] (Gummow, Hayne and Crennan JJ) [APP.0001.0020.0196]; *Chappel v Hart* at [62] (Gummow J), [93.3] (Kirby J) [CTH.0001.0001.0358]. See also, Ipp Report at [7.26], [CTH.0002.0001.0356].

128 See also, generally, ***Strong** v Woolworths Ltd* (2012) 246 CLR 182 [APP.0001.0020.0160].

common law should apply, the two inquiries may be considered in a more integrated manner.

103. Ultimately, the Commonwealth contends that the Court's conclusion on causation will not be affected by the debate as to the applicable law, as the applicants cannot establish causation at common law or under the statute.

C.2.1 Factual causation

The "but for" test

104. The question of factual causation should be approached by first asking whether the respondent's breach of the duty of care was a necessary condition of the harm suffered by the applicant.[129] This is tested by asking whether the harm would have resulted "but for" the respondent's breach of their duty of care.[130] Given the applicant bears the burden of proving causation on the balance of probabilities, the "but for" test will be satisfied if the applicant demonstrates that the harm *probably* would not have eventuated but for the breach; it is not sufficient to demonstrate the harm *might not* have eventuated but for the breach.[131]

105. Where the "but for" test cannot be satisfied, typically that will mean that factual causation cannot be satisfied.[132] For example, causation will usually not be made out where "*[t]he damage was inevitable and would probably have occurred even without the breach*" or "*[t]he event was ineffective as a cause of the damage, given that the event which occurred would probably have occurred in the same way even had the breach not happened*".[133] However, in some circumstances a court may accept that a respondent's breach of duty can be considered the cause

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129 Cf CLA Qld, s 11(1)(a).

130 *March v Stramare* at 515-6(Mason CJ) [APP.0001.0020.0092].

131 *Adeels Palace* at [53], [56] (*per curiam*) [CTH.0001.0001.0001]; *Tabet v Gett* at [46] (Gummow ACJ), [67]-[69] (Hayne and Bell JJ), [101]-[103] (Crennan J), [152] (Kiefel J) [CTH.0001.0001.2041].

132 See, for example, *Chappel v Hart* at [93.5] (Kirby J), [117] (Hayne J) [CTH.0001.0001.0358]. See also, CLA Qld s 11(1)(a) and (2).

133 *Chappel v Hart* at [93.5] (Kirby J) [CTH.0001.0001.0358], citing, respectively, *Hotson v East Berkshire Area Health Authority* [1987] AC 750 [CTH.0001.0001.1008] and *Laferriere v Lawson* [1991] 1 SCR 541 [CTH.0001.0001.1121]; (1991) 78 DLR (4th) 609, and *Daniels v Anderson* (1995) 37 NSWLR 438 at 539 [CTH.0001.0001.0417], as examples of these circumstances.

of the applicant's harm even if it cannot be shown that the harm would not have eventuated "but for" the respondent's breach.[134]

Material contribution to harm

106. Relevantly for present purposes, the courts have held that, in circumstances (described as "exceptional" in s 12(2) of the CLA Qld), factual causation may be made out where there are multiple factors that cumulatively cause the applicant's harm and the respondent's breach "materially contributed" to the harm suffered by the applicant.[135] A "material" contribution has been described as one that is not *de minimis*.[136] However, it has only been established where the contribution has been significant or substantial.

107. The seminal case on "material contribution" is the House of Lords' decision in ***Bonnington Castings*** *v Wardlaw*.[137] In that case, an employee had developed a lung disease that was caused by the gradual accumulation of silica particles in the lungs. The employee had been exposed to silica particles by two sources, only one of which (the swing grinders) was the result of his employer's breach of its duty of care. The exposure by reason of the employee's negligence probably made up a smaller proportion of exposure than the other sources but was not a negligible amount. In those circumstances, the House of Lords held that the employer's negligence had "materially contributed" to the employee's lung disease.

108. The leading judgment was given by Lord Reid. His Lordship observed:[138]

> *What is a material contribution must be a question of degree. A contribution which comes within the exception de minimis non curat lex is not material, but I think that any contribution which does not fall within that exception*

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134 See, for example, *March v Stramare* at 515-6 (Mason CJ), 522 (Deane J), 524 (Toohey J), 525 (Gaudron J) [APP.0001.0020.0092]; ***Lewis*** *v Australian Capital Territory* (2020) 271 CLR 192 at [152] (Edelman J) [APP.0001.0020.0086]. Cf CLA Qld, s 11(2).

135 See, for example, *Strong* at [26] (French CJ, Gummow, Crennan and Bell JJ) [APP.0001.0020.0160]; *March v Stramare* at 514 (Mason CJ), 532 (McHugh J) [APP.0001.0020.0092]. See also, *Sharma FC* at [305] (Allsop CJ) [APP.0001.0020.0101].

136 See ***Bonnington Castings*** *v Wardlaw* [1956] AC 613 at 621 (Lord Reid) [APP.0001.0020.0023]; *March v Stramare* at 532 (McHugh J) [APP.0001.0020.0092]; *Sharma FC* at [305] (Allsop CJ) [APP.0001.0020.0101].

137 [1956] AC 613 [APP.0001.0020.0023].

138 *Bonnington Castings* at 622 (Lord Reid, Viscount Simonds agreeing) [APP.0001.0020.0023].

must be material. I do not see how there can be something too large to come within the de minimis principle but yet too small to be material.

109. Applying that to the case before him, his Lordship said:[139]

> *It is … probable that much the greater proportion of the noxious dust which he inhaled over the whole period came from the hammers. But, on the other hand, some certainly came from the swing grinders, and I cannot avoid the conclusion that the proportion which came from the swing grinders was not negligible. [The plaintiff] was inhaling the general atmosphere all the time, and there is no evidence to show that his hammer gave off noxious dust so frequently or that the concentration of noxious dust above it when it was producing dust was so much greater than the concentration in the general atmosphere, that that special concentration of dust could be said to be substantially the sole cause of his disease.*

110. In *Bonnington Castings*, there was one established cause of the injury: exposure to silica particles. The relevant question was, therefore, whether the respondent's negligent contribution to that particular cause was more than *de minimis*.

111. This is to be contrasted with a situation where there are multiple potential causes of the injury. That situation arose in ***Amaca v Ellis***.[140] In that case, a smoker who had been exposed to asbestos by two employers died of lung cancer. At trial, no expert had assigned a greater probability than a 23% chance that the lung cancer was caused by exposure to asbestos (as opposed to smoking). The High Court held that the executor of the employee's estate had failed to prove it was more likely than not that asbestos exposure, as opposed to smoking, was the cause of the harm.[141]

Material increase in risk

112. In ***Fairchild*** *v Glenhaven Funeral Services Ltd*,[142] the House of Lords accepted that, in exceptional cases, where the same negligence of successive defendants was capable of causing the harm that resulted, but the state of the medical evidence was such that it was impossible to determine which of the defendants in fact caused the harm, causation may be proved where negligent conduct

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139 *Bonnington Castings* at 622 (Viscount Simonds agreeing); see also at 623-4 (Lord Tucker) [APP.0001.0020.0023].

140 (2010) 240 CLR 111 [CTH.0001.0001.0048].

141 *Amaca v Ellis* at [66]-[68] [CTH.0001.0001.0048].

142 [2002] 1 AC 32 [APP.0001.0020.0056].

"*materially increased the risk*" of the harm occurring. All Lords in *Fairchild* emphasised the exceptional nature of the principle.[143]

113. The *Fairchild* principle does not form part of the law in this country. It has not yet been directly considered by the High Court.[144] However, in *Tabet v Gett*,[145] the High Court held that, in cases where the state of scientific or medical knowledge makes it impossible to prove on the balance of probabilities the cause of a plaintiff's harm, it is not sufficient for the plaintiff merely to establish that the defendant's wrong materially increased the risk of harm. Nor is it sufficient to show that the breach led to a loss of a chance that the injury would not be suffered. The approach in *Tabet v Gett* was consistent with statements made in a number of previous High Court cases.[146] Thus, as Allsop CJ said in *Evans v Queanbeyan City Council*,[147] "*any conclusion that increasing risk is sufficient for a conclusion of causation or causal or legal responsibility*" involves "*policy questions*" that are a matter for the High Court. His Honour made a similar point in *Sharma FC*, saying, "*until the High Court says otherwise, causing an increase in the risk of harm occurring does not amount of itself to causing or materially contributing to the harm*".[148] Beach and Wheelahan JJ made statements to the same effect.[149]

C.2.2 Scope of liability

114. The scope of liability aspect of the causation element is concerned with whether it is appropriate for legal responsibility for the harm to be attributed to the respondent.[150]

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[143] *Fairchild* at [2], [34] (Lord Bingham of Cornhill), [40]-[41], [70] (Lord Nicholls of Birkenhead), [63], [73]-[74] (Lord Hoffmann), [108], [114], [118] (Lord Hutton), [155], [169]-[170] (Lord Roger of Earlsferry) [CTH.0006.0001.0463].

[144] See *Strong* at [26], [28] (French CJ, Gummow, Crennan and Bell JJ) [APP.0001.0020.0160].

[145] *Tabet v Gett* at [46] (Gummow ACJ), [67]-[69] (Hayne and Bell JJ), [101]-[103] (Crennan J), [152] (Kiefel J) [CTH.0001.0001.2041].

[146] *Booth* at [41], [43], [52]-[53] (French CJ), [80]-[82] (Gummow, Hayne and Crennan JJ) [APP.0001.0020.0196]; *Alcan Gove Pty Ltd v **Zabic*** (2015) 257 CLR 1 at [15], [17] (per curiam) [CTH.0001.0001.0027]; *Ellis* at 123 [12] [CTH.0001.0001.0048]; *St George Club Ltd v Hines* (1961) 35 ALJR 106 at 107 [CTH.0001.0001.2017].

[147] [2011] NSWCA 230 at [31].

[148] *Sharma FC* at [320] (Allsop CJ) [APP.0001.0020.0101].

[149] *Sharma FC* at [436] (Beach J), [875], [882] (Wheelahan J) [APP.0001.0020.0101].

[150] See, for example, CLA Qld, s 11(1)(b).

115. At common law, this involves a "*normative decision as to whether, for the purposes of the case, the precedent act for which the defendant is responsible should be seen as causal of the plaintiff's loss*". That evaluation is made by an evaluation of the relationship and the purposes and policy of the relevant part of the law, rather than the application of any particular test.[151]

116. Similarly, under s 11(1)(b) of the CLA Qld, this inquiry involves the court considering (among other relevant things) whether or not and why responsibility for the harm should be imposed on the respondent.

117. One part of the scope of liability inquiry is whether the consequence of the conduct can fairly be regarded as within the risk created by the negligence.[152]

118. Another is the common law concept of "*remoteness*". Even if an applicant can establish factual causation, a respondent will not be liable for harm caused as a result of the breach if the harm is too remote. Harm will be too remote if it was not reasonably foreseeable.[153] This test is narrower than the reasonable foreseeability enquiries at the duty and breach stages. It is tested by asking whether it was reasonably foreseeable to a reasonable person in the respondent's position that the respondent's *kind of carelessness* may result in *damage of the kind suffered* by the applicant.[154]

119. Further, it is recognised that it is not appropriate for the respondent's scope of liability to extend to the applicant's harm where there is a *novus actus interveniens*, namely where the chain of causation is broken by either: a separate, voluntary human action; or a causally independent event the conjunction of which with the wrongful act or omission is by ordinary standards so extremely unlikely as to be termed a coincidence.[155]

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151 *Henville v Walker* at [98] (McHugh J) [APP.0001.0020.0068], quoting *Barnes v Hay* (1988) 12 NSWLR 337 at 353 (Mahoney JA) [CTH.0001.0001.0159].

152 See, for example, *Wallace v Kam* at [24] (*per curiam*) [APP.0001.0020.0182]; *Sharma FC* at [206] (Allsop CJ) [APP.0001.0020.0101].

153 *The Wagon Mound (No 1)* [CTH.0001.0001.1295]; ***Chapman v Hearse*** (1961) 106 CLR 112 at 120-122 (*per curiam*) [APP.0001.0020.0032]. See also, *March v Stramare* at 510 (Mason CJ), 534-5 (McHugh J) [APP.0001.0020.0092].

154 *The Wagon Mound (No 1)* at 425-426 [CTH.0001.0001.1295].

155 *Haber v Walker* [1963] VR 339 at 358 (Smith J) [CTH.0001.0001.0779]. See also, *Chapman v Hearse* at 120-124 (*per curiam*) [APP.0001.0020.0032].

C.2.3 The Full Court's decision in *Sharma*

120. In *Sharma FC*, the evidence established that total emissions being considered would only contribute a "*tiny*" fraction (1/18,000th of one degree Celsius, about 0.000056°C) to global temperature rise.[156]

121. In that case, the applicants brought the claim for an injunction before any breach of duty or damage had occurred. For this reason, the Full Court did not determine any question of causation. However, in *obiter*, the judges were unanimous that an increase in GHG emissions from the proposed expansion of the coal mine, at most, resulted in an increase in risk of harm, and was not a material contribution to harm.

122. As noted above, Allsop CJ stated that, until the High Court determined otherwise, "*material contribution to risk*" was not sufficient to establish causation.[157] His Honour further stated that:[158]

> *From the above, it is clear that it is not for an intermediate appellate court to say that for proof of causal connection in the causing of harm from global warming increasing the risk of such is a sufficient causal connection to establish liability.*

123. Justice Beach considered the issue in some detail, as follows:[159]

> *Now putting to one side for the moment that one should not conflate reasonable foreseeability and causation, the* Bonnington Castings *approach has no application. The present case is more apposite for a* Fairchild *analysis. Let me say something more about* Bonnington Castings*. I will do so first by addressing the tipping point thesis. It is said that the* CO_2 *from the scope 3 emissions creates the risk of reaching the tipping point. If the tipping point is reached, there is a risk that the non-linear effects will cause the temperature to proceed from 2°C to 4°C above the base line by 2100. If that occurs, the personal injury to members of the claimant class or some of them may occur. But once one appreciates these elements one can see that the* Bonnington Castings *scenario has little to do with causation concerning the tipping point thesis.*
>
> …

[156] *Sharma FC* at [115] (Allsop CJ); see also at [882] (Wheelahan J) [APP.0001.0020.0101].
[157] *Sharma FC* at [319]-[320] [APP.0001.0020.0101].
[158] *Sharma FC* at [326] [APP.0001.0020.0101].
[159] *Sharma FC* at [433], [435]-[437] (emphasis added) [APP.0001.0020.0101].

> *In* Bonnington Castings *the noxious dust was made up of two component sources, the totality of which was inhaled and caused harm. And in that context, the dust from the swing grinders was a material contribution to the disease. But in the case before us the indivisible condition which is said to cause harm is the temperature, not the CO_2 emissions. Here the scope 3 emissions do not, with other emissions, directly cause the 4°C above the base line. Rather, the scope 3 emissions increase the likelihood or risk of producing the tipping point. And if that risk occurs, then there is a risk that the 4°C above the base line will occur.*
>
> *That is no analogue with the* Bonnington Castings *scenario. One is only dealing with an increase in risk. Moreover, the additional CO_2 molecules caused by the scope 3 emissions cannot be equated with the dust in* Bonnington Castings*. The CO_2 molecules themselves do not directly cause or contribute to harm. It is rather their effect on increased temperature, which temperature ultimately causes the harm. The more appropriate analogue is* Fairchild *dealing with a material increase in risk from the scope 3 emissions. But that has not yet been accepted as a test for causation in Australia. …*
>
> *One can make similar points concerning the non-tipping point causation thesis dealing with the linear correlation between increasing CO_2 emissions and temperature. But again, this is still not a* Bonnington Castings *scenario. Of course, many players contribute to the total CO2 emissions (like the dust), but it is the temperature that is then directly produced from the combined CO_2 emissions, not the harm. Contrastingly, in* Bonnington Castings *the harm was produced from the combined dust, with no intermediate step like the temperature as in our case. Again, even the linear correlation thesis is more a* Fairchild *analogue. I note that the NZ Court of Appeal was referred to* Fairchild *rather than* Bonnington Castings *in* Smith v Fonterra Co-operative Group Ltd *(2021) 23 ELRNZ 191 at [105]-[113] in the context of an argument concerning material contribution to risk rather than material contribution to harm.*

124. Justice Wheelahan made similar comments:[160]

> *The "tiny" contribution to which the primary judge referred would at most amount to a contribution to an increased risk of harm, but not a risk of contribution to the harm itself, still less a material contribution that would attract the principles in* Bonnington Castings*. That is because the claimed foreseeable injuries would not be caused by any effect on the human body or mind by the accumulation of CO_2 itself, but by consequential events such as bushfires, heat, droughts, cyclones, floods, and other weather events. The risk that was assessed by the primary judge was a risk of contribution to an increased risk of harm on a basis consistent with* Fairchild*, or alternatively a risk that additional CO_2 that would be emitted into the atmosphere as a result of the approval of the Extension Project would make a contribution, together*

[160] *Sharma FC* at [882] (emphasis added) [APP.0001.0020.0101].

> *with other sources, to global CO_2 levels which in turn presented a risk of injury. This latter type of risk is akin to the fourth scenario to which I referred above.*[161] *Neither type of contribution to risk of injury would give rise to a liability in negligence because Australian common law principles of causation would not recognise the Minister's decision to approve the Extension Project as a cause of injury. Any development of common law principles of causation in negligence to accommodate the* Fairchild *principle, or the contribution of insufficient causes to an end result, would have to confront an array of significant consequential issues, including whether the alleged tortfeasor is to be liable in solidum with any other tortfeasors for the whole of the damage, or only for some proportion:* Barisic v Devenport *[1978] 2 NSWLR 111 at 117 (Moffitt P, Hope JA agreeing).*

C.4 Damage

C.4.1 Damage is the gist of the cause of action

125. Damage is the gist of the cause of action of negligence.[162] It follows that a cause of action in negligence only arises when the claimant has suffered the damage said to be caused by the putative tortfeasor's negligence.[163] The "*damage necessary to found a cause of action in negligence … is the injury itself and its foreseeable consequences*".[164]

126. As Crennan J, with whom Gleeson, Gummow and Heydon JJ agreed, said in *Harriton v Stephens*:[165]

> *Because damage constitutes the gist of an action in negligence, a plaintiff needs to prove actual damage or loss and a court must be able to apprehend and evaluate the damage, that is the loss, deprivation or detriment caused by the alleged breach of duty.*

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161 See *Sharma FC* at [879] [APP.0001.0020.0101].

162 *Bunyan v Jordan* (1937) 57 CLR 1 at 16 (Dixon J) [CTH.0001.0001.0222]; *Williams v Milotin* (1957) 97 CLR 465 at 474 (Dixon CJ, McTiernan, Williams, Webb and Kitto JJ) [CTH.0001.0001.2130]; *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 569 (Stephen J) [CTH.0001.0001.0240]; *John Pfeiffer* at [194] (Callinan J) [APP.0001.0020.0077]; *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317 at [208] (Gummow and Kirby JJ) [APP.0001.0020.0164]; *Harriton v Stephens* (2006) 226 CLR 52 at [218] (Crennan J, Gleeson CJ, Gummow and Heydon JJ agreeing) [CTH.0001.0001.0842]; *Zabic* at [8] (French CJ, Kiefel, Bell, Keane and Nettle JJ) [CTH.0001.0001.0027].

163 See *Van Win Pty Ltd v Eleventh Mirontron Pty Ltd* [1986] VR 484 at 489-490 (Kaye J, with whom Gray and Phillips JJ agreed) [CTH.0001.0001.2121].

164 *Tabet v Gett* at [135] (Kiefel J) (emphasis removed) [CTH.0001.0001.2041].

165 *Harriton v Stephens* (2006) 226 CLR 52 at [251] [CTH.0001.0001.0842].

127. It is not sufficient for an applicant to show that they are at risk of suffering damage by reason of the respondent's alleged negligence.[166]

C.4.2 Any loss must be compensable under negligence law

128. In an action in which the applicant claims damages for negligence, any loss or damage must be compensable under the law of negligence.

129. In cases where the question of damages is reached, the objective of such damages is to provide "*compensation in a sum which, so far as money can do, will put [the applicant] in the same position as he or she would have been in if … the tort had not been committed*".[167] However, "*the compensatory principle is concerned with the measure of damages required to remedy <u>compensable</u> damage*".[168]

130. The applicant bears the onus of proving the injury or loss for which damages are sought.[169] In instances where a loss is identified, the Court must ask "*[i]s this the loss of something for which the claimant should and reasonably can be compensated?*"[170] In answering that question, it is necessary to focus attention upon the interests of the applicant,[171] noting that the award of damages is guided both by the compensatory principle "*and the principles that have developed for such awards in specific contexts*".[172]

131. In instances "*[w]here a defendant's tort impairs the value of a plaintiff's rights to tangible property, this will constitute loss or damage*". In such cases, the normal measure of damages is "*the diminution in the value to the plaintiff of their rights to tangible property, usually measured by the cost of repair, where it is reasonable to repair, or the cost of replacement*".[173] For the reasons developed in Part E.6.1 below the applicants have failed to adduce any evidence upon which

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166 See *Zabic* at [17(1)], [37] (French CJ, Kiefel, Bell, Keane and Nettle JJ) [CTH.0001.0001.0027].

167 *Haines v Bendall* (1991) 172 CLR 60 at 63 (Mason CJ, Dawson, Toohey and Gaudron JJ) [CTH.0001.0001.0818].

168 *Lewis* at [65] (Gordon J) (emphasis in original) [APP.0001.0020.0086], referring to *Amaca Pty Ltd v **Latz*** (2018) 264 CLR 505 at [41] (Kiefel CJ and Keane J) [CTH.0001.0001.0077].

169 *Todorovic v Waller* (1981) 150 CLR 402 at 412 (Gibbs CJ and Wilson J) [CTH.0007.0001.0063].

170 *Lewis* at [70] (Gordon J) [APP.0001.0020.0086], referring to *Pickett v British Rail Engineering Ltd* [1980] AC 136 at 149 (Lord Wilberforce) [CTH.0001.0001.1335].

171 *Latz* at [85] (Bell, Gageler, Nettle, Gordon and Edelman JJ) [CTH.0001.0001.0077].

172 *Lewis* at [65] (Gordon J) [APP.0001.0020.0086].

173 *Talacko v Talacko* (2021) 272 CLR 478 at [45] (*per curiam*) [CTH.0001.0001.2094].

the Court could conclude that there has been compensable loss arising from damage to property.

132. As is evident from AS [528], the *Ailan Kastom* elements of the applicants' claims are novel. For the reasons developed in Part E.6.3 below, they are not compensable under the law of negligence.

D. Factual Background

D.1 Group members

133. This proceeding is brought as a representative proceeding under Pt IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**). The class is defined at [1] of the 3FASOC as "*all persons who at any time during the period from 1985 to the date this pleading is filed, are Torres Strait Islander (whether by descent or by customary adoption) and suffered loss and damage as a result of the conduct of the Respondent*" described in the 3FASOC. The term "*Torres Strait Islander*" is defined at [54] of the 3FASOC to *include* persons:

    a) Indigenous to the Torres Strait Islands[174] within the meaning of the definition in s 4(1) of the *Aboriginal and Torres Strait Islander Act 2005* (Cth)[175] and/or who are Torres Strait Islander by way of customary adoption;

    b) from the *Gudang, Kaiwalagal, Maluiligal, Guda Maluyligal, Kulkalgal* and *Kemerkemer Meriam* Nations;

    c) who may hold native title and/or native title rights and interests (as defined in s 223 of the *Native Title Act 1993* (Cth) (**NTA**)) in relation to various parts of the Torres Strait Islands; and

    d) who have a distinctive customary culture, known as *Ailan Kastom*, which creates a unique spiritual and physical connection with the Torres Strait Islands and surrounding waters.

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[174] For completeness, the Commonwealth notes that the island of Daru (sometimes known as Darau) is within the geographical area of the Torres Strait Islands but is part of the territory of Papua New Guinea, not Australia. The Commonwealth does not understand the applicants to allege that residents of Daru are "Torres Strait Islanders" for the purposes of the definition of the class.

[175] Defined to mean "*a descendant of an indigenous inhabitant of the Torres Strait Islands*".

134. Four observations need to be made about the class in this proceeding.

135. The *first* is that the group excludes persons who fall within the definition of the class but who have opted out. The Court ordered the applicants to conduct an opt out process from 31 March 2023 to 26 May 2023 (**Opt Out Period**),[176] and made orders for the distribution of opt out notices and to facilitate opt out.[177] There is no evidence that any group members opted out of the proceeding before the Opt Out Period ended. However, after the first part of the trial had commenced, on 16 June 2023, four individuals emailed the Court indicating their wish to opt out. On 30 June 2023, the Court granted leave to those individuals to opt out of the proceeding.[178]

136. The *second* observation is that, although the group member definition refers to Torres Strait Islanders who have suffered loss and damage as a result of the Commonwealth's conduct at any time between 1985 and 26 October 2021 (being the date the Originating Application and Statement of Claim were filed), as a matter of logic it cannot be the case that there is any person who suffered loss and damage as a result of the Commonwealth's conduct prior to the alleged breaches of the Primary or Alternative Duties. The earliest alleged breach of the Primary Duty is said to have occurred in 2015 (AS [383]-[384]), and, although it is not entirely apparent when the applicants allege the earliest breach of the Alternative Duty occurred, the Commonwealth understands the earliest alleged breach is said to have occurred in late 2011 (see AS [731]). It is therefore not apparent why the class is said to include persons who have suffered harm since 1985.

137. Further, to the extent that members of the class have claims other than personal injury claims that accrued prior to 26 October 2015, those claims are barred by reason of the *Limitation Act 1985* (ACT) for the reasons outlined in Part E.6.4 below. A three year limitation period applies in respect of any personal injury claim by group members, as also outlined in Part E.6.4 below.

138. The *third* observation is that the class is defined by reference to people who have suffered loss or damage as a result of the Commonwealth's conduct pleaded in the 3FASOC. For reasons explained in detail in these submissions, the Commonwealth disputes the characterisation of its conduct in the pleading and

176 Orders dated 22 November 2022, order 4 [CRT.2000.0004.0001].
177 Orders dated 6 April 2023, orders 1 to 3 [CRT.2000.0004.0003].
178 Orders dated 30 June 2023, order 10 [CRT.2000.0004.0016].

also that that conduct caused any loss or damage to persons in the class (and therefore submits that there are no persons in the class).

139. The *fourth* observation is that neither the applicants, nor the group members, include any registered native title bodies corporate (**RNTBCs**). Immediately prior to the commencement of the second round of hearings in the proceedings, the applicants sought to "*take off the table their claims in relation to native title rights*" and confirmed that their "*claims for property damage and loss of fulfilment of Ailan Kastom … do not involve any claim for loss of native title rights*".[179] This position was confirmed during the hearing.[180] The significance of the applicants' disavowal of any reliance upon native title rights is discussed in further detail below in Part E.6.3.

D.2 Overview of key events

140. The applicants advance allegations with respect to the state of scientific knowledge, and steps taken by the Commonwealth to respond to climate change, over a number of years. The evidence discloses that climate science, attitudes and relevant international and domestic frameworks have developed over that time. As noted at [92] above, it is well-established that whether or not the Commonwealth breached any duty of care must be determined by reference to the circumstances as they existed at the time of the alleged breach.[181] Accordingly, in order to assist in contextualising the evidence in the case, this part of the submissions commences with a high-level chronological overview of key events, before addressing the key international agreements and other factual matters.

D.2.1 Early climate agreements

141. The *United Nations Framework Convention on Climate Change* (**UNFCCC**) was signed in 1992 and entered into force in 1994.[182] It is discussed in further detail below at [168]-[170].

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[179] Transcript of CMH on 30 October 2023, T6.32-T7.7 and T11.46 [CRT.2000.0005.0019].

[180] T1523.12-T1527.27 [TRN.0018.1455]; T1538.3-37, T1544.3-.20 [TRN.0019.1530].

[181] *Bond v South Australian Railways Commissioner* (1923) 33 CLR 273 at 282 (Isaacs J) [CTH.0002.0001.0076], referring to *Membrey v Great Western Railway Co* (1889) 14 App Cas 179 at 190 (Lord Herschell) [CTH.0002.0001.0375].

[182] UNFCCC [APP.0001.0003.0016_0004].

142. The *Kyoto Protocol* was adopted at the Conference of the Parties (**COP**) to the UNFCCC in Kyoto in 1997,[183] and its first commitment period spanned the period from 2008 to 2012.[184] Australia's commitment under the first commitment period of the Kyoto Protocol was to limit emissions to 108% of 1990 levels through the period 2008 to 2012.[185]

143. On 18 December 2009, at COP15, the parties to the UNFCCC adopted the Copenhagen Accord.[186] That document recognised "*the scientific view that the increase in global temperature should be below 2 degrees Celsius*" and agreed that deep cuts in global emissions were required "*so as to hold the increase in global temperature below 2 degrees Celsius*".[187] This was the first time the parties to the UNFCCC mentioned a goal temperature level at which to stabilise climate change.[188]

144. On 8 December 2012, the Doha Amendment to the Kyoto Protocol was adopted for a second commitment period, spanning 2013 to 2020.[189] Australia's commitment under the second commitment period of the Kyoto Protocol was to reduce emissions to 99.5% of 1990 levels from 2013 to 2020 (equivalent to a five percent reduction on 2000 levels).[190]

D.2.2 The IPCC published AR5

145. In September 2013, the IPCC published the Working Group I Contribution to the Fifth Assessment Report (**AR5 WGI**) addressing the physical science basis of climate change.[191]

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183 Kyoto Protocol [EVI.2002.0011.0052].
184 Kyoto Protocol, Art 3(1) [EVI.2002.0011.0052] at [.0055].
185 Setting Australia post-2020 target for reducing greenhouse gas emissions Final Report, [EVI.2001.0001.2411] at [.2430].
186 **Copenhagen Accord** of 18 December 2009, [CTH.0002.0001.0100].
187 See Copenhagen Accord at clauses 1 and 2, [CTH.0002.0001.0100].
188 See T1139.30-46 (Meinshausen) [TRN.0013.1118].
189 Doha Amendment, Article 3(1) [EVI.2002.0011.0046 at .0049].
190 UNFCCC Taskforce Issues Paper [EVI.2001.0001.2517] at [.2419] and [.2522].
191 SPM: [EVI.2001.0006.0473]; WGI: [EVI.2001.0006.0473].

146. In March 2014, the IPCC published the Working Group II Contribution to the Fifth Assessment Report (**AR5 WGII**) addressing the topics of impacts, adaptation and vulnerability.[192]

147. In April 2014, the IPCC published the Working Group III Contribution to the Fifth Assessment Report (**AR5 WGIII**) addressing the mitigation of climate change.[193]

148. In October 2014, IPCC published the Synthesis Report for the Fifth Assessment Report (**AR5 Synthesis Report**).[194]

D.2.3 The lead up to the Paris Agreement

149. In February 2014, the Climate Change Authority (**CCA**) published a report titled *Reducing Australia's Greenhouse Gas Emissions – Targets and Progress Review: Final Report* (**2014 CCA Report**).[195]

150. Between December 2014 and July 2015, the UNFCCC Taskforce in the Department of Prime Minister & Cabinet (**PM&C**) undertook a program of work to inform the Commonwealth's decision-making with respect to the adoption of a GHG emissions reduction target. The UNFCCC Taskforce interacted with the CCA and had regard to its work, including the 2014 CCA Report and its 2015 Special Review in relation to emissions reduction targets.[196] The work of the UNFCCC Taskforce and its interactions with the CCA are discussed in further detail below at [251] and [266].

151. Between 2013 and 2015, there was a structured dialogue between representatives of parties to the UNFCCC and 53 scientists (30 of whom were from the IPCC), in the lead up to COP21. In May 2015, prior to COP21, the structured dialogue concluded and a report was published.[197] The report of the dialogue recorded that the scientists advised that "*literature on the projected risks and impacts at 1.5°C*

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192 AR5 WGII, Part A: Global and Sectoral Aspects, [APP.0001.0004.0005]; AR5 WGII Part B: Regional Aspects [APP.0001.0004.0006].

193 AR5 WGIII, [APP.0001.0004.0007].

194 IPCC, Climate Change 2014 Synthesis Report, [APP.0001.0007.0115].

195 [EVI.2001.0005.2259].

196 CCA: Special Review: *Draft Report – Australia's future emissions reduction targets* (April 2015), [EVI.2002.0002.3822]; CCA, *Final Report on Australia's Future Emissions Reduction Targets* (2 July 2015), [APP.0001.0007.0148].

197 UNFCCC, *Report on the structured expert dialogue on the 2013-2015 review* (**UNFCCC Structured Dialogue Report**), [APP.0001.0013.0010].

of warming is limited"[198] and *"assessing the differences between the future impacts of climate risks for 1.5°C and 2°C of warming remains challenging*".[199]

152. On 11 August 2015, in advance of COP21, the Commonwealth communicated an intended Nationally Determined Contribution (**iNDC**) to reduce GHG emissions by 26-28% below 2005 levels by 2030 (**2030 Target**),[200] which had been approved by Cabinet.[201] Australia's iNDC became its first NDC upon its ratification of the Paris Agreement on 9 November 2016 (**2015 NDC**).[202]

153. Between 30 November 2015 and 13 December 2015, parties to the UNFCCC met at COP21 to negotiate, inter alia, the adoption of a new agreement on climate change.[203] At COP21, the parties to the UNFCCC resolved to adopt the Paris Agreement.[204] The Paris Agreement entered into force in Australia and globally on 9 December 2016.[205]

D.2.4 The IPCC's Report on 1.5°C

154. Although the parties to the Paris Agreement agreed to pursue efforts to limit global temperature increase to 1.5°C, at that time, as noted in the UNFCCC Structured Dialogue Report, the climate impacts at that temperature and the feasibility of achieving it had not been the subject of focussed consideration by the scientific community.[206]

155. Accordingly, at COP21, the parties to the UNFCCC resolved to invite the IPCC to provide a special report on the impacts of global warming of 1.5°C above pre-industrial levels and related global GHG emission pathways.[207] The IPCC

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198 UNFCCC Structured Dialogue Report at [107] [APP.0001.0013.0010] at [0030].

199 UNFCCC Structured Dialogue Report at "Message 10" [APP.0001.0013.0010].

200 Affidavit of Ms Kelly Jane McColl Pearce affirmed on 15 May 2023 (**Pearce Affidavit**) at [46] [WIT.2000.0001.0035] at [.0042]; affidavit of Ms Julia Rose Gardiner affirmed on 15 May 2023 (**Gardiner I**) at [23.1], [WIT.2000.0001.0001] at [.0006].

201 Pearce Affidavit at [44], [WIT.2000.0001.0035] at [.0041].

202 Gardiner I at [35], [WIT.2000.0001.0001] at [.0008].

203 Pearce Affidavit at [47], [WIT.2000.0001.0035] at [.0042].

204 UNFCCC, Report of the Conference of the Parties on its twenty-first section, held in Paris from 30 November to 13 December 2015 [EVI.2001.0001.0487].

205 3FASOC / Defence [37]; AS [340].

206 See similarly, T1135.1-31 (Meinshausen) [TRN.0013.1118].

207 UNFCCC, Decision 1/CP.21, [EVI.2001.0001.0487]. See also, AS [339].

accepted that invitation in April 2016.[208] This is described in the Special Report on 1.5°C as follows:[209]

> *Many countries considered that a level of global warming close to 2°C would not be safe and, at that time, there was only limited knowledge about the implications of a level of 1.5°C of warming for climate-related risks and in terms of the scale of mitigation ambition and its feasibility. Parties to the Paris Agreement therefore invited the IPCC to assess the impacts of global warming of 1.5°C above pre-industrial levels and the related emissions pathways that would achieve this enhanced global ambition.*

156. This process was also the subject of evidence from Prof Meinshausen,[210] which is summarised at [197] below.

157. In October 2018, the Summary for Policy Makers for the IPCC's Special Report on 1.5°C was adopted by the parties,[211] and the report published. Broadly, the IPCC reported that, in aggregate, climate-related risks for natural and human systems were lower at global warming of 1.5°C compared to 2.0°C,[212] and that "*limiting warming to 1.5°C is possible within the laws of chemistry and physics but would require unprecedented transitions in all aspects of society*",[213] as well as the use of carbon dioxide removal, which was subject to multiple feasibility and sustainability constraints.[214]

D.2.5 Events in 2020 and 2021

158. On 31 December 2020, the Australian Government communicated and updated its first NDC, reaffirming its 2030 target to reduce emissions by 26-28% below 2005 levels by 2030 (**2020 NDC Update**).[215] The steps that led to this communication are discussed in further detail below at [267]-[272].

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208 IPCC, *Global Warming of 1.5°C* (2018) (**Special Report on 1.5°C**), p. 4, [APP.0001.0007.0116].
209 IPCC Special Report on 1.5°C at p. v [APP.0001.0007.0116]. See also at pp. vii, 4.
210 See T1135.1-31 (Meinshausen) [TRN.0013.1118].
211 IPCC Special Report on 1.5°C at p. viii [APP.0001.0007.0116].
212 IPCC Special Report on 1.5°C, SPM [A.3], [APP.0001.0007.0116]. See also, SPM at [A.3.2] and Part B generally.
213 IPCC Special Report on 1.5°C at pp. v-vi, [APP.0001.0007.0116]. See also, SPM at [C.2].
214 IPCC Special Report on 1.5°C, SPM [C.3], [APP.0001.0007.0116].
215 Gardiner I at [23.3] and [33]-[38], [WIT.2000.0001.0001] at [.0006], [.0008]; 2020 NDC Update [EVI.2001.0001.0980].

159. In August 2021, the IPCC published the Working Group I Contribution to the Sixth Assessment Report (**AR6 WGI**) addressing the physical science basis of climate change.[216]

160. On 28 October 2021, the Australian Government communicated an updated first NDC in which it adopted a target of net zero emissions by 2050, reaffirmed the 2030 target in the 2015 NDC and adopted certain economic stretch goals (**2021 NDC Update**).[217] The steps that led to this communication are discussed in further detail below at [273]-[277].

D.2.6 Events in 2022 and 2023

161. In February 2022, the IPCC published the Working Group II Contribution to the Sixth Assessment Report (**AR6 WGII**) addressing the topics of impacts, adaptation and vulnerability.[218]

162. In April 2022, the IPCC published the Working Group III Contribution to the Sixth Assessment Report (**AR6 WGIII**) addressing the mitigation of climate change.[219]

163. On 16 June 2022, the Australian Government communicated an updated first NDC, which communicated a strengthened target for 2030 to reduce emissions by 43% below 2005 levels by 2030 and reaffirmed Australia's net zero by 2050 target (**2022 NDC Update**).[220] The steps that led to the setting of the 2022 target and the communication of the 2022 NDC are discussed at [278]-[282].

164. On 14 September 2022, the *Climate Change Act 2022* (Cth) commenced, having received Royal Assent the day before. Section 10 of that Act legislated the emissions reductions targets communicated in June 2022.

165. In March 2023, the IPCC published the Synthesis Report for the Sixth Assessment Report (**AR6 Synthesis Report**).[221]

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[216] [APP.0001.0007.0112].

[217] Gardiner I at [23.4] and [39]-[48], [WIT.2000.0001.0001] at [.0006], [.0009]; 2021 NDC Update [EVI.2001.0001.0248].

[218] [APP.0001.0007.0118].

[219] [APP.0001.0007.0113].

[220] Gardiner I at [23.5] and [49]-[57], [WIT.2000.0001.0001] at [.0006], [.0010]; 2022 NDC Update [EVI.2001.0001.0272].

[221] IPCC, *Sixth Assessment Report: Synthesis Report* [EVI.2002.0004.2977].

166. With that high-level overview of events in mind, these submissions turn to address the international framework established by the UNFCCC and Paris Agreement, before dealing with certain fundamentals of climate science and the evidence regarding the setting and communication of each of Australia's NDCs.

D.3 The relevant international framework

167. The applicants' case on the Primary Duty involves allegations regarding the identification of "*a Best Available Science Target*" and the implementation of "*measures*" to reduce Australia's GHG emissions consistent with that target.[222] It is therefore necessary to address the nature and function of the emissions reduction targets embodied in Australia's NDCs and the international framework within which those contributions were communicated.

D.3.1 The UNFCCC

168. The UNFCCC is a treaty established with the objective of stabilising GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.[223] The Convention provides that such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.[224] Australia is one of 197 parties to the UNFCCC, which entered into force on 21 March 1994.[225]

169. Article 4(1) of the UNFCCC provides for all parties to the Convention to take certain steps "*taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances*". Those steps include, among other things, the development, publication and updating of national inventories of anthropogenic emissions by sources and removals by sinks.[226] As the applicants note (at AS [333]), Article 4(2) identifies a number of commitments made by developed countries and other

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222 3FASOC [82](d) and (f).
223 UNFCCC, Art 2 [APP.0001.0003.0016] at [_0004]; see AS [333].
224 UNFCCC, Art 2 [APP.0001.0003.0016] at [_0004]; cf AS [333].
225 UNFCCC [APP.0001.0003.0016]. See also 3FASOC [32]-[33]; Defence [32]-[33].
226 UNFCCC, Art 4(1) [APP.0001.0003.0016_0005 to _0006].

Annex I parties. Australia is listed in Annex I. The commitments in Article 4(2) included commitments regarding:[227]

a) the adoption of national policies and the taking of corresponding measures on the mitigation of climate change, noting that the policies and measures would (among other matters) take into account the differences in parties' starting points and approaches, economic structures and resource bases, the need to maintain strong and sustainable economic growth, available technologies and other individual circumstances, as well as the need for equitable and appropriate contributions by each of the parties;

b) the periodic communication of detailed information on policies and measures of the kind referred to above, as well as projected anthropogenic emissions by sources and removals by sinks of GHGs; and

c) how the calculation of emissions by sources and removals by sinks of GHGs should take into account the best available scientific knowledge, including of the effective capacities of sinks and the contributions of such gases to climate change.

170. Article 7 of the UNFCCC established a COP, as the supreme body of the Convention, which was tasked with regularly reviewing the implementation of the Convention.[228]

D.3.2 The Paris Agreement

171. The Paris Agreement was negotiated and agreed at COP21 between 30 November and 13 December 2015.[229] The agreement was intended to enhance the implementation of the UNFCCC and aimed to strengthen the global response to the threat of climate change by holding the increase in global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels.[230] Article 2 of the Paris Agreement provided that:

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227 UNFCCC, Art 4(2) [APP.0001.0003.0016_0006 to _0007].

228 UNFCCC, Art 7 [APP.0001.0003.0016_0010 to _0012].

229 Gardiner I at [8], [WIT.2000.0001.0001] at [.0003]; UNFCCC, Decision 1/CP.21 [EVI.2001.0001.0487].

230 Paris Agreement, Art 2(1)(a) [APP.0001.0006.0017_.0004].

a) the parties agreed to "*strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty*" including by "*[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change*" (Art 2.1(a)); and

b) that agreement was to be "*implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances*" (Art 2.2).

172. Article 4 of the Paris Agreement provided that:

a) the parties agreed to reach global peaking of GHG emissions as soon as possible and "*to undertake rapid reductions thereafter in accordance with best available science*", so as "*to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty*" (Art 4.1);

b) each party was to prepare, communicate and maintain successive NDCs that it "*intends to achieve*", and pursue domestic mitigation measures "*with the aim of achieving the objectives of such contributions*" (Art 4.2);

c) each party's successive NDCs were to represent a progression beyond its then current NDCs and "*reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in light of different national circumstances*" (Art 4.3);

d) developed countries should continue taking the lead by "*undertaking economy-wide absolute emissions reductions targets*" (Art 4.4);

e) in communicating their NDCs, parties were to provide the information necessary for clarity, transparency and understanding in accordance with Decision 1/CP.21[231] and any relevant decisions of the COP (Art 4.8); and

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231 UNFCCC, Decision 1/CP.21 [EVI.2001.0001.0487].

f) the COP was to consider common time frames for NDCs at its first session, and a party could at any time adjust its existing NDC with a view to enhancing its level of ambition, in accordance with guidance adopted by the COP (Arts 4.10-11).

173. Decision 1/CP.21 relevantly requested that those parties whose iNDCs contained a time frame up to 2030 communicate or update those contributions by 2020 and do so every five years thereafter, pursuant to Art 4.9 of the Paris Agreement.[232] The decision also provided details of the types of information that may be included in NDCs.[233]

174. At COP24 in Katowice, Poland in December 2018, a number of decisions elaborating further rules and guidance for the implementation of the Paris Agreement were adopted.[234] Those decisions are known as the "*Katowice Climate Package*" or informally as the "*Paris Rulebook*".[235] Among the decisions forming part of the Paris Rulebook was Decision 4/CMA.1 which provided further guidance on the information that parties were to provide in their NDCs and technical guidance on how countries could account for their emissions reduction targets.[236] On its terms, the further guidance applied to the communication of second and subsequent NDCs.[237]

D.3.3 Incorporation into Australian law

175. The Paris Agreement is legally binding on Australia under international law.[238] However, consistent with the well-established principle that an international treaty "*can operate as a source of rights and obligations under Australian law only if, and to the extent that, it has been enacted by Parliament*",[239] neither the

232 UNFCCC, Decision 1/CP.21 at [24], [EVI.2001.0001.0487_.0491].
233 UNFCCC, Decision 1/CP.21 at [27], [EVI.2001.0001.0487_.0491]; Gardiner I at [15], [WIT.2000.0001.0001] at [.0004]and at [20]-[21] [WIT.2000.0001.0001] at [.0005].
234 Gardiner I at [15], [WIT.2000.0001.0001] at [22].
235 Gardiner I at [15], [WIT.2000.0001.0001] at [22].
236 UNFCCC, Decision 4/CMA.1 [EVI.2001.0001.0180]; Gardiner I at [15], [WIT.2000.0001.0001] at [22].
237 UNFCCC, Decision 4/CMA.1 [EVI.2001.0001.0180] at [7].
238 Gardiner I at [15] [WIT.2000.0001.0001] at [.0004]; T1353.9-.25 (Gardiner) [TRN.0016.1342].
239 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at [490] (Keane J) [CTH.0002.0001.0106], referring (among other authorities) to *Dietrich v The Queen* (1992) 177 CLR 292 at 305 (Mason CJ and McHugh J) [CTH.0002.0001.0253]*; Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-287 (Mason CJ and Deane J), 298 (Toohey J), 303-304 (Gaudron J), 315 (McHugh J) [CTH.0002.0001.0391].

UNFCCC nor the Paris Agreement themselves gave rise to rights and obligations under Australian law. Domestic legislation would be required for that purpose.

176. Since 14 September 2022, Australia's GHG emissions reductions targets have been legislated,[240] and the *Climate Change Act 2022* (Cth) contemplates the preparation and communication of future NDCs.[241]

D.4 The fundamentals of climate change science

177. The fundamentals of the climate science are not in dispute. However, there are some concepts and nuances, particularly in relation to causal relationships, which it is necessary to explain further. This section addresses those issues. It does so at a general level, rather than in relation to the Torres Strait. The current and projected impacts of climate change in the Torres Strait will be addressed in the context of CQs 1 and 2 in Parts E.1 and E.2 below.

D.4.1 Climate change

178. Anthropogenic climate change is the result of GHG emissions from human activity around the world.

179. Fundamental concepts underpinning the current understanding of climate change are summarised at AS [26]-[36]. Those matters are not in dispute.

180. In particular, the Commonwealth emphasises that it is not in dispute that global temperature increase is caused by the accumulation of GHG emissions from human activities everywhere on earth since around the Industrial Revolution.[242] In other words, a tonne of CO_2-equivalent (**CO_2-e**) emitted anywhere in the world, and at any time over at least the last 150 years, has made essentially the

[240] *Climate Change Act 2022* (Cth), s 10(1).

[241] *Climate Change Act 2022* (Cth), s 10(4) and (5).

[242] 3FASOC [8], [11(b)], [24(a)]; AS [34]-[36], [37.3], [39], [238]. See also, for example expert report of David Karoly dated 25 May 2023 (**Karoly 1**) at [21]-[26], [28], [29], [APP.0001.0003.0093]; expert report of Josep Canadell dated 6 October 2023 (**Canadell 1**) at p. 10, [EXP.2000.0001.0196]; expert report of Malte Meinshausen dated 14 July 2023 (**Meinshausen 1**) at [30], [APP.0001.0009.0001]; expert report of Andy Pitman dated 9 October 2023 (**Pitman**) at [21], [EXP.2000.0001.0286]. See also, T875.37-876.3 (Karoly) [TRN.0009.0844], T931.6-12 (Karoly) [TRN.0010.0920]; T1153.4-10 (Meinshausen) [TRN.0013.1118].

same contribution to global temperature increase as any other.[243] Prof Karoly opines that total global net anthropogenic GHG emissions increased from 1850-1900 by around 59 ± 6.6 Gt CO_2-e by 2019.[244] A gigatonne (**Gt**) is equal to 1 billion tonnes.

D.4.2 Near linear relationship between CO_2 and GHG emissions and temperature increase

181. There is also no dispute that there is a near (or "*quasi*") linear relationship between the accumulation of CO_2 in the atmosphere since around 1850 and global temperature increase.[245] The IPCC refers to that relationship as the "Transient Climate Response to Cumulative CO_2 Emissions" or "**TCRE**" and in their most recent report formulated the relationship as follows:[246]

> *Based on expert judgment that accounts for the incomplete coverage of all Earth system components, this results in a consolidated assessment that TCRE would fall likely in the range of 1.0-2.3°C per 1000 PgC, with a best estimate of 1.65°C per 1000 PgC (0.45°C per 1000 GtCO2).*[247]

182. Thus, there is no dispute that every tonne of CO_2 emissions causes an amount of radiative forcing that adds incrementally to global average temperature increase.[248]

183. The applicants further state (at AS [37]) that "*every tonne of GHG emissions adds to global warming*" and there is "*a similar near-linear relationship but with a different slope … between the increase of global temperature since the industrial revolution and cumulative emissions of CO2-equivalent gases*". The

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243 Canadell 1 at p. 10, [EXP.2000.0001.0196]; T899.8-900.11 (Karoly) [TRN.0009.0844]; T1329.26-36 (Pitman) [TRN.0015.1271].

244 Karoly 1 at [30] [APP.0001.0003.0093], noting the words *"per year*" in the third line should be removed: T866.23-24 (Karoly) [TRN.0009.0844].

245 3FASOC at [11(a)(i)]; Defence at [11(a)]; AS [37]. See also, Karoly 1 at [25]-[26], [29], [APP.0001.0003.0093]; Meinshausen 1 at [22], [APP.0001.0009.0001]; Canadell 1 at p. 8, [EXP.2000.0001.0196]; Pitman at [22], [EXP.2000.0001.0286]; T1329.30-36 (Pitman) [TRN.0015.1271].

246 IPCC AR6 WGI at Ch 5.5.1.4, p. 749, [APP.0001.0007.0112]. See also, Canadell 1 at p.8, [EXP.2000.0001.096]. See also, Defence [11(a)(ii)].

247 PgC = petagrams of carbon (C) = 1 Gt gigatons of C = 1 Bt billion tons of C = 1 x 10^{15} grams: see Canadell 1 at p. 8, [EXP.2000.0001.0196].

248 See, for example Karoly 1 at Fig 4 (from IPPC AR6 WGI), p. 13, [APP.0001.0003.0093]; Canadell 1 at p.8, [EXP.2000.0001.0196]; T1389.18-20 (Canadell) [TRN.0017.1379]; T1329.30-36 (Pitman) [TRN.0015.1271]. Cf 3FASOC [11(a)(i)].

Commonwealth agrees with those statements[249] but notes, as is accepted by the applicants, that different GHGs have different Global Warming Potentials (**GWPs**) to CO_2, so the slope of the relationship is different. Figure 4 extracted at AS [38] illustrates the TCRE for CO_2 (not GHGs as a whole).

184. Further, the quantum of total global warming over time will be determined by the cumulative effect of GHG emissions, combined with the offsetting cooling effect of other substances.[250]

D.4.3 "Best available science"

185. The concept of the "*best available science*" (**BAS**) is central to the applicants' pleading, and also pervades their submissions. It is, therefore, necessary to be precise about what is meant by the term in the context of the present proceedings. There are at least two questions: (1) what does BAS mean; and (2) what comprises the BAS?

186. The applicants have not provided a clear answer to the first question. As a preliminary point, the Commonwealth understands the term has been taken from the Paris Agreement, which provides that parties will undertake emissions reductions "*in accordance with [BAS]*" (Art 4.1: see [172.a)] above) and adaptation action "*based on and guided by*" inter alia, the BAS (Art 7.5).[251] Prof Karoly explains that he is not aware of a formal dictionary definition of BAS but opines that it is understood by the scientific community to mean "*the best information currently available that is derived from scientific sources, such as reputable high-impact peer-reviewed scientific journals, that has been accepted by a majority of the scientific community*".[252] It appears from the applicants' oral opening that this is also what they mean when they refer to BAS.[253] The applicants give a list of leading institutions.[254]

187. So it appears the applicants assert there are at least two aspects to the term; to qualify as BAS, the science must be: (1) contained in reports from a list of key

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249 See also, Karoly 1 at [27]-[28], [APP.0001.0003.0093]; supplementary expert report of Josep Canadell dated 13 February 2024 (**Canadell 2**), [EXP.2000.0004.0001].

250 IPCC AR6 WGI at 926 [APP.0001.0007.0112]. Cf Defence [11(a)(i)].

251 See AS [332]-[345].

252 Karoly 1 at [8], [APP.0001.0003.0093].

253 T12.7-13 and .28-29 (Applicants' oral opening) [APP.0001.0012.0004].

254 3FASOC [22].

leading institutions or high impact journals; and (2) accepted by a majority of the scientific community.

188. There is also a third aspect to the term: BAS in relation to what? The applicants have pleaded that certain sources constitute the BAS in relation to "*the causes and Impacts of Climate Change and the necessary actions to avoid the most dangerous Impacts of Climate Change*".[255] This definition is problematic in many respects. In particular, it raises questions as to what impacts are "*most dangerous*" and what actions are "*necessary*" to avoid those impacts — neither of which the applicants have clearly pleaded or addressed. It also uses the defined term "*Impacts of Climate Change*", which introduces an unwarranted degree of complexity and imprecision to the pleading. Finally, sources that address the actions "*necessary*" to avoid climate impacts may address matters of policy, and not just pure matters of science.

189. To avoid these issues, the Commonwealth submits that, for the purposes of these proceedings, the "BAS" may more appropriately be considered simply as a short-hand for the leading sources of climate change science, accepted by a majority of the scientific community. It is in this sense that the term "BAS" is used by the Commonwealth in these submissions.

190. As to the second question, what comprises the BAS, in the 3FASOC, the applicants contend that it is comprised by the reports of the IPCC, WMO, UNEP, CSIRO, BOM and CCA.[256] They press that contention in closing submissions.[257]

191. The Commonwealth accepts that the formal reports of the IPCC summarise the BAS at the time of those reports. The Commonwealth also accepts that the WMO and CSIRO are sources of BAS on climate change, though not every report published by the CSIRO will necessarily be the "BAS" as it may not have been accepted by a majority of the scientific community. The Commonwealth further accepts that the Australia State of the Environment Report 2021 and the joint BOM and CSIRO State of the Climate reports (listed by Prof Karoly at [10] of his report) are part of the BAS.

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255 3FASOC [22]. See also, AS [315].
256 3FASOC [22].
257 AS [21], [312].

192. The UNEP is not a scientific body, but the Commonwealth accepts that it provides reliable and credible public information informed by scientific information for policymakers. As such, although some aspects of the UNEP reports address policy matters (such as what countries should do to reduce GHG emissions), the Commonwealth accepts that the UNEP's calculations of the global emissions "gap" in its UNEP Gap Reports are BAS.

193. In relation to the CCA, the Commonwealth accepts that some parts of its reports summarise leading climate science. However, the CCA provided advice on mixed issues of science and policy (such as GHG emissions reductions targets), so it would not be appropriate to consider all aspects of its reports as part of the "BAS". The Commonwealth notes that Prof Karoly likewise did not include reports of the CCA in the list of "BAS" sources at [10] of his report, even though Prof Karoly was clearly aware of the work of the CCA, having been a member between 2012-2017.[258]

194. Prof Karoly also opines that two reports of the Australian Academy of Science (**AAS**) are part of the BAS.[259] The Commonwealth accepts that the 2015 AAS report[260] summarised the BAS at that time. The Commonwealth disagrees that the entirety of the AAS report entitled "*The risks to Australia of a 3°C warmer world*" (2021)[261] comprises part of the "BAS". This is because, as Prof Karoly acknowledged in cross-examination, it covers a number of topics other than climate science including policy recommendations,[262] and applies the "*precautionary principle*".[263] However, ultimately this dispute is of little moment in circumstances where Prof Karoly does not otherwise rely on it in his report,[264] and the applicants have not referred to those reports in closing submissions.

195. Finally, Prof Karoly opines at [10] of his report that "*several recent scientific review papers published in high-impact scientific journals*" which are "*referred to*

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258 Karoly 1 at [6], [APP.0001.0003.0093].

259 Karoly 1 at [10], [APP.0001.0003.0093].

260 AAS, *The science of climate change: questions and answers* (February 2015), [APP.0001.0007.0067].

261 [APP.0001.0007.0052].

262 T895.44-896.12 (Karoly) [TRN.0009.0844].

263 APP.0001.0007.0052, p. 8 (0007); T898.10-899.21 (Karoly) [TRN.0009.0844].

264 Prof Karoly again cites the AAS 3°C Report as part of the BAS on the impacts of climate change in Australia at [64(d)], but does not otherwise rely on that report as a source for his opinions on the impacts of climate change in Australia. Prof Karoly erroneously gives endnote 11 as the citation for the *State of the Environment Report 2021* at [67]-[68] of his report, and at [93]-[94] as the citation for the UNEP Gap Report referred to in [92].

in [his] report" are part of the BAS. The Commonwealth assumes this at least includes the article by Armstrong McKay et al (endnote 23).[265] The Commonwealth accepts that this article is leading climate science, though whether it is accepted by a majority of climate scientists is unclear. Further, the article was published after the Commonwealth took the actions said to constitute its breaches of duty. There are some other journal articles referred to in Prof Karoly's report, but as none of those were tendered, the Commonwealth does not address them.

196. The parties agree that the science (including the "BAS") on climate change, and what constitutes the "BAS" on climate change, evolves over time.[266] Thus, to state the obvious, "BAS" published in 2021 did not form part of the "BAS" in 2014.[267] Likewise, a report from 2010 may not be "BAS" in 2022 or today.[268] This is important to keep in mind when evaluating questions of duty and standard of care.

197. Amongst other things, the concern and focus of the global community has changed over time, most notably with the shift in focus from stabilising temperatures at 2°C in 2014 to the later increasing focus on stabilising at 1.5°C. This can be seen from the history set out in Part D.2, and was also the subject of evidence from Prof Meinshausen.[269] In short, as Prof Meinshausen explained, prior to the Paris Agreement, the focus had been on stabilising temperatures at 2°C but, after a political decision was made to include it in the Paris Agreement at the end of 2015, there was "*a flurry of activity*" as the "*science was reacting to the political decision*". Prof Meinshausen further explained that "*[i]t's not the role of IPCC to suggest those targets, it's the role of policy makers. But, once that target was set, the IPCC kicked into action*" to investigate the consequences of adopting that target,[270] which led to the IPCC's 2018 Report on 1.5°C.

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265 **Armstrong McKay et al**, "Exceeding 1.5C global warming could trigger multiple climate tipping points" (2022) 377 *Science* 1171, [APP.0001.0007.0063].

266 3FASOC [22A]. See also, T12.26-29 (Applicants' oral opening) [APP.0001.0012.0004].

267 See, for example T893.37-894.23 (Karoly) [TRN.0009.0844].

268 For example, Suppiah et al, *Observed and Future Climates of the Torres Strait Region* (2010) (**Suppiah 2010**), [APP.0001.0007.0053], which Prof Pitman opines is out of date: see Pitman, EXP.2000.0001.0286, [20]. Prof Karoly likewise acknowledges that it is *"somewhat out-of-date*": Karoly 1, APP.0001.0003.0093, [74]. See also, TRN.0010.0920, T949.46-47 (Karoly).

269 See generally, T1135.1-31, 1141 (Meinshausen) [TRN.0013.1118].

270 T1135.1-31 (Meinshausen) [TRN.0013.1118].

D.4.4 The current (global) impacts of climate change

198. It is agreed that climate change to date has included a number of changes and impacts globally: global temperature increase; ocean acidification; increase in ocean temperature; changing precipitation patterns; sea level rise and inundation of coastal lands; increase in the frequency, size and intensity of extreme weather events; and harm and destruction of ecosystems and non-human species.[271] It is also agreed that those impacts have been caused by the accumulation of anthropogenic GHG from around 1850 to date.[272]

199. The Commonwealth notes that throughout their pleading[273] and submissions[274] the applicants refer to the "*most dangerous*" impacts of climate change. This phrase is not defined in the pleading, submissions or expert evidence. The Commonwealth submits that the Court is not in a position to assess what are the "*most dangerous*" impacts of climate change.

D.4.5 The projected (global) impacts of climate change

200. There is also no dispute that, on average, globally, the frequency and/or severity of several of the impacts of climate change are projected to increase as global warming increases.[275] Further, the scientific consensus is that, on average, globally, many of the impacts of climate change are likely to be less severe at 1.5°C of global warming compared to 2°C and higher levels of global warming,[276] and less severe at 2°C compared to 3°C and higher levels of global warming (relative to the period 1850-1900).[277] However, several points must be made.

201. *First*, there is no evidence for the submission at AS [83] that each additional increment of temperature "*accelerates*" changes to climate and weather extremes.

202. *Secondly*, there are varying levels of confidence as to the relationship between particular levels of global temperature increase (such as 1.5°C vs. 2°C) and the

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271 3FASOC / Defence [10], [25]. See also, AS [45].
272 See, for example AS [46].
273 3FASOC [13], [17], [21], [22], [23(c)], [31], [82(c)].
274 AS [305.1], [307.3], [315], [346], [376], [444.3], [495.1].
275 See, for example 3FASOC [11(a)(ii)], [26], [27]-[28]; Defence [11(b)], [26], [27]-[28].
276 Special Report on 1.5°C, [APP.0001.0007.0116] at [.0019]; IPCC AR6 WGI SPM, [APP.0001.0007.0112] at [.0031]. See Amended CSR [27]. Cf AS [84].
277 IPCC AR6 WGI, Ch 4.6, [APP.0001.0007.0112].

frequency and severity of different impacts and risks. Climate models struggle to separate the impact of even large increments of warming, such as the 2 Watts per square metre difference between SSP1-2.6 and SSP3-7.0 by 2060.[278] Accordingly, there is considerable uncertainty as to the difference in frequency and severity of climate change impacts at significantly smaller increments.[279] The Representative Concentration Pathways (**RCPs**) and Shared Socioeconomic Pathways (**SSPs**) in the IPCC reports do not model impacts at that level of granularity.

203. *Thirdly*, the applicants accept that the projected impacts of climate change will be "*significant*" at global temperature increase of 1.5°C,[280] and (as addressed at [208]-[212] below and in detail in Part E.5) their causal theory is that increases in temperature lead to linear or at least incremental increases in impacts.

204. *Fourthly*, as noted at [197], since 2014, the view of the international community has shifted from aiming to stabilise temperatures at 2°C, to focus more recently on stabilising at 1.5°C.

205. Accordingly, it is not correct to contend, as the applicants do, that from at least 2014, the BAS has been that 1.5°C is a "*global temperature limit*".[281] The science has been to the effect that global temperature rise should be kept as low as possible and in December 2015 the signatories to the Paris Agreement chose "*well below 2°C*" and "*pursuing efforts*" to stabilise temperatures at 1.5°C as the aim. It is not in dispute that stabilising global average temperatures at 1.5°C of warming rather than 2°C would likely reduce the average impacts of climate change across the globe. However, a contention that 1.5°C is a threshold or cliff beyond which the impacts materially (as opposed to incrementally) worsen is not supported by the evidence. Indeed, many scenarios in which the world is predicted to stabilise at 1.5°C model that it will exceed that level by a couple of tenths of a degree in the medium term.[282]

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278 Pitman at [33]-[42], [EXP.2000.0001.0286].

279 Pitman at [38], [41], [EXP.2000.0001.0286]; T1311.37-1312.11 (Pitman) [TRN.0015.1271]. See also, IPCC AR6 WGI, Ch 11 at 1517 [APP.0001.0007.0112].

280 3FASOC [26A].

281 3FASOC [31]; AS [85].

282 See AS [43]-[44], and in particular, SSP1-1.9, with a best estimate of 1.6°C in the mid-term and 1.4°C in the long term, extracted from Karoly 1, Table 2, p. 33, [APP.0001.0003.0093], in turn extracted from AR6 WGI.

206. Moreover, it should be noted that, before AR6 was released in 2021, the BAS was to the effect that higher emissions were consistent with lower levels of global warming. This is recognised by Prof Karoly, who states that "*[t]he simulated global temperature increases in 2081-2100 are about 0.2°C to 0.3°C higher from the SSP emission scenarios than from the comparable RCP scenarios*".[283] For example, in AR5, RCP2.6 (meaning 2.6 Watts per m^2 radiative forcing)[284] had a median modelled warming of around 1.6°C,[285] whereas in AR6, SSP1-2.6 (with the same level of radiative forcing) is modelled as having a median modelled warming of around 1.8°C.[286] Similarly, the 2014 UNEP Gap Report reported that, to stay within 2°C, neutrality would need to be achieved somewhere between 2055 and 2070.[287] Accordingly, at the time the Commonwealth issued its first iNDC, the global consensus was that 2°C was the aim and that it would be possible to emit materially more GHGs globally and still achieve that aim. This must be kept in mind when considering any standard of care at that time.

207. Finally, the Commonwealth notes that in *Sharma FC*, the evidence was that there was a real risk that any emissions in excess of 2°C may cause a tipping cascade that would bring about a 4°C world.[288] There is no evidence to that effect in this case. The most recent evidence (summarised at [291] below) is that global temperatures should stabilise at 3°C based on current national policies and measures, and 2°C or below if all unconditional and conditional NDCs are implemented.

D.4.6 The applicants' contention that there is a near linear relationship between global temperature increase and climate impacts

208. The applicants put significant emphasis on the contention that the relationship between global temperature increase and the impacts of climate change (listed at [198] above) is "*near linear*" or "*approximately linear*".[289]

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283 Karoly 1 at [82], [APP.0001.0003.0093].
284 See T881.44 (Karoly) [TRN.0009.0844].
285 See Karoly 1 at Fig 10, p. 32, [APP.0001.0003.0093]; IPCC AR5 WGI, SPM.2, p 23, [EVI.2001.0006.0473] at [0507].
286 Karoly 1 at Table 2, p. 33 and [85], [APP.0001.0003.0093]. IPCC AR6 WGI, SPM.1, p 14, [EVI.2001.0003.0321].
287 UNEP Gap Report 2014, [APP.0001.0007.0169] at [. 0016].
288 *Sharma FC* at [279]-[383] (Allsop CJ), [APP.0001.0020.0101].
289 See AS [47]. See also, Karoly 1, [APP.0001.0003.0093], [42]-[62].

209. To unpack that contention, it is first necessary to define what the phrase "*linear relationship*" means in this context. The Commonwealth understands it to mean that, with every increment of global temperature increase, the impact increases a uniform amount — i.e. "*proportionately*".[290] So, if, for each degree, an impact increased by 2x, that would be a "*linear*" relationship. There would not be a linear relationship if it increased by 1x for the first degree and 0.5x for the second degree.

210. Although, as noted at [200] above, it is not disputed that, globally, on average, the frequency and/or severity of several of the impacts of the global impacts of climate change are projected to increase as global warming increases, it is doubtful whether that relationship could be described as "*approximately linear*".[291] Prof Karoly acknowledged that the IPCC does not use that term, rather he had just inferred it from Fig. 6 of his report.[292] He further acknowledged that there was substantial uncertainty in the figures in Fig. 6, for example, drought today is 0.7-4.1 times more likely than the baseline, meaning there are potentially 30% less droughts or 400% more.[293]

211. In any case, even if it is correct to describe the relationship between global average temperature change and some impacts of climate change on a global, average basis as "*approximately linear*", that does not mean that there is a linear relationship between global temperature increase and the intensification of an impact at a *regional or local* scale. As the AAS said in a 2015 report of which Prof Karoly was an author, "*[e]ven if a global change were broadly known, its regional expression would depend on detailed changes in wind patterns, ocean currents, plants and soils*".[294] Further, Prof Karoly himself recognises that each of the impacts listed at [198] vary geographically at any given level of global temperature increase.[295] Therefore, it cannot be inferred that a given level of

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290 T904.11 (Karoly) [TRN.0009.0844].

291 See generally, the cross-examination of Prof Karoly on this issue at T904-915 (Karoly) [TRN.0009.0844]; T923-924 (Karoly) [TRN.0009.0920].

292 See, for example T911.47-912.16 (Karoly) [TRN.0009.0844]; T923.14-23 (Karoly) [TRN.0010.0920].

293 T9244.1-30 (Karoly) [TRN.0010.0924].

294 APP.0001.0007.0067, p. 28 (0027), addressed at T925.4-15 (Karoly) [TRN.0010.0920].

295 Karoly 1 at [42] (ocean surface temperature), [43] (ocean acidification), [54] (precipitation), [58]-[60] (extreme weather events), [60] (impact on ecosystems and non-human species), [APP.0001.0003.0093]. See also, Karoly 2 at [12], [APP.0001.0015.0005]. Prof Karoly does not address sea level rise, but the regional variation is recognised by the experts on this topic: see expert report of Dr John Church dated 14 July 2023] (**Church**) at [50]-[51],

global temperature increase will cause a given level of intensification of an impact of climate change at a specific location, such as the Torres Strait.

212. Further, the parties agree that there is no linear or near linear relationship, even at a global level, between global temperature increase and the decline of sea ice or permafrost.[296]

D.4.7 Tipping points

213. "*Tipping points*" are critical thresholds beyond which a system reorganises, including abruptly and/or irreversibly.[297]

214. As the IPCC has said in its most recent report, AR6, the existence of tipping points for the climate system "*cannot be excluded*"[298] but they "*are not well understood*"[299] and "*[f]or global climate indicators, evidence for abrupt climate change is limited*".[300] There is some uncertainty as to the identification of tipping points, and further uncertainty as to their temperature thresholds.

215. The Commonwealth agrees that the risk of triggering tipping points increases with global temperature increase,[301] and that, therefore, the risk of triggering tipping points is lower at 1.5°C than at higher levels of global warming.[302] However, the meaning of the assertion (at AS [115]) that the risk increases "*greatly*" with higher levels of global warming is obscure. As Prof Karoly makes clear,[303] the science is to the effect that different potential tipping points are likely to be triggered at different temperature thresholds, though there is significant uncertainty as to what those thresholds are. As the IPCC said in AR6, "*[e]stablishing links between specific GWLs [global warming levels] with tipping points and irreversible behaviour is challenging due to model uncertainties and lack of observations*".[304]

[APP.0001.0009.0002]. See also, T915.28-32 (Karoly) [TRN.0009.0844]. See also, Lane et al at p. 0005, [APP.0001.0017.0002].

296 Karoly 1 at [44]-[49], [APP.0001.0003.0093].

297 See, for example 3FASOC [11(a)(iii)]; Defence [11(c)]; AS [114]. See also, IPCC AR6 WG1I SPM Footnote B.5.2 Footnote 34 at p 21; defined in Annex VII (Glossary), [APP.0001.0007.0112]; Karoly 1 at [119], [APP.0001.0003.0093].

298 IPCC AR6 WGI at Technical Summary, Box TS.9 at p. 59, [APP.0001.0007.0112].

299 IPCC AR6 WGI at [4.6.2.1] pp. 617-8, [APP.0001.0007.0112].

300 IPCC AR6 WGI at Technical Summary, p. 59, [APP.0001.0007.0112].

301 Defence [11(d)]. See also, for example IPCC AR6 WGI at [4.6.2.1] pp. 617-8 and at Technical Summary, Box TS.9, p. 106, [APP.0001.0007.0112].

302 Cf AS [115], Karoly 1 at [125], [APP.0001.0003.0093].

303 Karoly 1 at [124]-[126], [APP.0001.0003.0093]. See also, Defence [11(d)].

304 IPCC AR6 WGI at Technical Summary, Box TS.9, p. 59, [APP.0001.0007.0112].

However, the IPCC said that, "*[f]or global warming up to 2°C above 1850-1900 levels, paleoclimate records do not indicate abrupt changes in the carbon cycle (low confidence)*" and "*[t]here is no evidence of abrupt change in climate projections of global temperature for the next century*".[305]

216. In light of this uncertainty, as pointed out by Armstrong McKay et al (being the article cited by Prof Karoly in his report),[306] AR6 WG1 was "*not explicit about [the] temperature thresholds*" of the potential tipping points it identified[307] (in Table 4.10 of the report). Further, the IPCC reported varying levels of confidence that the potential tipping points would lead to "*abrupt climate change*". For example, "*Greenland Ice Sheet*" was a "*No, high confidence*" whereas "*Global Sea-Level Rise*" was "*Yes, high confidence*" and "*Antarctic Sea Ice*" was "*Yes, low confidence*". The IPCC also reported different levels of "*irreversibility*" and "*projected 21st century change under continued warming*", again, with different confidence levels.[308] Table 4.10 of the report highlights the different number of factors that are relevant to assessing the nature and potential impact of tipping points, and the uncertainties associated with those.

217. Even less was known about tipping points at the time AR5 WG1 was released, in November 2013.[309] In that report, the IPCC said:[310]

> *In some cases where multiple states and irreversibility combine, bifurcations or 'tipping points' can been [sic] reached ... however, there is no evidence for global-scale tipping points in any of the most comprehensive models evaluated to date in studies of climate evolution in the 21st century. ... There are also arguments for the existence of regional tipping points, most notably in the Arctic... although aspects of this are contested... .*

218. That can be seen, inter alia, by comparing Table 4.10 in AR6 with Table 12.4 of AR5, which records all except one (disappearance of summer Arctic Sea ice under high forcing scenarios such as RCP 8.5) as "*very unlikely*", "*exceptionally unlikely*" or "*low confidence*".[311] RCP 8.5 does not now represent a realistic warming trajectory for the world.[312]

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305 IPCC AR6 WGI at Technical Summary, Box TS.9, p. 59, [APP.0001.0007.0112].
306 Karoly 1 at [124]-[126], [APP.0001.0003.0093].
307 Armstrong McKay et al, p. 2, [APP.0001.0007.0063].
308 See AR6 WGI at Table 4.10, [APP.0001.0007.0112].
309 In addition to the IPCC reports, see T944.36-47 (Karoly) [TRN.0010.0920].
310 AR5 WGI at [1.2.2], p 129 [EVI.2001.0006.0473].
311 AR5 WGI at [12.5.5], p 1115, [EVI.2001.0006.0473].
312 T941.10-11 (Karoly) [TRN.0010.0920].

219. Finally, the assertion in the last sentence in AS [284.1], regarding what was said to have been known about tipping points from at least 2007, is not supported by the evidence cited by the applicants.

D.4.8 Time lag / climate "inertia"

220. A time lag exists between the release of GHGs and certain impacts of climate change.[313] The chief of these is sea level rise. As Prof Karoly explains, "*the magnitude of sea level rise is delayed relative to changes in global temperature and will continue for a very long time after global temperature has stabilised*".[314] This is because there is a lag between GHG emissions and sea level rise due to the time taken for deep warming and ice sheet melt.[315] Therefore, the sea level rise being experienced now is likely to be substantially the product of GHG emissions some time in the past, rather than emissions today.[316]

221. As a result of this time lag, even if all GHG emissions were to cease today, many impacts of climate change, particularly sea rise, would continue to manifest for hundreds of years to come.[317] Sea level rise is caused by warming of the ocean in combination with the melting of glaciers and ice sheets, all of which have long response times of decades to centuries and even millennia.[318]

222. This has relevance, not only to whether it can be said that any alleged breach of a duty by the Commonwealth caused any loss the applicants and group members experienced as a result of current impacts of climate change, such as sea level rise; it is also relevant in considering the scope and scale of the potential liability / indeterminacy.

D.4.9 Modelling the regional impacts of climate change

223. It does not appear to be seriously in dispute that predicting the future impacts of climate change in a specific location is difficult. The 2015 AAS report, of which Prof Karoly was an author, noted it is difficult to "*predict accurately or in detail*"

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313 See, for example T1131.27-1132.5 (Meinshausen) [TRN.0013.1118]. See also, IPCC AR6 WGI, Ch 9, p. 1215(glacier melt) and Ch 8.2.3.1, p. 1072 (permafrost melt), [APP.0001.0007.0112].

314 Karoly 1 at [105], [APP.0001.0003.0093].

315 Karoly 1 at [105], [APP.0001.0003.0093]; T1131.27-1132.5 (Meinshausen) [TRN.0013.1118].

316 See Church at [73], [84], [APP.0001.0009.0002].

317 Karoly 1 at [105], [APP.0001.0003.0093].

318 Church at [24], [99], [APP.0001.0009.0002].

the impacts of climate change at regional levels.[319] Prof Pitman's evidence echoed that sentiment,[320] as does the Lane et al article tendered by the applicants.[321]

224. Prof Pitman explains that the coarseness of the resolution of global climate models (that is, those used to simulate the global climate) means they are not very useful in assessing the impacts of climate change at a local level.[322] This does not appear to be in dispute.

225. Prof Karoly and Prof Pitman have differing views on the robustness of dynamical downscaling to model future regional climate impacts. Prof Karoly, though acknowledging there are uncertainties in dynamical downscaling models, considers that the Queensland model (the Future Climate Dashboard) can be relied upon to project some impacts of climate change in the Torres Strait.[323] On the other hand, Prof Pitman notes the scientific community has a "*diversity of views*" on dynamical downscaling, including some who "*strongly disagree*" with the approach.[324] He was "*nervous*" about relying on the Queensland downscaling model in this context.[325]

226. The Commonwealth submits it is not necessary for the Court to resolve this technical debate as it has no material impact on the issues for decision in the proceeding. In particular, the dispute does not apply to current impacts, which instead will be assessed based on direct observation. Nor does it have any material impact on the assessment of projected impacts in the Torres Strait for reasons explained in Part E.2 below. To the extent the Court considers it is necessary to resolve this dispute, the Commonwealth submits Prof Pitman's view

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319 AAS 2015 report (of which Prof Karoly was an author) at p. 5 (0004), [APP.0001.0007.0067]. See similarly, p. 28 (0027).

320 Pitman, [EXP.2000.0001.0286]. See also, T1320.15-19 (Pitman) [TRN.0015.1271].

321 APP.0001.0017.0002.

322 Pitman at [4]-[7], [EXP.2000.0001.0286].

323 Karoly 1 at [113]-[118], [APP.0001.0003.0093]; T892.17-39 (Karoly) [TRN.0009.0844]; T938-939, 948-49 (Karoly) [TRN.0010.0920].

324 Pitman at [15], [EXP.2000.0001.0286]. See generally, at [10]-[19]. See also, IPCC AR5 WGI at Ch. 9, p 744 (Pitman, footnotes 25-26), [EVI.2001.0006.0473], and Lafferty & Sriver, "Downscaling and bias-correction contribute considerable uncertainty to local climate projections in CMIP6", [EVI.2002.0024.0026]; Di Luca et al, "Challenges in the Quest for Added Value of Regional Climate Dynamical Downscaling" (2015) 1 *Curr Clim Change Rep* 10, [EXP.2000.0002.5761]; Hoffmann et al, "Bias and variance correction of sea surface temperatures used for dynamical downscaling", [EXP.2000.0002.5778]. See further, T1310.10-1311.2, 1336.43-1337.2 (Pitman) [TRN.0015.1271].

325 T1311.4-25 (Pitman) [TRN.0015.1271].

should be accepted, as it is supported by the scientific literature[326] (contra. AS [50]).

D.5 *Mitigating climate change*

D.5.1 Net zero

227. To halt global temperature increase, it is necessary to reach a balance between the amount of CO_2 emitted and removed from the atmosphere globally. This is called reaching **net zero** or more properly, **net zero CO_2 emissions**. In a broad sense, this means achieving net zero emissions of CO_2 from human activities,[327] though this may be achieved by reducing emissions or increasing carbon sinks, including natural carbon sinks (and, more likely, a combination of both).[328] It is not necessary to achieve net zero emissions of other GHGs to stabilise global temperatures,[329] though those emissions will need to be reduced from current global levels.[330]

228. As recognised by Allsop CJ in *Sharma FC*,[331] climate change is a global problem, contributed to by all countries, and all people, around the world, and it requires all nations to work together to dramatically reduce GHG emissions around the globe. Likewise, Prof Karoly said the Commonwealth "*cannot fix climate change on its own*"; that is, it is not possible for the Commonwealth acting alone to reach net zero and thus "*hold*" global temperature increase to 1.5°C, or even 2°C, or a higher figure.[332] This does not seem to be controversial.[333]

D.5.2 Global CO_2 budgets[334]

229. As there is a near linear relationship between CO_2 emissions and global temperature increase, science is able to calculate the cumulative amount of global CO_2 emissions that can be emitted globally over a certain timeframe to give a

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326 See the sources in footnote 324 above.
327 Cf AS [40]; Karoly 1 at [28], [APP.0001.0003.0093].
328 See, for example Karoly 1 at [128]-[134], [APP.0001.0003.0093]; T1399.1-7 (Canadell) [TRN.0017.1379].
329 Meinshausen 1 at [36], [APP.0001.0009.0001]. Contra. 3FASOC [11(a)(ii)].
330 See AS [41], including footnote 60.
331 *Sharma FC* at [227] [APP.0001.0020.0101]. See similarly at [213].
332 T888.36-889.1 (Karoly) [TRN.0009.0844]. Contra. 3FASOC [47], [49], [50].
333 See, for example AS [100.3] ("*the trajectories humanity adopts*").
334 Cf 3FASOC [43A]-[43B]; AS [118]-[121].

specified probability of holding global temperature increase at a given level.[335] This is known as a **global CO_2 budget**.

230. As the applicants accept (at AS [121]), there is a degree of scientific uncertainty as to the quantification of global CO_2 budgets. This is because, as Prof Meinshausen explains, there is some uncertainty in exactly how much warming each tonne of CO_2 emissions causes.[336] For this reason, global CO_2 budgets are formulated as a budget that keeps warming below a threshold with a given probability, such as 50%.[337]

231. The IPCC has formulated estimated global CO_2 budgets since AR5 in 2013,[338] though the references in AR5 are less clear than in AR6. In AR5 WG1, the IPCC reported as follows:[339]

> *Limiting the warming caused by anthropogenic CO2 emissions alone with a probability of >33%, >50%, and >66% to less than 2°C since the period 1861–1880, will require cumulative CO2 emissions from all anthropogenic sources to stay between 0 and about 1570 GtC (5760 GtCO2), 0 and about 1210 GtC (4440 GtCO2), and 0 and about 1000 GtC (3670 GtCO2) since that period, respectively. These upper amounts are reduced to about 900 GtC (3300 GtCO2), 820 GtC (3010 GtCO2), and 790 GtC (2900 GtCO2), respectively, when accounting for non-CO2 forcings as in RCP2.6. An amount of 515 [445 to 585] GtC (1890 [1630 to 2150] GtCO2), was already emitted by 2011.*

232. Essentially, that translates into a budget of around 1,010 $GtCO_2$ from 2011 for a 66% chance of staying within 2°C and of around 1,120 $GtCO_2$ for a 50% chance. AR5 did not provide budgets for holding global temperature increase to 1.5°C. As noted above, at that time, the Paris Agreement had not been signed and the focus was on stabilising temperatures at 2°C.

233. The first budgets for a chance of holding global temperature increase to 1.5°C appeared in the IPCC's Special Report on 1.5°C released in 2018. The budget for a 50% probability was 580 $GtCO_2$.[340]

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[335] See, for example Meinshausen 1 at [14]-[24], [APP.0001.0009.0001]. Contra. 3FASOC [11(c)(iii)] (global GHG emissions budget).
[336] Meinshausen 1 at [20], [APP.0001.0009.0001].
[337] Meinshausen 1 at [20], [APP.0001.0009.0001].
[338] Meinshausen 1 at [15], [APP.0001.0009.0001].
[339] IPCC AR5 WGI at SPM [E.8], p. 27, [EVI.2001.0006.0473].
[340] IPCC Report on 1.5°C at SPM [C.1.3], [EVI.2001.0005.2668].

234. In August 2021, in AR6 WG1, the IPCC calculated global CO_2 budgets from the beginning of 2020 for a chance of holding global temperature increase to 1.5°C, 1.7°C and 2.0°C. The global CO_2 budget for a 50% change of holding global temperature increase to 1.5°C was 500 $GtCO_2$ and to 2.0°C was 1,350 $GtCO_2$.[341]

D.5.3 GHG emissions reductions targets

235. Most of the States parties to the Paris Agreement, including Australia, have now set GHG emissions reductions targets.[342] A GHG emissions reduction target is a communication of a nation party's ambition to lower GHG emissions by a certain amount by a certain date. Parties communicate their target through their NDC, which is lodged under the Paris Agreement.

236. The applicants apparently contend that national GHG emissions reductions targets can be derived from the "BAS" alone.[343] The experts do not agree. The experts from both parties were adamant that determining a GHG emissions reduction target was a matter of "*policy*" and "*value judgements*"; a "*normative question*", and not a question of climate science.[344] As Prof Meinshausen explained, "*[t]here can be no consensus amongst climate scientists [as to the approach] because its inherently a value judgment*".[345] A similar point was made in the 2015 AAS report, of which Prof Karoly was an author: "*Decisions are informed by climate science, but fundamentally involve ethics and value judgements*".[346] Dr Canadell said, "*it's a value judgement of what I think … but that has nothing to do with science*".[347]

237. Further, as the applicants appear to accept,[348] there is "*no consensus*" as to how targets should be set.[349] Prof Meinshausen explained that the States Parties to the Paris Agreement have been unable to agree on an approach in climate

341 IPCC AR6 WGI at Table SPM.2, p 29, [APP.0001.0007.0112].
342 146 out of 194 Parties per UNEP Gap Report 2022 at p. 12, [APP.0001.0007.0166].
343 3FASOC [45], [49].
344 T889.24-25 (Karoly) [TRN.0009.0844]; T1126.20-34, 1128.14-20, 1136.37-1137.24 (Meinshausen) [TRN.0013.1118]; T1399.46-1400.3, 1401.14-1402.16 (Canadell) [TRN.0017.1379]. See also, Defence [45], [49].
345 T1126.26-27 (Meinshausen) [TRN.0013.1118].
346 AAS, *The science of climate change: questions and answers* (February 2015) at p. 31 (0030), [APP.0001.0007.0067]. See T894.32 (Karoly) [TRN.0009.0844], noting he was an author of this report though he was not a fellow of the AAS at that time.
347 T1399.46-1400.1 (Canadell) [TRN.0017.1379].
348 See AS [126].
349 Meinshausen 1 at [51], [APP.0001.0009.0001]; T1126.24-47 (Meinshausen) [TRN.0013.1118].

negotiations, and that there "*will never be an agreement on a specific allocation formula*" because there's "*always a political – geopolitical negotiation dimension to it*".[350] It was for this reason, he explained, that the Paris Agreement adopted a "*bottom up*" approach, whereby each country determined its target (hence, a "*nationally determined contribution*"), rather than a "*top down*" approach whereby each country's NDC was determined by reference to an agreed approach or formula.[351] That is, not only was there no consensus as to a single approach that must be taken; the consensus was that each country should be able to determine its own approach.

238. Prof Meinshausen's evidence was that climate science has discussed three "*broad categories*" of approaches to dividing up the GHG emissions "pie" between all countries on earth, if a purely scientific or mathematical approach was taken.[352] Those approaches are (1) **Equality** or **equal per capita**; (2) **Historical responsibility**; and (3) **Grandfathering**.[353] The Commonwealth agrees with the summary explanation for each of those broad approaches at AS [127], subject to the matter addressed in the paragraph below. Prof Meinshausen accepted that these are three "*broad categories*", within which there are a multitude of different approaches as well as hybrid approaches[354] — and, further, as noted, there is in any case no agreement that any of these approaches should be taken.

239. The Commonwealth disagrees with the contention at AS [127] that "*grandfathering approaches do not incorporate principles of equity or fairness required under Article 2(1)(a) of the Paris Agreement*".[355] First, the Commonwealth observes that that is a legal opinion from Prof Meinshausen which is outside his field of expertise and inadmissible or should be given no weight. In any case, Prof Meinshausen accepted that there was no consensus on what the reference to "*equity and the principle of common but differentiated responsibilities*" means in Article 2(1)(a).[356] The Commonwealth submits that grandfathering approaches can be compatible with equity and fairness, while

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350 T1126.15-47, 1127.10-15 (Meinshausen) [TRN.0013.1118].
351 T1127.24-47 (Meinshausen), [TRN.0013.1118].
352 Meinshausen 1 at [51], [53], [APP.0001.0009.0001].
353 Meinshausen 1 at [51]-[57], [APP.0001.0009.0001].
354 Meinshausen 1 at [51], [53], [APP.0001.0009.0001]; T1125.40-1125.13, 1126.29-31 (Meinshausen) [TRN.0013.1118].
355 See similarly, AS [130.1], [327].
356 T1127.19-1128.20 (Meinshausen) [TRN.0013.1118].

taking into account the fact that some economies that are more heavily dependent on high GHG emitting technologies and industries may need longer to transition.

240. The Commonwealth also disagrees with AS [129]. The Commonwealth does not dispute that the three categories of approaches identified by Prof Meinshausen represent the three "*broad categories*" of approaches to dividing up GHG budgets that have been discussed in the scientific community. However, the Commonwealth did cross-examine Prof Meinshausen on these approaches, at some length,[357] to make the points summarised above, including that there is no consensus amongst scientists or nations as to how targets should be developed but that it is fundamentally a question of policy and value judgement for each individual country. Therefore, it is not established, if this be implied by the applicants, that the grandfathering approach taken in Prof Meinshausen's report is some kind of "*baseline*" which the climate science establishes Australia ought to have met or exceeded.[358] Likewise, it is inapt to say the scientific community has "*accepted*" these methodologies; as Prof Meinshausen explained, they have not been "*accepted*" by either nations or scientists, merely discussed as different approaches that may be taken or used in combination.

D.5.4 The reporting of GHG emissions

241. The territorial emissions reported under the UNFCCC and Paris Agreement are not equivalent to any of the emissions often referred to as scope 1, scope 2 and scope 3 emissions.[359] In accordance with the UNFCCC Guidelines, States Parties (including Australia) report scope 1 emissions and scope 2 and 3 emissions to the extent they occur within their own territory.[360] Scope 2 and 3 emissions that

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357 T1125-1128 (Meinshausen) [TRN.0013.1118].

358 See, for example, T1140.10-15 (Meinshausen) [TRN.0013.1118], where Prof Meinshausen said "*the equivalent of a 0.97 target could have been a little bit lower, could have been a little bit higher…*".

359 See, for example, Karoly 1 at [135], [APP.0001.0003.0093]; T945.43-44 (Karoly) [TRN.0010.0920].

360 2006 Guidelines at Ch 1, p. 0239 "National territory", [EVI.2002.0003.0236]; 2006 Guidelines at Ch 8, p. 0251, [EVI.2002.0003.0248]; 2019 Guidelines at Ch 1, p. 0287 "National territory" [EVI.2002.0003.0282]; 2019 Guidelines at Ch 8, p. 0308, [EVI.2002.0003.0305]. See also, Canadell 1 at p. 4, [EXP.2000.0001.0196]; Meinshausen 1 at [24], [APP.0001.0009.0001]; Karoly 1 at [136], [APP.0001.0003.0093]; T946.5-36 (Karoly) [TRN.0010.0920].

occur in another country will be included in the GHG emissions reporting of the country in whose territory they occur. This avoids double-counting.[361]

D.5.5 Australia's GHG emissions

242. Statistics concerning Australia's emissions are summarised in Dr Canadell's first report.[362] They are reported in $MtCO_2$-e, being a megatonne (1 million tonnes) of CO_2 equivalent emissions.[363] As Dr Canadell's report shows, Australia's emissions have dropped each year from 2014 to 2021, from around 556 $MtCO_2$ in 2014, to around 464 $MtCO_2$-e in 2021 (around 17%),[364] despite an increase in population during that time (of around 11%).[365]

243. Since 2014, Australia's GHG emissions have made up only around 1% of total global annual GHG emissions. This is not in dispute.[366] It is shown in Table 2 in Dr Canadell's first report, which uses the data from EDGAR.[367] For completeness, the Commonwealth notes that Australia's GHG emissions according to the "*most comprehensive accounts*" from Department of Climate Change, Energy, the Environment and Water (**DCCEEW**) were significantly (up to around 100 Mt annually) lower than reported by EDGAR during the relevant period.[368]

244. Between 2014 and 2022, Australia has ranked between 14th to 17th globally in terms of absolute emissions and 10th (except 9th in 2020) in terms of per capita emissions (using the EDGAR figures). Again, these figures are not in dispute.[369] The countries above Australia in the absolute rankings have annual GHG emissions which are many multiples higher than Australia's emissions. For

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361 2006 Guidelines at Ch 1, p. 0239, 1.1 "Concepts", [EVI.2002.0003.0236]; 2019 Guidelines, Ch 1, p. 028, 6 1.1 "Concepts", [EVI.2002.0003.0282]. See also, T946.24-36 (Karoly) [TRN.0010.0920].

362 Canadell 1 at pp. 2-6, [EXP.2000.0001.0196].

363 See Meinshausen 1 at [25], [APP.0001.0009.0001].

364 Canadell 1 at Table 1, p. 2, [EXP.2000.0001.0196].

365 See Canadell 1 at Table 3, p. 6 "Australian Population (ABS)", [EXP.2000.0001.0196].

366 See, for example, Karoly 1 at [138], APP.0001.0003.0093; T889.3-6 (Karoly) [TRN.0009.0844].

367 The Emissions Database for Global Atmospheric Research. See Canadell 1 at Table 2, p. 5 [EXP.2000.0001.0196].

368 Canadell 1 at p. 2, especially Table 1, [EXP.2000.0001.0196]. Prof Canadell comments on this at p. 6 of his report, final sentence.

369 See Meinshausen 2 at Table 1 [APP.0001.0015.0010]; AS [477]. Prof Meinshausen's data indicates that Australia is ranked 11th in terms of per capita emissions from 2014-2021. See also, EDGAR, GHG emissions of all world countries (2023), [EVI.2002.0003.0725].

example, in 2022, the two largest emitters, China and the US, had emissions which were 27 times and almost 11 times higher than Australia's emissions.[370] Together, the countries with emissions larger than Australia made up 65% of global annual emissions.[371]

D.6 The setting of Australia's GHG emissions reduction targets

245. This section addresses the evidence regarding the setting of Australia's initial iNDC in 2015, and subsequent NDC updates in 2020, 2021 and 2022.

D.6.1 Overview of lay evidence

246. As is evident from the high-level chronology above at [150], the formulation of Australia's first iNDC pre-dated the adoption of the Paris Agreement. The formulation of the 2015 iNDC was preceded by a substantial body of work, including work undertaken by the UNFCCC Taskforce within the PM&C in advance of COP21 in Paris.

247. Ms Kelly Pearce gave evidence about the work of the UNFCCC Taskforce and the setting of the target embodied in the 2015 iNDC,[372] while Ms Julia Gardiner gave evidence about the targets embodied in the 2020, 2021 and 2022 communications.[373]

248. Ms Pearce was an Assistant Secretary at PM&C in 2014 to 2015 and was the head of the UNFCCC Taskforce.[374] She reported to the Deputy Secretary (Economic) at PM&C and was also responsible for briefing the Prime Minister and the Minister for Foreign Affairs (and their offices) on matters relating to the work of the UNFCCC Taskforce.[375] She obtained instructions and comments on the work of the UNFCCC Taskforce from these Ministers as the work of the taskforce progressed.[376] At the time she gave evidence to the Court, she was a First

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370 For figures for China and US see Canadell 1 at p. 6, compared to EDGAR figures for Australia at Table 2, p. 5, [EXP.2000.0001.0196].]

371 Figures for countries at Canadell 1, p. 6, compared to total EDGAR figure for 2022 at Table 2, p. 5, [EXP.2000.0001.0196].

372 See Pearce Affidavit [WIT.2000.0001.0035].

373 See Gardiner I [WIT.2000.0001.0001; affidavit of Julia Rose Gardiner affirmed on 6 October 2023 (**Gardiner 2**) [WIT.2000.0001.0030].

374 Pearce Affidavit at [8], [WIT.2000.0001.0035].

375 Pearce Affidavit at [18], [WIT.2000.0001.0035].

376 Pearce Affidavit at [18], [WIT.2000.0001.0035].

Assistant Secretary responsible for the Higher Education Division within the Department of Education.[377] Ms Pearce was a senior Commonwealth public servant with a long and distinguished career in public administration.[378]

249. Ms Gardiner was the Director of Negotiations, Strategy and Analytics in the International Climate and Energy Division of DCCEEW at the time of giving evidence.[379] She had worked in climate related roles since 2014,[380] and had extensive experience in international climate negotiations, having joined the International Climate Change Negotiations Section of DCCEEW's predecessor Department in 2015.[381] She had attended COP21 in Paris, and since then had attended each subsequent COP as a member of the official Australian delegation.[382] Her responsibilities included managing and developing the capabilities of the DCCEEW's team of climate negotiators and supervising the preparation and submissions of documents that communicate Australia's NDCs to the UNFCCC Secretariat.[383]

250. Ms Pearce and Ms Gardiner gave careful and considered evidence. There could be no doubt that each was a truthful, credible and reliable witness.

D.6.2 PM&C's UNFCCC Taskforce and the 2015 iNDC

251. The formulation of the 2015 iNDC was informed by the work of the UNFCCC Taskforce within PM&C, which was announced in December 2014[384] and formally established in around January 2015.[385] The terms of reference for the UNFCCC Taskforce were set out in the Australian Government: *Setting Australia's Post-2020 Target for Reducing Greenhouse Gas Emissions: Final Report of the UNFCCC Taskforce* (August 2015) (**UNFCCC Taskforce Final Report**).[386] Those terms of reference indicated (among other matters) that the UNFCCC Taskforce:

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377 Pearce Affidavit at [1], [9], [WIT.2000.0001.0035].
378 Pearce Affidavit at [4]-[9], [WIT.2000.0001.0035].
379 See Gardiner I at [1], [WIT.2000.0001.0001].
380 See Gardiner I at [8], [WIT.2000.0001.0001].
381 See Gardiner I at [10], [WIT.2000.0001.0001].
382 See Gardiner I at [11], [WIT.2000.0001.0001].
383 See Gardiner I at [12], [WIT.2000.0001.0001].
384 Pearce Affidavit at [14], [WIT.2000.0001.0035]; Media Release, *Assisting the Global Response to Climate Change* (10 December 2014), [EVI.2001.0001.2320].
385 Pearce Affidavit at [15], [WIT.2000.0001.0035].
386 UNFCCC Taskforce Final Report Box 1.1, [EVI.2001.0001.2411] at [.2424].

a) had been established to coordinate the provision of information to the government; and

b) was also responsible for the "*coordination and advice on options to reduce Australia's greenhouse gas emissions and adapt to our changing climate and the range, combination and cost of domestic instruments that could be used to meet a post-2020 target.*"

252. A number of groups were established within government to provide input into the work of the UNFCCC Taskforce, including a Deputy Secretary Steering Committee, a Working Group and an Interdepartmental Committee.[387] The groups were constituted by public servants from a number of central agencies and line agencies, including PM&C, the Department of Foreign Affairs and Trade (**DFAT**), the Department of the Environment, the Department of Treasury, the Department of Agriculture and the Department of Finance (as needed).[388]

253. In March 2015, the UNFCCC Taskforce published an Issues Paper entitled PM&C, *Setting Australia's post-2020 target for greenhouse gas emissions* (**Issues Paper**).[389] The Issues Paper commenced by acknowledging the context in which the UNFCCC Taskforce had been established, being that the government had committed to reviewing GHG emissions reduction targets and settings in the context of negotiations for a new global climate agreement to be concluded at COP21 in Paris. Having identified the context for the review, the first matter addressed in the Issues Paper, prior to any further substantive discussion was the need for a strong and effective global agreement that addressed carbon leakage and delivered environmental benefit, which was said to be in Australia's national interest.[390] It was noted that the latest climate information from the CSIRO and Bureau of Meteorology indicated that "*Australia has warmed by 0.9°C since 1910, with most of the warming since 1950*" and that *"[t]here has been a rise in sea levels of about 20 centimetres over the past century, increased ocean acidification and a shift in rainfall patterns."*[391] It was noted that Australia's climate would continue to have high variability and that average temperatures

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387 Pearce Affidavit at [20], [WIT.2000.0001.0035].
388 Pearce Affidavit at [20], [WIT.2000.0001.0035].
389 Pearce Affidavit at [16], [WIT.2000.0001.0035]; Issues Paper, [EVI.2001.0001.2517].
390 Issues Paper, [EVI.2001.0001.2517] at [.2519].
391 Issues Paper at Endnote i, [EVI.2001.0001.2517] at [.2519], referring to the CSIRO and BOM, *State of the Climate 2014* (2015) [APP.0001.0003.0006].

were *"projected to continue to increase and extreme rain events are projected to become more intense*" while *"[a]verage rainfall in southern Australia is projected to decrease*".[392]

254. After providing context on the international efforts to address climate change, the Paris Agreement, Australia's national circumstances and Australia's action on climate change, the Issues Paper addressed the setting of Australia's post-2020 emissions reduction target.[393] The Issues Paper invited submissions on Australia's post-2020 emissions reduction target.[394]

255. The UNFCCC Taskforce developed a draft stakeholder consultation plan, and identified a range of relevant stakeholders.[395] The taskforce received 498 submissions in response to the Issues Paper,[396] which were considered by the taskforce.[397] The evidence discloses that a range of people and organisations provided submissions in relation to the 2030 emissions reduction target, including the AAS, the Australian Conservation Foundation, the Business Council of Australia, and the Minerals Council of Australia.[398] The UNFCCC Taskforce consulted with stakeholders through a series of Ministerial Roundtables that were held in Sydney, Perth, Melbourne and Brisbane, which involved 64 business, community, environmental and Indigenous stakeholders.[399] It also engaged with stakeholders at events hosted by other organisations.[400]

256. The UNFCCC Taskforce considered economic modelling prepared by Prof Warwick McKibbin AO, which considered the economic implications for Australia of post-2020 commitments under the anticipated Paris Agreement, and the economic implications of four potential 2030 targets for the Australian

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392 Issues Paper at Endnote ii, [EVI.2001.0001.2517] at [.2519], referring to the CSIRO and BOM, *State of the Climate 2014* (2015) [APP.0001.0003.0006].
393 Issues Paper [EVI.2001.0001.2517] at [.2522–.2523].
394 Issues Paper [EVI.2001.0001.2517] at [.2523].
395 UNFCCC Taskforce Stakeholder Consultation Plan and supporting materials (20 February 2015), [PMC.2004.0007.7332]; UNFCCC Taskforce Stakeholder Tier List, [PMC.2004.0007.7334].
396 Pearce Affidavit at [29], [WIT.2000.0001.0035].
397 Pearce Affidavit at [25], [29], [WIT.2000.0001.0035].
398 Pearce Affidavit at [30]-[31], [WIT.2000.0001.0035].
399 Pearce Affidavit at [23], [WIT.2000.0001.0035].
400 Pearce Affidavit at [32], [WIT.2000.0001.0035].

economy.[401] It also considered economic modelling undertaken by RepuTex,[402] ClimateWorks,[403] and the Treasury and the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education.[404]

257. The UNFCCC Taskforce also gave consideration to the iNDCs notified by other countries in advance of COP21, and particularly those of countries with large economies and Australia's trading partners.[405]

258. The UNFCCC Taskforce Final Report was substantially finalised by 30 July 2015.[406] The report noted that, at the point of its publication, the UNFCCC Parties had agreed to a collective goal of limiting global average temperature rise to less than 2°C above pre-industrial levels.[407] In order to have a meaningful global action, all countries needed to act to limit and reduce their GHG emissions which meant that the Paris Agreement "*must deliver full participation*".[408]

259. As with the Issues Paper, the first substantive component of the UNFCCC Taskforce Final Report commenced by addressing the climate science.[409] It referred to the most recent data and analysis of the BOM and CSIRO concerning temperature increase and resulting climate impacts in Australia,[410] and noted the work of the IPCC, its six yearly review cycle and the circumstance that its assessments "*are subject to multiple rounds of review from IPCC member governments, including the Australian Government, registered experts and*

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401 Pearce Affidavit at [35], [WIT.2000.0001.0035]; Prof McKibbin, *Report 1: 2015 Economic Modelling of International Action under a New Global Climate Change Agreement* (August 2015) (**McKibbin 1**), [EVI.2001.0001.2322]; Prof McKibbin, *Report 2: 2015 Economic Modelling of Australian Action Under a New Global Climate Change Agreement* (August 2015) (**McKibbin 2**), [EVI.2001.0001.2377].

402 Pearce Affidavit at [36.2], [WIT.2000.0001.0035]; RepuTex Carbon, *The Lost Years: Australian Abatement Cost Curve to 2020 & 2030* (April 2015), [PMC.2005.0001.0001].

403 Pearce Affidavit at [36.1], [WIT.2000.0001.0035]; ClimateWorks, *Pathways to Deep Decarbonisation in 2050* (September 2014), [EVI.2001.0001.1961]; ClimateWorks, *Pathways to Deep Decarbonisation in 2050: How Australia can prosper in a low carbon world (Technical Report)* (September 2014), [EVI.2001.0001.2010].

404 Pearce Affidavit at [36.3], [WIT.2000.0001.0035]; DICCSTRE, *Climate Change Mitigation Scenarios: Modelling Report Provided to the Climate Change Authority in Support of its Caps and Targets Review* (2013), [EVI.2001.0001.2179].

405 Pearce Affidavit at [38]-[40], [WIT.2000.0001.0035]; UNFCCC Taskforce Final Report at Figure 2.8 and Figure 5.2, [EVI.2001.0001.2411] at [.2437] and [.2461].

406 Pearce Affidavit at [42], [WIT.2000.0001.0035].

407 UNFCCC Taskforce Final Report, [EVI.2001.0001.2411] at [.2419].

408 UNFCCC Taskforce Final Report, [EVI.2001.0001.2411] at [.2419].

409 UNFCCC Taskforce Final Report, [EVI.2001.0001.2411] at [.2428-.2429].

410 UNFCCC Taskforce Final Report, [EVI.2001.0001.2411] at [.2428-.2429], referring in the references to the CSIRO and BOM, *State of the Climate 2014* (2015) [APP.0001.0003.0006].

observer organisations". The report then provided a high level overview of the impacts of climate change.[411] It specifically noted that *"Australia's coastal areas, including our major cities, are vulnerable to sea level rise and storm surge"* and that "*[v]ulnerable areas include … wetlands and mangroves*", which played *"an important role in reducing the impacts of floodwaters produced by coastal storm events and tropical cyclones, as well as in physically buffering climate change impacts, including sea level rise".*[412] The report also noted the impacts of climate change on ecosystems and fisheries, including as a result of higher sea temperatures, changes in ocean currents and acidity.[413] Ms Pearce gave evidence that the UNFCCC Taskforce's consideration of the climate science extended beyond the overview in its report, that the IPCC reports were accepted, and that the CCA reports were considered by government.[414]

260. Consistent with the complex and polycentric nature of the policy exercise with which the UNFCCC Taskforce was engaged, the report proceeded to consider a number of other factors. Those factors included: the iNDCs promulgated by other countries, including Australia's trading partners, in advance of COP21;[415] the historical background to the Paris Agreement negotiations;[416] the views of the diverse range of stakeholders that were obtained through the public consultation process,[417] including the CCA (with which the UNFCCC Taskforce liaised);[418] and Australia's national circumstances.[419]

261. As to the CCA, the UNFCCC Taskforce was cognisant of what the CCA was doing,[420] and worked closely with it in undertaking its review.[421] Ms Pearce was aware of the CCA's earlier 2014 CCA Report,[422] and considered the outcomes of

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411 UNFCCC Taskforce Final Report, [EVI.2001.0001.2411] at [.2428-.2429].
412 UNFCCC Taskforce Final Report, [EVI.2001.0001.2411] at [.2429].
413 UNFCCC Taskforce Final Report, [EVI.2001.0001.2411] at [.2429].
414 T1515.39-T1516.6 (Pearce) [TRN.0018.1455].
415 UNFCCC Taskforce Final Report, [EVI.2001.0001.2411] at [.2430, .2436-2437].
416 UNFCCC Taskforce Final Report, [EVI.2001.0001.2411] at [.2434-.2435].
417 UNFCCC Taskforce Final Report, [EVI.2001.0001.2411] at [.2438-.2444].
418 UNFCCC Taskforce Final Report, [EVI.2001.0001.2411] at [.2440].
419 UNFCCC Taskforce Final Report, [EVI.2001.0001.2411] at [.2445-.2456].
420 T1463.12-.23 (Pearce) [TRN.0018.1455].
421 T1487.4-.5 (Pearce) [TRN.0018.1455]. Ms Pearce's evidence in this regard is consistent with the contemporaneous documents: see, by way of example PMC.2007.0005.7609; PMC.2007.0007.2590; PMC.2007.0007.2591; PMC.2007.0007.2560; PMC.2004.0001.0693; PMC.2004.0001.0693.
422 T1478.45-T1479.2 (Pearce) [TRN.0018.1455]; see also CCA, *Reducing Australia's Greenhouse Gas Emissions – Targets and Progress Review: Final Report* (February 2014), [APP.0001.0004.0015].

that review.[423] Following the 2014 CCA Report, the CCA was commissioned in December 2014 to undertake a Special Review,[424] that occurred in parallel with the work of the UNFCCC Taskforce in the first half of 2015, resulting in the publication of a Draft Report in April,[425] and a Final Report in July 2015.[426] Ms Pearce gave evidence that the CCA reports were a key input into the government's consideration of what the targets would be.[427] However, as Ms Pearce explained, ultimately it was a matter for the executive government how they took into account the CCA Report and the UNFCCC Taskforce Report.[428]

262. The UNFCCC Taskforce Final Report addressed a range of potential target scenarios,[429] ranging from a no further action beyond 2020 scenario to a scenario of 45 per cent below 2005 by 2030 (which was based upon the minimum target recommended by the CCA of 40 per cent below 2000 levels by 2030).[430] These scenarios were compared to the targets of other key countries by reference to a number of metrics, including change in absolute emissions, level and change in emissions per capita, the level and change in emissions intensity of the economy and the average annual change in absolute emissions post-2020. The report then considered the economic impact of various scenarios, noting that it was necessary to consider the impact on "*people's standard of living*".[431] The economic analysis drew upon the modelling referred to at [256] and disclosed material variations in Gross National Income, jobs and wages, and particular sectors of the Australian economy depending upon which scenarios were adopted. The report referred to analysis conducted by the Centre for International Economics that noted that Australia's marginal abatement cost was higher than the world average.[432]

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423 T1480.40-.41 (Pearce) [TRN.0018.1455].

424 T1484.9-.10, T1481.45-T1482.5 (Pearce) [TRN.0018.1455]; Minister Hunt, *Instrument Requesting CCA undertake Special Review* (15 December 2014), [APP.0001.0013.0009].

425 T1484.7 (Pearce) [TRN.0018.1455]; CCA: Special Review: *Draft Report – Australia's future emissions reduction targets* (April 2015), [EVI.2002.0002.3822].

426 See, for example, CCA, *Final Report on Australia's Future Emissions Reduction Targets* (2 July 2015), [APP.0001.0007.0148].

427 T1484.9-.10 (Pearce) [TRN.0018.1455].

428 T1486.45-T1487.5 (Pearce) [TRN.0018.1455].

429 UNFCCC Taskforce Final Report, [EVI.2001.0001.2411] at [.2457-.2467].

430 UNFCCC Taskforce Final Report, [EVI.2001.0001.2411] at [.2458] (Scenario 6); T1517.1-.9 (Pearce) [TRN.0018.1455].

431 UNFCCC Taskforce Final Report, [EVI.2001.0001.2411] at [.2463-.2467].

432 UNFCCC Taskforce Final Report, [EVI.2001.0001.2411] at [.2467].

263. Finally, the UNFCCC Taskforce Final Report addressed policy options to achieve emissions reductions consistent with the 2030 target.[433]

264. The target of a reduction in emissions by 26-28% below 2005 levels by 2030 was approved by Cabinet.[434] Ms Pearce, then the head of the UNFCCC Taskforce, was present when the 2030 Target was approved by Cabinet.[435] She gave evidence that the UNFCCC Taskforce Final Report reflected the Government's decision-making.[436] There are limitations on the evidence that the Commonwealth is able to lead concerning the deliberations of Cabinet.[437] Having regard to the purpose for which the UNFCCC Taskforce was established, the nature of the analysis it undertook, the evidently substantial resources devoted to the work of the taskforce and Ms Pearce's evidence, the Court can safely infer that its work informed the formulation and adoption of the 2015 iNDC.

265. On 11 August 2015, the Prime Minister announced the adoption of the 26-28% target.[438] The 2015 iNDC was subsequently communicated.[439] The UNFCCC Taskforce Final Report having been substantially finalised by 30 July 2015 (see above at [258]), the report was updated to reflect the Government's decision to adopt the 2030 target before being published on 21 August 2015.[440]

266. In circumstances where the Paris Agreement had not yet been adopted at the time of its communication and the process of developing guidance on the content of NDCs which resulted in the "*Paris Rulebook*" had not yet commenced (as to which, see [174] above), the 2015 iNDC adopted a shorter format than subsequent NDC communications.[441] The iNDC noted that the target represented a significant progression beyond Australia's commitment under the second commitment period of the Kyoto Protocol.[442] It noted that across a range of metrics, Australia's target was comparable to the targets of other advanced economies, representing projected cuts of 50-52% in emissions per capita by 2030

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433 UNFCCC Taskforce Final Report, [EVI.2001.0001.2411] at [.2468-.2482].
434 Pearce Affidavit at [43], [WIT.2000.0001.0035].
435 Pearce Affidavit at [44], [WIT.2000.0001.0035].
436 T1517.8-.9, T1517.25-.31 (Pearce) [TRN.0018.1455].
437 Pearce Affidavit at [44], [WIT.2000.0001.0035].
438 Pearce Affidavit at [43] [WIT.2000.0001.0035]; Media Release, *Australia's 2030 Emissions Reduction Target* (11 August 2015), [EVI.2001.0001.2321].
439 Pearce Affidavit at [44] [WIT.2000.0001.0035]; 2015 iNDC, [EVI.2001.0001.1958].
440 Pearce Affidavit at [46] [WIT.2000.0001.0035].
441 2015 iNDC, [EVI.2001.0001.1958].
442 2015 iNDC, [EVI.2001.0001.1958] at [.1958].

and 64-65% per cent per unit of GDP by 2030.[443] It also noted that the target took account of Australia's unique national circumstances including "*a growing population and economy, role as a leading global resources provider, our current energy infrastructure, and higher than average abatement costs.*"[444] As Ms Gardiner noted, the 2015 iNDC was solidly within the range of peer country targets at the time it was communicated to the UNFCCC.[445]

D.6.3 The 2020 NDC Update

267. The 2020 NDC Update reaffirmed Australia's 2030 target of reducing GHG emissions by 26-28% below 2005 levels.[446]

268. As Ms Gardiner explained, in accordance with Article 4.9 of the Paris Agreement and Decision 1/CP.21, each party is required to submit an NDC every five years in accordance with Decision 1/CP.21.[447] The 2015 iNDC became Australia's first NDC upon its ratification of the Paris Agreement.[448] Paragraph 24 of Decision 1/CP.21 requested that parties (such as Australia) whose iNDCs contained a time frame up to 2030 communicate or update by 2020 those contributions and to do so every five years thereafter pursuant to Art 4(9) of the Paris Agreement.[449] Australia's second NDC is due to be communicated to the UNFCCC in 2025,[450] being five years from the 2020 date referred to in [24] of Decision 1/CP.21.

269. On 10 March 2020, a Ministerial Brief was sent to Minister Taylor which sought the Minister's agreement that Australia recommunicate its Paris Agreement NDC in the second half of 2020 with the timing to be determined.[451] The brief noted that there was no requirement for Australia to communicate a new target and that its next NDC, including a target to 2035, was due to be communicated in 2025.[452] It communicated to the Minister that according to public statements of government officials, over 100 countries were intending to submit an updated

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443 2015 iNDC, [EVI.2001.0001.1958] at [.1958].
444 2015 iNDC, [EVI.2001.0001.1958] at [.1958].
445 T1371.13-.22 (Gardiner) [TRN.0016.1342].
446 Gardiner I at [33], [WIT.2000.0001.0001]; 2020 NDC Update, [EVI.2001.0001.0980].
447 Gardiner I at [35], [WIT.2000.0001.0001].
448 Gardiner I at [35], [WIT.2000.0001.0001].
449 UNFCCC Decision 1/CP.21 [EVI.2001.0001.0487] at [0491].
450 See, eg, MS20-000327 at [1](a), [DCC.2008.0002.0002].
451 Gardiner 2 at [4], [WIT.2000.0001.0030]; **MS20-000327**, *Recommunication of Australia's Nationally Determined Contribution* (10 March 2020), [DCC.2008.0002.0002].
452 MS20-000327 at [1](a), [DCC.2008.0002.0002].

NDC including seven members of the G20 (including the European Union),[453] and that four countries (Switzerland, Norway, Suriname and the Republic of Marshall Islands) had submitted NDC communications as of 5 March 2020.[454] The brief advised that, while Australia's 2030 target had been set, there were some technical parameters that needed to be updated in the recommunication of the NDC. For example, it was necessary to update "*global warming potentials to the values used in the IPCC Fifth Assessment Report*" and refer to the "*latest IPCC guidance for emissions estimation methodology*".[455] The brief noted that most countries would make their recommendation ahead of the next international climate conference in Glasgow in November 2020.[456] The brief indicated that the Department would work with PM&C and DFAT to determine the best timing for recommunication,[457] and proposed that the Minister seek agreement to the NDC recommunication (once drafted), in consultation with the Foreign Minister, from the Prime Minister.[458] The brief referred to the potential for scrutiny from the international community and domestic stakeholders if an NDC update or recommunication was not put forward.[459] It was accompanied by a summary of NDCs submitted as at 26 February 2020.[460]

270. On 16 April 2020, Minister Taylor signed the Ministerial Brief agreeing to the recommunication.[461] Later in April 2020, the instruction to prepare an updated NDC for communication in the second half of 2020 recommunicating the 2015 iNDC was provided back to Ms Gardiner.[462]

271. Minister Taylor was provided with a copy of the draft NDC for approval,[463] which occurred by way of a Ministerial Brief dated 10 December 2020 seeking agreement to the transmission of the NDC recommunication to the UNFCCC, subject to the views of the Prime Minister.[464] The Ministerial Brief noted that the

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453 MS20-000327 at [1](d), [DCC.2008.0002.0002].
454 MS20-000327 at [2], [DCC.2008.0002.0002].
455 MS20-000327 at [3](a)(i) and (ii), [DCC.2008.0002.0002].
456 MS20-000327 at [4], [DCC.2008.0002.0002].
457 MS20-000327 at [4](a), [DCC.2008.0002.0002].
458 MS20-000327 at [5], [DCC.2008.0002.0002].
459 MS20-000327 at [7], [DCC.2008.0002.0002].
460 MS20-000327, [DCC.2008.0002.0002 at .0004] at Attachment B.
461 Gardiner 2 at [5] [WIT.2000.0001.0030]; MS20-000327, [DCC.2008.0002.0005].
462 Gardiner I at [37] [WIT.2000.0001.0001]; Gardiner 2 at [6] [WIT.2000.0001.0030].
463 Gardiner I at [38] [WIT.2000.0001.0001].
464 Gardiner 2 at [7]-[8] [WIT.2000.0001.0030]; **MS20-004039**, *Recommunication of Australia's Nationally Determined Contribution to the Paris Agreement* (10 December 2020) [DCC.2008.0002.0006].

Minister's Office would work with the offices of the Prime Minister and Minister for Foreign Affairs to determine when to transmit the NDC to the UNFCCC.[465] The brief noted that at December 2020, around 20 countries had submitted their 2020 NDC communications to the UNFCCC.[466] The brief was accompanied by a draft letter from Minister Taylor to the Prime Minister, in which Minister Taylor informed the Prime Minister of his intent to submit the 2020 NDC on 31 December 2020. The letter indicated that the placeholder NDC would inform the UNFCCC of Australia's intention to return in 2021 with a formal NDC communication before COP26, which was scheduled to occur in November.[467] The letter was signed by Minister Taylor and copied to the Minister for Foreign Affairs and the Minister for the Environment. Minister Taylor approved the 2020 NDC Update,[468] and the 2020 NDC Update was submitted to the UNFCCC Secretariat at 6.35 pm on 31 December 2020.[469] Ms Gardiner gave evidence with respect to the 2020 NDC Update that the Government had taken the 2030 target to the 2019 election and was returned — the target was set at that point in time and they had been given a mandate for the target.[470]

272. The 2020 NDC Update noted that newly released emissions projections showed Australia was on track to beat its 2030 target without relying on past overachievement.[471] It also noted that Australia's Long Term Greenhouse Gas Emissions Reduction Strategy was under development and would be submitted to the UNFCCC ahead of COP26.[472] The document outlined Australia's policies and measures, including those newly released in 2020.[473] The formal aspect of the NDC, which was contained in the Attachment,[474] contained the details required under the Article 4.8 and Decision 1/CP.21 (referred to above at [171]-[173]). The document noted that the target represented a halving of emissions per person in Australia, or a two-thirds reduction in emissions per unit of GDP, and represented a serious and ambitious effort, taking account of Australia's unique

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465 MS20-004039 at [4], [DCC.2008.0002.0006 at .0007].
466 MS20-004039 at [4](b), [DCC.2008.0002.0006 at .0007].
467 MS20-004039, [DCC.2008.0002.0009].
468 Gardiner I at [38], [WIT.2000.0001.0001].
469 Gardiner I at [38], [WIT.2000.0001.0001]; Email: UNFCCC Focal Point to NDCs@unfccc.int, Subject: Australia NDC Communication, [PMC.2001.0002.7392].
470 T1360.35-.46, T1365.19-.26 (Gardiner) [TRN.0016.1342 20].
471 2020 NDC Update, [EVI.2001.0001.0980] at [.0981].
472 2020 NDC Update, [EVI.2001.0001.0980] at [.0981].
473 2020 NDC Update, [EVI.2001.0001.0980] at [.0981-.0984].
474 2020 NDC Update, [EVI.2001.0001.0980] at [.0985-.0986].

national circumstances including its growing population and role as a leading global resources provider.[475]

D.6.4 The 2021 NDC Update

273. The 2021 NDC Update was an updated first NDC that adopted a target of net zero emissions by 2050, reaffirmed the 2030 target adopted in the 2015 NDC and adopted certain economic stretch goals.[476]

274. In September 2021, preparations for the communication of an updated NDC commenced.[477] In mid-October 2021, the government adopted a net zero by 2050 target, which it sought to communicate through the updated NDC communication.[478] The decision was made by Cabinet.[479] Prior to its submission, the document was approved by Minister Taylor's office.[480] The NDC was communicated to the UNFCCC Secretariat on 28 October 2021.[481] The government also published *Australia's Long-Term Emissions Reduction Plan: A whole-of-economy plan to achieve net zero emissions by 2050*.[482] Ms Gardiner also gave evidence with respect to the 2021 NDC Update that the target was consistent with the target that the government had taken to the previous election.[483]

275. The 2021 NDC Update itself noted that Australia was on track to achieve a 30-35% reduction on 2005 levels by 2030.[484] It noted that comprehensive modelling and analysis had been undertaken to inform Australia's "*whole of economy Long Term Emissions Reduction Plan*".[485] The stretch goals that were introduced to the 2021 NDC Update were discussed in a discrete section of the communication,[486]

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475 2020 NDC Update, [EVI.2001.0001.0980] at [.0986] ("*A fair and ambitious contribution*").
476 Gardiner I at [39], [WIT.2000.0001.0001]; 2021 NDC Update, [EVI.2001.0001.0248].
477 Gardiner I at [42], [WIT.2000.0001.0001].
478 Gardiner I at [42], [WIT.2000.0001.0001].
479 Gardiner I at [43], [WIT.2000.0001.0001].
480 Gardiner I at [44], [WIT.2000.0001.0001].
481 Gardiner I at [45]-[46], [WIT.2000.0001.0001]; Media Release, *Australia committed to successful COP26 summit in Glasgow*, [EVI.2001.0002.0001].
482 Gardiner I at [47], [WIT.2000.0001.0001]; Australian Government, *Australia's Long-Term Emissions Reduction Plan: A whole-of-economy plan to achieve net zero emissions by 2050*, [EVI.2001.0001.0292].
483 T1366.23-.29 (Gardiner) [TRN.0016.1342].
484 2021 NDC Update [EVI.2001.0001.0248] at [.0250].
485 2021 NDC Update [EVI.2001.0001.0248] at [.0251].
486 2021 NDC Update [EVI.2001.0001.0248] at [.0254]-[.0255].

and included initiatives concerning: clean hydrogen, ultra low-cost solar, energy storage, low emissions steel, low emissions aluminium, carbon capture and storage, and soil carbon measurement. The formal tables containing the information required by Article 4.8 and Decision 1/CP.21 and the further information encouraged by the Decision 4/CMA.1 "*Paris Rulebook*"[487] included information on both the net zero by 2050 target and economic stretch goals.

276. The section of the NDC dealing with the fair and ambitious contribution aspect of the NDC[488] noted that emissions projections showed Australia would more than halve emissions per person and achieve a 77-81% reduction in emissions per unit of GDP by 2030. It noted that the target took *"account of Australia's unique national circumstances, including a growing population and economy, role as a leading global resources and agricultural commodities provider, our current energy infrastructure, and higher than average abatement costs"*.[489] In addressing the contribution made by the NDC towards achieving the objective of Art 2 of the UNFCCC and the Paris Agreement's temperature and mitigation goals, the NDC noted that the targets would contribute towards the stabilisation of GHG concentrations and holding the increase in the global temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels.[490] The targets would be achieved in a manner that ensured "*economic growth and prosperity and [would] be complimented by measures to advance adaptation, ensure security of food production and to enable sustainable economic development*".[491]

277. The contextual matters and national circumstances section of the NDC noted certain aspects of Australia's national circumstances, including that:[492] (i) Australia's vast size, diverse landscapes, predisposition to climate variability, resource-based economy and small but growing population living mostly in coastal regions posed challenges and opportunities to managing the impacts of climate change; (ii) Australia is one of the world's largest energy exporters, and is among the world's largest exporters of coal and LNG but also has the world's largest reserves of uranium and close to the best solar resources in the world; (iii)

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[487] 2021 NDC Update [EVI.2001.0001.0248] at [.0256]-[.0261].
[488] 2021 NDC Update, [EVI.2001.0001.0248] at [.0262]-[0263].
[489] 2021 NDC Update, [EVI.2001.0001.0248] at [.0262].
[490] 2021 NDC Update, [EVI.2001.0001.0248] at [.0263].
[491] 2021 NDC Update, [EVI.2001.0001.0248] at [.0263].
[492] 2021 NDC Update, [EVI.2001.0001.0248] at [.0265].

Australia had a large agricultural sector and a dependence on long-haul transport, which had led to relatively high, but declining, per capita emissions compared to other developed countries. The national circumstances also included efforts to transform the electricity market, including through increasing penetration of renewables, storage and demand management.

D.6.5 The 2022 NDC Update

278. The 2022 NDC Update communicated a strengthened target for 2030 to reduce emissions by 43% below 2005 levels by 2030 and reaffirmed Australia's net zero by 2050 target.[493] Ms Gardiner gave evidence about the circumstances in which the 2022 NDC Update was prepared and submitted.[494]

279. Prior to the federal election in 2022, the Australian Labor Party (**ALP**) adopted a policy of changing Australia's NDC target under the Paris Agreement to reflect an updated target of reducing Australia's GHG emissions by 43% below 2005 levels by 2030.[495] Prior to the election, the ALP published the "*Powering Australia Plan*",[496] and economic modelling prepared by RepuTex Energy.[497] The Powering Australia Plan contained a commitment to reduce emissions by 43% below 2005 levels by 2030.[498] The document contained a discussion of economic imperatives, scientific imperatives and national and international imperatives.[499] The document referred to the IPCC's recent report (in context, AR6), which showed that Australia had already warmed 1.4°C (above the global average of 1.1°C).[500] The 2021 RepuTex Modelling sought to analyse the GHG emissions and economic impacts of the Powering Australia Plan, and consider individual and aggregate impacts of sectoral policy settings against GHG emissions reductions relative to the 2005 reference year, employment, direct and indirect

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493 Gardiner I at [49], [WIT.2000.0001.0001]; 2022 NDC Update [EVI.2001.0001.0272].

494 Gardiner I at [49]-[57], [WIT.2000.0001.0001].

495 Gardiner I at [52], [WIT.2000.0001.0001].

496 Gardiner I at [52], [WIT.2000.0001.0001]; ALP, *Powering Australia: Labor's plan to create jobs, cut power bills and reduce emissions by boosting renewable energy* (2021) (**Powering Australia Plan**), [EVI.2001.0001.1863].

497 Gardiner I at [53], [WIT.2000.0001.0001]; *RepuTex Energy, The Economic Impact of the ALP's Powering Australia Plan: Summary of modelling results* (December 2021) (**2021 RepuTex Modelling**), [EVI.2001.0001.1917].

498 Powering Australia Plan, [EVI.2001.0001.1863] at [.1866].

499 Powering Australia Plan, [EVI.2001.0001.1863] at [.1871-.1875].

500 Powering Australia Plan, [EVI.2001.0001.1863] at [.1873].

investment and impacts upon retail and wholesale electricity prices.[501] The analysis considered a range of policy measures in the electricity sector,[502] industry,[503] and transport,[504] and their resulting impacts.

280. Prior to the federal election in 2022, as part of the Department's preparation of incoming government briefs, Ms Gardiner's team commenced work on an updated NDC in anticipation that an incoming Labor government would likely want to communicate its strengthened 2030 target to the UNFCCC early in its term.[505] Shortly after the 2022 election, Ms Gardiner worked with her team to draft the 2022 NDC Update having regard to the Powering Australia Plan.[506] She gave evidence that the 2022 NDC Update was based on the ALP's policy.[507]

281. Ms Gardiner received a formal instruction to prepare the updated NDC on or around 3 June 2020, and supervised the preparation of the document.[508] Cabinet then approved the 2020 NDC Update.[509] The government announced that the updated NDC had been conveyed to the UNFCCC on 16 June 2022.[510] Ms Gardiner submitted the 2022 NDC Update to the UNFCCC Secretariat.[511]

282. The 2022 NDC Update provided details of the enhanced 2030 target and the implementation of new policies across the economy to drive the transition to net zero, noting that the new 2030 target was based upon the modelled impact of those policies.[512] The formal tables continued to include requisite details for both the 2030 target and 2050 target.[513] In addressing the contribution made by the NDC towards achieving the objective of Art 2 of the UNFCCC and the Paris Agreement's temperature and mitigation goals, the NDC again noted that the targets would contribute towards the stabilisation of GHG concentrations and holding the increase in the global temperature to well below 2°C above

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501 2021 RepuTex Modelling, [EVI.2001.0001.1917] at [.1919].
502 2021 RepuTex Modelling, [EVI.2001.0001.1917] at [.1927-.1934].
503 2021 RepuTex Modelling, [EVI.2001.0001.1917] at [.1936-.1942].
504 2021 RepuTex Modelling, [EVI.2001.0001.1917] at [.1944-.1945].
505 Gardiner I at [54], [WIT.2000.0001.0001].
506 Gardiner I at [55], [WIT.2000.0001.0001].
507 T.1367.4-.7 (Gardiner) [TRN.0016.1342].
508 Gardiner I at [55], [WIT.2000.0001.0001].
509 Gardiner I at [55], [WIT.2000.0001.0001].
510 Gardiner I at [56], [WIT.2000.0001.0001]; Media Release, *Stronger action on climate change* (16 June 2022), [EVI.2001.0001.1915].
511 Gardiner I at [57], [WIT.2000.0001.0001].
512 2022 NDC Update, [EVI.2001.0001.0272] at [.0274].
513 2022 NDC Update, [EVI.2001.0001.0272] at [.0274 to .0289].

pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels.[514] The contextual matters and national circumstances section of the NDC again noted salient aspects of Australia's national circumstances,[515] including with respect to population distribution and features of Australia's economy.

D.6.6 Key factual conclusions regarding the formulation of Australia's NDCs

283. The Court should conclude based on the evidence summarised above that the formulation of Australia's GHG emissions reduction targets as embodied in its various NDC communications represented archetypal examples of a high-level government policy decision. Decisions regarding the targets were taken at the highest levels of government, including Cabinet. They involved the weighing of a range of competing incommensurable values (including long-term, economy-wide impacts; considerations regarding Australia's relationships with foreign governments; the views of the electorate including diverse sections of the Australian community; and plainly the environmental and practical consequences of GHG emissions). As the course of events leading to the communication of both the 2020 NDC Update and the 2022 NDC Update makes plain, consistent with its implications for various aspects of society, the emissions reduction targets were the subject of commitments which successive governments had taken to federal elections.

284. As the applicants appear to accept (AS [318]), in setting the emissions reductions targets embodied in the NDC communications, the Commonwealth was aware of scientific materials such as the IPCC Assessment Reports and methodological guidance issued by the IPCC.[516] The government was advised of the findings of the IPCC reports.[517] Consistent with the polycentric nature of the decision to determine a national emissions reduction target, that science was considered along with a range of other pertinent factors in arriving at an appropriate target.

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514 2022 NDC Update, [EVI.2001.0001.0272] at [.0282 to .0283].
515 2022 NDC Update, [EVI.2001.0001.0272] at [.0283].
516 Referring to T1467:30-1468:46 (Pearce) [TRN.0018.1455]; T1349:33-1350:4 (Gardiner) [TRN.0016.1342].
517 T1359.43-.45, T1362.38-.39, T1363.38-.47 (Gardiner) [TRN.0016.1342].

D.7 Other nations' GHG emissions reductions targets

285. A number of nations have set GHG emissions reductions targets in furtherance of the aims of the Paris Agreement. As noted, Ms Gardiner gave evidence that the Commonwealth's 2015 iNDC was solidly within the range of peer country targets at the time it was communicated to the UNFCCC.[518] This is supported by the documentary evidence. This section summarises the documentary evidence at relevant points between 2014 and 2022.

286. In November 2014, before the Paris Agreement was signed, only 42 countries (including Australia) had submitted economy-wide emissions reduction pledges for 2020.[519] Few, if any, had set net zero targets.[520] Prof Meinshausen was not aware of any country that had as aggressive targets as he has modelled in his report for Australia in 2014.[521]

287. By 1 October 2015, of the 119 iNDCs that had been submitted, covering 146 countries, only 32 iNDCs (including Australia's) reported on an absolute reduction from historical base year emissions.[522] The original NDCs of the 12 G20 countries (besides Australia) that had submitted their NDCs by 1 October 2015 are summarised in the table below:[523]

Country	Original (2015) 2030 pledge
Brazil	43% below 2005 levels
Canada	30% below 2005 levels
China	Peak CO_2 emissions around 2030
EU27	40% below 1990 levels
India	Reduce emissions intensity of GDP by 33-35% below 2005 levels

518 T1371.13-.22 (Gardiner) [TRN.0016.1342 20].

519 UNEP Gap Report 2014 at p. 0048, [APP.0001.0007.0169,].

520 See UNEP Gap Report 2014, [APP.0001.0007.0169], which does not refer to any net zero targets. See also, T1144.6-7 (Meinshausen) [TRN.0013.1118], agreeing that "*most*" countries had not set net zero targets at this time.

521 T1144.1-1145.10 (Meinshausen) [TRN.0013.1118]. Prof Meinshausen notes there were a few countries that claimed they were net zero by this time, but they were "*smaller developing countries*" like Bhutan and "*probably not of interest here*".

522 UNEP Gap Report 2015 at p. 0035, [APP.0001.0007.0159].

523 See also, UNEP Gap Report 2015 at pp. 0072-0085, [APP.0001.0007.0159].

Indonesia	29% (unconditional) or 41% (conditional) below BAU
Japan	26% below 2013 levels by 2030
Republic of Korea	37% below BAU
Mexico	22% (unconditional) or 36% (conditional) below BAU
Russian Federation	Limit to 70-75% of 1990 level (i.e. 25-30% reduction over 1990 level)
South Africa	Limit 2025-2030 emissions to 398-614 $MtCO_2$-e
USA	26-28% below 2005 levels by 2025

288. By 2022, 146 of 196 States Parties to the Paris Agreement had communicated NDCs that contained GHG targets,[524] and 88 countries had set net zero targets in law, a policy document (such as an NDC or a long term strategy) or in an announcement by a high-level government official.[525] The NDCs of G20 countries covered a range of targets, including: China – peak CO_2 emissions before 2030;[526] Republic of Korea – 40% below 2018 levels;[527] Japan – 46% below 2013 levels, with efforts to reduce by 50%;[528] Canada – 40-45% below 2005 levels;[529] USA – 50-52% below 2005 levels;[530] and EU – 55% below 1990 levels.[531] Amongst G20 countries, all net zero targets were for 2050 or later except Germany (2045) and Mexico (no net zero target).[532] Prof Meinshausen accepted that, even as at today, no developed country has set a target of net zero by 2024, as he opines Australia should have under the "equality" approach in 2014.[533]

289. There is no detailed evidence as to how countries have set their GHG emissions reductions targets. Prof Meinshausen gave oral evidence that some countries'

524 UNEP Gap Report 2022 at p. 0039, [APP.0001.0007.0166].
525 UNEP Gap Report 2022 at p. 0040, [APP.0001.0007.0166].
526 [APP.0001.0007.0166].
527 [EVI.2002.0001.0714].
528 [EVI.2002.0001.0653].
529 [EVI.2002.0001.0295].
530 [EVI.2002.0001.1062].
531 [EVI.2002.0001.0456].
532 UNEP Gap Report 2022 at p. 0051, [APP.0001.0007.0166]. See also, T1146.1-15 (Meinshausen) [TRN.0013.11118].
533 T1145.23-24 (Meinshausen) [TRN.0013.1118].

targets imply a grandfathering approach.[534] His article from 2018 notes that developed countries' NDCs "*often imply a status-quo in terms of global emissions shares*" and are collectively inadequate to achieve the 2°C goal of the Paris Agreement.[535] As explained at [598] below, what can be gleaned from the NDCs of other countries indicates that they, like Australia, determine their targets by reference to a range of scientific, economic, social and political factors. Certainly, it does not appear to be in dispute that the NDCs of most developed countries are not consistent with an approach based on equity or historical responsibility.

290. Further, it is not in dispute that, since 2014, collectively, the extant promises made by the world's governments to reduce their GHG emissions have not been, and are not, projected to be adequate to hold global temperature increase to 1.5°C.[536] In 2014, the UNEP Gap Report reported the emissions gap in 2030 for a 50% chance of achieving "*the 2°C target*" was estimated to be about 14-17 $GtCO_2$-e.[537] The 2015 UNEP Gap Report reported that full implementation of unconditional NDCs results in a 66% chance of a 3.5°C world.[538]

291. The picture has improved since then, with current commitments (if fully implemented) giving a chance of achieving the 2°C goal but still fall short of the 1.5°C goal. According to the 2022 UNEP Gap Report, existing policies have a 66% chance of causing a 2.8°C increase in global average temperatures; implementation of unconditional and conditional NDCs reduce this to 2.6°C and 2.4°C respectively, and it is further reduced to 1.8°C assuming full implementation of conditional and unconditional net zero targets.[539] The equivalent figures for a 50% chance are 2.6°C, 2.4°C, 2.2°C and 1.7°C.[540] The emissions gap in 2030 is 15 $GtCO_2$-e for a 2°C pathway and 23 $GtCO_2$-e for a 1.5°C pathway.[541] In the most recent 2023 UNEP Gap Report, full

534 Meinshausen 1 at [54], [APP.0001.0009.0001].

535 Du Pont & Meinshausen, "Warming assessment of the bottom-up Paris Agreement emissions pledges" (2018) 9 *Nature Communications* 4810, especially at pp. 2-3, [APP.0001.0007.0001].

536 See, for example Applicants' oral opening, T8.9-13 (McLeod SC) [APP.0001.0012.0004]; T1161.29-32 (Meinshausen) [TRN.0013.1118].

537 APP.0001.0007.0169, p. 0020.

538 APP.0001.0007.0159, p. 0017.

539 APP.0001.0007.0166, p. 0015.

540 APP.0001.0007.0166, p. 0063.

541 APP.0001.0007.0166, p. 0015. See also, T1161.34-40, 1162.6-15 (Meinshausen) [TRN.0013.1118], regarding his recently published analysis in *Nature*, which has calculated a 50% chance of stabilising temperatures at 1.9°C.

implementation of all NDCs is modelled to give a 50% chance of stabilising temperatures at 1.8°C, and the emission gaps as at 2030 are modelled as 11 $GtCO_2$-e for a 2°C pathway and 19 $GtCO_2$-e for a 1.5°C pathway.[542] Similarly, Prof Meinshausen in oral evidence noted that he had recently published an analysis in *Nature*, which has calculated a 50% chance of stabilising temperatures at 1.9°C.[543]

D.8 Expert evidence on alternative hypothetical targets

292. In support of their contention that the Commonwealth's GHG emissions targets were not in accordance with BAS, the applicants filed a report of Prof Meinshausen.[544] The Commonwealth filed reports of Dr Canadell[545] and Prof Pitman[546] in response. The applicants filed a supplementary report of Prof Meinshausen in reply[547] (plus associated workings)[548] and Dr Canadell produced a supplementary report addressing further questions posed by the applicants following cross-examination.[549] This section summarises that evidence.

D.8.1 Professor Meinshausen's evidence on hypothetical targets

293. In his primary report, Prof Meinshausen calculated a series of hypothetical GHG emissions reductions targets that the Commonwealth could have set as at 2014 and 2022.

Calculating budgets using hindsight analysis

294. As a first step, Prof Meinshausen calculated global GHG emissions budgets from 2014 and 2022. To do this, he did the following:

a) First, he started with the IPCC's latest assessment of the global CO_2 budget from 2020 for a 50% chance of holding global temperature

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542 APP.0001.0019.0006, pp. xx, xxii, 31.

543 T1161.34-40, 1162.6-15 [TRN.0013.1118]. See also, Karoly 1 at [93] (2.8°C), [APP.0001.0003.0093]; T941.10-11 (Karoly) [TRN.0010.0920].

544 Meinshausen 1, [APP.0001.0009.0001].

545 Canadell 1, [EXP.2000.0001.0196].

546 Pitman, [EXP.2000.0001.0286].

547 Meinshausen 2, [APP.0001.0015.0010].

548 APP.0001.0016.0001 (A47).

549 Canadell 2, [EXP.2000.0004.0001].

increase to 1.5°C above 1850-1900, published in AR6 in August 2021 (at [38]-[39]). That is **500 Gt CO_2**.

b) To convert this to a budget to hold global temperature increase to 1.5°C above "*pre-industrial levels*" in line with Article 2.1(a) of the Paris Agreement, he deducted 150 GtC02, as, according to AR6, the difference in temperature between 1850-1900 is 0.1°C, which is around 150 $GtCO_2$ (at [40]). That gave a budget of **350 Gt CO_2**.

c) The IPCC AR6 budget is a budget *from 2020*. To convert this to a budget *from 2014*, Prof Meinshausen added back in the global GHG emissions between 2014-2020, as reported in an article from 2022, of around 245 $GtCO_2$ (at [41]). This gave a budget of **595 $GtCO_2$**.

d) Then, Prof Meinshausen converted the budget to *GHG emissions*, rather than just CO_2 emissions, again using figures and scenarios from AR6 (at [42]). That gave a budget of **951 $GtCO_2$-eq**.

e) Finally, he reduced that by 89 $GtCO_2$ to account for the fact that countries' reported emissions take credit for natural carbon uptake by terrestrial plants, and a further 39 $GtCO_2$ to account for the emissions of international aviation and shipping, again using AR6 and another article from 2021 (at [43]-[44]).

f) That final step resulted in a final global budget of **823 GtO_2-eq** to limit global temperature increase to 1.5°C as at 2014 (at [45]).

295. To get the same budget for 2022, Prof Meinshausen subtracted the reported GHG emissions between 2014 and 2022 of 377 $GtCO_2$-eq to get a budget for 2022 of **446 $GtCO_2$-eq** ([46]-[47]).

296. This process is summarised by Prof Meinshausen in Table 1 (p. 20).

297. It is immediately apparent from the above that the approach Prof Meinshausen has taken to determining the GHG budgets at 2014 is based entirely on hindsight analysis. It starts with the CO_2 budget for 1.5°C published by the AR6 in 2021, and works backwards to develop a budget for 2014, using, at every step, scientific information that was not available in 2014.[550] As such, this is not an approach

[550] See cross-examination on this at T1133-1135, 1144-1145 (Meinshausen) [TRN.0013.1118].

that the Commonwealth, or anyone, could have undertaken as at the time of the alleged breach in 2014. Prof Meinshausen accepted this in cross-examination, saying the budgets and targets were based on BAS "*at this point and stage, so not 2014 but 2023*"[551] and that he was "*not saying that Australia should have set that target in 2014.*"[552] Indeed, as at 2014, the IPCC had not even published a global CO_2 budget for 1.5°C, as the focus then was on 2°C. For these reasons, Prof Meinshausen's 2014 hypothetical budgets, and the 2014 targets derived therefrom, are irrelevant to assessing the standard of care required at the time. This is addressed further in Part E.4 below.

Australia's hypothetical targets

298. Having established the global GHG emissions budget as at 2014 based on hindsight analysis, Prof Meinshausen then used that budget as the "pie" which he divided up in accordance with examples of the three broad approaches in the scientific literature (at [238] above) to generate hypothetical targets for the Commonwealth in 2014, as follows:

a) **Contraction & convergence:** In its 2014 report, the CCA calculated Australia's share of any future GHG emissions budget using a form of grandfathering known as "*modified contraction and convergence*" to be 0.97%. Prof Meinshausen calculated that applying that percentage to the global GHG emissions budget of 446 $GtCO_2$-e (at [295] above) gives Australia a national GHG emissions budget of 7.98 $GtCO_2$-e from 2014. A straight-line path to zero from 2014 gives a target of 47% reduction from 2005 levels by 2025, 62% by 2030, 78% by 2035, 93% by 2040 and net zero by 2043 (at [60], [61], [68(a)], [69(a)]).

b) **Equality:** Prof Meinshausen opined that Australia comprises 0.33% of the world's population. Applying that percentage to the global GHG emissions budget gives Australia a national GHG emissions budget of 2.72 $GtCO_2$-e since 2014. A straight-line path to zero from 2014 requires net zero emissions by 2024 (at [64], [68(b)], [69(b)]).

551 T1134.34-45 (Meinshausen) [TRN.0013.1118].
552 T1145.7-8 (Meinshausen) [TRN.0013.1118].

c) **Historical responsibility:** Prof Meinshausen opined that this would be less than the equality target so is unnecessary to calculate (at [65]-[66], [69(c)]).

299. To calculate hypothetical targets as at 2022, Prof Meinshausen subtracted from the 2022 contraction & convergence grandfathering and equality budgets (of 7.98 and 2.72 $GtCO_2$-e respectively) the GHG emissions emitted by Australia between 2014-2022, and then calculated straight lines from 2022 to net zero (at [70]-[71]). On the contraction & convergence grandfathering approach, that gave targets of: 44% below 2005 levels by 2025, 63% by 2030, 83% by 2035 and net zero by 2040 (at [71(a)]). Prof Meinshausen opined that Australia had already exhausted its allocation of GHG emissions under the equality and historical responsibility approaches as at 2022 (at [71(b)-(c)]).

300. In conclusion, based on the above analysis, Prof Meinshausen observed that the Commonwealth's 2014 and 2022 targets fell short of the hypothetical targets he had calculated so were "*not consistent with remaining within its cumulative greenhouse gas emissions limit*", except that the 2022 43% target was (just) consistent with the contraction & convergence grandfathering approach (at [73]-[74]).

301. In the introduction at [7] of his report, Prof Meinshausen expressed a broader opinion to the effect that Australia's 2030 targets (except the 43% target, as noted) "*are not and have not been consistent with remaining within its share of cumulative greenhouse gas emissions*". However, Prof Meinshausen clarified in cross-examination that what he meant by [7] was the targets were not consistent with the three ways that he had calculated Australia's potential share in his report.[553] Amongst other things, Prof Meinshausen was not able to opine as to whether Australia's target was within its "share" because, as noted at [236]-[237], there is no consensus as to how GHG emissions should be divided and in any case the question is one of policy and not climate science.

553 T1125.4-13 (Meinshausen) [TRN.0013.1118].

Problems with Prof Meinshausen's approach

302. There are several issues with Prof Meinshausen's targets, which mean they are not relevant to assessing the standard of care owed by the Commonwealth. None of these issues is a criticism of Prof Meinshausen.

303. *First*, as noted above, a key problem with Prof Meinshausen's report is that it uses hindsight and is therefore irrelevant to assessing the standard of care required in 2014 and/or 2015 and whether the Commonwealth breached that standard of care. In addition to the hindsight steps explained at [294]-[297] above, to calculate the hypothetical targets, Prof Meinshausen assumes that the aim in 2014 was to stabilise global temperature increase at 1.5°C, whereas his own evidence[554] is that the aim, and the climate science, was then focussed on 2°C.

304. A *second* issue is that, for the evidence to be relevant, it must be assumed that the Commonwealth was obliged to take one of these approaches to calculate its targets, when the expert evidence, and the evidence generally, establishes that there was no consensus that such approaches should be taken and even Prof Meinshausen does not suggest the Commonwealth should have done so.

305. A *third* issue is that the applicants allege breach of the Primary Duty as at each date the Commonwealth set its target: in August 2015, 2020, 2021 and 2022 (the last ongoing) (AS [379]). However, Prof Meinshausen does not calculate any hypothetical alternatives as at August 2015, 2020 or 2021. Thus, Prof Meinshausen's evidence does not provide a basis to find a breach of duty at any time before 2022.

306. A *fourth* issue is that, in any case, even if the Commonwealth was obliged to take one of Prof Meinshausen's approaches, that would have no direct impact, or a negligible impact, on global temperature increase and no material impact at all on climate effects in the Torres Strait Islands. Dr Canadell and Prof Pitman's evidence is particularly relevant to this fourth, causation, issue. The ramifications of that evidence are discussed in Part E.5 below.

[554] T1135.1-31 (Meinshausen) [TRN.0013.1118].

D.8.2 Dr Canadell's evidence on the impact of Prof Meinshausen's targets

307. In his reports, Dr Canadell calculated the reduction in Australia's GHG emissions, and its consequential impact on global temperature increase, that would have occurred if Australia had adopted Prof Meinshausen's contraction & convergence grandfathering or equality targets in 2014 and then taken a straight-line path to that target to date.

308. Dr Canadell explained that "*there's no instrument in the world or no model in the world that could detect such a small change in temperature as … the counterfactual that we're discussing here*".[555] Accordingly, Dr Canadell considered the only way to do so was to calculate it mathematically using, in his primary report, the quasi-linear relationship between CO_2 and global temperature increase (TCRE) and then, in his supplementary report, revising the calculations to add in the effect of non-CO_2 GHGs and assumed emissions to 2023 (on the conservative assumption that emissions in 2022 and 2023 would be the same as emissions in 2021 as the actual data is not available).[556]

309. The figures from Dr Canadell's supplementary report[557] are as follows:

Target	Avoided GHG emissions	Avoided global temperature increase Best estimate (uncertainty range)
Contraction & convergence (47% by 2030)	485.75 $MtCO_2$-e	0.000218°C (0.00013-0.00030°C)
Equality (Net zero by 2024)	2,181.92 $MtCO_2$-e	0.0012°C (0.00073-0.0016°C)

310. Dr Canadell noted that he and Prof Meinshausen (that is, the calculations in Prof Meinshausen's supplementary report) both "*strongly agree that it's a very small impact*".[558]

311. Dr Canadell opined that "*[i]t is not possible to quantify the actual and specific climate impacts that would have been avoided*" with a temperature reduction of

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555 T1382.16-18 (Canadell) [TRN.0017.1379].

556 See T1382.11-40, 1385.11-1387.36 (Canadell) [TRN.0017.1379].

557 Canadell 2, [EXP.2000.0004.0001]. Further explanation as to how Dr Canadell calculated these figures is in Canadell 1 at pp. 8-11, [EXP.2000.0001.0196].

558 T1382.38-40 (Canadell) [TRN.0017.1379].

that nature. This is because Earth System Models, the global climate models used to model climate impacts "*have limitations at present in their capacity to resolve very small changes in the atmospheric load of GHGs or at small spatial scales*". Key limitations include: (a) the large natural variability of the climate system, which limits the detection of small temperature changes given the much larger temperature swings due to natural variability; (b) the low resolution of the models often operating with grids; and (c) a small global mean temperature change would be undetectable amidst the range of climate sensitivities (uncertainty) given by different models.[559]

312. Dr Canadell concluded that it was "*very unlikely*" that an increase of 0.00009°C (range: 0.00005-0.00013°C) or 0.00045° (range: 0.00027-0.00063°C) "*had material and/or quantifiable impacts with our current climate observation networks and attribution modelling capability*".[560]

D.8.3 Prof Pitman's evidence on the impact of Prof Meinshausen's targets

313. Prof Pitman opines that the tiny increase in global temperature that Dr Canadell calculates would have been avoided had Australia adopted Prof Meinshausen's hypothetical targets would have had no material impact on the impacts of climate change in the Torres Strait.

314. *First*, such a small increment of avoided warming could not be demonstrated, or measured, as the accuracy of temperature measurements is typically a few tenths of a degree (the lowest known being 0.01°C).[561]

315. *Secondly*, it is not possible "*to link … this change in GHG emissions and any avoided increase in global mean temperature to any change in temperature, rainfall or other phenomenon over the Torres Strait. The amounts of avoided emissions are simply too small to demonstrate any link between these emissions and any climate impact"*.[562]

316. *Thirdly*, any such impact is "*dwarfed by natural variability*".[563]

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559 Canadell 1 at pp. 9-10, [EXP.2000.0001.0196].
560 Canadell 1 at pp. 10-11, [EXP.2000.0001.0196].
561 Pitman at [30] and footnote 56, [EXP.2000.0001.0286].
562 Pitman at [44], [EXP.2000.0001.0286]. See similarly, [30].
563 Pitman at [30], [EXP.2000.0001.0286].

317. In other words, just because it may be mathematically calculated (in accordance with the near linear relationship between GHG emissions and global temperature increase) that a tonne of GHG emissions has an incremental impact on global temperature increase, it "*doesn't logically follow that everywhere on the planet necessarily sees an impact from that*".[564] This is because (as is uncontroversial: see [211]), the impacts of climate change vary geographically and the numbers relevant here are simply too small to know whether they could or did have any effect in a particular location. Further, Prof Karoly explained that "*in terms of local concentration variations, from one year to the next or within a year, it is very important where those emissions occur*".[565]

318. Although Prof Pitman's opinions in his report were expressed in the context of the figures in Dr Canadell's original report, which were revised up slightly in his supplementary report, it is clear that change would not affect Prof Pitman's opinions. As noted above, Prof Pitman's evidence makes clear that such a small change in temperature (maximum around one 100th of a degree) is below the threshold of measurement (of several tenths of a degree). Prof Pitman opined that "*[a] value of 0.010°C and very probably 0.10°C would be equally impossible to link to a change in any climate variable over the Torres Strait. This indicates that if Canadell's calculations were incorrect by a factor of 100 and very probably a factor of 1000, my assessment … would remain the same*".[566] Prof Pitman was not cross-examined on this opinion.

319. Dr Canadell gave oral evidence to the same effect. He disagreed with the question that "*we can comfortably say that [each tonne of GHGs] contribute towards the impacts experienced at a local level in some cases*", answering: "*Not from a tonne or any quantity of greenhouse gas emissions. So the answer is no to that local impact.*" He explained that he would "*probably say yes*" if we were talking about 100 billion tonnes of CO_2 but not a quantity like 300 Mt as "*it's very unlikely that we could at a local level relate that additional greenhouse gasses into the atmosphere to an impact that could be discernible and observable or measurable*."[567] He specifically stated that he was not able to respond to whether Australia's emissions over the last decade were impacting persons in the Torres

564 T1330.40-41 (Pitman) [TRN.0015.1271]. See similarly, T1320.15-20.
565 T900.40-41 (Karoly) [TRN.0009.0844].
566 Pitman at [45], [EXP.2000.0001.0286].
567 T1389.36-45 (Canadell) [TRN.0017.1379]. See similarly, T1390.7-12.

Strait. He said, "*it would be very difficult from a modelling point of view to attribute 10 years of Australian emissions to a specific attributed impact in Australia*".[568]

320. *Finally*, to emphasise the difficulties of quantifying the climate impacts of so small a temperature increase, Prof Pitman noted the difficulties climate models face in distinguishing the difference in climate impacts of very large amounts of radiative forcing, such as the 2 Watts per m^2 difference between SSP1-2.6 and SSP3-7.0 through to around 2060.[569] This can be seen from the large overlap in the uncertainty bars between those scenarios. Prof Meinshausen agreed that the models for those different scenarios overlap.[570] While not critical to Prof Pitman's opinions summarised above, this additional explanation highlights the *de minimis* impact of Australia's contribution, and also underscores the point at [202] about the difficulty of separating the climate impacts between large differentials of global warming, let alone the small amount of avoided GHG emissions calculated to arise from the Commonwealth's alleged breaches in this case.

321. Other aspects of Prof Pitman's evidence are addressed in the context of CQs 1 and 2 regarding the impacts of climate change in the Torres Strait, in Parts E.1 and E.2 below.

D.8.4 Prof Meinshausen's reply to Dr Canadell and Prof Pitman

322. A few days before his cross-examination, the applicants served a report from Prof Meinshausen in response to the Canadell and Pitman reports.[571] He was asked whether he disagreed with any of the opinions expressed in the Canadell or Pitman reports, and gave just three clarifications.

323. The *first* was to suggest that Prof Pitman was implying that a difference in 2 Watts per m^2 in radiative forcing did not cause detectable and attributable differences in climate change (at [4], [7]). This was not what Prof Pitman was implying, and he confirmed that in his oral evidence. He was merely illustrating that the existing science around climate models finds it difficult to separate a

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568 T1396.41-1397.4 (Canadell) [TRN.0017.1379].
569 Pitman at [33]-[42], [EXP.2000.0001.0286].
570 T1149.43-47 (Meinshausen) [TRN.0013.1118].
571 Meinshausen 2, [APP.0001.0015.0010].

different of 2 Watts per m^2, so it "*seems optimistic to think you could separate a fraction of that in one particular region of the earth*".[572] Prof Pitman also explained how the analogy Prof Meinshausen gave of assuming the gas heater in a house in Melbourne contributed to its warmth[573] was not apt as it is a closed system.[574] The analogy of the house is to the global average TCRE caused by CO_2 (or the equivalent for GHGs), which is not disputed; but what the Court must consider is whether that incremental change to global average temperature caused particular climate impacts in a particular region.

324. Prof Meinshausen went on to make the point that, just because any impacts caused by the incremental increase in radiative forcing linked to the Commonwealth's alleged breaches of duty is below the "*limit of our scientific capability*" to detect, that should not be used to justify an assumption that there is no effect (at [8]). Prof Meinshausen appeared to contend this link should be made because that is "*the tragedy of the commons where every single contributor's effect is very, very, very, very small and probably can't individually be detected*",[575] rather than on the basis of science. Prof Meinshausen also accepted that attribution of climate impacts is "*not [his] core area of expertise*".[576]

325. On the other hand, Prof Pitman considered that "*the scientific method requires either observed evidence or empirical evidence or modelling evidence in support of a statement one might make*" and "*[i]f you can't detect it or demonstrate what is causing something*" then science could not "*help you unpack the story*". In short, he considered Prof Meinshausen was making a philosophical, and not a scientific, point at [8] of his supplementary report.[577]

326. In any case, whether it may be "*assumed*" that there is some tiny, undetectable effect on climate impacts in the Torres Strait arising from the Commonwealth's alleged breaches of duty, the Commonwealth submits the expert evidence is clear that any such effect is *de minimis*.[578] Thus, it cannot be contended that the breaches made a "material contribution" to any loss the applicants and group

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572 T1311.37-1312.11 (Pitman) [TRN.0015.1271].
573 Meinshausen 2 at [5], [APP.0001.0015.0010].
574 T1313.12-21 (Pitman) [TRN.0015.1271].
575 T1154.14-39 (Meinshausen) [TRN.0013.1118].
576 T1161.23 (Meinshausen) [TRN.0013.1118].
577 T1316.7-16 (Pitman) [TRN.0015.1271]. See similarly, T1331.5-10.
578 See especially, Meinshausen 2 at [8]-[9], [APP.0001.0015.0010].

members incurred as a result of climate change. This is addressed further in Part E.5 below.

327. The *second* clarification Prof Meinshausen offered in his supplementary report was to note that Dr Canadell, in his original report, addressed the temperature increase caused by the Commonwealth's CO_2 emissions only, rather than all GHGs (at [10]-[11]). This was subsequently addressed by Dr Canadell in his supplementary report (the figures from which are in the table at [307] above), so is no longer relevant. In any case, Prof Meinshausen said in cross-examination that he did not "*disagree in any way or shape or form with the kind of calculations that Dr Pep Canadell did*" and that the calculations "*wouldn't change materially*" if the other GHG emissions were included.[579]

328. The *third* clarification Prof Meinshausen made was to put "*Australia's warming contribution in the context of those from other countries*" (at [12]-[28]). Essentially, the point Prof Meinshausen appeared to be making was that, if Australia's contribution to global warming was not considered to be material, then no country's contributions to global warming is material (at [25]). *First*, this is a legal submission rather than expert evidence. *Secondly*, in any case, it does not necessarily follow. *Thirdly*, even if it did, that is no reason to hold, for the purposes of tort law, that a contribution that has no detectable effect on damage is "material". It rather underscores the inappropriateness of holding the Commonwealth liable in negligence for damage that was contributed to incrementally by every country and person since 1850. *Finally*, the Commonwealth notes that Table 1 of Prof Meinshausen's supplementary report does not calculate each country's emissions against what their targets should have been, had those been "BAS" targets; it rather assumes each country was required to adopt the same approach as Prof Meinshausen opined for Australia.[580] Therefore, care must be taken in using the figures from this table.

329. For completeness, we note that Prof Karoly did not disagree with any aspect of Dr Canadell and Prof Pitman's evidence, except in relation to dynamical downscaling. That is addressed immediately below.

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579 T1159.7-1160.43 (Meinshausen) [TRN.0013.1118].

580 See for example, T1156.29-1157.2 (Meinshausen) [TRN.0013.1118].

D.8.5 General comments on climate science evidence

330. The credentials of all the climate / targets experts are undisputed.[581]

331. The applicants submit that the Court should readily accept Prof Karoly's evidence as largely uncontroversial (at AS [25]). The Commonwealth agrees that most of Prof Karoly's evidence is largely uncontroversial, subject to the points raised in these submissions, which primarily concern linear relationships to climate impacts and regional modelling.

332. The Commonwealth submits that the Court should also accept Dr Canadell's evidence as uncontroversial.[582] The only material issues the applicants raised with Dr Canadell's reports have been addressed by Dr Canadell in his supplementary report. The applicants apparently take no issue with that supplementary report.

333. The Commonwealth submits that there are a number of issues with Prof Meinshausen's report (summarised at [302]-[306]), which makes it irrelevant to the issues for decision. Further, as a minor matter, throughout his report, Prof Meinshausen expresses opinions as to how the Paris Agreement should be interpreted, or whether certain actions taken by countries including Australia are consistent with the Paris Agreement (such as Art 2.1(a)).[583] The Commonwealth submits such comments are outside his expertise as a climate scientist and should be given no weight.

334. Finally, Prof Pitman's evidence is largely uncontroversial, subject to his more conservative stance on dynamical downscaling, which is not relevant for the reasons outlined at [226] above, and Prof Meinshausen's point addressed at [323]-[326] above, which for the reasons there was misplaced. Otherwise, Prof Karoly noted that Prof Pitman's report was "*based on best available science*"[584] and he "*agree[d] with many points*".[585] To the extent there are differences between Prof Pitman and Prof Meinshausen regarding regional modelling and attribution,

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[581] For example, Prof Karoly describes each of Dr Canadell and Prof Pitman as "*excellent scientists*": T891.23-25 (Karoly) [TRN.0009.0844].

[582] See also, T891.40 (Karoly) [TRN.0009.0844].

[583] Meinshausen 1 at [6], [50], [54], [APP.0001.0009.0001].

[584] T891.23-25 (Karoly) [TRN.0009.0844].

[585] T950.9-10 (Karoly) [TRN.0010.0920].

Prof Pitman's evidence should be preferred as Prof Meinshausen accepted it was not his core expertise.[586]

D.9 Ailan Kastom

335. The next two sections summarise the evidence relevant to the alleged loss and damage claimed by the group members. Following the amendments to remove the native title claims and the confirmation at AS [533] that there is no evidence of personal injury in relation to either of the applicants,[587] there are now only two kinds of damage claimed by the applicants: damage to *Ailan Kastom* and property damage. These will each be addressed in turn.

336. In addition, the 3FASOC claims that some group members have suffered personal injury.[588] However, the applicants do not claim, and have not adduced any evidence of, such damage, nor are there any common questions which raise the question of whether group members have suffered personal injury in relation to those claims. Accordingly, it is not necessary for these submissions, or the Court, to consider that head of damage in any detail, other than to determine that aspect of the damages claim adversely to the applicants. The Commonwealth notes that such claims, if made by any other group members, are likely to raise particular issues in relation to limitation and damages caps, amongst other things.

337. These submissions will first address the evidence in relation to *Ailan Kastom*. The Commonwealth's legal submissions with respect to the compensability of loss of *Ailan Kastom* are developed below at E.6.3.

338. It is not in dispute that *Ailan Kastom* is the body of customs, traditions, observances and beliefs of Torres Strait Islanders generally, or of a particular community or group of Torres Strait Islanders, which includes the following:[589]

    a) connection to the marine and terrestrial environment, including as part of cultural ceremony;

    b) participating in cultural ceremony;

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586 T1161.19-27 (Meinshausen) [TRN.0013.1118].
587 See 3FASOC [54(c)], [81A], [82A(c)], [86].
588 See 3FASOC [86(d)].
589 3FASOC [55]; Defence [55].

c) use of plants and animals for food, medicine and cultural ceremony;

d) burying Torres Strait Islanders in local cemeteries and performing mourning rituals;

e) visiting sacred sites, including on uninhabited islands; and

f) dugong and marine turtle hunting, and other marine hunting and fishing.

339. Nor is it in dispute that connection to sea country and marine hunting is integral to *Ailan Kastom* in the Torres Strait Islands.[590]

340. Each of the applicants' lay witnesses gave evidence of the central role that *Ailan Kastom* plays in their lives and the way in which its practice is connected to the land and sea of the Torres Strait (see, for example AS [136]-[140]). The Commonwealth does not dispute the importance of *Ailan Kastom* to those witnesses, nor that there is a close connection between the practice of *Ailan Kastom* and the land and sea of the Torres Strait.

341. The applicants' lay witnesses also gave evidence of the ways in which their practice of *Ailan Kastom* has been affected by the impacts of climate change to date, and their fears about how its practice may be impacted in future by further impacts of climate change.

342. The Commonwealth's primary response to this allegation is that the Court is not required to consider the extent to which the applicants have suffered or will suffer a loss of fulfilment of *Ailan Kastom* because:

a) loss of fulfilment of *Ailan Kastom* is not compensable under the laws of negligence for the reasons outlined in Part E.6.3 below;

b) even if loss of fulfilment of *Ailan Kastom* were compensable, the Commonwealth does not owe Torres Strait Islanders the Primary Duty or the Alternative Duty;

c) even if the Commonwealth owed Torres Strait Islanders the Primary Duty and/or the Alternative Duty, it did not breach either of those duties; and

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590 3FASOC [56(a)], Defence [56(a)].

d) even if it was found to have breached those duties, any breaches were not causally connected to any loss or damage to *Ailan Kastom*.

343. However, to the extent that it is necessary for the Court to make findings about the extent of any loss of fulfilment of *Ailan Kastom*, in this section the Commonwealth outlines its position on the evidence of loss of fulfilment of *Ailan Kastom* relied upon by the applicants, and makes some observations about the limitations of that evidence. Two general limitations about that evidence need to be noted:

a) *First*, there was a significant amount of lay evidence given about how the impacts of climate change had affected the practice of *Ailan Kastom* prior to any alleged breach of duty by the Commonwealth. Any such impacts could not have been caused by any of the alleged breaches.

b) *Secondly*, there was some lay evidence about how it was expected that the impacts of climate change would impact the practice of *Ailan Kastom* in the future. As noted in Part C.4.1 above, a cause of action in negligence only arises once compensable loss or damage has been suffered, and the mere risk of harm is not compensable. Evidence of anticipated future harm to the practice of *Ailan Kastom* that may result if certain impacts of climate change eventuate is not loss or damage for which the applicants or group members can be compensated. For example, several lay witnesses gave evidence of the consequences they feared if they lost the island of Warul Kawa,[591] or if they had to leave their homelands due to the impacts of climate change.[592] With respect, that is evidence of the anticipated consequences if a particular risk of harm eventuates, and is not compensable loss under the laws of negligence.

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591 See, for example, affidavit of Mr Pabai Pabai sworn 13 December 2022 (**Pabai Pabai Affidavit**) at [191]-[192], [APP.0001.0009.0008]; affidavit of Mr Peo Ahmat sworn 23 January 2023 (**Ahmat Affidavit**) at [31] [APP.0001.0009.0012]; affidavit of Mr Guy Paul Kabai sworn 15 December 2022 (**Kabai Affidavit**) at [150] [APP.0001.0009.0005]; affidavit of Mr Mark Herbert Warusan sworn 15 December 2022 (**Warusan Affidavit**) at [30] [APP.0001.0009.0007].

592 See, for example, affidavit of Mr Gerald Bowie sworn 22 January 2023 (**Bowie Affidavit**) at [54], [APP.0001.0009.0011]; Pabai Pabai Affidavit at [200], [APP.0001.0009.0008]. See also T60.37-39 (Mr Pabai Pabai) [APP.0001.0012.0004]; T468.23-26 (Kabai) [APP.0001.0012.0003]; T93.16 (Mr Fred Pabai) [APP.0001.0012.0004].

344. Against the background of those general observations, the Commonwealth responds to the specific evidence relied upon by the applicants in their written closing submissions.

D.9.1 Teaching *Ailan Kastom*

345. The Commonwealth does not dispute that cultural education is an important part of the practice of *Ailan Kastom* (see AS [144]).

346. Various witnesses gave evidence about how changes to the environment have impacted on their ability to teach traditional knowledge to younger generations. The applicants refer to various examples of this evidence in their written submissions. However, in order for the Court to assess the relevance of this evidence, it is necessary to specify with precision: (1) what the relevant environmental change is, and whether it has been caused by GHG emissions; and (2) when this change is said to have occurred.

347. Both these questions are essential to ascertain whether the relevant environmental change, and consequent impact on Torres Strait Islanders' ability to teach traditional knowledge, could be causally linked to the alleged breach of the Primary Duty by the Commonwealth. Of course, those matters alone will not establish that any alleged act or omission of the Commonwealth caused that environmental change. This needs to be considered in light of the climate science discussed in Part D.8 above. However, if the alleged changes are caused by matters other than GHG emissions, or occurred prior to the alleged breaches, then it is difficult to see how they could assist the applicants. For completeness, the Commonwealth notes that it understands that it is not alleged that any breach of the Alternative Duty has caused damage to the teaching of *Ailan Kastom*.

Evidence of Mr Nona

348. The applicants first rely (at AS [145]) on various statements by Mr Nona that explain the way in which the cultural education system may be undermined by climate change. However, none of those statements refer explicitly to which particular environmental changes he says have impacted upon the system of cultural education, nor does he say when those changes occurred. There are several examples of this.

349. *First*, Mr Nona gave evidence of a correlation between the migration of the *Birru Birru* and turtle mating season.[593] He gave evidence that the numbers of *Birru Birru* had been decreasing since he was a young boy.[594] It is not apparent what the cause of this drop in numbers of migrating birds is, and in any event Mr Nona, who was 48 years old at the time of giving evidence,[595] must be understood to have testified that the changes occurred (or at least started to occur) well before the Commonwealth conduct that is the subject of these proceedings.

350. *Secondly*, Mr Nona gave evidence of a correlation between the appearance of dragonflies after the monsoon season, following which squid would appear. Mr Nona gave evidence that, when this happened, it was also a good time to collect turtle eggs. However, he said that over the last decade he had noticed less dragonflies and more mosquitos, and that there are not as many squid as before.[596] Mr Nona said that this had happened in 2019 because it was a dry year and the creeks dried up.[597] However, Mr Nona's evidence was that he had started observing the change some 10 years before giving evidence, which was prior to any alleged breach of the Primary Duty.

351. *Thirdly*, he gave evidence that dugong hunting had become too easy, which impacted the roles of Uncles in teaching the intricacies of hunting for dugong.[598] He gave an example that, in 2022, a whole herd of dugong were found on top of the reef close to the island which made the hunt "*easy pickings*".[599] In his oral testimony he also explained that many hunters no longer used the traditional hunting practice of "*popathayan*".[600] However, it was not apparent how either of these changes were a result of increased GHG emissions. Nor was it apparent when or why some hunters had stopped using popathayan.

Evidence of other lay witnesses

352. The applicants also rely (at AS [146]-[147]) on evidence of:

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593 Affidavit of Mr Nona dated 14 February 2023 (**Nona Affidavit**) at [25]-[27], [APP.0001.0009.0013].

594 Nona Affidavit at [27], [APP.0001.0009.0013]; T428.15-40 (Nona) [APP.0001.0012.0002].

595 Nona Affidavit at [4], [APP.0001.0009.0013].

596 Nona Affidavit at [41], [APP.0001.0009.0013].

597 T429.19-31 (Nona) [APP.0001.0012.0002].

598 Nona Affidavit at [45]-[46], [APP.0001.0009.0013].

599 Nona Affidavit at [44], [APP.0001.0009.0013].

600 T206.25-208.7 (Nona) [APP.0001.0012.0005].

a) Mr Kabai, who gave evidence that the seasons no longer match up with what the stars are telling him, meaning he cannot pass those teachings onto his children and grandchildren.[601] However, on Mr Kabai's own evidence he started noticing this change 30 years ago.[602]

b) Mr Pabai Pabai, who gave evidence that the elders taught him how to read the constellations to know when to plant and harvest particular crops, but that it was hard to teach the younger generation about the constellations.[603] However, Mr Pabai did not give any specific evidence about why he was unable to pass on those teachings, nor when these changes occurred.

c) Mr Billy, who gave evidence that he was unable to teach his children and grandchildren about gardening.[604] In his oral evidence, Mr Billy explained that his family grew vegetables in the 1970s because they had less connection to mainland food supply so they had to grow their own vegetables. He gave evidence that his family began having problems growing vegetables in the 1980s because the heat from the sun caused the soil to become too dry.[605]

d) Mr Bowie, who gave evidence that it was difficult to pass on the cultural teachings about the seasons, the winds, the tides and the stars because things were changing.[606] The changes Mr Bowie said he had observed included an increase in lightning and thunder, a change in the migration patterns of birds such as pelicans, spoonbills and Torres Strait pigeons, and a change in the pattern of the waves.[607]

e) Mr Fred Pabai, who gave evidence in the following exchange with counsel for the applicants:[608]

Ms Barrett: *Are you worried though Uncle that there will be parts of that knowledge that you have ---*

601 Affidavit of Mr Paul Kabai dated 15 December 2022 (**Kabai Affidavit**) at [113], [APP.0001.0009.0005].
602 Affidavit of Mr Kabai at [110].
603 Pabai Pabai Affidavit at [118], [APP.0001.0009.0008].
604 Affidavit of Mr Boggo Billy dated 24 January 2023 (**Billy Affidavit**) at [42], [APP.0001.0009.0006].
605 T646.24-647.9 (Billy) [APP.0001.0012.0008].
606 Bowie Affidavit at [16], [APP.0001.0009.0011].
607 Bowie Affidavit at [13]-[15] [APP.0001.0009.0011].
608 T95.36-46 (Fred Pabai) [APP.0001.0012.0004].

Fred Pabai:	*Yes.*
Ms Barrett:	*--- that you will not be able to teach to the future generations?*
Fred Pabai:	*[Aboriginal language spoken to Mr Pabai]. The sad thing is that what I know, and if I cannot pass down my knowledge and skill there won't be any tomorrow for the future of our young youth and young generation.*

When read in context it is clear that Mr Pabai is giving evidence about how he would feel should he be unable to pass on his cultural knowledge. It is not evidence about harm that he has already experienced.

f) Ms Enosa, who gave evidence that the younger generations are noticing inconsistencies between the teachings and the environment.[609] Ms Enosa gave evidence about various environmental changes in her affidavit at [25]-[49], and then stated at [50] that the changes "*have been happening since about the 1980s, but it has been much quicker and much more noticeable in the last 10 years or so*". Ms Enosa has been living on Thursday Island since 1991.[610] In cross-examination, she clarified that she had visited Saibai a few times a year for that 30 year period.[611] She also explained that some of her evidence about these changes, including her evidence about turtle mating season being late, the changing patterns of migrating birds and a method of using a native earleaf acacia to work out when to catch a certain fish, were based on things others had told her rather than her direct observation.[612]

D.9.2 Gravesites and ancestral connections

353. The Commonwealth accepts that the witnesses demonstrated a strong connection to their ancestors and the importance of gravesites (see AS [148]). However, as with the evidence relating to teaching of *Ailan Kastom*, in order for the Court to

609 Affidavit of Ms Jennifer Enosa sworn 22 January 2023 (**Enosa Affidavit**) at [56], [APP.0001.0009.0010].
610 Enosa Affidavit at [7], [APP.0001.0009.0010].
611 T609.30-610.29 (Enosa) [APP.0001.0012.0006].
612 T612.7-16, T616.5-35, 620.9-33 (Enosa) [APP.0001.0012.0006].

assess the relevance of this evidence it is necessary to specify with precision when the alleged harm is said to have occurred.

354. The applicants rely on evidence from Mr Kabai about the Saibai cemetery (AS [149]). Mr Kabai's evidence was that he had noticed sea water coming into the cemetery since his 20s (Mr Kabai was 55 years old at the time of swearing his affidavit).[613] He also gave evidence that the cemetery had eroded, particularly in the 5 to 10 years before the seawall was completed in 2017,[614] and that the cemetery was badly flooded in about 2012 and that it was at this time that many graves were washed away.[615] Mr Kabai gave evidence that the seawall now stops the tide from coming into the cemetery, which also stopped erosion.[616]

355. The applicants rely on evidence from Mr Pabai Pabai about the Boigu cemetery (AS [150]). Mr Pabai's evidence was that sea water has come into the cemetery on Boigu on a number of occasions in the last 20 years,[617] and also accepted in cross-examination that the cemetery had sometimes flooded prior to that.[618] He also gave evidence that the inundation of the cemetery that he had observed occurred before the seawall was built.[619] As the applicants note, Mr Pabai also gave evidence that they had experienced difficulties burying community members because their graves had filled with water. Mr Pabai confirmed in evidence that this had been happening since he was young.[620] Mr Pabai was 53 years old at the time of swearing his affidavit.[621]

356. The applicants also rely (at AS [151]) on evidence from Mr Bowie, who lives on Badu, that he had observed water coming up through the soil when digging graves in the last 5 to 10 years.[622] However, it was not entirely clear from Mr Bowie's evidence where this occurred. In his oral evidence, he confirmed that only the front part of the Badu cemetery gets flooded.[623] Neither of the other witnesses

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613 Kabai Affidavit at [4], [85], [APP.0001.0009.0005].
614 Kabai Affidavit at [85], [APP.0001.0009.0005].
615 Kabai Affidavit at [132], [APP.0001.0009.0005].
616 T467.17-29 (Kabai) [APP.0001.0012.0003].
617 Pabai Pabai Affidavit at [87], [APP.0001.0009.0008].
618 T76.26-36 (Pabai Pabai) [APP.0001.0012.0004].
619 T126.18-26, 127.28-39 (Pabai Pabai) [APP.0001.0012.0007].
620 T76.22-24 (Pabai Pabai) [APP.0001.0012.0004].
621 Pabai Pabai Affidavit at [4], [APP.0001.0009.0008].
622 T728.13-45 (Bowie) [APP.0001.0012.0008]; Bowie Affidavit at [47], [APP.0001.0009.0011].
623 T760.29-46 (Bowie) [APP.0001.0012.0008].

from Badu (Mr Nona and Mr Ahmat) gave evidence that the Badu cemetery the Court visited had flooded.

D.9.3 Traditional foods and gardening

357. The Commonwealth accepts that the use of traditional foods and gardening is an aspect of the practice of *Ailan Kastom*. However, as with the other evidence relied on by the applicants to show a loss of fulfilment of *Ailan Kastom*, it is important to be precise about when the harm occurred to determine whether it could have any relevance to the present case.

358. Mr Pabai Pabai's evidence was that soil testing that occurred in 2013 or 2014 demonstrated that the soil was too salty.[624] Although there was no evidence about soil testing undertaken before this time, Mr Pabai gave evidence that he had first experienced difficulties growing cassava in the 1970s or 1980s, and that he believed this was due to the salinity of the soil.[625] The applicants also refer to several water testing documents, produced by the Torres Strait Regional Authority (**TSRA**)on subpoena.[626] On their face, those documents appear to be records of water quality testing undertaken on 14 May 2015 on Saibai. Although the documents record a salinity level, no context is given for what that salinity level means in terms of being able to garden, nor how it has changed over time. The Commonwealth submits that those documents are of no probative value.

359. Mr Warusan gave evidence that almost all of the gardens behind the village on Saibai are gone because of the inundation and salt.[627] However, on a site visit to some of these gardens Mr Warusan suggested that some of these areas could still be gardened. For example, he showed the Court an area that had been used by Mr Ronnie Akiba to plant bananas. Mr Warusan said that Mr Akiba passed away, but indicated that the garden could still be used.[628] He also pointed to various parts of the gardens that could still be farmed.[629]

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624 Pabai Pabai Affidavit at [121], [APP.0001.0009.0008].
625 T78.13-31 (Pabai Pabai) [APP.0001.0012.0003].
626 See AS footnote 286.
627 Warusan Affidavit at [33], [APP.0001.0009.0007].
628 T590.11-19 (Warusan) [APP.0001.0012.0006].
629 T592.28-43 (Warusan) [APP.0001.0012.0006].

360. Mr Warusan also gave evidence that a community garden was set up on Saibai in 2013, but that he is the last person who gardens there.[630] Mr Warusan also gave evidence that his family had taken up gardening at *Surum* in 1981,[631] but that his family was no longer doing this in the 2000s because the land was becoming inundated.[632] He later clarified that he had planted his last harvest there in 2002.[633]

361. Mr Kabai gave evidence that, when he was young, he was taught to garden by his aunts in his family's garden behind the village. He said that the ground is now too soft and salty to grow things,[634] and that his family has not been able to use the garden for the past 20 years.[635] Mr Kabai also gave evidence that his family's garden can no longer be used because erosion of the beachfront meant the road had to be moved back, and it now runs over his family's garden.[636]

362. The applicants also rely on evidence from Mr Warusan about how the changing nature of seasonal patterns has impacted Torres Strait Islanders' ability to grow and eat foods in accordance with *Ailan Kastom* (at AS [155]).[637] However, Mr Warusan's evidence is that he first noticed this change occurring around 30 years ago.[638] In oral evidence he explained that the seasonal calendar in the Torres Strait was based on "*before time*", and said that, even when he was taught about the seasonal calendar, it did not match up with what he was experiencing.[639]

363. Further, the applicants rely on evidence of Mr Fauid (at AS [156]) that, because people cannot grow and eat traditional fruit and vegetables, they have to buy food from the IBIS shop, which is not as healthy, and that he sees lots of people with high blood pressure and other health problems. It is difficult to see how this evidence could be probative in relation to any fact in issue in this proceeding. Mr Fauid's evidence is at such a high level of generality that the Court could not make any findings of fact on the basis of it — he does not identify any individuals

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630 Warusan Affidavit at [34], [APP.0001.0009.0007].
631 Warusan Affidavit at [36], [APP.0001.0009.0007].
632 T509.13-16 (Warusan) [APP.0001.0012.0003].
633 T511.14-19 (Warusan) [APP.0001.0012.0003].
634 T463.6-35 (Kabai) [APP.0001.0012.0003].
635 Kabai Affidavit at [56], [APP.0001.0009.0005].
636 Kabai Affidavit at [50], [APP.0001.0009.0005].
637 The Commonwealth notes that the first three paragraphs of the block quote at AS [155] is attributed to Mr Pabai Pabai, but is actually a quote from the Warusan Affidavit at [109]-[111]. The fourth paragraph in the block quote is from the Pabai Pabai Affidavit at [113].
638 Warusan Affidavit at [110], [APP.0001.0009.0007].
639 T528.10-38 (Warusan) [APP.0001.0012.0003].

who have suffered such illness, nor when they suffered that illness. Further, the Commonwealth understands that the Court is not being asked to make any findings in relation to personal injury because, as the applicants properly accept at AS [533], there is no evidence that either applicant has suffered this kind of harm and no common question raises the issue of whether other group members have suffered personal injury.

D.9.4 Camping and community gathering

364. The applicants rely (at AS [157]) on four different aspects of the evidence said to show that climate change has interfered with traditional camping and community gathering. However, when the first three aspects of that evidence are considered in context, it is clear that the environmental changes said to have interfered with traditional camping and community gathering have been occurring since before any alleged breach by the Commonwealth of either the Primary Duty or the Alternative Duty.

365. The evidence of Mr Kabai was that people used to canoe across the whole island because the rivers and swamps were connected by trenches, but that this was no longer possible.[640] However, in cross-examination it became clear that people had not been canoeing across the whole island since before Mr Kabai was born. Mr Kabai gave evidence that he had not canoed across the whole island, but that he had done some canoeing to the swamp to get some mussels.[641] It was not clear whether he was still able to do this.

366. The evidence of Mr Warusan was that his family's campsite at Surum had eroded in the last 15 years, meaning that his family could only camp there for a "*tiny bit*" of the year.[642]

367. Mr Pabai Pabai gave evidence that families do not go out camping anymore because of the erosion.[643] However, he also gave evidence that the process of erosion of the beach near his campsite has been ongoing since the 1970s.[644]

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640 Kabai Affidavit at [43], [APP.0001.0009.0005].
641 T487.9-41; T588.11-589.8 (Kabai) [APP.0001.0012.0006].
642 Warusan Affidavit at [19], [APP.0001.0009.0007].
643 T46.39-42 (Pabai Pabai) [APP.0001.0012.0004].
644 T80.31-36 (Pabai Pabai) [APP.0001.0012.0004].

368. The fourth aspect on which the applicants rely is evidence from Mr Nona and Mr Ahmat about erosion near their campsites. However, neither suggested that the erosion has impacted their ability to use those sites for camping. Accordingly, it is not clear what is said to be the interference with *Ailan Kastom*.

D.9.5 Ceremony and sacred sites

369. As noted, the Commonwealth does not contest that the practice of *Ailan Kastom* is deeply connected to the land and waters of the Torres Strait. However, as above, it is necessary to provide some further context to the evidence the applicants rely on to ascertain whether it is relevant to the issues in dispute, and if so, how.

370. The applicants rely (at AS [159]) on evidence from Mr Kabai. Mr Kabai gave evidence that, because of sea level rise and flooding of the swamps, it was not possible to visit particular places where cultural ceremonies had once taken place, so some ceremonies were now practiced in people's houses.[645] Mr Kabai was not able to confirm when these ceremonies had to start being held at people's houses.[646] Neither of the other witnesses from Saibai (Mr Warusan and Ms Enosa) gave any evidence about whether they were still able to visit particular sites for cultural ceremonies. The Commonwealth submits that, without any evidence about when Mr Kabai stopped being able to visit these sites, it is not possible for the Court to make a finding that any of the alleged breaches by the Commonwealth could have causally contributed to this occurrence.

371. The applicants rely (at AS [160]) on evidence given by Mr Pabai Pabai. Mr Pabai gave evidence that he was no longer able to go crabbing due to erosion and flooding.[647] However, in cross-examination, he clarified that he had gone crabbing as a young child and had not done this since he was a young man of about 20.[648] Mr Pabai was 53 years old at the time of giving evidence.[649] He also gave evidence that, in the 1970s, the dugong ceremony had been performed on the beach in front of the town, but the beach was no longer there.[650] Mr Pabai's evidence was that, in the 1970s, a seawall had been built by the community in the

645 Kabai Affidavit at [106], [APP.0001.0009.0005].
646 T492.1-11 (Kabai) [APP.0001.0012.0003].
647 Pabai Pabai Affidavit at [143]-[144].
648 T80.38-81.24 (Pabai) [APP.0001.0012.0004].
649 Pabai Pabai Affidavit at [4], [APP.0001.0009.0008].
650 Pabai Pabai Affidavit at [145]-[158], [APP.0001.0009.0008].

location where the current seawall stands, and that the beach had disappeared by this time.[651] The applicants also rely on Mr Pabai's evidence about the impacts on the Boigu cemetery of rising seawater and encroaching mangroves (at AS [162]). As to the impacts of rising seawater on the Boigu cemetery, the Commonwealth refers to [355] above. As to the impacts of the mangroves, the evidence cited by the applicants does not make any suggestion that the mangroves are causing damage to the cemetery.

372. Finally, the applicants rely on evidence that there is erosion on the red sandbank and Warul Kawa, which are places of great significance to Mr Pabai Pabai and others. Various witnesses gave evidence that they had witnessed erosion on Warul Kawa. However, two of the witnesses who gave evidence about Warul Kawa had only been to Warul Kawa on a few occasions. Mr Ahmat had only been to Warul Kawa twice — first in 1985, and then again in 2021.[652] It follows that he cannot comment on when throughout this period the changes he had observed in 2021 had occurred. Mr Kabai had only been to Warul Kawa three times — in 2019, 2020 and 2021.[653] He gave very high-level evidence that it was "*eroded away*" but did not explain when this had occurred, or the extent of the erosion. Mr Warusan, in his role as a TSRA ranger, had visited Warul Kawa about twice a year since 2012.[654] Although he gave evidence that Warul Kawa was the "*worst eroded island in the Torres Strait*", he clarified in cross-examination that this was based on his "*general knowledge*", having visited many other islands in his role as a ranger.[655] Although the Commonwealth does not dispute Mr Warusan's evidence that he had witnessed erosion on Warul Kawa over this time, there are no clear measurements of the extent of erosion, or when it occurred.

D.9.6 Seasons and hunting

373. As the applicants note (at AS [164]), several of the witnesses gave evidence that seasonal weather patterns had changed and the associated loss of *Ailan Kastom*. However, several witnesses who gave evidence on this issue said that they had

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651 T69.37-70.28 (Pabai) [APP.0001.0012.0004].
652 T171.23-40 (Ahmat) [APP.0001.0012.0005].
653 T475.30-33; T495.21-29 (Kabai) [APP.0001.0012.0003].
654 T512.40-T513.5 (Warusan) [APP.0001.0012.0003].
655 T534.15-21 (Enosa) [APP.0001.0012.0003].

noticed these changes occurring long before any of the alleged breaches of duty. For example, Mr Kabai gave evidence that he started noticing these changes 30 years ago,[656] Ms Enosa gave evidence that these changes began in the 1980s,[657] Mr Billy gave evidence that some of the changes had been occurring for 20 years,[658] and Mr Warusan gave evidence that the seasons had not matched with the teachings even when he was taught about them.[659]

374. The applicants also rely (at AS [167]) on evidence from Mr Kabai that he can no longer practice hunting for dugong on seagrass beds, but his evidence was that this practice had occurred from when he was very young until he was in his mid-20s (Mr Kabai was 55 years old at the time of his affidavit).[660]

D.10 Property Damage

375. At AS [168]-[170], the applicants set out the property damage that they allege has been caused by the impacts of climate change.

376. As in relation to *Ailan Kastom*, that loss or damage could not possibly be attributed to the Commonwealth's breaches if it occurred before those alleged breaches. Some of the property damage identified in the applicants' submissions falls into this category, and can therefore be disregarded for the purposes of this case. That alleged damage is:

a) the damage to Mr Pabai Pabai's house referred to at AS [169], which occurred following a flood in 2007;[661]

b) the damage to Mr Kabai's house, tools and a washing machine referred to at AS [170], which occurred in about 2012;[662]

c) any evidence of increased salinity and erosion that occurred prior to any of the alleged breaches (as to which, see, for example, [354]-[355], [358]-[362] above).

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656 Kabai Affidavit at [110], [APP.0001.0009.0005].
657 Enosa Affidavit at [50], [APP.0001.0009.0010].
658 Billy Affidavit at [35], [APP.0001.0009.0006].
659 T528.10-38 (Warusan) [APP.0001.0012.0003].
660 Kabai Affidavit at [4], [115], [APP.0001.0009.0005].
661 Pabai Pabai Affidavit at [169]-[170], [APP.0001.0009.0008].
662 Kabai Affidavit at [131], [APP.0001.0009.0005].

377. The only remaining evidence of property damage suffered by the applicants referred to in the submissions is as follows. The entirety of the applicants' claims are to be determined in this trial,[663] so this alleged loss must be the full extent of the applicants' claim for property damage:

a) Mr Kabai's evidence that his washing machine and tools were "*affected*" by a king tide in 2020, although there is no evidence that either were damaged, nor the extent of the damage;[664]

b) Mr Pabai Pabai's evidence that his cassava garden was wrecked by tides a few months prior to him swearing his affidavit, although he also gave evidence that soil testing in 2013 or 2014 concluded that the soil was too salty at that point in time and that his home garden had been too salty to grow anything for the past 8 years;[665] and

c) Mr Pabai's evidence that his campsite had experienced erosion in the past 10 years,[666] although as noted at [367] above, Mr Pabai gave evidence that erosion had also been occurring prior to this point.

378. Some of the other group members gave evidence of alleged property damage they have suffered.[667] The applicants referred to this evidence in their submissions, but it is not relevant for the purposes of this hearing, which concerns only common questions and the applicants' claims.

379. It should also be noted that, insofar as the damage alleged relates to land, there is no evidence before the Court as to what interest the applicants have in the land said to have been damaged.

380. In Part E6.1 below, the Commonwealth submits that the evidence before the Court is insufficient to sustain a finding that there has been property damage in respect of which any award of loss or damage could be made.

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663 Orders made on 4 March 2024, order 1(a), [CRT.2000.0004.0018].
664 Kabai Affidavit at [140], [APP.0001.0009.0005], relied on at AS footnotes 318 and 325
665 Pabai Pabai Affidavit at [113], [120]-[121], relied on at AS footnotes 319 and 322.
666 Pabai Pabai Affidavit at [130]-[141], relied on at AS footnotes 323-324.
667 See, e.g. Warusan Affidavit at [32]-[33], [APP.0001.0009.0007], relied on at AS footnotes 316, 317, 319 and 327; affidavit of Mr Peo Ahmat at [45], [APP.0001.0009.0012], relied on at AS [170].

D.11 Governance in the Torres Strait Islands

381. As is the case throughout Australia, there are three levels of government in the Torres Strait Islands. The roles and responsibilities of the Commonwealth government in relation to Torres Strait Islanders need to be considered in light of the roles and responsibilities of the other levels of government in the Torres Strait Islands, namely the Queensland Government and the two local councils — the Torres Strait Island Regional Council (**TSIRC**) and the Torres Shire Council (**TSC**). The TSRA, a Commonwealth authority that is established as a body corporate under s 142 of the *Aboriginal and Torres Strait Islander Act*, also plays a role in the region. The roles of each of the local governments, the Queensland Government and the TSRA are outlined in further detail in this section.

D.11.1 Local Government

382. There are two councils in the Torres Strait Islands: the TSIRC and the TSC.

383. The TSIRC is the larger council in the Torres Strait region. It is the local government body for 15 island communities, namely Mer, Erub, Ugar, Iama, Masig, Warraber, Poruma, Badu, Arkai, Wug, Mabuyag, Kirriri, Saibai, Boigu and Dauan. All of the lay witnesses who gave evidence in this case came from communities where the TSIRC is the local council.[668]

384. The TSIRC was established in 2008 by the *Local Government and Other Legislation (Indigenous Regional Councils) Amendment Act 2007* (Qld), which amended the (now repealed) *Local Government Act 1993* (Qld). Prior to the establishment of the TSIRC, each community had its own island council established under the *Community Services (Torres Strait) Act 1984* (Qld).

385. The *Local Government Act 2009* (Qld) (**2009 Act**) repealed and replaced the *Local Government Act 1993* (Qld), and the TSIRC is now governed by the 2009 Act. The purpose of the 2009 Act is to provide for the way in which a local government is constituted and the nature and extent of its responsibilities and powers.[669] Part 1 of Chapter 2 of that Act is titled "*Local governments and their*

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[668] Jennifer Enosa, who gave evidence on Saibai, currently resides on Thursday Island, where the TSC is the local council. However, Ms Enosa's evidence largely concerned matter relating to Saibai, and she did not give evidence about the impacts of climate change on Thursday Island.

[669] *Local Government Act 2009* (Qld), s 3(a).

constitution, responsibilities and powers". Section 8(1) provides that a local government is "*an elected body that is responsible for the good rule and local government of a part of Queensland*". Section 9 sets out the powers of local governments generally, and provides that a local government *"has the power to do anything that is necessary or convenient for the good rule and local government of its local area*", subject to the qualification that it can only do something that the State of Queensland can validly do.

386. The TSIRC plays an important role in climate change adaptation in the Torres Strait Islands. In particular, as outlined in Part F below, the TSIRC has been the government entity responsible for implementing the Seawalls Project (with funding assistance from State and Commonwealth governments).

387. The TSIRC's role in climate change adaptation is also evident from its participation in the QCoast2100 program, a program created by the Queensland government and managed by the Local Government Association of Queensland, by which local councils work through an eight-phase process to assist them to develop a Coastal Hazard Adaptation Strategy (**CHAS**) to plan for short and long term coastal hazard impacts up to the year 2100.[670]

388. At the time of giving evidence in this case, Mr Laurie Nona was the Councillor for Badu serving on the TSIRC. He gave evidence that the TSIRC had responsibilities in relation to climate change, including playing a role in prioritising which islands seawalls should be built on.[671] The TSIRC's responsibilities in relation to climate change are also evident from the fact that it has a Climate Change Adaptation and Environment Committee, two records of whose minutes have been tendered by the applicants.[672] Those minutes show that the Committee is actively engaged in progressing adaptation measures in the Torres Strait region, including by working toward the completion of a Coastal Hazard Adaptation Strategy as part of the QCoast2100 program[673] and applying for funding for coastal hazard adaptation measures.[674]

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[670] APP.0001.0003.0103 at section 1.1.

[671] T413.26-36 (Nona) [APP.0001.0012.0002].

[672] Minutes of meeting dated 11 March 2022, [APP.0001.0003.0165]; Minutes of meeting dated 27 April 2023, [APP.0001.0003.0171].

[673] Minutes of Climate Change Adaptation and Environment Committee meeting dated 11 March 2022 at item 7, [APP.0001.0003.0165 at 0005].

[674] TSIRC Information Report annexed to Minutes of meeting dated 27 April 2023, [APP.0001.0003.0171] at [.0011-0012].

389. The TSC is the local government for Thursday Island, Prince of Wales Island, Horn Island and immediate surrounding islands. Like the TSIRC, it is governed by the 2009 Act. The applicants have not adduced any evidence from lay witnesses about the impacts of climate change in areas governed by the TSC.

D.11.2 The Queensland Government

390. The Torres Strait Islands form part of the territory of the State of Queensland. Queensland has plenary power to make laws for that state,[675] subject to the Constitution.[676]

D.11.3 The TSRA

391. In their submissions, the applicants make various arguments that draw upon the relationship between the Commonwealth and the TSRA. These are dealt with in Parts E and F below, but in order to respond those arguments it is necessary to provide some background about the TSRA.

392. Part 3A of the *Aboriginal and Torres Strait Islander Act* governs the TSRA. The TSRA is established as a body corporate which may sue and be sued in its corporate name under s 142 of that Act. The TSRA is the leading Commonwealth representative body for Torres Strait Islander and Aboriginal people living in the Torres Strait.[677] It is made up of elected members.[678] Only Torres Strait Islander or Aboriginal persons may vote in the election for members,[679] and only Torres Strait Islander or Aboriginal persons are qualified to be elected as members.[680]

393. It follows that, although it is established under an enactment of the Commonwealth Parliament, the TSRA is a separate legal entity to the Commonwealth. The TSRA is not a party to these proceedings, nor is there any allegation in the 3FASOC that the Commonwealth is liable for any act or omission of the TSRA. It is a corporate Commonwealth entity under the *Public Governance, Performance and Accountability Act 2013* (Cth) (**PGPA Act**),[681]

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675 *Constitution Act 1867* (Qld), s 2.
676 Australian Constitution, s 107. [CTH.0002.0001.0441]
677 Torres Strait Development Plan for 2019-2022, [EVI.2001.0003.4880] at [.4898].
678 *Aboriginal and Torres Strait Islander Act*, s 142R(1).
679 *Aboriginal and Torres Strait Islander Act*, s 142U(1).
680 *Aboriginal and Torres Strait Islander Act*, s 142V(1), read with s 142U(1).
681 *Public Governance, Performance and Accountability Act 2013* (Cth), ss 10-11.

and is subject to the legislative requirements of that Act in its use and management of public resources.[682]

394. The functions of the TSRA are set out in s 142A(1) of the *Aboriginal and Torres Strait Islander Act*. Those functions include:

a) to recognise and maintain the special and unique *Ailan Kastom* of Torres Strait Islanders living in the Torres Strait area;

b) to formulate and implement programs for Torres Strait Islanders, and Aboriginal persons, living in the Torres Strait area;

c) to monitor the effectiveness of programs for Torres Strait Islanders, and Aboriginal persons, living in the Torres Strait area, including programs conducted by other bodies;

d) to develop policy proposals to meet national, State and regional needs and priorities of Torres Strait Islanders, and Aboriginal persons, living in the Torres Strait area;

e) to assist, advise and co-operate with Torres Strait Islander and Aboriginal communities, organisations and individuals at national, State, Territory and regional levels; and

f) to take such reasonable action as it considers necessary to protect Torres Strait Islander and Aboriginal cultural material and information relating to the Torres Strait area if the material or information is considered sacred or otherwise significant by Torres Strait Islanders or Aboriginal persons.

395. Section 142D of the *Aboriginal and Torres Strait Islander Act* requires the TSRA to formulate, and revise from time to time, a plan to be known as the Torres Strait Development Plan. The aim of the plan is "*to improve the economic, social and cultural status of Torres Strait Islanders, and Aboriginal persons, living in the Torres Strait area*". It must outline the strategies and policies that the TSRA intends to adopt in order to implement the plan.

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682 *Public Governance, Performance and Accountability Act 2013* (Cth), ss 15.

396. The Torres Strait Development Plan for 2019-2022 is in evidence.[683] Relevantly for present purposes, that plan (inter alia):

a) states that the "*aspiration for regional governance is recognised by the Commonwealth of Australia in the [Aboriginal and Torres Strait Islander Act] and places the special and unique Ailan Kastom of the Torres Strait at the centre of formulating and coordinating all programs towards the development and growth of our people*";[684]

b) states that the TSRA's programmes are set out in the plan, which also specifies how each programme will contribute to achieving the goals of the Indigenous Advancement Strategy and the *Torres Strait and Northern Peninsula Area Regional Plan 2009-2029*, and that the programmes are aligned to the Indigenous Advancement Strategy and the COAG Building Blocks for overcoming Indigenous disadvantage; [685] and

c) provides an outline of how the Torres Strait Development Plan relates to other regional and national planning documents.

397. As to the last, the Torres Strait Development Plan:

a) provides an overview of the *Torres Strait and Northern Peninsula Area Regional Plan 2009-2029* (**Regional Plan**), which was a plan developed by the TSRA, the TSIRC, the TSC and the Northern Peninsula Area Regional Council[686] with support from the Queensland Government following a comprehensive community engagement process.[687] The Regional Plan provides 11 goals to strategic policy development by all government service providers in the Torres Strait and Northern Peninsula Area, which relevantly include: effective and transparent self-government and management of the natural and cultural environment. The Torres Strait Development Plan states that the Regional Plan is supported by the Integrated Service Delivery action plan, which "*involves government at all*

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683 EVI.2001.0003.4880.

684 Torres Strait Development Plan for 2019-2022, EVI.2001.0003.4880 at [.4887].

685 Torres Strait Development Plan for 2019-2022, EVI.2001.0003.4880 at [.4888].

686 Being the local government responsible for communities on mainland Australia, including Bamaga and Seisia, which fall outside the Torres Strait Islands as described at 3FASOC [52].

687 Torres Strait Development Plan for 2019-2022, [EVI.2001.0003.4880] at [.4893].

levels working in the region to achieve the coordinated, integrated delivery of services";

b) states that the Torres Strait Development Plan is part of the Integrated Planning Framework for the Torres Strait and Northern Peninsula Area,[688] which is set out at Appendix 1.[689] This Framework shows that there are numerous inputs from different bodies into developing the Regional Plan and other plans in the Torres Strait region, including input from Prescribed Bodies Corporate, consultations with the community, as well as Australian Government and Queensland Government policies, and input from local councils;

c) provides an overview of the COAG building blocks and the Australian Government's Indigenous Advancement Strategy, which was introduced on 1 July 2014 and groups individual programmes under five broad programmes, relevantly including the "Remote Australia Strategies";[690]

d) states that the TSRA is committed to the observance of the Declaration on the Rights of Indigenous Peoples as set out in Resolution 61/295 of the United Nations General Assembly,[691] several articles of which emphasise the right to self-determination.[692]

398. The Torres Strait Development Plan further states that the TSRA will deliver eight programmes that contribute to the regional goals expressed in the Regional Plan to achieve the targets for which the TSRA has a regional policy or service delivery role as outlined in the National Indigenous Reform Agreement.[693] Those programs are: (1) Economic Development; (2) Fisheries; (3) Culture, Art and Heritage; (4) Native Title; (5) Environment Management; (6) Governance and Leadership; (7) Healthy Communities; and (8) Safe Communities.

399. The TSRA's Environment Management programme is particularly relevant in this case. Under this programme, the TSRA's Land and Sea Management Unit works in partnership with Torres Strait Traditional Owners, communities, researchers

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688 Torres Strait Development Plan for 2019-2022, [EVI.2001.0003.4880] at [.4893].
689 Torres Strait Development Plan for 2019-2022, [EVI.2001.0003.4880] at [.4984].
690 Torres Strait Development Plan for 2019-2022, [EVI.2001.0003.4880] at [.4895-4596].
691 Torres Strait Development Plan for 2019-2022, [EVI.2001.0003.4880] at [.4896].
692 Declaration on the Rights of Indigenous Peoples, Arts 3, 4 and 5.
693 Torres Strait Development Plan for 2019-2022, [EVI.2001.0003.4880] at [.4899-4900].

and all levels of government to help address and manage environmental issues. Its aim is to support the regional goal of empowering Torres Strait Islander and Aboriginal people to sustainably manage and benefit from their land, sea and cultural resources into the future, in accordance with *Ailan Kastom*, Aboriginal lore and/or law, and Native Title rights and interests.[694] The Environment Management Programme has a mandate from the TSRA Board to undertake climate change adaptation and resilience projects.[695]

D.11.4 The division of responsibility between the three levels of government for adaptation in Australia

400. In 2012, the Council of Australian Government's (**COAG**) Select Council on Climate Change agreed to the "Roles and Responsibilities for Climate Change Adaptation in Australia" (**COAG Agreement**), which "*sets out the principles for the management of climate-change risks, and roles and responsibilities for adapting to climate change within the three tiers of government: Commonwealth, State and Territory and Local*".[696]

401. The COAG Agreement recognises that the three levels of government in Australia "*have different responsibilities and have differentiated, yet complementary roles in helping Australia adapt to the impacts of climate change*".[697] It differentiates between those roles as follows:[698]

a) **The Commonwealth:** The Australian government has stewardship of the national economy and is responsible for promoting Australia's national interests more broadly. The Commonwealth will need to take a leadership role in positioning Australia to adapt to climate change impacts that may affect national prosperity or security. It will:

i) provide national science and information;

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694 Torres Strait Development Plan for 2019-2022, [EVI.2001.0003.4880] at [.4944-4945].

695 Torres Strait Development Plan for 2019-2022, [EVI.2001.0003.4880] at [.4947].

696 [EVI.2001.0006.2001].

697 COAG Agreement, [EVI.2001.0006.2001] at [.0693]. (The document ID for the COAG Agreement (EVI.2001.0006.2001) is inconsistent with the document "stamp" which appears in the top right-hand corner of each page of the document. In these submissions, the Commonwealth has used the document ID to refer to the COAG Agreement generally, and the document stamp for all pin point references.)

698 COAG Agreement, [EVI.2001.0006.2001] at [.0693-.0698].

ii) manage Commonwealth assets and programs;

iii) provide leadership on national adaptation reform; and

iv) maintain a strong, flexible economy and a well-targeted social safety net.

b) **State and Territory Governments:** State and Territory Governments deliver a broad range of services, administer a significant body of legislation and manage a substantial number of assets and infrastructure. The focus for State and Territory Governments will be on ensuring appropriate regulatory and market frameworks are in place, providing accurate and regionally appropriate information, and delivering an adaptation response in areas of policy and regulation that are within the jurisdiction of the state. This includes key areas of service delivery and infrastructure, such as emergency services, the natural environment, planning and transport. States and Territories will:

i) provide local and regional science and information;

ii) manage State and Territory assets and programs;

iii) work with the Commonwealth to implement national adaptation reform; and

iv) encourage resilience and adaptive capacity.

c) **Local Governments:** Local governments are responsible for a broad range of services, the administration of a range of Commonwealth, State and Territory legislation, and the management of a substantial number of assets and infrastructure, including assets and infrastructure of local, regional, state and national significance. Local governments are at the frontline of climate change. They have a critical role to play in ensuring that particular local circumstances are adequately considered in the overall adaptation response and in involving the local community directly in efforts to facilitate effective change. They are strongly positioned to inform State and Commonwealth Governments about on-the-ground needs of local and regional communities, to communicate directly with communities, and to respond appropriately and in a timely manner to local changes. Local governments will:

i) administer relevant state and territory and/or Commonwealth legislation to promote adaptation as required including the application of relevant codes;

ii) manage risks and impacts to public assets owned and managed by local governments;

iii) manage risks and impacts to local government service delivery;

iv) collaborate across councils and with State and Territory Governments to manage risks of regional climate change impacts;

v) ensure policies and regulations under their jurisdiction, including local planning and development regulations, incorporate climate change considerations and are consistent with State and Commonwealth Government adaptation approaches;

vi) facilitate building resilience and adaptive capacity in the local community, including through providing information about relevant climate change risks;

vii) work in partnership with the community, locally-based and relevant NGOs, business and other key stakeholders to manage the risks and impacts associated with climate change; and

viii) contribute appropriate resources to prepare, prevent, respond and recover from detrimental climatic impacts.

402. In 2015, the Commonwealth Government developed the National Climate Resilience and Adaptation Strategy 2015 (**2015 Strategy**).[699] It sets out a similar division of responsibilities in relation to climate change adaptation among the three levels of government in Australia to that set out in the COAG Agreement.[700]

403. The strategy also states that there "*is broad agreement between Australian jurisdictions on respective adaptation roles and responsibilities*",[701] and one of the guiding principles for the strategy is that of shared responsibility — that is,

699 [APP.0001.0007.0149].
700 2015 Strategy, [APP.0001.0007.0149] at [.0005-.0006].
701 2015 Strategy, [APP.0001.0007.0149] at [.0006].

"*Governments at all levels, business, communities and individuals all have an important role to play*".[702]

404. The Commonwealth has since developed a further version of the strategy, the National Climate Resilience and Adaptation Strategy 2021-2025 (**2021 Strategy**), which was developed in consultation with all levels of government, key stakeholders in industry and academia and community groups.[703] The 2021 Strategy reiterates the division of roles and responsibilities as between the three different levels of government in the COAG Agreement.[704] It states that "*[i]n line with these responsibilities, all levels of government and many businesses have developed plans to adapt to climate change*".[705]

D.11.5 The TSIRC, TSC and the TSRA lead adaptation in the Torres Strait Islands

405. Determining and implementing adaptation measures to climate change in the Torres Strait has involved coordinated efforts between local, State and Commonwealth entities, but has largely been led by the government entities with a local presence: that is, the local councils and, to some extent, the TSRA.

406. For example, the TSRA, TSIRC and TSC produced the "Torres Strait Climate Change Strategy 2014-2018: Building Community Adaptive Capacity and Resilience" (**Torres Strait Strategy**).[706] The strategy notes that the TSRA, in partnership with local councils, as well as Queensland and Australian Government departments and several research organisations, has "*undertaken a number of activities to support Torres Strait Islanders to make informed decisions about adaptation to sea level rise and other climate change impacts*". It states that the strategy "*outlines some of the observed and potential future impacts of climate change on Torres Strait ecosystems and communities, and identifies priority responses through an Action Plan*". It is noted that the strategy is intended "*to guide whole-of-government efforts to manage the impacts of climate change, and facilitate adaptation to future change*" and "*to support grass-roots, community-based plannings and local decision-making, enabling communities to*

[702] 2015 Strategy, [APP.0001.0007.0149] at [.0076].
[703] 2021 Strategy, [APP.0001.0007.0157] at [.0006].
[704] 2021 Strategy, [APP.0001.0007.0157] at [.0013].
[705] 2021 Strategy, [APP.0001.0007.0157] at [.0014].
[706] APP.0001.0004.0016.

respond to these challenges in the most culturally appropriate and locale-specific way".[707]

407. The Action Plan found in the Torres Strait Climate Change Strategy 2014-2018 identifies for each action item the lead agency and the support agencies.[708] This makes plain the extent to which the local council and the TSRA take the lead on adaptation measures in the Torres Strait with the support of other government agencies. Of particular note is that the TSIRC is identified as the lead agency with responsibility for developing shoreline erosion management plans to ensure long-term stability of the coastline and natural defences, and securing funding for and implementing the Torres Strait Major Coastal Works program to progress coastal defences for Saibai, Boigu, Poruma, Iama, Warraber and beach replenishment for Masig (that is, the Seawalls Project).[709] No Commonwealth department is identified as a "*supporting agency*" in relation to those action items.

408. The TSRA also developed the Torres Strait Adaptation and Resilience Plan 2016-2021 in collaboration with the TSIRC and TSC, which was also developed in conjunction with the communities of the Torres Strait.[710] The Plan delivers on a number of actions in the Torres Strait Climate Change Strategy 2014-2018.[711] It states that the TSRA, TSIRC and TSC will "*actively seek to partner with both the Australian and Queensland Governments to implement this Plan*".[712]

409. The Torres Strait Adaptation and Resilience Plan 2016-2021 (**Adaptation and Resilience Plan**) sets out approximately 120 proposed actions that aim to improve the resilience of the region and reduce the impacts of climate change.[713] These actions are grouped under various "*Adaptation Outcomes*", the most relevant of which for the purposes of this case is "*Adaptation Outcome 1: Coastal communities and infrastructure are protected from sea-level rise and coastal impacts, and communities have options in responding to long-term sea-level rise*".[714]

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707 Torres Strait Strategy, [APP.0001.0004.0016] at [.0004].
708 Torres Strait Strategy, [APP.0001.0004.0016] at [.0028-.0034].
709 Torres Strait Strategy, [APP.0001.0004.0016] at [.0032].
710 Adaptation and Resilience Plan 2016-2021, [EVI.2001.0003.2961] at [.2971].
711 Adaptation and Resilience Plan 2016-2021, [EVI.2001.0003.2961] at [.2965].
712 Adaptation and Resilience Plan 2016-2021, [EVI.2001.0003.2961] at [.2965].
713 Adaptation and Resilience Plan 2016-2021, [EVI.2001.0003.2961] at [.2975].
714 Adaptation and Resilience Plan 2016-2021, [EVI.2001.0003.2961] at [.2975].

410. Implementation of the plan is informed by, influenced by or takes effect through various other reports, instruments and programs including:[715]

    a) the Torres Strait Development Plan;

    b) the Torres Strait Regional Plan;

    c) the Torres Strait Island Regional Council Planning Scheme;

    d) the Torres Shire Planning Scheme;

    e) the Land and Sea Management Strategy for the Torres Strait;

    f) various Evacuation Plans;

    g) the Torres Strait Local Disaster Management Plan;

    h) the Community Disaster Management Plan; and

    i) relevant State programs in the Torres Strait.

411. The Adaptation and Resilience Plan sets out various adaptation principles that inform the approach in the plan. One such value is local decision making, which acknowledges that Torres Strait Islander and Aboriginal peoples as Traditional Owners of the region have an inherent right to self-determination.[716]

412. The Plan also sets out each of the proposed actions under Adaptation Outcome 1, as well as the lead agency and any support agencies that are responsible for that action.[717] Relevantly, local government is identified as the lead agency with responsibility for the following action items:[718]

    a) model cost benefits of defend versus relocation in relation to infrastructure damage and replacement costs; and

    b) install hard infrastructure to protect key sites where no other cost-effective options exist.

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[715] Adaptation and Resilience Plan 2016-2021, [EVI.2001.0003.2961] at [.2994].
[716] Adaptation and Resilience Plan 2016-2021, [EVI.2001.0003.2961] at [.2996].
[717] Adaptation and Resilience Plan 2016-2021, [EVI.2001.0003.2961] at [.3027].
[718] Adaptation and Resilience Plan 2016-2021, [EVI.2001.0003.2961] at [.3027].

413. The TSRA is identified as a support agency for each of those items. No other Commonwealth department or agency is identified as having a role in relation to these action items.

D.12 The Seawalls Project

D.12.1 Overview

414. The applicants' case concerning the Alternative Duty is focused on a project to build various coastal protection measures on six islands in the Torres Strait, namely Saibai, Boigu, Poruma, Warraber, Iama and Masig (**Seawalls Project**).

415. The Seawalls Project has been implemented by the TSIRC, with funding assistance from the Commonwealth and Queensland governments. It commenced in 2011, when the TSIRC sought funding assistance from the Commonwealth and State governments. At that time, it was anticipated that the entire Seawalls Project would cost $26.2 million. This estimate was based on two reports prepared by AECOM.[719] That entire amount was provided in funding — the Commonwealth and Queensland governments each provided $12 million and the TSRA provided $2.2 million. However, between late 2015 and early 2016, it became apparent that the cost of the project would exceed the $26.2 million budget,[720] so the Seawalls Project was split into two stages, with the $26.2 million funding the first stage only. The first stage involved completing all planned works on Saibai plus some of the planned works on Boigu and Poruma (**Seawalls Project Stage 1**). Seawalls Project Stage 1 was completed in November 2017.

416. A further $40 million was sought from the Commonwealth and Queensland Governments for the second stage of the Seawalls Project (**Seawalls Project Stage 2**). Each government provided $20 million in funding. It was initially proposed that this money would fund the completion of the coastal protection measures on Boigu, Poruma, Warraber, Iama and Masig in respect of which the initial $26.2 million had been sought in 2011 (plus some additional measures on Warraber and Masig, as outlined at [477] and [480] below). The Seawalls Project on Boigu achieved practical completion in March 2022, and the Seawalls Project

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719 See [NIA.2000.0001.0140] at [.0178-.0179].
720 See [NIA.2000.0001.0140] at [.0156].

on Poruma achieved practical completion in November 2022.[721] However, the cost of the project exceeded the funding that had been granted for Stage 2 such that the scope of the projects on Iama, Masig and Warraber had to be reduced in May 2023.[722]

417. Each of the projects on Iama, Masig and Warraber are ongoing. As at September 2023, the projects on Masig and Iama were at the pre-construction phase and the project on Warraber was at the in-house bid phase.[723] It is incorrect to suggest that there are no funds available for the construction of the seawalls planned on those three islands (contra AS [537], [576.4], [577.2], [711.7]). The projects on Masig, Iama and Warraber (as reduced in scope in May 2023) have been allocated budgets of $6 million, $8.65 million and $7 million respectively from the $40 million allocated to Seawalls Project Stage 2, and there is no suggestion that those projects will be over budget.[724] To the contrary, as at September 2023, the projects were forecast to come in under budget with contingency amounts of $442,095, $926,608 and $1,400,000 respectively.[725] As at September 2023, it was anticipated that the Seawalls Project on Masig and Iama would reach practical completion in June 2024, and the project on Warraber would reach practical completion in June 2025.[726]

418. Since May 2023, the Commonwealth (via the National Indigenous Australians Agency (**NIAA**)) and the TSRA have been investigating options for funding a third stage of the Seawalls Project.[727] Those efforts were ongoing at the time that evidence closed in these proceedings in November 2023.[728]

419. The applicants' case concerning the Seawalls Project is addressed in Part F below, but it largely concerns the adequacy of funding provided by the Commonwealth and whether the Commonwealth had a "*coherent plan to fund seawalls on the 6 islands*" (AS [542]). A detailed summary of the evidence about the funding process and governance structures for both Seawalls Project Stage 1 and Seawalls

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721 Affidavit of Shay Simpson dated 15 May 2023 (**Simpson 1**) at [45], [WIT.2000.0001.0046].

722 Simpson 1 at [47], [WIT.2000.0001.0046].

723 Tab 2 to Exhibit SS-2 to the Affidavit of Shay Simpson dated 7 November 2023 (**Simpson 2**) at p 1, [WIT.2000.0002.0001] at [.0034].]

724 Tab 2 to Exhibit SS-2 to Simpson 2 at p 1, [WIT.2000.0002.0001] at [.0034].

725 Tab 2 to Exhibit SS-2 to Simpson 2 at p 1, [WIT.2000.0002.0001] at [.0034].

726 Tab 2 to Exhibit SS-2 to Simpson 2 at p 1, [WIT.2000.0002.0001] at [.0034].

727 Simpson 2 at [8]-[16], [WIT.2000.0002.0001].

728 Simpson 2 at [16], [WIT.2000.0002.0001]; T1689.7-13 (Simpson) [TRN.0021.1593].

Project Stage 2 is set out in Parts D.12.3 and D.12.4 below. A short summary of the status of the Seawalls Project on each of the six islands is outlined in Part D.12.5 below.

D.12.2 Seawalls as a coastal protection mechanism — some relevant terminology and background

420. Both the applicants and the Commonwealth refer throughout their submissions to "seawalls" in a general sense to refer to a range of coastal protection measures designed to provide a level of protection against inundation or erosion. However, in order to understand specifically what the Seawalls Project was designed to achieve on each of Saibai, Boigu, Poruma, Warraber, Masig and Iama, it is necessary to provide a brief overview of the evidence about the specific coastal protection measures that formed part of the Seawalls Project:

a) **Seawalls**: when the term "seawall" is used in a technical sense (rather than the general sense in which it is used in the parties' submissions) it refers to a wall built to defend against erosion. Seawalls may be made from rock, "seabee" blocks or geobags (although geobags may also be constructed in a way that provides some measure of flood protection).[729]

b) **Wave return walls**: these are concrete walls, usually built on top of or set back from a seawall. They are designed to mitigate the impacts of flooding by reducing the impact of severe events and reducing the frequency of events that cause flooding beyond the wall. Wave return walls are not designed to stop flooding. Flooding may still occur from leakage, overtopping of the wall and rainfall.[730]

c) **Bunds**: bunds are a flood mitigation defence.[731] Mr Bettington described bunds as "extraordinarily expensive" to build because all materials to build the bunds must be brought in from off the island and then the walls have to be built across swampy ground.[732]

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729 T1200.43-44, 1238.38-1239.6 (Bettington) [TRN.0014.1172]; T1285.12-19 (Bettington) [TRN.0015.1271].
730 T1200.44-1201.4, 1239.8-28 (Bettington) [TRN.0014.1172].
731 T1200.44, 1239.20-32 (Bettington) [TRN.0014.1172].
732 T1244.35-46 (Bettington) [TRN.0014.1172].

D.12.3 Seawalls Project Stage 1: Funding Process and Governance Structures

The Commonwealth's funding of Seawalls Project Stage 1

421. In 2011, the Commonwealth announced a $1 billion dollar fund called the Regional Development Australia Fund (**RDAF**), which was created for the purpose of funding projects in regional Australia.[733] Under Round Two of the RDAF, $200 million in funding was available.[734]

422. The RDAF was a competitive grants process administered by the Department of Infrastructure and Regional Development (**DIRD**),[735] and followed the typical process applied to competitive grants programs administered by the Commonwealth.[736] Competitive grants programs administered by the Commonwealth have a defined pool of money that can be divided and distributed amongst applicants who meet the criteria of the grants program as set out in the grant guidelines published for that program.[737] Sometimes Commonwealth grant guidelines specify that, in order to be eligible for funding, the applicant's project must be co-funded by another entity.[738]

423. The grant guidelines for RDAF Round Two provided for a two-step application process. All potential applicants had to first lodge an expression of interest with the local Regional Development Australia Committee (**RDA Committee**) for the area in which the project is proposed to be undertaken. There were about 50 RDA Committees throughout Australia. Each RDA Committee assessed each expression of interest in accordance with the process set out in the guidelines and identified three priority projects, who were then invited to submit an application for funding to DIRD.[739]

424. DIRD then assessed applications for funding against both eligibility and selection criteria. Relevant State and Commonwealth entities were consulted as part of this

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733 Affidavit of Christopher Connolly dated 15 May 2023 (**Connolly 1**) at [33], [WIT.2000.0001.0015].
734 Connolly 1 at [33], [WIT.2000.0001.0015].
735 The name of the DIRD changed over the relevant period, but is referred to as DIRD throughout these submissions.
736 Connolly 1 at [11], [WIT.2000.0001.0015].
737 Connolly 1 at [12]-[14], [WIT.2000.0001.0015].
738 Connolly 1 at [17], [WIT.2000.0001.0015]
739 Connolly 1 at [15], [WIT.2000.0001.0015].

process. The viability of the project was also assessed. DIRD's assessment of each application was then provided to an advisory panel, who were tasked with considering the relative merits of each application and providing advice to the Minister for Regional Australia, Regional Development and Local Government about which projects to fund. It was ultimately a decision for the Minister about which projects to fund, but the Minister was required to comply with the grant guidelines and the broader regulatory framework that governed the grants process, such as the *Financial Management and Accountability Act 1997* (Cth) (**FMA Act**) and the *Commonwealth Grant Guidelines 2009* (Cth) (**CGG 2009**).[740]

425. On 1 December 2011, the TSIRC lodged an expression of interest with the RDA Committee for Far North Queensland.[741] The TSIRC's application was ranked in the top three expressions of interest reviewed by that RDA Committee.[742] On 15 February 2012, the TSIRC lodged an application for funding under RDAF Round Two with DIRD.[743] That application relevantly stated that: the Seawalls Project would commence on 1 September 2012 and would be completed by 30 June 2015; the total cost of the Seawalls Project would be $24 million and that it sought $5 million from RDAF Round Two; and that it had $19 million in partner funding from the Major Infrastructure Program, which is an infrastructure program in the Torres Strait Islands jointly funded by the Commonwealth and Queensland Governments; and indicated that the project overall would be funded jointly by the Commonwealth and Queensland Governments, with each government funding 50% of the project.[744] After reviewing the TSIRC's application for funding in accordance with the grant guidelines, an "*Overview of Application for Funding*" document was prepared by the assessors at DIRD. That overview relevantly noted that the application had been prepared by AECOM "*which can give some comfort to budget and process*".[745]

426. DIRD's assessment of the TSIRC's application, along with the other applicants', were then considered by the advisory panel, who met to consider the applications on 23, 24 and 26 April 2012.[746] The advisory panel's recommendations were

740 Connolly 1 at [18]-[27], [WIT.2000.0001.0015].
741 Connolly 1 at [33] Tab 3 to Exhibit CC-1, [WIT.2000.0001.0015].
742 Connolly 1 at [33] Tab 4 to Exhibit CC-1, [WIT.2000.0001.0015].
743 Connolly 1 at [34] Tab 5 to Exhibit CC-1, [WIT.2000.0001.0015].
744 Tab 5 to Exhibit CC-1, [INF.2000.0002.0354] at [.0357], [.0363], [.0368].
745 Tab 9 to Exhibit CC-2, [INF.2000.0002.0373] at [.0376].
746 The RDAF Round Two advisory panel's minutes are at INF.2004.0001.0065.

then set out in a brief to the Minister, who determined which projects to fund on 31 May 2012.[747] The TSIRC's application was successful.

427. Ordinarily, once a grant from DIRD was approved, a contract would then be negotiated with the successful applicant. In this case, the funding agreement between the TSIRC and DIRD was executed on 11 April 2014.[748] There are several reasons why the funding agreement was executed in 2014 rather than at an earlier point in time, including:

a) In order to finalise the funding agreement, the TSIRC needed to provide proof of the $19 million in partner funding to be provided by the Queensland and Commonwealth governments. Queensland did not confirm its share of the funding until January 2013.[749]

b) There were concerns about the TSIRC's financial position, which needed to be considered before the funding agreement could be executed.[750]

c) After Queensland committed its partner funding, all funding partners sought to agree upon governance arrangements for the project (these arrangements are set out at [428]-[431] below).[751]

d) It was necessary for DIRD and the TSIRC to agree upon the project milestones and outcomes, which required agreement between the funding partners about the project implementation plan.[752]

e) A federal election was held on 7 September 2013. The government went into caretaker mode prior to this, during which time DIRD was advised it was unable to finalise the funding agreement.[753]

f) After the federal election, the incoming government considered whether to provide the $12 million that had been committed by the previous

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747 The brief to the Minister is at INF.2004.0001.0081.

748 Connolly 1 at [54], [WIT.2000.0001.0015].

749 Affidavit of Christopher Connolly dated 24 November 2023 (**Connolly 2**) at [7.1], [WIT.2000.0003.0001] Tabs 1-3 of Exhibit CC-2, [WIT.2000.0003.0001].

750 Connolly 2 at [7.2] Tabs 4-5 of Exhibit CC-2, [INF.2003.0002.0671], [INF.2003.0002.1751].

751 Connolly 2 at [7.3], [WIT.2000.0003.0001] Tabs 6-9 of Exhibit CC-2, [INF.2003.0002.2012], [INF.2003.0002.2987], [INF.2003.0002.3066], [INF.2003.0002.3068], [INF.2003.0002.3070], [INF.2003.0002.2572].

752 Connolly 2 at [7.4], [WIT.2000.0003.0001] Tabs 10-18 of Exhibit CC-2, [INF.2003.0002.3933], [INF.2003.0002.4099], [INF.2003.0002.4105], [INF.2003.0002.4148], [INF .2003. 0002.4961], [INF.2003.0002.5173], [INF.2003.0002.6610], [INF.2003.0002.6697], [INF.2003.0002.6704].

753 Connolly 2 at [7.5], [WIT.2000.0003.0001] Tab 19 of Exhibit CC-2, [INF.2003.0002.7089].

government to the Seawalls Project. This included considering the most appropriate source of funding within the Commonwealth's budget. Under the previous government, it was anticipated that $5 million would be provided under an RDAF Round Two grant and the remaining $7 million of the Commonwealth's overall commitment would be drawn from the Indigenous Housing and Infrastructure (**IHI**) Appropriation within the portfolio of the Minister for Indigenous Affairs. The incoming Minister for Indigenous Affairs, Nigel Scullion, wrote to Warren Truss, the Deputy Prime Minister and Minister for Infrastructure and Regional Development on 2 December 2013 noting his support for the Seawalls Project but requesting that the funding to be drawn from the IHI be found elsewhere within the infrastructure portfolio to ensure that funds were left under the IHI appropriation for critical and essential services in remote Indigenous communities across Australia.[754] On 23 December 2013, Minister Truss responded to Minister Scullion, confirming that the $5 million that was originally to be provided under RDAF Round Two would now be provided under the Community Development Grants Programme, but that there was no appropriate source of funding within the infrastructure portfolio for the remaining funds.[755] The incoming government reiterated its commitment to providing the full $12 million in funding for the Seawalls Project on 25 February 2014, confirming that $5 million in funding would come from the Community Development Grants Programme and $7 million would come from the IHI programme.[756]

Funding Agreements for Seawalls Project Stage 1

428. It was the TSIRC which implemented the Seawalls Project Stage 1, and to whom the $26.2 million in funding from the Commonwealth, Queensland and TSRA was ultimately provided. That funding was initially provided to the TSIRC via two avenues.

429. $19 million in funding (comprising the $7 million paid by the Commonwealth out of the IHI programme and the entirety of the $12 million paid by the Queensland)

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754 Connolly 2 at [7.6], [WIT.2000.0003.0001] Tabs 20-21 of Exhibit CC-2, [INF.2003.0003.3108], [INF.2003.0003.3109].

755 Connolly 2 at [7.6] Tabs 22 of Exhibit CC-2, [NIA.2001 .0001 .0194].

756 Connolly 2 at [7.6] Tab 23 of Exhibit CC-2, [INF.2003.0003.4147].

was managed by the TSRA as trustee for the Major Infrastructure and Other Projects Trust Fund (**MIP Trust Fund**).[757] The TSRA paid those funds (plus the $2.2 million in funding provided by the TSRA) to the TSIRC pursuant to a funding agreement (**the TSRA-TSIRC Funding Agreement**).[758] The TSRA-TSIRC Funding Agreement relevantly provided that:

a) the scope of the Seawalls Project was as set out in the Torres Strait Seawalls 2013-2017 Project Implementation Plan;[759]

b) there was to be a Project Governance Committee (**PGC Stage 1**) for the Seawalls Project, comprised of representatives of the relevant funding bodies whose terms of reference are set out in the Project Implementation Plan.[760] The role of the PGC Stage 1 was to provide "*a high level governance and probity mechanism*" for the Seawalls Project;[761]

c) The TSIRC's roles under the agreement were as the Grantee Council or beneficiary, the Seawalls Project Manager and the Contractor for in-house bids;[762]

d) the TSRA had appointed an "Independent Technical Support" to "*provide assurances to the [TSRA] and funding bodies that there are robust internal controls in place due to the fact that TSIRC act as project manager and as contractor"*;[763]

e) The TSIRC was "*fully responsible*" for the performance of the Seawalls Project;[764]

f) the maximum total funding to be provided for the Seawalls Project under the TSRA-TSIRC Funding Agreement was $21,237,456 (excluding GST), comprising $2,237,456 from the TSRA, $7 million from the

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757 Connolly 1 at [53], [WIT.2000.0001.0015].
758 The TSRA-TSIRC Funding Agreement is at INF.2005.0001.0065.
759 INF.2005.0001.0065 at [.0066]-[.0067]. The 2013-2017 Project Implementation Plan is at INF.2005.0001.0001.
760 INF.2005.0001.0065 at [.0067].
761 INF.2005.0001.0065 at [.0067], read with Supplementary Condition AA, definition of "Project Governance Committee" at [.0084].
762 INF.2005.0001.0065 at [.0067].
763 INF.2005.0001.0065 at [.0068].
764 INF.2005.0001.0065 at [.0068].

Commonwealth via the PM&C and $12 million from the State of Queensland;[765]

g) the Torres Strait Seawalls Project Framework is set out in Annexure B of the TSRA-TSIRC Funding Agreement, which makes clear that the TSIRC had responsibility for implementing the project.[766]

430. The remaining $5 million in Commonwealth funding, being the funding awarded under the Community Development Grants Programme, needed to be provided under a separate funding agreement between DIRD and the TSIRC.[767] As noted above, that funding agreement (**the DIRD-TSIRC Funding Agreement**) was entered into on 11 April 2014. The DIRD-TSIRC Funding Agreement relevantly provided as follows:

a) The Funding payable under the agreement was $5 million.[768]

b) DIRD was not responsible for the provision of any additional money to meet any expenditure in excess of those funds, and the TSIRC was responsible for any shortfalls or cost overruns as a result of the DIRD-TSIRC Funding Agreement.[769]

c) The TSIRC was required to take all reasonable steps to minimise delay in the completion of the project.[770]

431. In November 2015, the funding provided under the DIRD-TSIRC Funding Agreement was transferred to the MIP Trust Fund to allow all of the funding provided for the Seawalls Project Stage 1 to be administered under the TSRA-TSIRC Funding Agreement.[771]

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765 INF.2005.0001.0065 at [.0072].
766 INF.2005.0001.0065 at [.0082].
767 Connolly 1 at [53], [WIT.2000.0001.0015].
768 Definition of "Funding", read with cl 4.1 and cl 2.1 of the Schedule, INF.2000.0001.0565 at [.0571], [.0574], [.0600].
769 Definition of "Funds", read with cll 5.15 and 5.16 and cl 2.1 of the Schedule, INF.2000.0001.0565 at [.0571], [.0574], [.0576], [.0600].
770 Cl 21, INF.2000.0001.0565 at [.0589].
771 See INF.2000.0064; INF.2007.0003.0001; INF.2000.0001.0563.

The 2013-2017 Project Implementation Plan

432. The 2013-2017 Project Implementation Plan set out the scope of works to be completed under the Seawalls Project,[772] and outlined a plan for the completion of that project. It also relevantly provided as follows:

a) The TSIRC will be a key stakeholder in the overall project and will take on multiple roles during delivery. They will be principals to the design and construction contracts and will also act as the assessment manager to procure the necessary statutory permits.[773] The TSIRC would be contractually responsible for the project in accordance with the TSRA-TSIRC Funding Agreement and the DIRD-TSIRC Funding Agreement.[774]

b) The PGC Stage 1 would provide an overall direction, as well as a high-level governance and probity mechanism to the project. A key responsibility of the PGC Stage 1 was to approve any changes to the scope, schedule and quality of the project.[775]

Completion of Seawalls Project Stage 1

433. The Seawalls Project Stage 1 was completed in November 2017.[776] Following its completion, the Minister for Indigenous Affairs requested that the TSRA undertake a review, analysis and evaluation of the project and the lessons learnt.[777] The Minister had requested this advice due to the reductions in the scope of the Seawalls Project Stage 1 for the purpose of understanding how the funding had been spent and before considering further funding for the Seawalls Project.[778] This review was undertaken by Enmark Business Advisors, who delivered a report titled "*Torres Strait Seawalls Evaluation Report*" dated 30 April 2018 (**Enmark Report**).[779]

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772 See at section 2.2, [INF.2005.0001.0001] at [.0005].
773 Section 3.2.3.2, [INF.2005.0001.0001] at [.0009].
774 Section 6.2, [INF.2005.0001.0001] at [.0013].
775 Sections 6.2, 9.2.1, [INF.2005.0001.0001] at [.0013], [.0018-.0019].
776 [NIA.2000.0001.0140] at [.0154-.0155].
777 [NIA.2000.0001.0140] at [.0157].
778 [NIA.2002.0001.0022] at [5].
779 [NIA.2000.0001.0140].

D.12.4 Seawalls Project Stage 2: Funding Process and Governance Structures

The Commonwealth's decision to fund the Seawalls Project Stage 2

434. As noted above, the Queensland and Commonwealth governments have each provided $20 million in funding for the Seawalls Project Stage 2. However, the applicants' case involves an allegation that there was a delay in the provision of funding for the Seawalls Project Stage 2 (see AS [711.6]), so it is necessary to summarise the evidence about the circumstances in which the Commonwealth decided to provide further funding for the Seawalls Project.

435. The evidence shows that consideration was being given to the provision of further funding from shortly after the Enmark Report was finalised on 30 April 2018. It also highlights the political nature of the decision-making process that led to the Commonwealth's decision to provide a further $20 million in funding on 16 December 2019. The relevant evidence is as follows.

436. At a meeting on 8 May 2018, the Chairperson and CEO of the TSRA provided the Minister for Indigenous Affairs with a summary of the findings of the Enmark Report and requested that the Commonwealth match the Queensland government's commitment.[780]

437. On 21 June 2018, the Chairperson of the TSRA wrote a letter to the Minister for Indigenous Affairs. In that letter, the Chairperson noted the positive findings of the Enmark Report and that the Queensland government had formally announced that it would provide a further $20 million in funding for the Seawalls Project.[781]

438. On 25 July 2018, the PM&C briefed the Minister with a summary of the key points in the Enmark Report.[782]

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780 Department of the Prime Minister and Cabinet, Findings of the Independent Evaluation of the TSRA Seawalls (Stage 1) Funding (**Exhibit R8**) at [2], [7], [NIA.2002.0001.0022].

781 Simpson 1 at [18.1], [WIT.2000.0001.0046], Tab 2 of Index to Exhibit SS-1, [NIA.2002.0001.0014].

782 Exhibit R8 at [7], [NIA.2002.0001.0022].

439. On 23 August 2018 and 18 September 2018, the Premier of Queensland wrote to the Prime Minister, noting that Queensland had committed $20 million for the project and asking the Commonwealth to match Queensland's commitment.[783]

440. On 19 October 2018, the PM&C briefed the Minister for Indigenous Affairs with more detail about the outcomes of the Enmark Report. The brief noted that, should the Minister be satisfied with the results of the Enmark Report, the Department would brief him on options for responding to the request that the Commonwealth provide $20 million in funding.[784]

441. On 28 March 2019, the PM&C again briefed the Minister for Indigenous Affairs. That brief recommended that the Minister approve a funding contribution of $20 million. It noted that the Seawalls Project Stage 2 had been assessed against the criteria found in the Indigenous Advancement Strategy (**IAS**) Grant Guidelines, and recommended that the Minister take a non-competitive direct approach to providing $20 million in funding to the TSRA under Programme 2.5 Remote Australia Strategies in the 2019, 2020, 2021 and 2022 financial years as permitted under the IAS Grant Guidelines and per paragraph 11.5 of the Commonwealth Grants Rules and Guidelines. It noted that seeking a contribution from DIRD was not a viable option because DIRD would need to seek funding through the budget process. The brief also noted that funding the Seawalls Project Stage 2 under the IAS would reduce the available funding for other projects under that appropriation.[785]

442. On 4 April 2019, the Minister approved providing a total of $12 million to the Seawalls Project Stage 2, namely $7 million to Gur A Baradharaw Kod Torres Strait Sea and Land Council (**GBK**) and $5 million to the TSRA for the Seawalls Project Stage 2.[786]

443. On 18 May 2019, there was a Federal Election.

444. On 22 July 2019, the new Minister for Indigenous Australians, the Hon Ken Wyatt, was briefed by the NIAA with an update on the Seawalls Project Stage

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783 Exhibit R8 at [1], [NIA.2002.0001.0022]; Premier of Queensland Minister for Trade, Attachment E – Letter to Prime Minister of Australia, [NIA.2002.0001.0129].

784 Exhibit R8 at [14], [NIA.2002.0001.0022].

785 Simpson 1, [WIT.2000.0001.0046], Tab 3 of Index to Exhibit SS-1 at [6]-[8], [11], [NIA.2000.0001.0243].

786 Simpson 1 at [18.3], [WIT.2000.0001.0046], Tab 3 of Index to Exhibit SS-1, [NIA.2000.0001.0243], Tab 4 of Index to Exhibit SS-1, [NIA.2000.0001.0247].

2,[787] which the Minister noted on 23 July 2019.[788] The brief flagged that the NIAA was negotiating with GBK and that it would make a funding decision based on technical capability and that GBK's capability to manage the Seawalls Project was unknown.

445. On 16 December 2019, Minister Wyatt approved the provision of $20 million in funding for the Seawalls Project Stage 2 under the IAS.[789] It is important to note two matters outlined in the brief to the Minister:

a) *First*, the brief noted that this would make use of funds that had already been earmarked for infrastructure under the IAS and attached an assessment of the project under the IAS criteria.[790]

b) *Secondly*, in November 2019, the TSRA and GBK had agreed to work in a more united and cohesive way that would deliver the best outcomes for the region. It recommended that the TSRA deliver the package through the MIP, on the condition that the TSRA establish a Regional Infrastructure Governance Group to be comprised of the TSRA, Traditional Owners, Regional Councils and State and Commonwealth funding bodies to act as a platform for Traditional Owner consideration and endorsement of projects.[791]

Funding Agreements for Seawalls Stage 2

446. There are two relevant agreements pursuant to which the Commonwealth's funding has been (and continues to be) provided to the TSIRC for the Seawalls Project Stage 2.

447. *First*, funding is provided by the Commonwealth (represented by the NIAA) to the TSRA under schedule 4 of an agreement called "*Working Arrangements Agreement 2018-2023 in relation to various Projects in the Torres Strait Islands,*

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787 Simpson 1, [WIT.2000.0001.0046], Tab 5 of Index to Exhibit SS-1, [NIA.2002.0001.0142].

788 Simpson 1, [WIT.2000.0001.0046], Tab 6 of Index to Exhibit SS-1, [NIA.2002.0001.0019].

789 Simpson 1 at [18.5], [WIT.2000.0001.0046], Tab 7 of Index to Exhibit SS-1, [NIA.2002.0001.0161],

790 Simpson 1, [WIT.2000.0001.0046], Tab 7 of Index to Exhibit SS-1 at [3], [NIA.2002.0001.0161].

791 Simpson 1, [WIT.2000.0001.0046], Tab 7 of Index to Exhibit SS-1 at [6]-[9], [NIA.2002.0001.0161].

Bamaga and Seisia" (**Working Arrangements Agreement**).[792] That agreement provides for a total of $20 million to be provided for the Seawalls Project subject to the TSRA reaching certain milestones.[793]

448. *Secondly*, funding is provided from the TSRA to the TSIRC under a funding agreement called the Torres Strait Seawalls Programme State 2 MIOP[794] Capital Works Grant Agreement.[795] That agreement provides that the maximum amount of the grant payable is $40 million (being the combined funding provided by the Commonwealth and Queensland governments for the Seawalls Project Stage 2).[796]

The Program Implementation Plan

449. The scope of the Seawalls Project Stage 2 is set out in the Program Implementation Plan (**PIP Stage 2**). There have been three versions of the PIP Stage 2. The first was finalised on 16 September 2020.[797] A revised version was finalised on 6 August 2021.[798] A further revised version was finalised on 5 May 2023.[799] In each version of the PIP Stage 2, Part 2.1 has provided that the Seawalls Project Stage 2 is to be overseen by a Program Governance Committee (**PGC Stage 2**). The PGC Stage 2's role is to provide a high level governance and probity mechanism of the Seawalls Project. The PIP Stage 2 provides that it is to meet monthly or as required, and includes as members: the Department of Local Government, Racing and Multicultural Affairs (Qld) (although the Queensland government is now represented by the Department of State Development, Infrastructure, Local Government and Planning), NIAA, TSRA, the

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792 Simpson 1 at [21], [35], [WIT.2000.0001.0046], Tab 9 of Index to Exhibit SS-1, [NIA.2000.0001.0273], Tab 13 of Index to Exhibit SS-1, [NIA.2007.0001.0080].

793 Simpson 1 at [22], [35], [WIT.2000.0001.0046], Tab 9 of Index to Exhibit SS-1, [NIA.2000.0001.0273], Tab 13 of Index to Exhibit SS-1, [NIA.2007.0001.0080].

794 This refers to Major Infrastructure and Other Projects.

795 Simpson 1 at [19], [WIT.2000.0001.0046], Tab 8 of Index to Exhibit SS-1, [NIA.2000.0001.0324].

796 Simpson 1, [WIT.2000.0001.0046], Tab 8 of Index to Exhibit SS-1 at p 17, [NIA.2000.0001.0324] at [.0338].

797 Simpson 1 at [24], [WIT.2000.0001.0046], Tab 10 of Index to Exhibit SS-1, [NIA.2005.0001.0001].

798 Simpson 1 at [24], [WIT.2000.0001.0046], Tab 11 of Index to Exhibit SS-1, [NIA.2000.0001.0307].

799 Simpson 1 at [24], [WIT.2000.0001.0046], Tab 12 of Index to Exhibit SS-1, [NIA.2008.0002.0001] at [.0021].

TSIRC, the Trust Fund Manager, the Program Manager and other stakeholders as required.[800]

Reduction in scope of Seawalls Project Stage 2

450. In May 2023, the scope of the planned projects on Iama, Masig and Warraber had to be reduced due to the anticipated costs of the project exceeding the funding that had been granted for the Seawalls Project Stage 2. The reason for this was an increase in costs across the construction industry that occurred between 2019 and 2022.[801] The following steps occurred prior to the scope of the project being reduced.

451. On 14 June 2022, representatives of Queensland, the TSRA, TSIRC, AECOM and Black & More (the Program Manager of the Seawalls Project Stage 2) met to discuss options for reducing the scope of the project. The NIAA was not invited to attend that meeting.[802]

452. On 30 June 2022, the PGC was provided with a draft "*Scope Containment Reporting*" document prepared for the TSIRC by AECOM.[803] This report considered the priority of different aspects of the Seawalls Project Stage 2 and provided costings for the reduced scope. The PGC was not provided with a final copy of this report.[804]

453. Black & More then sought a review of the proposed scope containment from M P Rogers & Associates, an engineering consultant who specialises in coastal, port and marine projects. That review stated that the areas proposed by the reduced works "*generally appear to be appropriate for the individual islands*" and that they in general appeared appropriate to address the higher risk items for the three islands.[805]

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800 Simpson 1 at [26]-[27], [WIT.2000.0001.0046].

801 Simpson 1 at [47], [WIT.2000.0001.0046], Tab 24 of Index to Exhibit SS-1 at p 5, [NIA.2005.0001.0159] at [.0163].

802 Simpson 1 at [47], [WIT.2000.0001.0046], Tab 23 of Index to Exhibit SS-1, [NIA.2005.0001.0126].

803 Simpson 1 at [47], [WIT.2000.0001.0046], Tab 24 of Index to Exhibit SS-1, [NIA.2005.0001.0159].

804 Simpson 1 at [47], [WIT.2000.0001.0046].

805 Simpson 1 at [47], [WIT.2000.0001.0046], Tab 25 of Index to Exhibit SS-1, [NIA.2005.0001.0298].

454. On 6 March 2023, Black & More circulated a memorandum which recommended the scope containment process.[806]

D.12.5 Status of the Seawalls Project on each of the six islands

Saibai

455. The Seawalls Project on Saibai involved the following projects:[807]

a) construction of a seawall to protect the cemetery, which was completed in June 2015;

b) construction of a rock seawall along the foreshore that is 2,284m in length, topped with a concrete wave return wall that is 2,062m in length – this project reached practical completion in May 2017;

c) the construction of an earth bund wall structure, which also reached practical completion in May 2017.

456. The initial budget for the Saibai Seawall was $20.3 million but its actual cost was $23.8 million.[808] The Enmark Report identified the following reasons why the project went over budget by $3,477,327, namely:[809]

a) price escalation, which accounted for approximately $2.4 million;

b) road works (namely the cost of constructing roads to access the rock stockpile location and the cemetery wall), which accounted for approximately $481,000;

c) Project Management and Planning costs in excess of budget, which accounted for $642,000;

d) cemetery (out of scope works), which accounted for $707,000;

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806 Simpson 1 at [47], [WIT.2000.0001.0046], Tab 26 to Exhibit SS-1, [NIA.2005.0001.0267].

807 Lessons Learnt Evaluation – Torres Strait Seawalls Project 2013-2017, [NIA.2000.0001.0140] at [.0154].

808 Lessons Learnt Evaluation – Torres Strait Seawalls Project 2013-2017, [NIA.2000.0001.0140] at [.0154].

809 Lessons Learnt Evaluation – Torres Strait Seawalls Project 2013-2017, [NIA.2000.0001.0140] at [.0188].

e) acid sulphate soil remediation (which had not been included in the costings used to generate the budget), which accounted for $654,000; and

f) the construction and contingency budget being less than required, which accounted for $1,051,000.

457. The applicants make no submissions about the adequacy of the Seawalls Project insofar as it concerns Saibai (other than its general submission that the Commonwealth was required to have a coherent plan for funding the project on all six islands), so it is not necessary to summarise the evidence on that issue.

Boigu

458. Projects were undertaken on Boigu as part of both Stage 1 and Stage 2 of the Seawalls Project.

459. The planned works for Boigu for the Seawalls Project Stage 1 were as follows:[810]

a) wave return wall construction, including reconstruction of the jetty and barge ramp areas; and

b) raise, extend and repair the bund wall behind the community.

460. The initial budget for these planned works was $2.6 million. However, the estimated cost of these works had increased to $6-7 million by March 2016, so the scope of the planned works on Boigu for Stage 1 was reduced. The works undertaken on Boigu in Stage 1 were upgrades to the seawall and the bund wall, as well as upgrading drainage. These works cost $2.4 million and reached practical completion in November 2017.[811]

461. The planned works for Boigu for the Seawalls Project Stage 2 were as follows:[812]

a) construction of new wave return wall (approximately 1,022 metres);

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810 Torres Strait Island Regional Council, Torres Strait Seawalls (2013-2017) 4 Year Project Implementation Plan at s 2.2, [INF.2005.0001.0001] at [.0005].

811 Lessons Learnt Evaluation – Torres Strait Seawalls Project 2013-2017, [NIA.2000.0001.0140] at [.0155].

812 Torres Strait Seawalls Program Stage 2 Stage 2at s 4.1, [NIA.2005.0001.0001]; Simpson 1, Tab 10 of Index to Exhibit SS-1, [WIT.2000.0001.0046]

b) earth works to raise existing bund wall and extend (approximately 450 metres);

c) demolition of redundant infrastructure including concrete slabs, drainage, fences and other miscellaneous items;

d) concrete works including new concrete lined drained and reinforced concrete wave return wall;

e) earthworks including treatment of acid sulphate soils, foundation and subgrade treatments, general earthworks and backfilling activities for the new seawall works;

f) stormwater drainage including replacement of existing pipe culverts and construction of new pipe outlets (including reinstatement of existing infrastructure);

g) maintain access to existing boat ramp and wharf areas and consideration of any ancillary marine access areas for the community;

h) protection works to coastal revetments through construction of new rock armour seawalls, or reconstruction of existing failed seawalls (including rebuild and topping up);

i) reestablishment of the traditional dugong and turtle processing slabs;

j) replacement of shelters as required due to construction; and

k) site clean-up and make-good.

462. Practical completion of the Seawalls Project Stage 2 on Boigu was achieved in March 2022. The forecast budget for this project was $15 million,[813] and its actual cost was $14.32m.[814]

463. As with Saibai, the applicants make no submissions about the adequacy of the Seawalls Project insofar as it concerns Boigu (other than its general submission that the Commonwealth was required to have a coherent plan for funding the

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813 Torres Strait Seawalls Program Stage 2 Stage 2at s 4.1, [NIA.2005.0001.0001]; Simpson 1, Tab 10 of Index to Exhibit SS-1, [WIT.2000.0001.0046].

814 Simpson 2, Tab 2 of Index to Exhibit SS-2 at [.0034], [WIT.2000.0002.0001].

project on all six islands), so it is not necessary to summarise the evidence on that issue.

Poruma

464. Projects were undertaken on Poruma as part of both Stage 1 and Stage 2 of the Seawalls Project.

465. The planned works for Poruma for the Seawalls Project Stage 1 were:[815] emergency coastal infrastructure repairs; and seawall and erosion control.

466. An initial budget of $1.3 million was allocated for these projects. However, due to the increased cost of the project on Saibai, the only work undertaken on Poruma in the Seawalls Project Stage 1 was the provision of emergency sandbagging in 2015 and 2016 to protect infrastructure, which cost $238,000.[816]

467. The planned works for Poruma for the Seawalls Project Stage 2 were as follows:[817]

    a) sand stockpiling;

    b) geotextile sand bag seawall (approximately 1,060 metres at four locations);

    c) alter existing groyne to the east of the barge ramp;

    d) maintain access to existing boat ramp and beach;

    e) provision of amenity and beach access; and

    f) site clean-up and make-good.

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[815] Torres Strait Island Regional Council, Torres Strait Seawalls (2013-2017) 4 Year Project Implementation Plan at s 2.2, [INF.2005.0001.0001] at [.0005].

[816] Lessons Learnt Evaluation – Torres Strait Seawalls Project 2013-2017, [NIA.2000.0001.0140] at [.0155].

[817] Torres Strait Seawalls Program Stage 2 Stage 2at s 4.1, [NIA.2005.0001.0001]; Simpson 1, Tab 10 of Index to Exhibit SS-1, [WIT.2000.0001.0046].

468. Practical completion of the Seawalls Project Stage 2 on Poruma was achieved in November 2022. The forecast budget for the project was $5 million,[818] and the actual cost was $4.03 million.[819]

469. As with Saibai and Boigu, the applicants make no submissions about the adequacy of the Seawalls Project insofar as it concerns Poruma (other than its general submission that the Commonwealth was required to have a coherent plan for funding the project on all six islands), so it is not necessary to summarise the evidence on that issue.

470. Rather, the applicants' case about Poruma seems to be based on the fact that the delay in completing the Seawalls Project there led to Poruma being impacted by marine inundation in January 2018 (see AS [717]). This submission is dealt with in greater detail below, but by way of summary the Commonwealth submits that there is no evidence of the extent of any damage caused by the extreme events on Poruma in January 2018, nor is there any evidence to suggest that this damage would have been avoided had the Seawalls Project on Poruma been completed prior to this date.

Iama

471. It was initially planned that the following works would be completed on Iama as part of the Seawalls Project Stage 1:[820]

a) rock wall upgrade (northern beach area);

b) raise the boat ramp near the airport; and

c) bund/wave return wall along the rear of the northern spit.

472. The budget for these works was $0.6 million,[821] although due to budget overruns in other parts of the Seawalls Project Stage 1 they could not be completed.

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818 Torres Strait Seawalls Program Stage 2at s 4.1, [NIA.2005.0001.0001]; Simpson 1, Tab 10 of Index to Exhibit SS-1, [WIT.2000.0001.0046].

819 Simpson 2, Tab 2 of Index to Exhibit SS-2, [WIT.2000.0002.0001] at [.0034].

820 Torres Strait Island Regional Council, Torres Strait Seawalls (2013-2017) 4 Year Project Implementation Plan at s 2.2, [INF.2005.0001.0001] at [.0005].

821 Lessons Learnt Evaluation – Torres Strait Seawalls Project 2013-2017, [NIA.2000.0001.0140] at [.0155].

473. The works that were initially planned for Iama for the Seawalls Project Stage 2 (as reflected in the 16 September 2020 version of the PIP Stage 2[822]), as compared to the works as planned, following the descoping of the Seawalls Project Stage 2 in May 2023 (as reflected in the May 2023 version of the PIP Stage 2[823]), are compared in the following table:

Planned works as at 16 September 2020 (Forecast budget $7 million)	Planned works as at May 2023 (Forecast budget $7 million)
Final design and approval	Maintained
Wave return wall (approx. 2100 metres)	Reduced length of wall to approx. 349 metres
Earth bund walls at two locations (approx. 600 metres at two locations)	Removed
Rock seawall partial demolishing and reconstruction and raising of height (estimated 200 metres)	Removed
Rock armour seawall (approx. 450 metres)	Removed
Sand stockpiling	Maintained
Geotextile sand bag seawall with bund (approx. 650 metres)	Reduced length to approx. 190 metres
New culvert at stormwater outlet on beach at western side of community	Removed
Road bund crossing (three)	Removed
Maintain access to existing boat ramp and beach	Maintained
Provision of amenity and beach access	Maintained
Site clean-up and make-good	Maintained

474. As noted above, as at September 2023, the project on Iama was at the pre-construction phase.[824] The projects on Iama (as reduced in scope in May 2023) have been allocated a budget of $8.65 million from the $40 million allocated to Seawalls Project Stage 2, and there is no suggestion that those projects will be over budget. To the contrary, as at September 2023, the projects were forecast to come in under budget with a contingency amount of $926,608.[825] As at

822 Torres Strait Seawalls Program Stage PIP Stage 2at s 4.1, [NIA.2005.0001.0001]; Simpson 1, Tab 10 of Index to Exhibit SS-1, [WIT.2000.0001.0046].

823 Torres Strait Seawalls Program Stage PIP Stage 2at s 4.1, [NIA.2005.0001.0001]; Simpson 1, Tab 12 of Index to Exhibit SS-1. [WIT.2000.0001.0046].

824 Simpson 2, Tab 2 of Index to Exhibit SS-2 at p 1, [WIT.2000.0002.0001] at [.0034].

825 Tab 2 to Exhibit SS-2 to Simpson 2 at p 1, [WIT.2000.0002.0001] at [.0034].

September 2023, it was anticipated that the projects on Iama planned as part of the Seawalls Project Stage 2 would reach practical completion in June 2024.[826]

475. The applicants did not call any witness from Iama.

Warraber

476. It was initially planned that the only work that would be completed on Warraber as part of the Seawalls Project Stage 1 would be to extend the seawall at the eastern end of the existing seawall.[827] The budget for these works was $1.2 million.[828] However, due to budget overruns in other parts of the Seawalls Project Stage 1, these works could not be completed.

477. The initial scope of Seawalls Project Stage 2 planned for Warraber included works beyond what had been in the scope of planned works for Stage 1. Although the planned works for Warraber were reduced in scope in May 2023, they nevertheless include works that had not been planned for Stage 1. The works that were initially planned for Warraber for the Seawalls Project Stage 2 (as reflected in the 16 September 2020 version of the PIP Stage 2[829]), as compared to the works as planned following the descoping of the Seawalls Project Stage 2 in May 2023 (as reflected in the May 2023 version of the PIP Stage 2[830]) are compared in the following table:

Planned works as at 16 September 2020 (Forecast budget $7 million)	Planned works as at May 2023 (Forecast budget $7 million)
Final design and approval	Maintained
Wave return wall (approx. 325 metres)	Removed
Geotextile bund wall (approx. 50 metres)	Removed
Rock seawall partial demolishing and reconstruction and raising of height (approx.. 690 metres)	Removed
Repair and top-up existing rock seawall (approx. 280 metres)	Removed
Sand stockpiling	Maintained

826 Tab 2 to Exhibit SS-2 to Simpson 2 at p 1, [WIT.2000.0002.0001] at [.0034].
827 2013-2017 Project Implementation Plan at s 2.2, [INF.2005.0001.0001] at [.0005].
828 NIA.2000.0001.0140 at 0155.
829 PIP Stage 2 at s 4.1, Tab 10 to Exhibit SS-1.
830 PIP Stage 2 at s 4.1, Tab 12 to Exhibit SS-1.

Geotextile sand bag seawall (approx. 300 metres)	Reduced length to approx. 295 metres
Road bund crossing (two)	Removed
Provision of amenity and beach access	Maintained
Site clean-up and make-good	Maintained

478. As at September 2023, the project on Warraber was at the in-house bid phase.[831] It has been allocated a budget of $7 million from the $40 million allocated to Seawalls Project Stage 2, and there is no suggestion that it will be over budget. To the contrary, as at September 2023, the project was forecast to come in under budget with a contingency amount of $1,400,000.[832] As at September 2023, it was anticipated that the project on Warraber would reach practical completion in June 2025.[833]

Masig

479. It was initially planned that the only work that would be completed on Masig as part of the Seawalls Project Stage 1 would be to conduct sand replenishment and berm restoration.[834] That is, there was no seawall, wave return wall or bund planned on Masig for the Seawalls Project Stage 1. The budget for these works was $0.2 million,[835] although due to budget overruns in other parts of the Seawalls Project Stage 1 they could not be completed.

480. As with Warraber, the initial scope of Seawalls Project Stage 2 planned for Masig included works beyond what had been in the scope of planned works for Stage 1. Although the planned works for Masig were reduced in scope in May 2023, they nevertheless include works that had not been planned for Stage 1. The works that were initially planned for Masig for the Seawalls Project Stage 2 (as reflected in the 16 September 2020 version of the PIP Stage 2[836]), as compared to the works as planned following the descoping of the Seawalls Project Stage 2 in May 2023

[831] Tab 2 to Exhibit SS-2 to Simpson 2 at p 1, [WIT.2000.0002.0001] at [.0034].
[832] Tab 2 to Exhibit SS-2 to Simpson 2 at p 1, [WIT.2000.0002.0001] at [.0034].
[833] Tab 2 to Exhibit SS-2 to Simpson 2 at p 1, [WIT.2000.0002.0001] at [.0034].
[834] 2013-2017 Project Implementation Plan at s 2.2, [INF.2005.0001.0001] at [.0005].
[835] NIA.2000.0001.0140 at [.0155].
[836] PIP Stage 2 at s 4.1, Tab 10 to Exhibit SS-1.

(as reflected in the May 2023 version of the PIP Stage 2[837]) are compared in the following table:

Planned works as at 16 September 2020 (Forecast budget $6 million)	Planned works as at May 2023 (Forecast budget $6 million)
Sand stockpiling	Maintained
Geotextile sand bag seawall (est 1,300 metres at four locations)	Reduced to 1,105 metres (still at four locations)
Geotextile bund wall (est 2,800 metress)	Maintained
Maintain access to 3 existing boat ramps	Maintained
Provision of amenity and beach access	Maintained
Site clean-up and make-good	Maintained

481. As at September 2023, the projects on Masig were at the pre-construction phase.[838] The projects have been allocated budgets of $6 million from the $40 million allocated to Seawalls Project Stage 2, and there is no suggestion that those projects will be over budget. To the contrary, as at September 2023, the projects were forecast to come in under budget with a contingency amount of $442,095.[839] As at September 2023, it was anticipated that the Seawalls Project on Masig would reach practical completion in June 2024.[840]

482. The applicants did not call any witness from Masig to give evidence.

E. The Targets Case

483. This section of the submissions addresses the common questions in relation to the Primary Duty case, concerning the setting of the Commonwealth's GHG emissions reduction targets.

E.1 The current impacts of climate change in the Torres Strait (CQ 1)

484. There is no dispute that the Torres Strait has been affected by some impacts of climate change,[841] being the impacts of the accumulation of anthropogenic GHG emissions globally since at least 1850. However, there is disagreement about the

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[837] Tab 12 to Exhibit SS-1.
[838] Tab 2 to Exhibit SS-2 to Simpson 2 at p 1, [WIT.2000.0002.0001] at [.0034].
[839] Tab 2 to Exhibit SS-2 to Simpson 2 at p 1, [WIT.2000.0002.0001] at [.0034].
[840] Tab 2 to Exhibit SS-2 to Simpson 2 at p 1, [WIT.2000.0002.0001] at [.0034].
[841] See Defence at [57], [CRT.2000.0003.0001] at [.0021].

nature and extent of these impacts. The evidence on each impact asserted by the applicants is summarised below.

485. As the Court will see from that evidence, the applicants' general statements that impacts of climate change that have occurred globally are occurring in the Torres Strait (AS [49]) or that they "*manifest similarly or more severely in the Torres Strait as they have in other places around the world*" (AS [51]) must be treated with caution. As noted above, the experts agree that the impacts of climate change vary regionally, and it cannot be assumed that an impact of climate change experienced globally is experienced in the Torres Strait Islands at all, or in the same way. In each case, it is necessary to consider the impact being asserted and the evidence of its nature and extent in the Torres Strait Islands.

486. Further, the case on both the Primary Duty and Alternative Duty require an understanding of the extent to which particular climate change impacts have occurred at particular points in time. There has been little attempt by the applicants to isolate evidence of those climate change impacts at the relevant time:

a) The Primary Duty case is premised on the applicants establishing that the Commonwealth has caused or contributed to climate change impacts since 2015, being the date breach of that duty is first alleged. This is addressed further in Part E.5 below. There has been little attempt by the applicants to quantify the extent to which GHG emissions that it is contended would not have occurred but for the Commonwealth's alleged breach of the Primary Duty have caused or contributed to particular climate change impacts since that time.

b) The Alternative Duty case is premised on the applicants establishing that, by reason of the Commonwealth's alleged failure to take reasonable steps to implement adaptation measures, the applicants and group members have suffered compensable harm by reason of inundation and erosion events on the Torres Strait Islands. This is addressed further in Part F.3 below. As outlined in that part, although it is not entirely clear, the Commonwealth understands that the earliest breach is alleged to have occurred in late 2011. The applicants' evidence about inundation and erosion is not confined to events that have occurred since this time.

E.1.1 Sea level rise

487. The Commonwealth admits that the Torres Strait has been affected by sea level rise due to climate change.[842] However, it submits that the extent of the impacts of sea level rise, including inundation, will vary between islands in the Torres Strait depending on a range of factors, including their topography and the extreme sea levels that apply to those islands. It notes that the court has evidence about the effects of sea level rise only on particular islands, namely Boigu, Saibai, Poruma and Warraber, and submits that evidence about the likely impacts of sea level rise on these islands does not provide a basis for the Court to make findings about the likely impact of sea level rise on the remaining islands in the Torres Strait.

488. The Commonwealth accepts that the applicants' summary at AS [52]-[55] accurately summarises the evidence in this proceeding, subject to two qualifications.

489. *First*, as to the proposition (at AS [54]) that "*over the last three decades, sea level rise in northern Australia has been larger than southern Australia and the global average at approximately 4 to 6 mm yr-1*", the Commonwealth notes that Prof Church conceded in cross-examination that, if the influence of the El Niño southern oscillation were removed from this measurement, sea level rise in Northern Australia would be closer to the global mean.[843] Prof Church then said that "*[w]hether there remains a contribution from climate change leading to a larger rate [of sea level rise] in Australia, I couldn't say whether that was the case or not*".[844]

490. *Secondly*, as to the applicants' reliance on Prof Karoly's evidence (at AS [55]), that evidence is drawn from the Torres Strait Report Card. The Commonwealth submits that report does not comprise the BAS and cannot be relied upon (or given material weight) as expert evidence of the nature and extent of impacts in the Torres Strait, in circumstances where it does not describe the data and research on which it is based, Prof Karoly acknowledged he did not know what studies sat behind it[845] and the Commonwealth did not have a chance to

842 Defence at [57(b)], [CRT.2000.0003.0001] at [.0021].
843 T1581.22-25 (Church) [TRN.0020.1551].
844 T1581.28-29 (Church) [TRN.0020.1551].
845 T932.7-14 (Karoly) [TRN.0010.0920].

interrogate the report card or cross-examine its makers. In any case, Prof Karoly confirmed in cross-examination that he does not comment on how much of that rise has been caused by emissions post-2014.[846]

491. In this regard, the Commonwealth notes that, as explained at [220]-[222] above, there is a time lag between GHG emissions and sea level rise due to the time taken for deep warming and ice sheet melt. Therefore, the sea level rise being experienced now is likely to be substantially the product of GHG emissions some time in the past, rather than emissions today.

E.1.2 Extreme sea level events and inundation of coastal areas

492. The applicants' submissions on this issue are condensed to three propositions (AS [66]). The Commonwealth responds to each as follows.

493. As to the *first* proposition (that sea levels have risen in the Torres Strait region by a conservative estimate of 21 cm from pre-industrial times to the present day), the Commonwealth accepts Prof Church's evidence that the change in *global* mean sea level for 1900 to 2020 is about 21 cm.[847] There is no evidence before this court as to the amount of sea level rise that has occurred in the Torres Strait Islands between 1900 and 2020, but the Commonwealth does not take issue with assuming the Torres Strait Islands have experienced an equivalent rise in sea levels over this period.

494. As to the *second* proposition (that this observed sea level rise has contributed to an increase in the frequency and severity of flooding events experienced by communities in the Torres Strait), the Commonwealth accepts the general proposition that an increase in mean sea levels can increase the frequency of extreme sea level events. However, the extent of the frequency and severity of such extreme events in the Torres Strait Islands is uncertain, as is the extent to which this has changed over time. In particular, there is no evidence before the court about the extent to which, if any, the frequency and severity of extreme sea level events has increased since 2014. Some parts of the Torres Strait Islands have been affected by inundation during high tides and surge events from time to time for many years, including prior to 2014. For example, there was a

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846 T932.16-36 (Karoly) [TRN.0010.0920].

847 Church at [49], [APP.0001.0009.0002] at [_0014]-[_0015].

significant inundation event on Saibai in 1947 which led to many members of the community leaving for Bamaga.[848] The applicants also set out evidence of inundation events on Iama, Warraber, Saibai and Boigu that predate 2014 at AS [562].

495. The applicants rely on evidence from Prof Church and Mr Bettington to demonstrate the frequency and severity of inundation presently being experienced in the Torres Strait Islands. As a preliminary matter, it should be noted that the evidence of Prof Church and Mr Bettington is based on modelling of the anticipated current frequency and severity of inundation in the Torres Strait Islands. Although Mr Bettington draws to some extent on observed events in his calculations,[849] the evidence of those experts is not evidence that events at the modelled frequency or of the modelled severity have in fact occurred, nor as to whether those events caused any compensable damage. Evidence of such events must therefore be drawn from the lay evidence (as to which, see AS [82] and Part E.1.8 below).

496. Further, the Commonwealth submits that Mr Bettington's calculations of extreme water levels should not be accepted. Mr Bettington calculated the extreme water levels at AS [59] by taking the extreme sea levels set out in Dr Harper's 2011 Study titled "Torres Strait Extreme Water Level Study"[850] and then adding an amount, determined by Mr Bettington on an impressionistic basis, to account for what Mr Bettington considered to be regional anomalies.[851] Dr Harper, who gave expert evidence for the Commonwealth on this issue, considered that there was no basis for this addition because the figures calculated in his 2011 study accounted for the kinds of regional anomalies identified by Mr Bettington.[852] Dr Harper was not challenged on this in cross-examination. Mr Bettington accepted in the joint report that the regional uplift he had added to his extreme sea level calculations was "*arbitrary*".[853] In oral evidence, Mr Bettington also described his method of applying a regional uplift as "*crude*", "*not super-refined*", "*arbitrary and*

848 Enosa Affidavit at [69]-[74], [APP.0001.0009.0010] at [_0011]-[_0012].

849 See Supplementary Expert Report of Stuart Bettington (**Bettington 2**), Table 4, [APP.0001.0015.0011] at [_0005].

850 Harper, Torres Strait Extreme Water Level Study, [EXP.2000.0002.0012].

851 Expert report of Stuart Bettington (**Bettington 1**), ss 2.2.2-2.2.3, [APP.0001.0009.0003] at [_0017]-[_0021].

852 Expert Report of Bruce Harper (**Harper**) at [3]-[6], [EXP.2000.0001.0241] at [.0249]-[0253].

853 Joint Report, [APP.0001.0015.0001], p 4.

therefore simplistic" and "*rudimentary*".[854] Mr Bettington further accepted that his regional uplift was applied uniformly across the region, rather than being island specific, despite accepting that there are significant differences between islands, and that the events on one island cannot be used reliably to determine whether regional uplift is needed for other islands.[855] This court should not make findings about extreme water levels that are, on the applicants' expert's own admission, "*arbitrary*", "*crude*" or "*rudimentary*". The calculations performed by Dr Harper, based upon modelling he performed in his 2011 study, are to be preferred.

497. Dr Harper's version of Table 7 in the Joint Report, which shows his calculation of extreme water levels as at 1900 relative to the Australian Height Datum (**AHD**),[856] is as follows:

Average recurrence interval (ARI years)	Boigu Storm tide (m AHD)	Saibai Storm tide (m AHD)	Poruma Storm tide (m AHD)	Warraber Storm tide (m AHD)
HAT[857]	2.92	2.54	2.42	2.52
10 years	3.13	2.66	2.66	2.86
25 years	3.19	2.71	2.70	2.94
50 years	3.23	2.74	2.74	2.98
100 years	3.26	2.78	2.75	3.00
500 years	3.36	2.87	2.79	3.05

498. Dr Harper's version of Table 8 in the Joint Report, which shows extreme sea levels as at 2023 relative to AHD, is as follows:

[854] T1217.29, .40, 1227.20, 1233.11 (Bettington) [TRN.014.1172].

[855] T1217.41, .1218.29-33 (Bettington) [TRN.014.1172].

[856] The Australian Height Datum is the datum for altitude measurement in Australia: Export Report of Matthew (**Barnes**), s 3.1, [EXP.2000.0001.0001] at [.0006]-[.0007].

[857] Highest Astronomical Tide.

Average recurrence interval (ARI years)	Boigu Storm tide (m AHD)	Saibai Storm tide (m AHD)	Poruma Storm tide (m AHD)	Warraber Storm tide (m AHD)
HAT	3.13	2.75	2.63	2.73
10 years	3.34	2.87	2.87	3.07
25 years	3.40	2.92	2.91	3.15
50 years	3.44	2.75	2.95	3.19
100 years	3.47	2.99	2.96	3.21
500 years	3.57	3.08	3.00	3.26

499. The applicants compare Mr Bettington's extreme water levels for 1900 and 2023 to what Mr Bettington has determined to be a "*Township Inundation Event*" on each of Boigu, Saibai, Poruma and Warraber. A "*Township Inundation Event*" represents the sea level at which Mr Bettington considered, based on a visual assessment of his flood mapping, that half of the community would be flooded.[858]

500. Mr Bettington accepted in cross-examination that the concept of a "*Township Inundation Event*" was not something used in coastal risk assessments.[859] In his supplementary report, he explained that "*[t]he determination of Township inundation levels involved identifying the water level that would flood roughly 50% of the community. This process entailed manually adjusting the water levels in small (0.1 m) incremental steps and mapping the resulting flood impact on the Township (visual assessment). Upon reaching a water level where I assessed that 50% of the township's land was flooded, it was considered the Township inundation event*."[860] The Commonwealth submits the measure is not only arbitrary (for example, no explanation is given as to why 50% was chosen), but is also not a meaningful method of understanding the extent to which a community would be flooded during an extreme sea level event of a given height for two reasons.

501. *First*, as Dr Harper opined, "*[t]he actual impact of [community flooding] will vary between the communities depending on the community exposure (i.e., where buildings are located and at what elevation), plus the vulnerability of the structures and also the resilience and expectations of the residents*."[861] In cross-

[858] Bettington 1, [s 2.3.3, [APP.0001.0009.0003] at [_0023]-[_0024].
[859] TRN.1236.5-7 (Bettington) [TRN.014.1172].
[860] Bettington 2, s 2.2, [APP.0001.0015.0011] at [_0015].
[861] Harper 1 at [5], [EXP.2000.0001.0241] at [_0267].

examination, Mr Bettington observed that "*on Saibai … really, all the houses are on stilts because of the flooding issues*",[862] whereas he had determined what would constitute a Township Inundation Event by reference to when approximately half of the ground would be inundated.[863]

502. *Secondly*, the flood maps used to calculate the Township Inundation Event water level for each island were generated by what is known as a "bathtub" or "bucket fill" model. The peak water level is taken and applied to the topography of the land. It is therefore assumed that there is sufficient time and water available to overtop any coastal barriers (such as seawalls, wave return walls and bunds) and to fill potential holding basins up to the given water level. In that regard, it should be noted that Mr Bettington's evidence was that "*[u]nder present day conditions the recently built flood barriers on Saibai and Boigu significantly reduce the marine flooding and intensity*".[864] The flood maps therefore may overrepresent the extent of the flooding at a given water level, although it is accepted that the flood maps also do not account for wind and wave action and may in that respect underrepresent the extent of the flooding.[865]

503. However, even if it is assumed that Mr Bettington's Township Inundation Event levels do represent an event in which half the community would be flooded, the frequency of such events should be calculated by reference to Dr Harper's figures as opposed to those of Mr Bettington for the reasons outlined at [496] above. Dr Harper's figures are applied to the Township Inundation Event levels in the table below:

	Boigu	Saibai	Poruma	Warraber
~50% of township flooded (m AHD)	3.4	2.8	3.6	3.5
Frequency as at 1900 (years)	>500	>100	>500	>500
Frequency as at 2023 (years)	25	<10	>500	>500

504. For the reasons outlined above, the applicants' submission at AS [65] that Boigu and Saibai in the present day experience significant inundation events that cause

862 T1195.14-15 (Harper) [TRN.014.1172].
863 T1195.19 (Harper) [TRN.014.1172].
864 Bettington 1, s 5.3.1, [APP.0001.0009.0003] at [_0073].
865 Barnes, s 3.6, [EXP.2000.0001.0001] at [.0019].

up to 0.5 m of flooding in almost all parts of the community has an annual likelihood of occurrence of 8% and 20% annually, overstates the actual risk of flooding in those specific communities as modelled in the evidence.

505. Further, that paragraph overstates the effect of the evidence for two further reasons. *First*, it is unclear on what basis the risk is said to be "*rapidly rising*" — as noted above, the only evidence relied upon by the applicants is evidence relating to extreme water levels in 1900 in comparison to 2023. *Secondly*, the applicants do not cite any evidence for the proposition that there is a threat to the "*habitability of communities in the Torres Strait*". The only evidence relied upon is evidence of the likelihood of a Township Inundation Event on Boigu, Saibai, Warraber and Poruma. That evidence provides no basis for the court to make findings in relation to other communities in the Torres Strait. Further, the evidence does not provide a basis for finding that there is a risk to the habitability on Poruma and Warraber, noting that a Township Inundation Event on both those islands is a one in 500 year event if Dr Harper's calculations are preferred (such an event on Warraber would be a one in 100 year event if Mr Bettington's calculations are preferred).

506. Finally, as to the *third* proposition at AS [66] (that the increased frequency of inundation events since 1900 has reduced the habitability of those islands), the only evidence relied upon for this proposition is a statement by Mr Bettington that the increase in Township Inundation Events on Boigu and Saibai "*represents a significant increase in issues for the community*".[866] There is no evidence about the point at which the risk of flooding on Saibai and Boigu becomes a risk to their habitability.

E.1.3 Temperature increase and extreme heat

507. The Commonwealth admits that the Torres Strait has been affected by warmer days as a result of climate change.[867] However, the extent or quantum of the warming is not clear on the evidence.

508. Contrary to AS [68], the average warming trend across Australia or northern Australia cannot be extrapolated to the Torres Strait Islands. Prof Karoly did not

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866 Bettington 1, p 24, [APP.0001.0009.0003] at [_0024].

867 Defence at [57(b)].

give evidence to that effect. His evidence at [69] of his report[868] is that the impacts of climate change in northern Australia are "*generally relevant to the Torres Strait*", and it cannot be extrapolated therefrom that the extent of those impacts is the same. Prof Karoly accepted in cross-examination that his evidence in question 10(b) of his report comprised high level conclusions about average impacts across Australia and was not evidence as to impacts in the Torres Strait in particular.[869] He also accepted that the *State of the Climate 2022* report, the origin of the figures at AS [68], did not include the Torres Strait.

509. The temperature data from Horn Island shows an increase in average maximum temperature (the average over a year of the daily maximum temperature)[870] of 0.8°C between the decade 1951-1960 to the most recent decade 2011-2020.[871] However, the extent to which this is attributable to climate change as opposed to the large seasonal variation in the Torres Strait is uncertain.[872] Further, the experts are agreed that the short timescale means it is impossible to identify,[873] and no expert attempted to identify, the extent to which temperature has increased due to global warming, as opposed to seasonal variation, since 2014, the first asserted date of breach.[874] Further, the natural variability on timescales of 1 to 5 years at Horn Island dwarfs the calculated avoided warming.[875]

E.1.4 Ocean temperature increase

510. The Commonwealth admits that the Torres Strait has been affected by increases in ocean temperature due to climate change.[876]

511. As Prof Hughes notes, the data from the Australian Bureau of Meteorology "*shows the clear warming trend in sea surface temperatures on the Great Barrier*

868 Karoly 1 at [69], [APP.0001.0003.0093] at [_0027].
869 T916.10-20 (Karoly) [TRN.0009.0844].
870 T927.29-32 (Karoly) [TRN.0010.0920].
871 Karoly 1 at [70], [APP.0001.0003.0093] at [_0027]; chart with trend line, [APP.0001.0015.0007].
872 Pitman at [28], [EXP.2000.0001.0286] at [.0295]; T927.7-121 (Karoly) [TRN.0010.0920].
873 The experts are agreed that multi-decadal timescales are necessary to separate the impact of global warming from seasonal variation: see Karoly 1 at [33], [66], [APP.0001.0003.0093] at [_0015], [_0026] (period of 20 years or longer); Pitman at [28], [EXP.2000.0001.0286] at [.0295]; T874.25-45 (Karoly) [TRN.0009.0844].
874 See, for example, T928.45-929.2, 931.41-47, 932.33-34 (Karoly) [TRN.0010.0920].
875 Pitman at [31], [EXP.2000.0001.0286] at [.0296].
876 Defence at [57(b)].

Reef over the past 120 years",[877] albeit with a number of recent temperature spikes.[878] The applicants' written submissions (at AS [71]) appear to suggest that the period in which the trend has emerged is shorter, noting that "*preponderance of red bars [in Hughes' Figure 6] from 1970 onwards indicates a warming trend*". In either case, the warming trend referred to begins substantially before the alleged acts and omissions the subject of these proceedings.

512. As with other evidence in the proceeding that refers to the Great Barrier Reef, some caution must be exercised in drawing inferences from data and observations concerning the Great Barrier Reef as a whole, given that the Great Barrier Reef World Heritage Area covers an area of some 348,000km^2,[879] and the Torres Strait Islands is considered to be outside of the Great Barrier Reef Region.[880] However, the Commonwealth accepts that reliable observations made with respect to the northern extremities of the reef may, depending upon the circumstances, provide a basis for inferring similar impacts within the Torres Strait.

513. In the case of ocean temperature increases, the Commonwealth accepts that there have been some ocean temperature increases in the Torres Strait. However, the evidence does not supply the Court with a reliable basis to reach conclusions regarding the quantum of the increase. As Prof Hughes notes, Torres Strait waters have warmed less than the southern Great Barrier Reef and future temperature increases will also vary greatly in space and time.[881] To the extent the applicant relies upon the Suppiah report to suggest that average annual sea surface temperatures in the Torres Strait region rose by about 0.16°C to 0.18°C per decade from 1950 to 2010 (AS [72]),[882] those figures should be treated with some caution in circumstances where they pre-date the period that is the subject of the present proceedings, are contained in a report prepared by persons who were not called to give evidence in the proceedings, and the applicants' experts

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877 Expert Report of Prof Terry Hughes (**Hughes**) at [35], Figure 6, [APP.0001.0003.0095] at [_0014].

878 Hughes at [35], Figure 6, [APP.0001. 0003.0095] at [_0014].

879 Great Barrier Reef Marine Park Authority, Great Barrier Reef Region Strategic Assessment Report (2014), [APP.0001.0007.0081] at [.0022].

880 Hughes at Figure 1, [APP.0001.0003.0095] at [_0006].

881 Hughes at [68], [APP.0001.0003.0095] at [_0028].

882 Suppiah et al, *Observed and Future Climates of the Torres Strait Region* (2010) (**Suppiah 2010**), [APP.0001.0007.0053] at [.0006].

did not opine on the quantum of regional ocean temperature increases within the Torres Strait.

E.1.5 Erosion

514. The Commonwealth accepts the applicants' summary of Mr Bettington's evidence about erosion at AS [73]-[74]. However, Mr Bettington's evidence does not provide a basis for this Court to make findings about the extent of erosion, nor how this has changed over time.

E.1.6 Harm and destruction of ecosystems and non-human species

515. As is evident from AS [75], the applicants contend that climate change has led to the damage to nearshore ecosystems, including mangroves, mudflats, beaches, coastal wetlands and intertidal coral reefs.

516. There is no dispute that there have been extensive coral bleaching events in the waters off north-east Australia, particularly in the Great Barrier Reef World Heritage Area in recent decades.[883] Prof Hughes gave evidence that there have been three pan-tropical episodes of intense coral bleaching in the past three decades (in 1997-1998, 2010 and 2015-2016).[884] Locally, the Great Barrier Reef has experienced a number of coral bleaching events, including bleaching events in 1998, 2002, 2016, 2017, 2020 and 2022.[885]

517. However, the evidence led by the applicants does not permit reliable or uniform inferences to be drawn in relation to the other ecosystems identified in AS [75]. Prof Hughes is predominantly a coral reef ecologist by training and practice.[886] While he gave evidence about damage to mangrove ecosystems and hypersaline wetlands on Boigu and Saibai,[887] he accepted that during his visits to the Torres Strait Islands the focus of his work was on coral reefs and the ecosystems they support rather than mangroves and coastal wetlands, mudflats or beaches.[888] This

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[883] See also, Karoly 1 at [72], [APP.0001.0003.0093] at [_0027].
[884] Hughes at [31] and [34], [APP.0001.0003.0095] at [_0012] and [_0014].
[885] Hughes at [36], [APP.0001.0003.0095] at [_0014]-[_0015].
[886] T970.20-.21 (Hughes) [TRN.0010.0920].
[887] AS [76.1]; Hughes at [92], [APP.0001.0003.0095].
[888] T972.4-.16 (Hughes) [TRN.0010.0920].

was unsurprising in circumstances where his research had not focussed on the topics of mangroves, coastal wetlands, mudflats and beaches.[889]

518. In relation to mangroves, Prof Hughes' evidence was drawn from the literature,[890] and, in particular, a 2022 study by Duke et al.[891] The article noted that post-impact assessments of the dieback coincided with extreme high temperatures, prolonged low rainfall but also unusually *low* mean sea levels.[892] Investigations also identified a previously undetected earlier mass dieback of shoreline mangroves in 1982 across the same region, and both diebacks were synchronous with unusually low sea levels associated with severe El Nino conditions. The study from which Prof Hughes drew in compiling his report expressly noted that it did not involve an evaluation of observations in the context of global climate change.[893]

519. With respect to dugongs, Prof Hughes gave evidence that they remained abundant in the Torres Strait.[894] There had been fluctuations in observed numbers of dugongs in the Torres Strait dating back to the 1970s and that was partly due to behaviour.[895] Prof Hughes' evidence with respect to dugongs was substantially informed by his colleague Prof Marsh's work,[896] which concluded that there was considerable temporal variability in the estimated size of the dugong population.[897] There are also well documented difficulties in counting dugongs due to both their patterns of movements and because they spend most of their time submerged, often in muddy or turbid water.[898] Large-scale dugong movements appeared to be a response to seagrass dieback, and Torres Strait Islanders had

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889 T972.4-.32 (Hughes) [TRN.0010.0920]; see also Hughes Report at Annexure D ("*Publications*"), [APP.0001.0003.0095]. Prof Hughes did note that two of his papers had addressed wetlands and mangroves among a "*broad array of marine habitats*", and volunteered that a relevant paper concerned overfishing in the marine realm and included kelp beds.

890 T975.47-976.3 (Hughes) [TRN.0010.0920].

891 T976.3, .7-.35 (Hughes) [TRN.0010.0920]; **Duke et al**, *ENSO-driven extreme oscillations in mean sea level destabilise critical shoreline mangroves — An emerging threat* (1 August 2022) [EVI.2002.0009.0001].

892 Duke et al [EVI.2002.0009.0001] at [.0002].

893 Duke et al [EVI.2002.0009.0001] at [.0002].

894 T988.1-.2 (Hughes) [TRN.0010.0920]; Hughes at [40], [43], [APP.0001.0003.0095].

895 T987.24-.26 (Hughes) [TRN.0010.0920].

896 T984.22-.33 (Hughes) [TRN.0010.0920]; see **Marsh et al**, Aerial surveys and the potential biological removal technique indicate that the Torres Strait dugong fishery is unsustainable (2004) [APP.0001.0007.0103].

897 Marsh et al [APP.0001.0007.0103] at [_0005].

898 Marsh et al [APP.0001.0007.0103] at [_0001] ("*Estimating the size of dugong population*"); T985.18-.41 (Hughes) [TRN.0010.0920].

observed major diebacks as early as the 1970s.[899] While seagrass monitoring results indicate that seagrass beds to the north west of Badu and to the north of Poruma were in poor condition in 2021 and 2022, seagrass beds to the south east of Badu, the south west of Poruma, and around Mua and Iama are satisfactory or good.[900] As the applicants acknowledge, the causes of seagrass die-offs are poorly understood.[901]

520. Finally, as to the Bramble Cay melomys, it was declared extinct by IUCN in 2015.[902] However, it was not seen since 2009.[903] The loss of the Bramble Cay therefore occurred before the conduct alleged to constitute breach.

E.1.7 Heat induced mortality and morbidity

521. The Commonwealth has admitted that Torres Strait Islanders in the Torres Strait Islands are at risk of harm to human health from the potential impacts of climate change.[904] However, there is a dispute as to whether any perceptible health impacts have occurred, the nature and extent of any impacts and whether any impacts could be linked to an act or omission at issue in the proceedings. The applicants at least do not contend that they have suffered any health impacts.[905]

522. As is evident from the applicants' submissions at AS [78]-[80], their case on health impacts is substantially based upon broad statements of opinion offered by Associate Professor Selvey.[906] Dr Selvey's evidence concerning the relationship between temperature increase and health impacts commences from the premise that there are scientific studies (discussed in further detail below) that seek to link higher temperatures with adverse health outcomes. Dr Selvey then identifies comorbidities in populations that include (but are not limited to) Torres Strait Islanders, before concluding that higher temperatures have and will impact upon the health of Torres Strait Islanders. There are at least two overarching

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899 Marsh et al [APP.0001.0007.0103] at [_0006.]

900 TSRA, *Torres Strait Seagrass Monitoring 2021-2022 Results* [SUB.0001.0003.1230].

901 AS [76.2]; see also T988.4-.8 (Hughes) [TRN.0010.0920].

902 Hughes at [41], [88], [107], [APP.0001.0003.0095] at [_0016], [_0036], [_0043]; AS [77.1].

903 IPCC AR6 WGII, pp. 201, 221, [APP.0001.0007.0118] at [_0212], [_0232].

904 Defence [57(c)].

905 Letter from applicants dated 14 December 2022, [EVI.2001.0013.0001]; T1534.35-39 (McLeod SC), [TRN.0019.1530].

906 During the course of cross-examination, Associate Professor Selvey indicated that she preferred to be addressed as "*Doctor*": T1036.42-.43 (Dr Selvey) [TRN.0011.0992]. As a result, in the balance of these submissions she is referred to as Dr Selvey.

conceptual difficulties with this analysis. The *first* is that the analysis could likely be replicated with respect to many demographics within the broader Australian or global population,[907] including persons living in tropical areas and demographics with relevant comorbidities. The *second* is that the evidence is framed at such a level of generality that it is impossible to link particular health outcomes to acts and omissions that are the subject of these proceedings (as is explored further below).

523. Before turning to a number of the particular issues with Dr Selvey's evidence, it is necessary to make some preliminary observations. While the Commonwealth does not in any way suggest that Dr Selvey was not a truthful or credible witness, or that her evidence was given without proper regard to the Expert Witness Code of Conduct, aspects of her evidence (particularly those that are discussed in further detail below) should be treated with some caution. As Dr Selvey proactively acknowledged, she has been an environmentalist her whole adult life.[908] Under cross-examination, she accepted that she was an activist,[909] and that she had attended presentations with a view to playing an advocacy role about climate change.[910] Indeed, she had an advocacy role in relation to matters including the subject matter of her report for over 20 years,[911] and at one point had called for a greater use of non-violent direct action in fighting climate change.[912]

524. Dr Selvey also exhibited a willingness to opine on areas outside her expertise and offer opinions that were not soundly or obviously based upon primary facts and her training, study and experience. For example, she gave evidence that Torres Strait Islander people were "*already experiencing the impact of sea level rise*",[913] she spoke to "*the experiences of Aboriginal and Torres Strait Islander peoples as whole*",[914] and adopted an unreasoned statement to the effect that 47% of the health gap between Indigenous and non-indigenous Australians "*may be attributed to institutional racism, interpersonal racism and intergenerational*

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907 T1057.43-.47 (Dr Selvey) [TRN.0011.0992].
908 Expert Report of Dr Linda Selvey (**Selvey**) at [4], [APP.0001.0003.0094] at [_0002].
909 T1044.30 (Selvey) [TRN.0011.0992].
910 T1045.16 (Selvey) [TRN.0011.0992].
911 T1045.21-.22 (Selvey) [TRN.0011.0992].
912 T1045.28-.31 (Selvey) [TRN.0011.0992].
913 Selvey at [3], [APP.0001.0003.0094] at [_0001]-[_0002].
914 Selvey at [23], [APP.0001.0003.0094] at [_0011].

trauma" within the Queensland government's health system.[915] She was also prepared to draw a broad inference from a passing reference to "*socioeconomic factors*" in a WHO Fact Sheet[916] to infer that impacts upon matters such as housing and wastewater would result from climate change.[917] At times during her evidence, Dr Selvey spoke to work being undertaken by other witnesses,[918] and referred at one point to an aspect of her evidence as "*our assertion*".[919] The Commonwealth does not suggest that Dr Selvey's evidence was provided otherwise than in good faith, but those background matters may inform the Court's assessment of the weight to be afforded to her evidence.

525. Dr Selvey gave evidence that there is "*limited data about the health of Torres Strait Islander people, beyond generalisations from data about the health of Aboriginal and Torres Strait Islander populations*".[920] As a result, she accepted that she had made generalisations from data concerning Aboriginal and Torres Strait Islanders more broadly.[921] Dr Selvey accepted that aspects of her evidence disclosed that life expectancy and health outcomes were improving during periods when there were increased concentrations of GHG emissions.[922] While it is obviously the case that correlation does not equate to causation,[923] the difficulty is that, in many respects, Dr Selvey's reasoning fails to establish with any degree of precision the existence and extent of causal relationships between the alleged acts and omissions at issue and health outcomes. In part, this appears to have been a function of the very broad assumptions given to Dr Selvey, which required her to assume a causal relationship between increased global average surface temperature and particular impacts that were expressed at a very high degree of

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915 Selvey at [22], [APP.0001.0003.0094] at [_0010]-[_0011], referring to Burke et al, "*Transforming institutional racism at an Australian hospital*" (2019) 43 Australian Health Review at 611-618 [APP.0001.0007.0184] at [.0002] ("*What is the effect of institutional racism on Aboriginal and Torres Strait Islander people?*") and AIHW, Closing the Gap Targets: 2017 analysis of progress and key drivers of change [EVI.2002.0006.1303] at [.1543] (Pie chart, "*unexplained component*"); T1050.38-T1052.23 (Selvey) [TRN.0011.0992].

916 WHO, *Climate change and health* (30 October 2021) [APP.0001.0007.0215] at [_0002].

917 Selvey at [40], [APP.0001.0003.0094] at [_0018]; T1054.44-T1055.29 (Selvey) [TRN.0011.0992].

918 T1058.39-1059.6 (Selvey) [TRN.0011.0992].

919 T1069.18-.25 (Selvey) [TRN.0011.0992].

920 Selvey at [9], [APP.0001.0003.0094] at [_0005]; T1050.30-.6 (Selvey) [TRN.0011.0992].

921 T1050.3-.15 (Selvey) [TRN.0011.0992].

922 T1050.26-.28 (Selvey) [TRN.0011.0992].

923 T1050.33-.35, T1052.25-T1053.3 (Selvey) [TRN.0011.0992].

generality and without reference to the extent or degree of resulting impacts.[924] This resulted in evidence from Dr Selvey that was given in very general terms.

526. The evidence concerning the link between temperature and morbidity did not suggest that there would be any appreciable increase in risk or impacts across the class at large. Dr Selvey's evidence to the effect that Torres Strait Islander people were already experiencing increases in morbidity[925] was substantially based upon a study by Goldie and others from 1993 to 2011, which found that for a 2°C increase in temperatures there was a 1.78 % increase in hospital admissions.[926] That study was relied upon to reach conclusions with respect to a likelihood of increased hospital admissions even though Dr Selvey was not able to provide an indication of how many hospital admissions there would be in the Torres Strait in an average year as a ballpark figure.[927] In circumstances where Dr Selvey had been asked to assume an increase in temperatures of 1.2°C, defined by a decadal average above pre-industrial levels, she had difficulty identifying any real world impact in terms of increased hospital admissions in the Torres Strait,[928] let alone one which could be applied across the entire class (rather than, say, one or two individuals). Even at a 2°C increase, Dr Selvey accepted "*I can't tell you the number of admissions that that might result in*".[929] When one factors in Australia's relative contribution to GHG emissions in the period since 2015 (for example, by postulating a 0.000218°C or even a 0.0012°C increase),[930] it could not be seriously suggested that there was any appreciable increase in morbidity or the risk of morbidity. No study would enable the Court to reach such a conclusion.[931]

527. While Dr Selvey gave evidence regarding health impacts arising from increased rainfall,[932] she accepted that she had not looked at rainfall patterns in the Torres Strait.[933] She did not have any evidence or data as to how many extra days or

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924 Selvey at Annexure B, [C], [APP.0001.0003.0094] at [_0064]; T1054.16-.22 (Selvey) [TRN.0011.0992].

925 Selvey at [54], [APP.0001.0003.0094] at [_0023].

926 Goldie et al, Temperature and Humidity Effects on Hospital Morbidity in Darwin, Australia (2015) 81(3) *Annals of Global Health* 333 [APP.0001.0007.0229].

927 T1060.17-.29 (Selvey) [TRN.0011.0992].

928 T1059.36-1060.8, 1060.31-.35 (Selvey) [TRN.0011.0992].

929 T1060.8 (Selvey) [TRN.0011.0992].

930 See Canadell 2, EXP.2000.0004.0001.

931 T1060.42-T1061.10 (Selvey) [TRN.0011.0992].

932 Selvey at [84], [APP.0001.0003.0094] at [_0032].

933 T1061.32-.33 (Selvey) [TRN.0011.0992].

periods of heavy rain would make a significant difference in risk levels.[934] Similarly, while Dr Selvey gave evidence regarding the impact of salinity on fresh water,[935] she was not able to provide an opinion on current salinity levels or the level of salt incursion that would render drinking water dangerous.[936] Dr Selvey also offered an opinion with respect to the risks of ciguatera fish poisoning in circumstances where there was no evidence of it ever having been documented in the Torres Strait.[937] In effect, her opinion was that there was a possibility that the relevant microorganism could be brought to the Torres Strait and it could start to grow in big enough amounts to infect local fish and thereby infect people.[938]

528. Opinions regarding bacterial food-borne infections drew upon studies that dealt with cities that either were not in the tropics or concerned an Australia-wide population.[939] The point of those studies was to show that, with increasing temperatures, there would be increasing rates of Salmonella across the population of Australia.[940]

529. Ultimately, Dr Selvey's evidence does not provide a reliable basis for the Court to reach any conclusion as to the existence or extent of any identifiable health impacts arising from climate change in the Torres Strait, let alone impacts that could be linked to an act or omission at issue in the proceeding.

530. To the extent that reliance is placed upon the Suppiah report at AS [79], the Commonwealth repeats its submissions above at [521] about the weight that can be given to that evidence. It certainly cannot be evidence of health impacts since 2015, being published in 2010. Moreover, to the extent that the applicants make reference to "*apparent temperatures*", it ought to be appreciated both that the 12°C figure in AS [79] refers to the *differential* between absolute actual and apparent temperatures rather than any *change* in air temperatures said to result from climate change.[941] There is also seasonal variation as between the wet and dry seasons.[942]

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934 T1062.31-.34 (Selvey) [TRN.0011.0992].
935 Selvey at [86], [APP.0001.0003.0094] at [__033].
936 T1064.1-.5, 1064.17-.19 (Selvey) [TRN.0011.0992].
937 Selvey at [89], [APP.0001.0003.0094] at [_0034].
938 T1066.24-.27 (Selvey) [TRN.0011.0992].
939 Selvey at [92], [APP.0001.0003.0094] at [_0035]; T1066.39-1068.15 (Selvey) [TRN.0011.0992].
940 T1068.9-.15; .39-.44 (Selvey) [TRN.0011.0992].
941 Suppiah 2010 [APP.0001.0007.0053] at [.0007] ("*Apparent temperature*").
942 Suppiah 2010 [APP.0001.0007.0053] at [.0006] ("*Apparent temperature*").

E.1.8 Relevance of lay witnesses' observations

531. At AS [81]-[82], the applicants submit that the scientific findings on climate change above are reflected in the lived experiences of Torres Strait Islander witnesses, and submit that those witnesses have testified to witnessing changes on their islands including increased heat, increased ocean temperature, sea level rise, erosion, extreme sea level events and harm to ecosystems and animals. The Commonwealth makes three general observations about the applicants' reliance on this evidence.

532. *First*, it is not in dispute that each of these witnesses is giving lay evidence of what they have observed occurring in the environment, rather than as experts on the subject of climate change.[943] It follows that, whilst they can give evidence of changes they have observed in the environment, this does not provide a basis to infer that any such changes have been caused by GHG emissions. That is a matter for the expert evidence, outlined above.

533. *Secondly*, much of the evidence referred to at AS [82] is of such a high level of generality that it does not enable the Court to make findings about when relevant changes in the environment occurred, or the extent or rate of those changes. For example, the evidence of increased heat relied upon is a statement by Ms Enosa that "*[i]t is noticeably hotter than it used to be*".[944] Another example is the evidence given by Mr Billy that the water is "*really warm now*", without any specific measurement or point of reference for how the temperature has changed over time.[945] Although Mr Ahmat gave more specific evidence about the temperature of the water at particular points in the past two years, he did not comment on how the water temperature had changed over time (noting that he had owned his crayfish factory for two years at the time of giving evidence).[946]

534. *Thirdly*, some of the evidence concerns environmental changes that occurred prior to any alleged breach by the Commonwealth, or simply compares the state of the environment long prior to any alleged breach to its current state without any indication as to when the relevant changes occurred. For example, Mr Pabai

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943 T0003.5-6 (McLeod SC) [APP.0001.0012.0004].

944 Enosa Affidavit at [48], [APP.0001.0009.0010] at [_0008].

945 Billy Affidavit at [48], [APP.0001.0009.0006] at [_0009]; T0016.1-45 [APP.0001.0012.0008].

946 Ahmat Affidavit at [45], [APP.0001.0009.0012] at [_0016], T0110.36-0111.27 [APP.0001.0012.0005].

Pabai gave evidence that there used to be a beach in front of the village in the 1970s, but that it is now gone.[947] This evidence does not allow the Court to make a finding as to when this change occurred, which means that it is not possible to discern a causal connection between this change and any alleged breach by the Commonwealth.

E.1.9 No statistically significant changes in precipitation patterns

535. For completeness, the Commonwealth notes that Prof Karoly's evidence is that there has been no statistically significant change in precipitation from 1952-1980 to 1995-2022.[948] Further, AR6 WGI records that there is "*low*" confidence due to "*limited agreement*" in the attribution to climate change of observed increase in heavy precipitation, as well as an observed decrease in drought, over northern Australia.[949] Finally, the Commonwealth notes the Lane et al paper,[950] tendered by the applicants, of which Prof Pitman was an author, which emphasises the difficulties in attributing changes in precipitation, drought and extreme events (including cyclones) in and around Australia to climate change.

E.2 The projected impacts of climate change in the Torres Strait (CQ 2)

536. It is not in dispute that sea levels will continue to rise around the world in the future, including in the Torres Strait, regardless of the level at which global average temperatures stabilise.[951] The Commonwealth also accepts that, if global temperatures rise, temperatures are likely to rise in the Torres Strait Islands, though the extent is uncertain. The Commonwealth further accepts that small islands like the Torres Strait are projected to be at risk of and sensitive to some impacts of climate change such as increased oceanic warming, ocean

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947 Pabai Pabai Affidavit at [150]-[156], [APP.0001.0009.0008] at [_0038]-[_0040].

948 Karoly 1 at [73], [APP.0001.0003.0093] at [_0027]. See also, T907.6-7 (Karoly), [TRN.0009.0844].

949 IPCC AR6 WGI, Box TS.10, p. 109, [APP.0001.0007.0112] at [_0125]. See also, T1314.40-1315.46, 1332.26-1333.5 (Pitman) [TRN.0015.1271]. Cf Meinshausen 2 at [6], [APP.0001.0015.0010] at [_0003];

950 Lane et al, Attribution of extreme events to climate change in the Australian region – A review, *Weather and Climate Extremes* (2023), [APP.0001.0017.0002]. The applicants took Prof Pitman to this paper at T1333.39-1334.23 [TRN.0015.1271].

951 See Church, Table 3, [APP.0001.0009.0002] at [_0026].

acidification, tropical cyclones and further coral bleaching and mortality events.[952]

537. However, there is a lack of scientific studies as to the precise impact of a global temperature increase of 1.5°C compared to higher increments of warming on the Torres Strait Islands. As such, the current state of scientific knowledge, and the evidence in this case, does not support the applicants' assertion that 1.5°C is a "limit" or threshold for the Torres Strait, beyond which the impacts are significantly worse.

538. Given the absence of evidence as to the precise impacts of climate change on the Torres Strait Islands, in some cases, the applicants seek to apply global projections to the Torres Strait. That is inappropriate given that the experts agree that the impacts of climate change vary regionally, and it cannot be assumed that impacts in a particular region increase linearly with global temperature increase (see at [211]-[212] above).

539. The submissions below summarise the evidence on each of the impacts that the applicants contend in their closing submissions is a projected impact of climate change in the Torres Strait Islands if global temperatures exceed 1.5°C, and then consider their contention that 1.5°C is a threshold or "limit" for the Torres Strait Islands.

E.2.1 Sea level rise

540. The Commonwealth accepts that sea levels are predicted to rise under all SSP scenarios by 2050, and to rise further still by 2100. It accepts the IPCC's predictions as to the amount of global mean sea level rise by 2050 and 2100 relative to 1900 under various SSP scenarios, relied upon by both Prof Church and Prof Karoly. Further, the Commonwealth accepts Prof Church's regional projections of likely sea level rise under different SSP scenarios by 2050 and 2100 relative to 1900.

541. It is not in dispute that the projected amount of sea level rise to 2050 is only weakly dependent on GHG emissions between now and 2050.[953] For example, the central estimate of sea level rise in the Torres Strait by 2050 relative to 1900

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952 See Defence [59(b)]; Amended CSR [12].
953 Church at [84], [APP.0001.0009.0002] at [_0029].

levels is 34 cm under SSP 1-1.9, and 36 cm under SSP1-2.6. That is, the difference between SSP1-1.9 and SSP 1-2.6 is expected to be only 2 cm as at 2050. There is no evidence before this Court about the impact that this marginal difference will have on the habitability of different islands in the Torres Strait. Nor is it in dispute that projected sea level rise in the Torres Strait (and globally) is strongly dependent on future emissions scenarios.[954] However, even under SSP1-1.9, sea levels will continue to rise to 2100 (the central estimate for the Torres Strait region being that it will rise by 56 cm by 2100 relative to 1900 levels under that scenario). As the applicants identify, the reason for this is the time lag between GHG emissions and the consequential rise in sea level.

542. However, it is necessary to make two observations about the use the applicants seek to make of this evidence at AS [91].

543. *First*, as to AS [91.1], although it is not contentious that an increase in global temperature will cause sea levels to rise throughout the world and in the Torres Strait, there is no evidence to suggest there is a linear relationship between GHG emissions and sea level rise. Indeed, when it was put to Prof Church in cross examination that "*given the range of factors that influence the variation in regional sea level it would be correct to say that there's not a linear relationship between increasing global atmospheric temperature and sea level rise in a particular location*", Prof Church said that, while it would be misleading to describe this relationship as "*linear*", "*it is true that local sea level rise is an influence of a mix of factors*".[955] Nor is there any evidence about the extent to which Australia's GHG emissions since 2014 have contributed to existing sea level rise, or will contribute to the amount of sea level rise that will be observed in 2050 and 2100, let alone any evidence about the extent to which that contribution would have reduced had the Commonwealth not breached the Primary Duty as alleged. At AS [100.2(a)], the applicants submit that, "*The emission of GHGs in Australia in the past has contributed to the projected increase in sea level and the frequency and intensity of inundation events globally and in the Torres Strait*". As outlined at [486.a)] above, Australia's contribution to greenhouse gas emissions is relevant to the alleged breach of the Primary Duty. The applicants do not allege that the Commonwealth breached that duty prior to 2014.

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954 Church at [73], [APP.0001.0009.0002] at [_0023].

955 T1579.25-29 (Church) [TRN.0020.1551].

Therefore, in assessing the Commonwealth's liability in relation to the Primary Duty, it is not legitimate to consider any "contribution" before that date.

544. *Secondly*, as to AS [91.2], there is no basis for the Court to find that the short-term habitability of certain areas will depend on marginal differences in sea level rise between warming scenarios. As noted above, the difference between the central estimated amount of sea level rise in SSP 1-1.9 (the scenario closest to 1.5°C)[956] and SSP 1-2.6 (the scenario closest to 2°C)[957] in 2050 is 2 cm. There is no evidence to suggest that any particular community in the Torres Strait will become uninhabitable due to this difference (and, to the extent the applicants submit that can be inferred from the evidence of predicted extreme levels, that issue is dealt with in the section below).

E.2.2 Extreme sea level events and inundation of coastal areas

545. The applicants invite the Court to make findings about the likely frequency of flooding events in 2050 and 2100 in reliance on Mr Bettington's calculations as to the likely frequency of Township Inundation Events at those points in time under SSP1-1.9, SSP 1-2.6 and SSP 3-7.0.

546. For the reasons outlined at [500]-[502] above, the water levels identified by Mr Bettington as Township Inundation Events on each of Boigu, Saibai, Poruma and Warraber are not a meaningful method of understanding how those communities would be impacted by such an event.

547. If, however, the water levels identified by Mr Bettington are considered a useful metric, then in any event Dr Harper's estimates as to the average recurrence interval (**ARI**) of sea level events of different heights on Boigu, Saibai, Poruma and Warraber should be preferred to those of Mr Bettington for the reasons outlined at [496] above.

548. The following table shows the difference in Dr Harper and Mr Bettington's opinions about the anticipated ARI of the Township Inundation Event water

956 See Karoly 1, Table 2, p 33 and [84], [APP.0001.0003.0093] at [_0033].
957 See Karoly 1, Table 2, p. 33 and [87], [APP.0001.0003.0093] at [_0033]-[_0034].

levels identified by Mr Bettington on each of Boigu, Saibai, Poruma and Warraber under each of the relevant SSPs in 2050 is as follows:[958]

	Expert	Boigu	Saibai	Poruma	Warraber
~50% of township flooded (m AHD)		3.4	2.8	3.6	3.5
SSP1-1.9 2050 frequency (years)	Dr Harper	<10	<10	>500	>500
	Mr Bettington	7	3	250	60
SSP1-2.6 2050 frequency (years)	Dr Harper	<10	<10	>500	>500
	Mr Bettington	5	2.5	200	50
SSP3-7.0 2050 frequency (years)	Dr Harper	<10	<10	>500	>500
	Mr Bettington	4	2	150	40

549. The following table shows the difference in Dr Harper and Mr Bettington's opinions about the anticipated ARI of the Township Inundation Event water levels identified by Mr Bettington on each of Boigu, Saibai, Poruma and Warraber under each of the relevant SSPs in 2100 is as follows:[959]

	Expert	Boigu	Saibai	Poruma	Warraber
~50% of township flooded (m AHD)		3.4	2.8	3.6	3.5
SSP1-1.9 2100 frequency (years)	Dr Harper	<10	<10	>500	252
	Mr Bettington	2	1	100	15
SSP1-2.6 2100 frequency (years)	Dr Harper	<10	<10	>500	10-25
	Mr Bettington	1.5	0.7	70	11
SSP3-7.0 2100 frequency (years)	Dr Harper	<10	<10	<50	<10
	Mr Bettington	.5	.2	20	3

550. It is noted that Dr Harper only calculated the expected sea levels for particular ARIs (10, 25, 50, 100 and 500 years). To the extent that the Township Inundation Event has an ARI that falls between one of these set intervals it is not possible to ascertain the anticipated ARI for that event. It is, therefore, not possible to ascertain precisely the increased likelihood of Township Inundation Events as between the different SSPs. However, the above tables suggest that, at the very

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958 **Dr Harper's opinions:** Joint Report, [APP.0001.0015.0001], Dr Harper's modified Tables 11-13 at [_0015]-[_0017]; **Mr Bettington's opinions:** Bettington 2, Table 14, [APP.0001.0015.0011] at [_0011].

959 **Dr Harper's opinions:** Joint Report, [APP.0001.0015.0001], Dr Harper's modified Tables 15-17 at [_0018]-[_0020]; **Mr Bettington's opinions:** Bettington 2, Table 18, [APP.0001;0015.0011] at [_0013].

least, Mr Bettington has overstated the likely frequency of Township Inundation Events on Poruma and Warraber.

551. The applicants submit that Mr Bettington's evidence demonstrates the near-term necessity of limiting global temperature increase as much as possible in order to avoid rendering those communities uninhabitable (AS [96], [100.3]). However, as noted at [541] and [544] above, there is no evidence before the Court about the point at which these islands will cease to be habitable. This is a crucial piece of information for the Court to assess which SSPs, if any, will lead to a scenario where one or more of the islands will become uninhabitable. In the absence of such evidence, it is not open to the Court make a finding that likely sea level rise under a particular SSP will lead to any island becoming uninhabitable.

E.2.3 Temperature increase and intensification of heat extremes

552. As explained at [223]-[226] above, there is some dispute between the parties as to the value of regional climate modelling, particularly in a small island area like the Torres Strait. Therefore, the Commonwealth submits that the projections from the Queensland Future Climate Dashboard on which Prof Karoly relies for his evidence as to projected impacts of climate change in the Torres Strait[960] would not be a matter of scientific consensus. Even if that evidence were to be accepted, the Commonwealth notes that there is significant uncertainty as to the temperature projections at different levels of warming, with temperature projected to increase relative to 1986-2005 by 0.7°C (0.5°C to 0.9°C) for global warming of 1.5°C and 1.3°C (0.9°C to 1.5°C) for global warming of 2°C.

553. As to AS [101], the Commonwealth notes that paragraph concerns *global* temperature projections and not projections in the Torres Strait. Further, as to Prof Karoly's evidence that, if GHG emissions are reduced in accordance with current global commitments, temperatures are projected to increase by 2.8°C above preindustrial levels,[961] the projected temperature increases are lower if all NDCs and net zero pledges are implemented (see [291]).

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960 Karoly 1 at [112]-[115], [APP.0001.0003.0093] at [_0041]-[_0042].

961 See Karoly 1 at [93], [APP.0001.0003.0093] at [_0035].

E.2.4 Ocean temperature increase

554. As noted above, the Commonwealth does not dispute that the Torres Strait Islands are at risk of increased ocean warming due to climate change. However, there is no evidence of the quantum of that increase.

555. The evidence referred to at AS [103] is evidence of projected *global* average ocean temperature. It is not evidence of the projected quantum of increase in the Torres Strait. It cannot be relied on as such in circumstances where Prof Karoly says that ocean temperature increase "*varies geographically associated with the ocean current systems and variations in the mixing of surface waters into the deeper oceans*"[962] and that "*[i]n some locations, there will not be a linear relationship*".[963]

556. Although Prof Karoly did not give evidence in the terms of AS [104], the Commonwealth accepts that, as global temperatures increase, the Torres Strait is likely to be at higher risk of marine heatwaves, although there is no quantification of the impacts at different levels of warming.

E.2.5 Ocean acidification

557. Similar comments apply to AS [105]-[106]. The Commonwealth accepts that increasing GHG emissions are likely to lead to some level of increasing ocean acidification in the Torres Strait. However, there is no evidence as to the precise quantum at different levels of warming. The evidence at AS [105]-[106] is evidence of acidification globally and Australia-wide, which cannot be assumed to be the quantification in the Torres Strait where Prof Karoly has given evidence that acidification "*varies geographically*".[964]

E.2.6 Changes in precipitation patterns

558. Again, at AS [107], the applicants seek to apply global statements about projected levels of precipitation change to the Torres Strait. That is not appropriate, as the experts are agreed that increases in temperature do not lead to globally uniform

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[962] Karoly 1 at [42], [APP.0001.0003.0093] at [_0018].
[963] T904.34-36 (Karoly) [TRN.0009.0844].
[964] Karoly 1 at [43], [APP.0001.0003.0093] at [_0019]. See also, T905.1-8 (Karoly) [TRN.0009.0844].

increases in precipitation.[965] Further, Prof Karoly's evidence as to projected precipitation changes in the Torres Strait specifically is that mean changes in total annual rainfall in the Torres Strait are "*small and quite uncertain across the range of different global climate models*".[966] That is, as he confirmed in cross-examination, even in a 3°C world, there might not be any difference.[967] Indeed, contrary to global trend of increasing precipitation relied on by the applicants in AS [107], what evidence there is, from the Queensland Future Climate Dashboard, indicates that there will be a *decrease* in precipitation in the Torres Strait.[968] This underscores the inappropriateness of relying on information about global trends to assume a specific impact in the Torres Strait.

559. Prof Karoly also gives evidence that there are no statistically significant projected changes in the Torres Strait for extreme rainfall or relative humidity.[969]

560. Finally, the Commonwealth notes that the conclusion of the CSIRO and BOM *State of the Climate 2022* report is that there has been a decrease in the number of tropical cyclones observed around northern Australia, and any trend in cyclone intensity is harder to quantify.[970]

E.2.7 Erosion

561. At AS [108]-[109], the applicants submit that Mr Bettington opines that the *"erosion issues already observed on coral cays and rock islands will increase in line with sea level rise in the Torres Strait*". The Commonwealth submits this characterisation of Mr Bettington's evidence is overly broad. Rather, Mr Bettington focused on the coral cays (and specifically Poruma) in his expert report and his conclusions around observed erosion issues and sea level rise.[971] Further, Mr Bettington accepted in cross-examination that he expected the seawall on Poruma to "*halt erosion*" "*for the next 40 years or so*".[972]

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965 See, for example Karoly 1 at [54], [APP.0001.0003.0093] at [_0022]. See also at [535].
966 Karoly 1 at [117], [APP.0001.0003.0093] at [_0043].
967 T941.46-942.13 [TRN.0010.0920].
968 See Karoly 1 at [117], [APP.0001.0003.0093] at [_0043].
969 Karoly 1 at [117], [APP.0001.0003.0093] at [_0044].
970 See Karoly 1 at [65(g)], [APP.0001.0003.0093] at [0026].
971 Bettington 1, pp. 39, 45, [APP.0001.0009.0003] at [_0039], [_0045].
972 T1236.43 [TRN.0014.1172].

562. As to the submission at AS [109] that Mr Bettington gave evidence that "*harm and destruction to mangroves and wetlands on the mud islands (including Boigu and Saibai) will result in significant erosion*", the Commonwealth submits that:

a) to the contrary, Mr Bettington did not give evidence that harm and destruction to *wetlands* on the mud islands would result in significant erosion; and

b) Mr Bettington qualified his evidence as to the erosion issue by saying that no calculations to quantify the issue exist given the complex nature of the problem.[973]

563. As to the submission (citing Mr Bettington's report), also at AS [109], that "*[a]s sea levels rise, the tidal regime will change and impact the processes by which mangroves colonise, causing die-back*", Mr Bettington's evidence was that both die back *and* altered colonisation would occur as sea levels rise and the tidal regime changes.[974] Mr Bettington does not give specific evidence about the threshold of sea level rise at which particular mangrove species are expected to die back, nor any specifics of how particular rises in sea level are expected to alter the way in which particular mangroves colonise particular islands or parts thereof.

E.2.8 Groundwater contamination

564. Subject to one qualification, the applicants accurately summarise Mr Bettington's evidence on this issue at AS [110]-[111]. That qualification is that Mr Bettington does not give evidence that inhabitants will be unable to grow traditional garden crops. Rather, Mr Bettington's evidence was that, if groundwater contamination occurred, this would "*impact gardens and cropping that occurs on the island*".[975] For the reasons above at [527], Dr Selvey's evidence does not assist in this regard.

E.2.9 Harm and destruction of ecosystems and non-human species

565. As to AS [112.1] and [112.4-6], while the Commonwealth accepts the likelihood of impacts with respect to coral bleaching, for the reasons outlined at [517]-[519], it submits that there is an absence of reliable evidence upon which conclusions

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973 Bettington 1, pp. 57 and 65, [APP.0001.0009.0003] at [_0057], [_0065].

974 Bettington 1, p. 51, [APP.0001.0009.0003] at [_0051].

975 Bettington 1, s 3.2.3, [APP.0001.0009.0003] at [_0048]-[_0049].

could be drawn with respect to other ecosystems such as mangroves, seagrass fields and dugongs.

566. As to AS [112.2], the Commonwealth refers to [561]-[563] above.

567. As to AS [112.3], the Commonwealth refers to [564] above.

E.2.10 Impacts to human health in the Torres Strait

568. In circumstances where Dr Selvey's evidence does not provide a reliable basis for any conclusion with respect to current impacts of climate change in the Torres Strait (as to which, see [521]-[529]), the Commonwealth submits that there is no reliable basis for the Court to reach a conclusion with respect to projected impacts. The Commonwealth repeats its submissions at [521]-[529].

E.2.11 Tipping points

569. The nature of tipping points and the uncertainties associated with them have been described at [213]-[219] above.

570. The applicants submit at AS [116] that "*[t]he expert evidence focuses on three critical tipping points that, if triggered, would threaten the habitability of the Torres Strait*", being collapse of the Greenland and Antarctic icesheets, and rapid permafrost melt.

571. The Commonwealth accepts that total collapse of the Greenland and/or Antarctic ice sheets, if that occurred, could contribute metres of sea level rise over centuries to millennia, which would have significant impacts on the world, including the Torres Strait. Prof Church gave evidence that there could be a warming threshold above which the Greenland ice sheet decays, contributing up to 7.4 m of sea level rise over centuries to a millennia or more. Prof Church noted that the IPCC AR5 estimated this threshold to be 1°C to 4°C, but also stated in his expert report that this threshold "*is not well defined*".[976] As to the Antarctic ice sheets, Prof Church gave evidence that there was some uncertainty associated with its behaviour.[977] In the more recent AR6 report, the IPCC reported that "*there is <u>limited evidence</u>*

[976] Church at [100], [APP.0001.0009.0002] at [_0035]-[_0036].

[977] See, for example T1572.16-36 [TRN.0020.1551]; Church at [101], [APP.0001.0009.0002] at [_0036].

that the Greenland and West Antarctic ice sheets will be lost almost completely and irreversibly over multiple millennia"; near-complete loss of those ice sheets and "*substantial parts or all of Wilkes Subglacial Basin in East Antarctica*" is only projected at "*sustained warming levels between 3°C and 5°C*".[978] These are not realistic global futures (see [291]). Further, in AR5, the collapse of the Greenland or West Antarctica ice sheets was reported to be as "*exceptionally unlikely*" in the 21st century.[979]

572. The Commonwealth accepts that rapid thawing of the permafrost would emit CO_2 and methane, which would increase global temperatures. However, the IPCC in AR6 reported that "*there is low confidence on the timing, magnitude and linearity of the permafrost climate feedback owing to the wide range of published estimates and the incomplete knowledge and representation in models of drivers and relationships*".[980] The figures relied on by the applicant at AS [116.3(b)], from the IPCC Report on 1.5°C in 2018, highlight the uncertainty in predicting the extent of permafrost melt at different levels of temperature increase, with a range of 2-66% for 2°C or 30-99% for 4.3°C.

E.2.12 The "Global Temperature Limit" for the Torres Strait

573. In summary, the applicants contend that 1.5°C is a "Global Temperature Limit" for small and low-lying islands such as the Torres Strait Islands.[981] The Commonwealth understands the allegation to be that 1.5°C is a critical turning point for the Torres Strait Islands, in the sense that any incremental increase of temperature beyond 1.5°C will have severe impacts that will be avoided even slightly below that level.[982]

574. The Commonwealth accepts that, as global warming increases, a number of the impacts of climate change in the Torres Strait Islands are likely to increase. The Commonwealth further accepts that the parties to the Paris Agreement have agreed to take steps to hold the increase in the global average temperature to "*well below 2°C*" above pre-industrial levels and to "*pursue efforts*" to limit

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978 AR6 WGI, Technical Summary, Box TS.9, p. 106, [APP.0001.0007.0112] at [_0122].
979 AR6 WGI, p. 1115, [APP.0001.0007.0112] at [_1131]. See also, T961.17-30 (Karoly) [TRN.0010.0920].
980 AR6 WGI, Ch 5.4, Box 5.1, p. 726. , [APP.0001.0007.0112].
981 See 3FASOC [31], [51], [58], [60].
982 T11.38-39 (McLeod SC) [APP.0001.0012.0004].

temperature increase to 1.5°C above pre-industrial levels. However, as is clear, that Article does not establish 1.5°C as a "limit". Moreover, as is evident from the summary above, the expert evidence in this case does not establish that 1.5°C is a "limit" for the Torres Strait Islands, though some impacts are projected to worsen as temperature increases.

575. Further, contrary to 3FASOC [31] and AS [322], from 2014, the BAS has not always been that "*the maximum limit on global temperature increase necessary to avoid the worst impacts of climate change on small and low lying islands is 1.5°C*". As at 2014, the Paris Agreement had not been signed and there was no other agreement or aim to stabilise global warming at 1.5°C. The 1.5°C goal was not agreed until the Paris Agreement in December 2015, and it was not until the IPCC's Special Report on the 1.5°C was published in October 2018 that there was consensus science on the projected global impacts of warming at 1.5°C vs 2°C and the feasibility of stabilising temperature at that level. As per the extracts summarised at AS [322.2], that document reported that, in aggregate, climate-related risks for natural and human systems were lower at global warming of 1.5°C compared to 2°C for the world generally and particularly for small islands, though it did not report that 1.5°C was a "*maximum limit*".

576. The AR6 reports are to a similar effect. In AR6 WGII, published in February 2022, the IPCC reported that, above 1.5°C of global warming, limited freshwater resources pose potential hard limits for Small Islands (cf AS [322.4(b)]).[983] The evidence does not establish that this is a hard limit for the Torres Strait Islands. The Commonwealth accepts that coral reefs are projected to be substantially more affected above 1.5°C (cf AS [322.4(c)]). The Commonwealth likewise accepts that the risk of triggering tipping points increases with temperature increase, but again the evidence does not establish that 1.5°C is a particular threshold for the Torres Strait Islands in this regard (cf AS [322.4(d)]).

577. The unfortunate reality is that small and low-lying islands such as the Torres Strait Islands, will experience significant impacts of climate change both below and above 1.5°C.[984] This is evident, inter alia, from the experts' modelling of the sea level rise in the Torres Strait at SSP1-1.9, which is only 2 cm different from SSP1-2.6. The evidence does not establish that 1.5°C is a hard limit or cliff for

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983 IPCC AR6 WGII, [C.3.4], p. 26, [APP.0001.0007.0118] at [_0037].

984 See, for example, IPCC AR6 WGI, SPM [B.6.2], [APP.0001.0007.0112].

such islands. The Commonwealth is working with stakeholders in the Torres Strait Islands to assist local populations to adapt to the impacts of global warming today and in the future.

578. As to AS [323], the findings of the Belgian court are irrelevant for reasons explained at [642]-[656] below.

579. Finally, as will be developed in Part E.5 below, even if there is a Global Temperature Limit, the Commonwealth cannot hold global temperature increase to that limit.

E.3 The Commonwealth does not owe the duty of care alleged (CQ 3)

580. The principles that apply when determining whether to recognise a novel duty of care are outlined in Part C.2 above. The Primary Duty the applicants seek to have this Court recognise is as follows:[985]

> *The Commonwealth owes a duty to Torres Strait Islanders, including the Applicants and Group Members, 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 in and around the Protected Zone, including the Torres Strait Islands*
>
> *from the Current and Projected Impacts of Climate Change in the Torres Strait Islands.*

581. At the outset, the Commonwealth notes a fundamental difficulty with the way in which this alleged duty of care is expressed. It is not in a form that could be recognised by a court because it does not identify the risk of recognised harm in respect of which the Commonwealth is alleged to be required to take reasonable precautions (see at [36] above). The particular risk of recognised harm (for example, property damage or personal injury) is a matter that informs the application of salient features, so it is necessary that it be identified at the duty of care stage.[986]

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985 3FASOC [81].

986 *Brookfield* at [169] (Gageler J) [CTH.0007.0001.0001]. ***Heyman*** at 487 (Brennan J) [APP.0001.0020.0162].

582. Although the applicants have not identified the relevant risks of recognised harm, the Commonwealth proceeds on the basis that the applicants will allege that the Primary Duty required the Commonwealth to take reasonable precautions to prevent property damage, personal injury and loss of fulfilment of *Ailan Kastom*, those being the categories of loss the applicants submit that Torres Strait Islanders have suffered as a result of the alleged breach of the Primary Duty (see 3FASOC [86]). It is not contentious that property damage and personal injury are recognised as compensable under the laws of negligence, but the Commonwealth does not accept that loss of fulfilment of *Ailan Kastom* is compensable for the reasons outlined in Part E.6.3 below.

583. The applicants submit that the Court should recognise the Primary Duty in reliance on the following factors:

a) the "totality" of the relationship between the Commonwealth and Torres Strait Islanders, which the applicants submit requires focus on the special relationship between those parties (AS [179]-[190]);

b) the fact that courts have recognised duties that the applicants argue are analogous (AS [191]-[199]);

c) European case law in which courts have recognised duties relating to foreseeable harm from greenhouse gas emissions (AS [200]-[208]); and

d) a range of salient features that the applicants submit are present in the relationship between the respondent and Torres Strait Islanders, and which the applicants submit support the recognition of the novel duty of care (AS [210]-[271]).

584. Each of these matters is considered in turn below, and the Commonwealth submits that they do not justify the recognition of the Primary Duty. The Commonwealth submits that the totality of the relationship between the applicants and group members, and the Commonwealth, runs counter to the imposition of the pleaded duty of care in this case.

E.3.1 The "totality" of the relationship between the Commonwealth and Torres Strait Islanders

585. As outlined at [40]-[46] above, there is no dispute between the parties that the salient features analysis needs to take account of the broader context of the relationship between the putative tortfeasor and the person to whom it is alleged a duty of care is owed.

586. The Commonwealth submits that, in doing so, the critical contextual factors to be taken into account are the three matters identified by Allsop CJ in *Sharma FC* (extracted at [44] above). In particular, that: the threat of climate change is a global threat that can only be addressed by global co-ordinated action; governmental responses to that threat involve weighing many different and competing factors; and those decisions are, quintessentially, decisions of high level government policy in respect of which no duty of care can or should be owed.[987]

587. The applicants contend that there is a "*special relationship between the Commonwealth and Torres Strait Islanders*" (AS [179]-[190]). The Commonwealth submits that the matters the applicants rely on in that regard do not hold the weight asserted, and in any case are insufficient to overcome the very weighty reasons against recognition of a duty of care, including, centrally, the matters identified by Allsop CJ. In short, the Commonwealth submits that the matters identified by the applicants do not detract from the conclusion that the relationship between the Commonwealth and the applicants and group members here, as Allsop CJ concluded in *Sharma FC*, is "*one between the governing and the governed in a democratic polity*",[988] and, as such, is not the kind of relationship recognised to give rise to a duty of care in tort.

588. These submissions will address each of the three contextual factors identified by Allsop CJ in turn, and then the fourth contextual feature identified by the applicants.

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[987] See, especially, Defence [50(g)], [76(b)], [81A], [82(c)], [85A].

[988] *Sharma FC* at [232], [APP.0001.0020.0101].

(1) The nature of the underlying danger said to give rise to the Primary Duty

589. As Allsop CJ recognised in *Sharma FC*,[989] the danger said to give rise to the duty in that case, and in this case — being the accumulation of GHG emissions in the atmosphere and their impact on climate change — "*is one that can only be addressed by global co-ordinated policy and action, by countries around the world formulating and implementing effective policy measures to address the nature of the cause of the potential catastrophe*".

590. As is evident from the discussion of the UNFCCC and Paris Agreement above in Part D, international frameworks have been implemented to facilitate global action on climate change. Those frameworks expressly recognise the global scale of the danger posed by the accumulation of GHG emissions in the atmosphere and the necessity for co-ordinated policy and action among States.

591. For example, the preamble to the UNFCCC acknowledges that "*the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions.*"[990] Article 3(1) provides that, in their actions to achieve the objective of the UNFCCC, and to implement its provisions, the parties should be guided by the principle that they should "*protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities*".[991] Similarly, the Paris Agreement is directed at strengthening "*the global response to the threat of climate change*".[992] As discussed above in Part D, Article 4 of the Paris Agreement contains a range of commitments that require co-ordinated global action and policy development to address the threats posed by climate change, taking into account parties' "*common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances*".[993]

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[989] *Sharma FC* at [227] (Allsop CJ), [APP.0001.0020.0101] at [_0077].
[990] UNFCCC, Preamble, [APP.0001.0003.0016] at [_0001].
[991] UNFCCC, Art 3(1), [APP.0001.0003.0016] at [_0004].
[992] Paris Agreement, Art 2(1), [APP.0001.0006.0017] at [_.0004].
[993] Paris Agreement, Art 4, (chapeau), [APP.0001.0006.0017] at [_.0005].

592. In other words, these international agreements are directed to remedying the fact that climate change, and the effects thereof, are harms or risks contributed to incrementally by every single country and person in the world, with no one person, and unlikely any one country (certainly not Australia: see [281] above and [681]-[686] below), able to solve the problem. That is, the international agreements emphasise, rather than undermine, the Commonwealth's submission that the harm and risk of climate change is not an area apt for the attribution of responsibility according to tort law.

593. Further, as is clear from the evidence discussed above in Part D.6, the tasks of formulating and communicating Australia's NDCs occurred in the context of the international frameworks referred to immediately above and Australia's relationships with foreign countries and organisations. The UNFCCC Taskforce considered the iNDCs notified by other countries in advance of COP21,[994] and the UNFCCC Taskforce Final Report contained analysis of those iNDCs[995] and the historical background to the international negotiations leading to the Paris Agreement.[996] One of the key inputs into the UNFCCC Taskforce Final Report was specialised economic analysis prepared by Prof Warwick McKibbin AO that considered the economic implications for Australia of post-2020 commitments of various other countries including the United States, China and the European Union.[997] Similarly, when the enhanced 2022 target was formulated, policymakers considered international developments and expectations.[998] This evidence discloses that Australia's actions in formulating and communicating its NDCs occurred very much within a broader global context for co-ordinated policy and action on reducing GHG emissions.

(2) *Development of policy involves scientific, economic, social and political considerations*

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994 Pearce Affidavit at [38]-[40], [WIT.2000.0001.0035] at [.0041]; UNFCCC Taskforce Final Report at Figure 2.8 and Figure 5.2, [EVI.2001.0001.2411] at [.2437], [.2461].

995 UNFCCC Taskforce Final Report, [EVI.2001.0001.2411] at [.2430], [.2436]-[.2437].

996 UNFCCC Taskforce Final Report, [EVI.2001.0001.2411] at [.2434]-[.2435].

997 Pearce Affidavit at [35], [WIT.2000.0001.0035] at [.0040]; McKibbin Report 1, [EVI.2001.0001.2322].

998 Gardiner I at [52]-[55], [WIT.2000.0001.0001] at [.0010]-[.0011]; ALP, *Powering Australia Plan*, [EVI.2001.0001.1863] at [.1875].

594. As Allsop CJ observed in *Sharma FC*,[999] the development of GHG policies "*for any nation and for nations generally involves scientific, economic, social and political considerations, often depending on the nature and character of the countries in question, their populations and economies*". That was certainly the case with the formulation of the targets reflected in the Commonwealth's NDCs at issue in these proceedings. The evidence also discloses that the NDCs of other countries similarly reflected a range of scientific, economic, social and political considerations.

595. The evidence demonstrates that the process that led to the adoption of the target embodied in the 2015 NDC involved consideration of a wide and diverse range of considerations and interests. The UNFCCC Taskforce considered scientific information, including scientific evidence concerning temperature increase and sea level rise,[1000] and reports prepared by the CCA.[1001] A broad variety of stakeholders were consulted on the setting of targets, resulting in the receipt of 498 submissions, which were then considered by the taskforce.[1002] Ministerial roundtables were convened for the purpose of consulting with business, community, environmental and Indigenous stakeholders.[1003] A number of involved pieces of economic analysis were commissioned and considered in order to evaluate the impact of potential targets on various sectors of the Australian economy, Australia's GDP and the living standards of the Australian community, together with policy options for achieving emission reductions.[1004] The targets of foreign nations, including Australia's major trading partners were taken into

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[999] *Sharma FC* at [228] (Allsop CJ), [APP.0001.0020.0101] at [_0077]-[_0078].

[1000] UNFCCC Taskforce Issues Paper, [EVI.2001.0001.2517] at [.2519], referring at Endnote i to the CSIRO and BOM, *State of the Climate 2014* (2015) [APP.0001.0003.0006]; UNFCCC Taskforce Final Report [EVI.2001.0001.2411] at [.2428]-[.2429], referring in the references to the CSIRO and BOM, *State of the Climate 2014* (2015) [APP.0001.0003.0006].

[1001] T1484.9-.10 (Pearce) [TRN.0018.1455].

[1002] Pearce Affidavit at [25], [29], [WIT.2000.0001.0035] at [.0039]; UNFCCC Taskforce Stakeholder Consultation Plan and supporting materials (20 February 2015) [PMC.2004.0007.7332]; UNFCCC Taskforce Stakeholder Tier List [PMC.2004.0007.7334].

[1003] Pearce Affidavit at [23], [WIT.2000.0001.0035] at [.0039].

[1004] Pearce Affidavit at [35]-[36], [WIT.2000.0001.0035] at [.0040]-[.0041]; McKibbin 1, [EVI.2001.0001.2322]; McKibbin 2 [EVI.2001.0001.2377]; RepuTex Carbon, *The Lost Years: Australian Abatement Cost Curve to 2020 & 2030* (April 2015) [PMC.2005.0001.0001]; ClimateWorks, *Pathways to Deep Decarbonisation in 2050* (September 2014) [EVI.2001.0001.1961]; ClimateWorks, *Pathways to Deep Decarbonisation in 2050: How Australia can prosper in a low carbon world (Technical Report)* (September 2014) [EVI.2001.0001.2010]; DICCSTRE, *Climate Change Mitigation Scenarios: Modelling Report Provided to the Climate Change Authority in Support of its Caps and Targets Review* (2013) [EVI.2001.0001.2179].

account.[1005] Public servants drawn from across various government departments were involved in the UNFCCC Taskforce, including DFAT, the Department of the Environment, the Department of Treasury, the Department of Agriculture and the Department of Finance (as needed).[1006] The ultimate decision on the adoption of the target embodied in the 2015 NDC was made by Cabinet.[1007]

596. The decisions to communicate the 2020 NDC Update and 2021 NDC Update also involved consideration of a number of factors. The initial target embodied in the 2015 NDC was set having regard to factors including those discussed immediately above at [596], and the 2020 NDC Update and 2021 NDC Update (which reaffirmed the 2030) target were plainly also informed by that initial work. In addition, the evidence discloses that the Minister considered international developments prior to making the decision to communicate the 2020 NDC Update, and did so in consultation with the Prime Minister and Foreign Minister.[1008] The 2021 NDC Update, which incorporated the net zero by 2050 target, was accompanied by a long-term, economy-wide plan to achieve net zero emissions.[1009] There were also political considerations in the sense that Ms Gardiner's evidence was that the target had been taken by the Government to the previous election, which informed the decision to maintain the target.[1010] The decision in 2021 to adopt a net zero by 2050 target was also made by Cabinet.[1011]

597. Finally, it is clear that the 2022 decision to communicate a strengthened target to reduce emissions by 43% below 2005 levels by 2030 and reaffirm Australia's net zero by 2050 target was also informed by scientific, economic and social considerations. The evidence discloses that the target was formulated by reference to an election policy taken by the ALP to the 2022 federal election.[1012] The policy on which the strengthened 2030 target and 2022 NDC Update was based referred to economic imperatives, scientific imperatives and national and

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1005 UNFCCC Taskforce Final Report [EVI.2001.0001.2411] at [.2430], [.2436]-[.2437].

1006 Pearce Affidavit at [20], [WIT.2000.0001.0035] at [.0038].

1007 Pearce Affidavit at [43]-[44], [WIT.2000.0001.0035] at [.0041].

1008 Gardiner I at [37], [WIT.2000.0001.0001] at [.0009]; Gardiner 2 at [4]-[6], [WIT.2000.0001.0030] at [.0030]; MS20-000327 at [4], [DCC.2008.0002.0002] at [.0003]; MS20-004039, [DCC.2008.0002.0006] at [.0007].

1009 Gardiner I at [47], [WIT.2000.0001.0001] at [.0010]; Australian Government, *Australia's Long-Term Emissions Reduction Plan: A whole-of-economy plan to achieve net zero emissions by 2050*, [EVI.2001.0001.0292].

1010 T1366.23-.29 (Gardiner) [TRN.0016.1342].

1011 Gardiner I at [43], [WIT.2000.0001.0001] at [.0009].

1012 Gardiner I at [49]-[57], [WIT.2000.0001.0001] at [.0010]-[0011].

international imperatives.[1013] It was informed by specialist modelling that considered sectorial policy settings, and addressed a range of policy measures in the electricity sector,[1014] industry,[1015] and transport,[1016] and their resulting impacts. Cabinet approved the strengthened target that was communicated to the UNFCCC Secretariat in Australia's 2022 NDC Update.[1017]

598. Similarly, the targets set by other countries plainly involved the weighing of a number of scientific, economic and social considerations. For example, Japan's 2015 NDC referred to the country's Strategic Energy Plan, and the high marginal cost of reducing GHG emissions before addressing a range of measures that Japan intended to implement across various sectors of its economy.[1018] Canada's 2015 NDC referred to its growing population, extreme temperatures, large landmass and diversified growing economy, together with regulatory actions taken by the Canadian government in relation to its energy sector.[1019] Its 2021 NDC referred to consultation undertaken in the context of the Pan-Canadian Framework on Clean Growth and Climate Change, before outlining a range of government initiatives (including large scale regulatory and economic initiatives).[1020] Reference was also made to economic modelling and analysis.[1021] The iNDCs and NDCs of other countries and economic and political unions disclose consideration of a range of particular facts and circumstances in determining relevant targets.[1022]

1013 Powering Australia Plan, [EVI.2001.0001.1863] at [.1871]-[.1875].

1014 2021 RepuTex Modelling, [EVI.2001.0001.1917] at [.1927]-[.1934].

1015 2021 RepuTex Modelling, [EVI.2001.0001.1917] at [.1936]-[.1942].

1016 2021 RepuTex Modelling, [EVI.2001.0001.1917] at [.1944]-[.1945].

1017 Gardiner I at [55], [WIT.2000.0001.0001] at [.0011].

1018 Japan, *Submission of Japan's Intended Nationally Determined Contribution* (2015), [EVI.2002.0001.0666] at [.0666]-[.0667], [.0674]-[0680].

1019 Canada, *INDC Submission to the UNFCCC* (2015) (**Canada INDC Submission**) [EVI.2002.0001.0291] at [.0291]-[.0292].

1020 Canada INDC Submission, [EVI.2002.0001.0295] at [.0296]-[.0300].

1021 Canada INDC Submission to the UNFCCC, [EVI.2002.0001.0295] at [.0302]-[.0303].

1022 See, for example, United States, *Intended Nationally Determined Contribution* (2015) [EVI.2002.0001.1057]; *United States, Nationally Determined Contribution: Reducing Greenhouse Gases in the United States – A 2030 Emissions Target* (2021) [EVI.2002.0001.1062]; European Union, *Submission by Latvia and the European Commission on Behalf of the European Union and its Members States: Intended Nationally Determined Contribution of the EU and its Member States* (2015) [EVI.2002.0001.0451]; European Union, *Submission by Germany and the European Commission on Behalf of the European Union and its Members States: The update of the nationally determined contribution to the European Union and its Member States* [EVI.2002.0001.0456]; Korea, *Submission by the Republic of Korea: Intended Nationally Determined Contribution* (2015) [EVI.2002.0001.0683]; Korea, *Submission under the Paris Agreement: The Republic of Korea's Update of its First Nationally Determined Contribution*

599. Finally, as noted, the experts agreed that the setting of a target was a policy question and Prof Meinshausen expressly acknowledged the kinds of factors referred to above, including that it is not possible to "*turn off… all greenhouse gas emissions overnight*" and that in setting targets "*[t]here's a technical feasibility, there's an economic feasibility, there's a societal feasibility*".[1023]

600. In light of the evidence summarised above, it is clear that the Primary Duty relates to actions that involve weighing a range of scientific, economic, social and political considerations. As the climate experts said, determining a country's GHG emissions reduction target is a matter of "*policy*" and "*value judgements*" — a "*normative question*", and not a question of climate science.[1024] Imposing a duty of care upon such judgements is inapt.

(3) The Primary Duty seeks to impose a duty of care in relation to matters of "core policy" or the exercise of "quasi-legislative powers"

601. As explained at [47]-[79] above, it remains the case under Australian law that it will be inappropriate for a court to recognise a duty of care in respect of certain functions of government, namely matters of "*core policy*" or the government's exercise of "*quasi-legislative powers*". It is true that courts have in some cases experienced difficulty in delineating between matters of "*policy*" or "*core policy*" and other governmental activities in respect of which a duty of care may be recognised. However, this is not a borderline case: the government functions to which the Primary Duty relate are quintessential examples of matters of "*core policy*".

602. The discussion above at [594]-[597] outlines, in general terms, the range of scientific, economic, social and political considerations that informed the adoption and revision of the GHG targets embodied in the 2015 NDC, the 2020 NDC Update, the 2021 NDC Update and the 2022 NDC Update. The evidence concerning the process and considerations that led to the formulation of

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(2020) [EVI.2002.0001.0687]; Korea, *Submission under the Paris Agreement: The Republic of Korea's Enhanced Update of its First Nationally Determined Contribution* (2021) [EVI.2002.0001.0714].

1023 T1132.14-24 (Meinshausen) [TRN.0013.1118].

1024 T889.24-25 (Karoly) [TRN.0009.0844]; T1126.20-34, 1128.14-20, 1136.37-1137.24 (Meinshausen) [TRN.0013.1118]; T1399.46-1400.3, 1401.14-1402.16 (Canadell) [TRN.0017.1379]. See also, AAS, *The science of climate change: questions and answers* (February 2015), p. 31, [APP.0001.0007.0067] at [_0030].

Australia's GHG emissions reduction targets is also discussed in further detail above in Part D.

603. The evidence clearly discloses that, each time the target was set or affirmed, the decision was complex and polycentric in nature, requiring elected officials to evaluate and weigh a range of incommensurable values before arriving at an appropriate target. Each decision required, and involved, not only a consideration of the environmental impacts and the impacts on global and Australian communities of climate change, but also considerations such as economic and practical feasibility, economic impacts and the government's political mandate.

604. Further, the decisions were made pursuant to Australia's international obligations under the UNFCCC and Paris Agreement, and informed by and informing its relationships with foreign governments.

605. Finally, consistent with their importance and wide-ranging implications for Australian society, decisions to adopt or revise targets were taken by Cabinet.

606. Each of these circumstances lends support to the proposition that the Primary Duty seeks to impose the laws of negligence over matters of "*core policy*". It is, indeed, difficult to imagine a decision that is more centrally a high-level policy decision than the political decision of Cabinet as to what GHG emissions reduction target Australia should adopt, in response to the global threat of climate change, and in light of its international treaty commitments and the myriad social, political, economic and environmental impacts of the same. The same observations also apply to decision(s) as to what measures should be implemented to meet those targets.

607. It is also noteworthy that the GHG emissions reductions targets embodied in the 2022 NDC Update were subsequently legislated by the Government.[1025] This lends support to the proposition that the duty that is sought to be imposed relates to a legislative or "*quasi-legislative power*". If the applicants' case were to be accepted, the passage of the *Climate Change Act 2022* (Cth) by the Commonwealth Parliament would likely amount to a breach of the posited Primary Duty. That is a clear indication that the duty that is sought to be imposed

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[1025] *Climate Change Act 2022* (Cth), s 10(1).

relates to the exercise of a legislative or quasi-legislative power, and it is therefore inappropriate to impose a duty of care in this context (see further at [73] above).

608. The fact that the posited duty of care concerns matters of core policy is underscored by the applicants' submissions on breach of duty at AS [304]-[306]. At AS [304], the applicants accept that any standard of care imposed on the Commonwealth may ultimately require consideration of competing resource and policy demands, as well as financial constraints and budgetary imperatives. The Commonwealth contends these are factors underscoring the high policy nature of the decisions at issue and weighing heavily against recognition of the Primary Duty.

609. The applicants' submission at AS [306] is particularly stark in highlighting just how inappropriate it is to impose a duty of care on the Commonwealth in relation to these matters. The applicants submit that:

> *A person 'in the position of' the Commonwealth [for the purposes of analysing the measures a reasonable person would have taken to respond to the risk] is that of a developed international state actor who, at all material times:*
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> *306.1 was a member of the UNFCCC, UNEP, IPCC and WMO;*
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> *306.2 had its own agencies responsible for scientific research and weather, climate and water; and*
>
> *306.3 received expert advice on climate change policy and mitigation initiatives from an independent statutory body.*

610. This shows just how far this case is from the ordinary duties of care in tort, which are directed to duties that one "neighbour" owes another. That is not the case here. The posited duty could only be owed by a "*developed international state actor*" (that is, a nation State), with international treaty obligations, and access to multidisciplinary agencies, and advice from "*an independent statutory body*". This is plainly the realm of politics and policy, and not tort law.

(4) The relationship between Torres Strait Islanders and the Commonwealth

611. At AS [182]-[183], the applicants set out various ways in which the relationship between the colonies and Indigenous people throughout Australia was characterised as one of protection. The Commonwealth submits that these

historical materials have little relevance to the specific relationship the Court is being asked to consider in this case, being the relationship between the *Commonwealth* and Torres Strait Islanders. Each of the matters relied upon in those paragraphs concern the relationship between particular colonies and the Indigenous populations in those colonies. For example, the statements at AS [182] were made by officials of the then colonies of South Australia and New South Wales, and AS [183] refers to an enactment of the Queensland legislature in 1897. None of the matters referred to in those paragraphs concerns the relationship between the Commonwealth and Torres Strait Islanders — indeed, the Commonwealth only came into being on 1 January 1901, which postdates any of the matters referred to at AS [182]-[183].

612. At AS [184], the applicants refer to various ways in which an obligation of protection has been recognised in the context of native title. The applicants no longer assert a duty of care to protect Torres Strait Islanders from harm to native title rights and have expressly dropped all claims for damage to native title rights in this proceeding.[1026] In view of this, the comments made at AS [184] have little relevance to the applicants' present claim.

613. Further, and in any case, the *obiter* passage of Brennan J's judgment in *Mabo v Queensland (No 2)* (***Mabo No 2***), was made in the context of a specific situation relating to the surrender of native title to the Crown in right of Queensland, and shed no broader light on whether the Commonwealth might owe a duty of care of the kind the applicants seek to have recognised in this case – especially, as noted, where the applicants do not sue for impacts on native title.

614. Similarly, although the applicants submit that Brennan J "developed" this contention in ***Wik*** *Peoples v Queensland*, his Honour's comments in that case only serve to highlight the specific context in which his Honour was considering the existence of a fiduciary duty in *Mabo*. In the passage from *Wik* on which the applicants rely, Brennan J is in fact explaining that the Crown did *not* owe native title holders a fiduciary duty in the context of its statutory powers to alienate land (the relevant power his Honour was considering) because that power would necessarily adversely affect the interests of native title holders.[1027] His Honour's

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[1026] See above at [142], referring to Transcript, CMC (30 October 2023), T6.32-T7.7 and T11.46; T1523.12-T1527.27 (22 November 2023) [TRN.0018.1455]; T1538.3-37, T1544.3-.20 (23 November 2023) [TRN.0019.1530].

[1027] (1996) 187 CLR 1 at 95-97, [APP.0001.0020.0188] at [_0094]-[_0096].

reference to American and Canadian case law recognising a fiduciary duty was made in the context of recognising that a fiduciary duty *may* be recognised in relation to the exercise of a discretionary power that is imposed on a repository for its exercise on behalf of, or in the interests of, a group of people.[1028] Brennan J's judgment in *Wik* thus highlights that the common law does not recognise some general fiduciary duty in relation to native title holders, nor does it shed any light on whether it is appropriate to recognise the alleged Primary Duty.

615. It is true that one of the objects of the NTA is to "*provide for the recognition and protection of native title*",[1029] and that such protection was provided by the common law prior to its enactment. However, that protection relates to a specific kind of right — namely native title — which is not in issue in this proceeding. As with the native title cases, it is not of assistance in assessing whether the Commonwealth owes the novel duty alleged.

616. The applicants also rely, at AS [184]-[185], on the High Court's decision in ***Love** v Commonwealth*[1030] as demonstrating the common law's recognition of an obligation of protection owed by the Commonwealth to Indigenous persons. In particular, the applicants rely upon several statements in the judgment of Nettle J in which his Honour referred to the "*unique obligation of permanent protection*" owed by the Commonwealth to Indigenous persons.[1031] However, his Honour's comments must be understood in the context in which they were made. *Love* concerned the question of whether an Indigenous person is capable of meeting the definition of "*alien*" in s 51(xix) of the Constitution. As his Honour noted at the outset, alienage is marked by an absence of allegiance to the Crown and a want of protection by the sovereign.[1032] His Honour's references to the Crown owing Indigenous persons an obligation of "*protection*" or "*permanent protection*" refers to the kind of protection owed by the Crown to its subjects or persons who are not otherwise "*aliens*" under the Crown. All Australian citizens are owed an obligation of this kind. This is not the kind of neighbourly "*protection*" with

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1028 *Wik* at 96-97, [APP.0001.0020.0188] at [_0095]-[_0096].

1029 *Native Title Act 1993* (Cth), s 3A.

1030 (2020) 270 CLR 152, [APP.0001.0020.0089].

1031 See *Love* at [252], [272], [274], [APP.0001.0020.0089] at [_0092], [_0101]-[_0102], [_0102]-[_0103].

1032 *Love* at [248]-[249], [251]-[252], [APP.0001.0020.0089] at [_0090]-[_0091], [_0092].

which the law of negligence is concerned. His Honour's decision says nothing about whether Indigenous persons are owed protection in any more specific sense.

617. At AS [187], the applicants rely on the Torres Strait Treaty[1033] as expressing the Commonwealth's protective responsibilities towards the Torres Strait Islanders. The applicants submit that they seek to rely primarily on the historical fact of the Treaty as part of the relationship to which the common law analysis must be applied, rather than seeking to use it as a source of international law that informs the content of the common law.

618. Although the applicants submit that they rely primarily on the historical fact of the Treaty, they nevertheless seek to make submissions based on its purpose and the obligations they say it imposes on the Commonwealth (see, for example, AS [187] and [246]), so it is necessary to set out the Commonwealth's position on those matters.

619. It is not in dispute that the Commonwealth entered into the Torres Strait Treaty in 1978, which came into force in 1985.[1034] It is plain from the terms of the Torres Strait Treaty that it is concerned with both setting out an agreed position between Australia and Papua New Guinea as to their respective sovereignty over particular islands and establishing maritime boundaries in the Torres Strait, in addition to recognising the importance of protecting the traditional way of life and livelihood in the Torres Strait as well as the environment.[1035] The Commonwealth therefore accepts that one purpose of the Torres Strait Treaty — to which Part 4 of the Treaty is directed — is the protection of Torres Strait Islanders' traditional way of life and the environment in the Torres Strait Islands (see AS [187]).

620. However, it is necessary to consider the obligations that the Treaty imposes. As a preliminary matter, it is noted that the Treaty is between Australia and Papua New Guinea, and any obligations it imposes are owed under international law between those states to one another, rather than to any individual person.[1036] Part 4 of the

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1033 Treaty between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area Between Two Countries, Including the Area Known as Torres Strait, and Related Matters.

1034 [APP.0001.0007.0194].

1035 See Preamble, Part 2 (Sovereignty), Part 3 (Sovereignty and Jurisdiction – Related Matters), Part 4 (The Protected Zone), [APP.0001.0007.0194].

1036 This proposition is well-established in the context of the Convention Relating to the Status of Refugees, but the Commonwealth submits that the proposition applies equally to the Torres Strait Treaty. See *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and*

Torres Strait Treaty establishes a "*Protected Zone*", and Art 10(2) provides that the Parties "*shall adopt and apply measures in relation to the Protected Zone in accordance with the provisions of*" the Treaty. Those obligations include the permission of free movement and performance of traditional lawful activities with the Protected Zone,[1037] the recognition of traditional customary rights in areas under the other party's jurisdiction,[1038] and the prohibition of mining or drilling for certain purposes.[1039] Further, and of particular relevance to this case, is Article 13(1), which provides as follows:

> *Each Party shall take legislative and other measures necessary to protect and preserve the marine environment in and in the vicinity of the Protected Zone. In formulating those measures each Party shall take into account internationally agreed rules, standards and recommended practices which have been adopted by diplomatic conferences or by relevant international organisations.*

621. At AS [188]-[189], the applicants rely on Australia's endorsement of the United Nations Declaration on the Rights of Indigenous People (**UNDRIP**), as well as the International Covenant on Civil and Political Rights (**ICCPR**) as reinforcing the relationship of obligation and protection recognised in the Torres Strait Treaty. The Commonwealth notes that UNDRIP does not itself create legally binding obligations under international law, but echoes many of the rights already contained in other human rights treaties with a focus on First Nations people.

622. Further, as noted at [175] above, it is well-established that an international instrument can only operate as a source of rights and obligations under Australian law if, and to the extent that, it has been enacted by Parliament.[1040] In particular, it has been held to flow therefrom that such instruments cannot give rise to a duty of care.[1041] It follows that neither the Torres Strait Treaty nor the ICCPR can, of

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Indigenous Affairs (2005) 222 CLR 161 at [16] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ) [CTH.0008.0001.0095]; *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179 at [29] (Crennan, Bell, Gageler and Keane JJ) [CTH.0008.0001.0147].

1037 Torres Strait Treaty, Art 11(1), [APP.0001.0007.0194] at [_0007].

1038 Torres Strait Treaty, Art 12, [APP.0001.0007.0194] at [_0007].

1039 Torres Strait Treaty, Art 15, [APP.0001.0007.0194] at [_0008].

1040 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at [490] (Keane J) [CTH.0002.0001.0106], referring (among other authorities) to *Dietrich v The Queen* (1992) 177 CLR 292 at 305 (Mason CJ and McHugh J) [CTH.0002.0001.0253]*; Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-287 (Mason CJ and Deane J), 298 (Toohey J), 303-304 (Gaudron J), 315 (McHugh J) [CTH.0002.0001.0391].

1041 See *Nulyarimma v Thompson* (1996) 96 FCR 153 at [230] (Merkel J) (see also [220]) [CTH.0003.0001.0075]; *Sumner v United Kingdom of Great Britain & Ors* [2000] SASC 91 at

themselves, give rise to the Primary Duty as alleged (nor can the UNDRIP, which is not a treaty).

623. In their conclusion on this issue, the applicants submit (at AS [190]), that the matters it refers to in AS [180]-[189] demonstrate that "*in a fundamental sense, the foundation of the alleged duties is not novel*". That is simply not so. None of the matters referred to by the applicants in those paragraphs suggest that a duty of care of the kind for which they contend has been recognised in Australia. The fact that some kind of obligation of protection owed by the Commonwealth to Torres Strait Islanders, or Indigenous Australians more broadly, has been recognised in other contexts does not render the alleged Primary Duty any less novel.

E.3.2 Duties the applicants submit are analogous

624. At AS [191]-[199], the applicants set out various Australian and foreign cases in which they submit courts have recognised duties of care that are analogous to the Primary Duty. They submit that the cases at AS [192]-[195] are analogous in that they have recognised duties in negligence to protect against flooding from rivers, streams and dams, and that the cases at AS [196]-[199] are analogous in that they recognised duties to protect against the harms from other significant natural events, such as fires and landslides.

625. Before addressing each of the cases relied upon individually, the Commonwealth makes three general submissions as to why those cases are of limited use in determining whether to recognise the Primary Duty of Care.

626. *First*, none of the duties alleged concern the Commonwealth or Torres Strait Islanders. Nor is it apparent that any of the cases concern a relationship between the putative tortfeasor and claimant that is said to be analogous to the relationship between the Commonwealth and Torres Strait Islanders. As outlined above, there is no dispute between the parties that the Court's analysis at the duty of care stage should focus on the specific relationship between those parties. None of the cases referred to by the applicants in AS [191]-[199] shed any light on this question.

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[59], [63] (Nyland J) [CTH.0003.0001.0139]. See also *Cubillo v Commonwealth* (1999) 89 FCR 528 at [102] (O'Loughlin J) [CTH.0003.0001.0001].

627. *Secondly*, and relatedly, although each of the cases concern some kind of public body, none of them concern whether the Commonwealth owes a duty of care to protect a class of persons from natural disasters. Each of the cases concern either a duty of care owed by a local council in relation to risks arising within the territory for which it has responsibility, or public authorities with very specific remits (such as, for example, the dam operators and their employees in ***Rodriguez*** *& Sons Pty Ltd v Queensland Bulk Water Supply Authority t/a Seqwater*[1042]). The mere fact that those cases concern some kind of public authority does not suggest that they are analogous to the present case. The specific nature of a public authority's remit, and the functions to which the alleged duty relates, are of central relevance to determining whether it owes a duty of care to a class of persons. The nature of a local council's functions, or the functions of a public authority tasked with a specific responsibility such as operating a dam, differ greatly from those of a federal government with respect to an issue that is global in nature. The cases are therefore of no, or no material, assistance in determining whether it is appropriate to recognise that the Commonwealth owes the Primary Duty to Torres Strait Islanders.

628. *Thirdly*, the fact that those cases concerned duties of care to protect persons from harm arising from some kind of natural or other disaster does not mean that they are analogous to the alleged Primary Duty. Whether a public authority owes a duty of care to protect a certain class of persons from a particular kind of harm will depend on the entire relationship between the parties, including various salient features, including whether it is foreseeable that the public authority's conduct may cause harm to the class of persons, and the extent of the public authority's control over the risk of harm. Amongst other things, this will turn on the nature of the risk of the harm and the steps the public authority is able to take to mitigate the risk of harm. The Commonwealth submits that, here, the risk of harm caused by the Commonwealth's conduct was not reasonably foreseeable nor did the Commonwealth have a sufficient degree of control to justify the imposition of the Primary Duty for the reasons outlined at [658]-[665] and [678]-[682], respectively, below.

629. Against the background of those general submissions, the Commonwealth makes the following comments about the specific cases upon which the applicants rely.

1042 [2019] NSWSC 1657, [APP.0001.0020.0143].

Rodriguez & Sons Pty Ltd

630. The duty of care recognised in *Rodriguez* is not analogous to the alleged Primary Duty. In *Rodriguez*, Beech-Jones J found that each of Seqwater and flood engineers who controlled releases of water from the Wivenhoe Dam owed a duty of care to the applicant, being a person with an interest in land that was damaged by floods in Brisbane in 2011.[1043] In controlling the release of water, the flood engineers and Seqwater had "*significant but not complete level of control over the risk of flooding from the Brisbane River breaking its banks*".[1044] The persons to whom the duty was owed were correspondingly vulnerable to the risk created by the flood engineers and Seqwater.[1045]

631. Although it is true that Seqwater and the flood engineers were exercising powers of a public nature, there was no suggestion that the decision-making process they had followed concerned weighing matters of core policy or was quasi-legislative in nature. To the contrary, it was "operational" in nature. Further, as noted, the defendants in that case had a "significant" though not complete level of control over the risk of harm. That is not the case here. To the contrary, the Commonwealth has no control over the risk of harm. Therefore, the duties held to be owed in *Rodriguez* are not analogous to the alleged Primary Duty simply because they concerned the exercise of powers of a public nature.

Vernon Knights Associates v Cornwall Council

632. In ***Vernon** Knights Associates v Cornwall Council*,[1046] the Court of Appeal of England and Wales considered whether a council that owned and maintained roads owed a duty of care to adjacent landowners to avoid damage caused by flooding during heavy rain. The question was whether the council owed a duty of a recognised kind, being the duty a landowner owes to neighbouring properties to prevent natural occurrences on the landowner's property from causing damage to neighbouring properties.

633. While it is correct that the court found the council was liable even after making "*due allowance for the pressures on local authorities*", *Vernon* provides no

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[1043] *Rodriguez* at [86], [APP.0001.0020.0143] at [_0080].
[1044] *Rodriguez* at [86], [APP.0001.0020.0143] at [_0080].
[1045] *Rodriguez* at [86], [APP.0001.0020.0143] at [_0080].
[1046] ***Vernon** Knights Associates v Cornwall Council* [2014] Env. L. R. 6, [APP.0001.0020.0178].

assistance to this Court in resolving the questions of duty of care in this matter. This matter does not involve land owned by the Commonwealth adjacent to land owned by the applicants, that being a fundamental aspect of the council's liability in *Vernon*. The relationship between the parties in *Vernon* was thus plainly different to the relationships involved in this matter. It was more proximate, and depended on a recognised category of "neighbourhood" relationship, rather than the relationship between the governing and the governed in this case.

634. Additionally, the council in *Vernon* had a specific statutory duty to "*maintain the highway*"[1047] and had failed to maintain infrastructure that it had installed.[1048] The Court found that the council had a duty to take reasonable steps to maintain infrastructure it had installed pursuant to that statutory duty. While the ultimate liability of the council was not based on the statutory duty (rather it was based on the duty of a landowner to a neighbouring property), the council's statutory duty was an important factor underpinning the Court's decision.

High Country Outfitters Inc v Pitt Meadows

635. *High Country Outfitters Inc v Pitt Meadows (City)*[1049] provides no assistance because the question of duty was not considered by the Court. As the applicants say, the local authority's "*position of legal proximity*" to the applicant was not in dispute and the question of negligence failed on causation.

Electro Optic Systems Pty Ltd v New South Wales

636. This case does not assist the applicants. It is true that, at first instance, Higgins CJ considered, in *obiter*, that the Territory owed a duty of care at common law to take reasonable steps to protect persons and property in the Territory from loss or damage by fire.[1050] His Honour considered that the Territory owed such a duty for the same reasons he had concluded that NSW owed a duty of care in that case.[1051] However, his Honour's findings that NSW owed a duty of care were

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1047 *Vernon* at [4], [APP.0001.0020.0178] at [_0002]-[_0003]. The Court noted at [7] that this statutory duty did not impose any duty on the council to protect nearby property owners against flood damage, but did assist in establishing a duty to maintain the highways and associated drains – drains which failed and caused the damage the subject of the claim.

1048 *Vernon* at [58], [APP.0001.0020.0178] at [_0010].

1049 *High Country Outfitters Inc v Pitt Meadows (City)* [2012] BCJ No 1859, [APP.0001.0020.0070].

1050 (2012) 273 FLR 304 at [381].

1051 (2012) 273 FLR 304 at [381].

overturned on appeal.[1052] Although the issue of whether the Territory owed a duty of care did not arise on appeal, it was based on the same reasoning as his Honour's conclusion that NSW owed a duty of care, and it may be inferred that it was similarly erroneous.

Smaill v Buller District Council

637. In ***Smaill*** *v Buller District Council*,[1053] the High Court of New Zealand held that a local council owed a duty of care in relation to the grant of building permits in an area that was prone to rockfalls.[1054] As the applicants state, in determining that a duty was owed in a "*new factual situation*", the Court found that a sufficient degree of proximity and reliance existed between the council and property owners.[1055] The Court noted that, in New Zealand, local bodies' liability in negligence in relation to approving building plans that do not comply with bylaws or are deficient, was well established. It was therefore an appropriate incremental step to extend liability to the negligent grant of a building permit where there is risk to life and property from the failure of a nearby landform.[1056]

638. While the Court found that the council owed a common law duty of care, it is clear that the particular statutory background was an important factor in finding the requisite proximity and reliance. To the extent the statutory context is relevant in the present matter, it is not analogous to *Smaill*.

La Sucrerie Cassleman Inc v Cambridge (Township)

639. In ***La Sucrerie*** *Casselman Inc v Cambridge (Township)*,[1057] the Ontario Superior Court of Justice found that the Municipality owed a duty of care to the applicant who had sought to construct a building in a hazard zone where there were known risks of landslides.[1058] In determining whether a duty existed, the Court considered whether there was a sufficiently close relationship between the parties, and, if so, whether there were considerations which ought to negative or limit the

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[1052] *Electro Optic Systems Pty Ltd v New South Wales* (2014) 10 ACTLR 1 at [283]-[357].
[1053] *Smaill v Buller District Council* [1998] 1 NZLR 190, [APP.0001.0020.0151].
[1054] *Smaill* at 213.
[1055] *Smaill* at 213. See AS [198].
[1056] *Smaill* at 213.
[1057] ***La Sucrerie*** *Casselman Inc v Cambridge (Township)* [2000] OJ No 4650, [APP.0001.0020.0084].
[1058] *La Sucrerie* at [133].

duty.[1059] Having referred to legislation governing the issuing of building permits, the Court stated that municipalities have a clear responsibility for the health and safety of citizens when issuing and revoking building permits.[1060] The Court also noted the Municipality's awareness of the Conservation Authority's advice that there should be no construction in a particular area on the applicant's lands.[1061]

640. The statutory powers conferred on the Municipality and the factual background were central to the Court finding a sufficiently close relationship between the Municipality and the applicant, "*so that in the reasonable contemplation of the Municipality, carelessness on its part might cause damage to that person*".[1062] The finding of proximity in *La Sucrerie* was grounded within the particular legal and factual circumstances, and does not assist this Court in considering whether a duty exists in the present matter.

Nuisance cases

641. The applicants also note that the common law has attributed liability for changes to the natural environment under the tort of nuisance (AS [192], footnote 385). Those cases are of no assistance on the question of whether it is appropriate for the Court to recognise the Primary Duty because the question of whether the respondent owes the applicant a duty of care does not arise in the context of the tort of nuisance.

E.3.3 European Case Law

642. The applicants' submissions also draw on purported "*analogous duties on the part of states and private corporations to limit the foreseeable harms from GHG emissions*" from the jurisprudence in certain European civil law jurisdictions (AS [200]). While the applicants acknowledge the different legal contexts, they argue that these cases "*remain of utility in circumstances where they are grounded in very similar facts and similar legal concepts to neighbourhood and negligence*".

[1059] *La Sucrerie* at [126].
[1060] *La Sucrerie* at [128]-[130].
[1061] *La Sucrerie* at [110], [133].
[1062] *La Sucrerie* at [131].

643. These cases are from civil legal systems very different to our own. They are a matter of foreign law and therefore a question of fact required to be proved by expert evidence. As Gummow and Hayne JJ stated in ***Neilson*** *v Overseas Projects Corp (Vic) Ltd*:[1063]

> *The courts of Australia are not presumed to have any knowledge of foreign law. Decisions about the content of foreign law create no precedent. That is why foreign law is a question of fact to be proved by expert evidence. And it is why care must be exercised in using material produced by expert witnesses about foreign law. In particular, an English translation of the text of foreign written law is not necessarily to be construed as if it were an Australian statute. Not only is there the difficulty presented by translation of the original text, different rules of construction may be used in that jurisdiction.*

644. The time for filing of expert evidence has passed. Putting aside the lack of notice and the resulting prejudice to the Commonwealth if the applicants were permitted to rely on these cases, it is submitted that in the absence of any expert evidence it would be unsafe for the Court to rely on these cases in any way in its reasoning process given the misinterpretation risk identified by the High Court in *Neilson*.

645. In addition, in relation to some cases,[1064] the applicants propose to rely on unofficial translations of the decisions undertaken by artificial intelligence. The Commonwealth objects to that course. Such translations are hearsay, at least in the absence of a verified translation.[1065] Further or alternatively, the Court cannot be satisfied as to the accuracy of the translation in the absence of an explanation of how it was rendered.

646. In any event, the reasoning in these judgments (so far as the Commonwealth understands it, in the case of the translations undertaken by artificial intelligence) provides no assistance to this Court in resolving the question of whether the Commonwealth owes the Primary Duty. Therefore, regardless of technical questions of admissibility, they are irrelevant.

1063 (2005) 223 CLR 331 at [115] (per Gummow and Hayne JJ) see also [15]-[16] (per Gleeson CJ), [60] (per McHugh J), [CTH.0004.0001.1185].

1064 *VZW Klimaatzaak v Kingdom of Belgium & Others* [2021] Belgium, Court of First Instance of Brussels (unofficial translation) and *VZW Klimaatzaak v Kingdom of Belgium & Others* [2023] Belgium, Court of Appeal (unofficial translation).

1065 See, for example, *Director of Public Prosecutions (WA) v Mansfield (No 11)* [2009] WASC 294.

647. The applicants first refer to two decisions of the Hague District Court in ***Urgenda*** *Foundation v The State of the Netherlands* (at AS [201]-[202]),[1066] and ***Milieudefensie*** *v Royal Dutch Shell* (at AS [203]-[204]).[1067]

648. The first proceeding was commenced by Urgenda Foundation, which is a "*citizens' platform… involved in the development of plans and measures to prevent climate change*".[1068] Urgenda brought the proceeding on its own behalf and on behalf of 886 individuals who had authorised Urgenda to also conduct the proceeding on their behalf.[1069] However, unlike the present proceeding, the proceeding was not brought on behalf of any particular sub group of the Netherlands population to whom it was alleged the Netherlands owed a duty of care — to the extent the duty was owed to anyone, it was to the "*Dutch Society*" as a whole.[1070] The Hague District Court found that Urgenda had standing to bring the case on its own behalf, due to Dutch Civil Code that appears to allow an environmental organisation to commence a proceeding "*to protect the environment without an identifiable group of persons needing protection*".[1071] However, the Court found that the 886 Dutch Citizens who authorised Urgenda to also bring the proceeding on their behalf did not have standing, and the claim was rejected by the Court so far as it had been instituted on behalf of those claimants.[1072]

649. The Hague District Court found that the State breached Article 6:162 of the Dutch Civil Code (extracted at AS [201]) and acted negligently and therefore unlawfully towards Urgenda within the meaning of that provision. The Court therefore ordered the State to limit their greenhouse gas emissions "*by at least 25% at the end of 2020 compared to the level of the year 1990*".[1073] On appeal to the Court of Appeal[1074] and Supreme Court,[1075] the claim was determined on the basis of

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1066 [2015] ECLI:NL:RBDHA:2015:7196 (District Court of the Hague) (Court translation) [APP.0001.0020.0174].
1067 [2021] ECLI:NL:RBDHA:2021:5339 (District Court of the Hague) (Court translation) [APP.0001.0020.0097].
1068 *Urgenda* at [2.1], [APP.0001.0020.0097].
1069 *Urgenda* at [2.4], [APP.0001.0020.0097].
1070 *Urgenda* at [4.1], [APP.0001.0020.0097].
1071 *Urgenda* at [4.6]-[4.10], [APP.0001.0020.0097].
1072 *Urgenda* at [4.109], [APP.0001.0020.0097].
1073 *Urgenda* at [4.93], [5.1], [APP.0001.0020.0097].
1074 *The State of The Netherlands v Urgenda Foundation* [2018] ECLI:NL:HR:2018:2610 (Hague Court of Appeal) (Court translation), [APP.0001.0020.0114].
1075 *The State of The Netherlands v Stichting Urgenda* [2019] ECLI:NL:HR:2019:2007 (Supreme Court of The Netherlands) (Court translation), [APP.0001.0020.0157].

articles 2[1076] and 8[1077] of the European Convention of Human Rights (**ECHR**). However, the applicants nonetheless submit the first instance decision "*remains a useful illustration of the ways in which concepts of negligence … can result in the affixing of liability for failures to respond to the risks of climate change*" (AS [202]).

650. The Commonwealth submits that the Court can derive no assistance from the *Urgenda* first instance decision on the question of whether the Commonwealth owes the Primary Duty to Torres Strait Islanders. The Hague District Court did not consider whether the State owed a duty of care to anyone or any particular group within the Dutch society, nor was it required to do so by Article 6:162 of the Dutch Civil Code. Unsurprisingly, the judgment therefore contains no analysis that is analogous to the questions the Court is required to consider in this proceeding in order to determine whether to recognise the Primary Duty.

651. To the extent it is possible to identify from its reasons how the Hague District Court articulated the source of a relevant "*duty*" as distinct from breach, it appears to be this: "*[d]ue to the severity of the consequences of climate change and the great risk of hazardous climate change occurring — without mitigating measures — the court concludes that the State has a duty of care to take mitigation measures*" (at [4.83]). These considerations do not represent or even vaguely approximate the analysis required under Australian common law, which as outlined in Part C.1 above, requires focus on the relationship between the putative tortfeasor and the class to whom it is alleged the duty of care is owed using salient features as an analytical tool. Further, as noted above, to the extent that the duty of care in *Urgenda* was said to be owed to anyone, it was to "*Dutch Society*" as a whole,[1078] rather than any particular group within the Dutch society that the State has a special relationship with and duty to protect as the applicants allege in the present matter. A duty of care to the society at large is foreign to the negligence law in Australia and other common law jurisdictions, and rather resembles the

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[1076] Article 2(1) provides: Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

[1077] Article 8(1) provides: Everyone has the right to respect for his private and family life, his home and his correspondence.

[1078] *Urgenda* at [4.1], [APP.0001.0020.0097].

political duty (as identified by Allsop CJ in *Sharma FC*[1079]) that the government owes to those it governs.

652. The Hague District Court's finding in *Milieudefensie* that Royal Dutch Shell (**RDS**) had an obligation to reduce its emissions was also based on Article 6:162.[1080] As in *Urgenda*, the Court did not draw a clear distinction between whether a duty of care was owed and whether any such duty had been breached. At [4.4.1], it held that RDS' obligation to reduce its emissions arose from the unwritten standard of care laid down in Article 6:162, which standard of care "*means that acting in conflict with what is generally accepted according to unwritten law is unlawful*". The Court did not consider any anterior question of whether any duty of care existed.

653. The applicants' submissions also refer to the Belgian case of ***VZW Klimaatzaak** v Kingdom of Belgium & Others* (at AS [205]-[207]).[1081] In that case, the Brussels Court of First Instance found that the Belgian public authorities breached their duty of care and failed to act with prudence and diligence within the meaning of Article 1382 of the Belgian Civil Code.[1082]

654. The applicants' reliance on this case as an analogy to the inquiry required by Australian law is misplaced. The Belgian court explained at [219], that "*aquilian liability is subject to the simultaneous fulfilment of three conditions: the existence of fault, the existence of damage and the existence of a causal link between the two*." The first element of "*fault*" consists of "*an error of conduct to be assessed according to the criterion of the administrative authority normally careful and prudent in the circumstances, or… violates a norm of national law or an international treaty… imposes a duty on the State to respect and protect the rights of the citizens*."[1083] There is no separate consideration of whether a duty of care exists, or should be recognised, as is required under Australian law. The judgments do not relevantly evaluate the relationship between the parties,

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1079 *Sharma FC* at [232], [266].

1080 *Milieudefensie* at [4.4.1], [APP.0001.0020.0097]. The Commonwealth understands that the decision is the subject of an appeal.

1081 [2021] 2015/4585/A (Court of First Instance of Brussels) (unofficial translation) [APP.0001.0020.0176].

1082 *VZW Klimaatzaak* at 79 [2.3.1], 83 [APP.0001.0020.0176]. See the text of Article 1382 at AS [205].

1083 *VZW Klimaatzaak* at 57-58, [APP.0001.0020.0176]]; *VZW Klimaatzaak v Kingdom of Belgium & Others* [2023] 2021/AR/15gs 2022/AR/737 2022/AR/891 (Court of Appeal of Brussels) (unofficial translation) [APP.0001.0020.0175] at 116 [225].

including by reference to salient features, to constitute a sufficiently analogous case to be of assistance here. To the contrary, Article 1382 appears to assume that an international treaty directly gives rise to rights enforceable in domestic law, which is not the case in Australia.

655. Finally, in ***Notre Affaire à Tous*** *v France* (AS [208]),[1084] the Court's findings against the State was founded on Article 1246 of the French Civil Code,[1085] which provides that "*[a]ny person responsible for ecological damage is obliged to remedy it*." The Commonwealth agrees with the observation at AS [208] that "*the statutory provisions at issue in that case mean the question of liability is removed from the Australian context*", and submits accordingly that it could be of no assistance to this Court in resolving the issues before it.

656. In summary, the cases cited by the applicants provide no useful discussion of the principles for when a duty of care will be recognised under Australian law because there is no equivalent requirement that a duty of care be owed in the jurisdictions in which those cases were decided. The various findings of liability were grounded in the civil codes of each jurisdiction and/or breaches of the ECHR, which have different bases of liability to the common law concept of negligence. The different legal contexts of these jurisdictions, all of which are civil law jurisdictions, mean that these cases can provide no guidance on whether the Court should recognise the Primary Duty in this case.

E.3.4 Salient features

657. This section addresses salient features relevant to imposing a duty of care in this case.

Reasonable foreseeability

658. Reasonable foreseeability of harm is a necessary condition of any duty of care. It has been described as an undemanding test, but "*is not without some demand*".[1086] There can be no duty of care where it is not foreseeable as a possibility that a

[1084] [2021] No 1904967, 1904968, 1904972, 1904976/4-1 (Administrative Court of Paris) (3 February 2021) (unofficial translation) [APP.0001.0020.0118].

[1085] *Notre Affaire à Tous v France* at 31 [34], [APP.0001.0020.0118]. See also 24 [10] which sets out the terms of Articles 1246-1247.

[1086] *Sharma FC* at [300] (Allsop CJ).

breach of the duty of care on the part of the respondent would lead to harm to a class of persons including the applicant. That is, as Allsop CJ said in *Sharma FC*, "*the enquiry as to reasonable foreseeability has a causal element: The reasonable foreseeability is of the negligent act or omission causing or materially contributing to the harm*".[1087] As noted above, a risk will be foreseeable if it is not far-fetched or fanciful.

659. The Commonwealth submits that it was not reasonably foreseeable that any breach of the Primary Duty would cause or materially contribute to the applicants and group members suffering that harm. This is for two reasons.

660. *First*, as explained at [242]-[244] above, Australia's GHG emissions make up such a tiny proportion of global annual GHG emissions, and an even smaller amount of GHG emissions since 1850, that it could not be foreseen that failing to set higher targets would have any material impact on the applicants and group members. Even if it was foreseeable that a breach of duty could incrementally increase temperature or climate impacts in the Torres Strait, it was not foreseeable that that tiny incremental increase would materially contribute to the harm, as such an increment would not be detectable let alone a material contributor to harm, being the loss or damage alleged to have been suffered by the group members as a result of the climate impacts in the Torres Strait. In this regard, the Commonwealth relies upon the similar reasoning of Wheelahan J in *Sharma FC*.[1088]

661. *Secondly*, as the impacts of climate change vary regionally, it could not be foreseen that a tiny incremental increase in GHG emissions would cause particular impacts in the Torres Strait Islands.

662. The Commonwealth submits that reasoning of Allsop CJ and Beach J to the contrary in *Sharma FC* can be distinguished.

663. *First*, in that case, the court was concerned with approval of an activity that directly produced emissions. In that context, Allsop CJ and Beach J reasoned that it was "*small (but not zero) risk*" that an additional 100 Mt of GHG emissions could have the effect of crossing a tipping point that would have significant

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[1087] *Sharma FC* at [300].

[1088] *Sharma FC* at [869]-[886], especially at [885]-[886].

ramifications for the world including the children group members.[1089] However, here, what is at issue is the Commonwealth's setting of GHG emissions reductions targets. In the case of an approval of a mine one is approving a step to increase emissions, whereas in the case of a target one is dealing with a communication of an ambition to reduce emissions.

664. *Secondly*, the expert evidence, and the primary judge's findings of fact in relation thereto, are very different from the expert evidence in this case. The primary judge's findings in *Sharma FC* were that there was a real risk that even an infinitesimal increase in global temperature above 2°C may trigger a cascade of tipping points that could lead to a 4°C world,[1090] and that, to hold temperatures below 2°C, no new coal mines or extensions of coal mines could be approved.[1091] In that context, Allsop CJ and Beach J held that it was reasonably foreseeable that the additional emissions could lead to harm on the part of the group members.

665. The evidence is not the same in this case. Here, as at the date of the impugned decisions, the BAS on the tipping points contended by the applicants to be most relevant to the Torres Strait was that the thresholds at which they may be triggered was highly uncertain (see at [570]-[572]). A substantial degree of uncertainty remains. In that context, the Commonwealth submits it was not foreseeable that any incremental increase in global temperatures due to the Commonwealth's alleged breaches would trigger those tipping points.

Vulnerability and degree of harm

666. As noted at [83], the "*vulnerability*" salient feature is concerned with whether an applicant has the capacity to protect themselves from the consequences of a putative tortfeasor's want of reasonable care. Further, the enquiry is focussed on whether the applicant is vulnerable to the particular *kind of harm* it is said the putative tortfeasor owes a duty of care to take reasonable steps to avoid. It follows that, here, the question is not whether the class of persons to whom it is said a duty is owed are vulnerable to the impacts of climate change in some generalised sense, but whether they could not reasonably be expected to safeguard

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[1089] Cf *Sharma FC* at [330] (Allsop CJ), [420] (Beach J).

[1090] ***Sharma*** *v Minister for the Environment (Cth)* (2021) 391 ALR 1 at [84], [253] (Bromberg J). See also, *Sharma FC* at [331] (Allsop CJ).

[1091] *Sharma* at [73] (Bromberg J). See also, *Sharma FC* at [331] (Allsop CJ).

themselves from a particular kind of harm (for example, personal injury or property damage).[1092]

667. The applicants' submissions on vulnerability (at AS [216]-[224]) focus entirely on the ways in which Torres Strait Islanders are vulnerable to the impacts of climate change in a generalised sense. As noted at AS [217], the Commonwealth makes a number of admissions in that regard. However, the applicants' submissions do not explain what kinds of compensable harm they say Torres Strait Islanders are vulnerable to suffer as a result of the impacts of climate change (noting that the Commonwealth submits that loss of fulfilment of *Ailan Kastom* is not compensable: see Part E.6.3. below), nor how that harm is a consequence of the Commonwealth's want of reasonable care (for the reasons outlined in the Commonwealth's submissions on control at [678]-[682] below, it cannot be established that the impacts of climate change in the Torres Strait Islands, nor any harm of a compensable kind suffered therefrom, were a matter within the Commonwealth's control). The Commonwealth submits that, on that basis, the applicants have failed to establish that Torres Strait Islanders are vulnerable in the relevant sense, that is, to the damage in respect of which they claim.

668. In relation to property damage, the Commonwealth notes that the applicants have dropped their claims in relation to native title, and have not attempted to prove any other real property rights. Nor have they attempted to prove why any chattels they own may be vulnerable to damage.

669. Further, the applicants submit (at AS [216]) that Torres Strait Islanders are "*uniquely vulnerable*" within Australia in terms of the harm they have experienced, and will continue to experience, from climate change, on two "*axes*". Those submissions must be qualified:

    a) The first "*axis*" advanced is that Torres Strait Islanders are especially exposed to the associated impacts of sea level rise by reason of their living on low-lying tropical islands (AS [217]). As the applicants note, the Commonwealth accepts that small and low-lying islands are vulnerable to several impacts of climate change, and that some Indigenous people in Australia are more vulnerable to the impacts of climate change than

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1092 *Sharma FC* at [671] (Beach J).

others.[1093] However, not all Torres Strait Islanders live in the Torres Strait Islands and the group definition in these proceedings is not confined to those living in the Torres Strait, so not all members of the class can be said to be vulnerable on this basis. Furthermore, the evidence discloses that there are different levels of vulnerability to the impacts of sea level rise even amongst Torres Strait Islanders who live in the Torres Strait Islands. That is so because different islands have differing levels of susceptibility to sea level rise by reason of their different geographical features. For example, there is evidence to suggest that Badu is less susceptible to the impacts of sea level rise compared to some of the other islands,[1094] and for many island communities there is no evidence at all.

b) The second "*axis*" of Torres Strait Islanders' vulnerability is said to be that the consequences of sea level rise (and other effects of climate change) are especially damaging to Torres Strait Islanders given the dependence of their ability to practice *Ailan Kastom* on their connection to the land and sea (AS [218]). The Commonwealth does not dispute the close connection that Torres Strait Islanders have to the land and seas of the Torres Strait, nor the importance of that connection to the practice of *Ailan Kastom*. However, for the reasons outlined in Part E.6.3 below, the Commonwealth submits that a loss of fulfilment of *Ailan Kastom per se* is not compensable damage under the laws of negligence. As noted above, the vulnerability salient feature looks to whether an applicant is able to protect themselves from relevant harm, being compensable harm. The fact that the practice of *Ailan Kastom* may be vulnerable to the impacts of climate change does not, with respect, demonstrate that Torres Strait Islanders are vulnerable in the relevant sense.

670. Moreover, an applicant is only vulnerable in the relevant sense if they cannot reasonably be expected to safeguard themselves from the relevant harm.[1095] The Commonwealth of course does not suggest that Torres Strait Islanders could reasonably be expected to prevent the impacts of climate change (that is a global problem requiring a global response). However, it submits that this Court would

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1093 Defence [28(a)], [29(b)].

1094 For example, the Badu Land and Sea Profile created by the TSRA characterises Badu's vulnerability to sea level rise of more than 1 metre as "very low" [APP.0001.0003.0048]. See also [SUB.0001.0003.2065] at p 41.

1095 *Crimmins* at [93] (McHugh J), [APP.0001.0020.0036].

fall into error if it were to find that there were no steps that could reasonably be required of at least some Torres Strait Islanders to protect themselves from some of the property damage or personal injury that might otherwise be suffered as a result of those impacts. There is evidence before this Court that some Torres Strait Islanders have taken such measures. For example, Mr Nona gave evidence that he had taken steps to protect his campsite from storm tides by procuring and filling sandbags.[1096] There is also evidence (and the Court observed during the on-country hearing in June 2023) that the houses on Boigu and Saibai are raised on stilts, which provides them with some measure of protection from inundation (which the applicants acknowledge at AS [583]).[1097]

671. It must also be recognised that aspects of the vulnerability upon which the applicants rely are equally applicable to significant segments of the Australian population. A number of the statements of the IPCC and other organisations collected at AS [219]-[220] refer to First Nations people and inhabitants of remote communities in general.[1098]

672. Reference is also made to coastal communities in general.[1099] For example, the applicants' place reliance upon the *Climate Change Risk to Australia's Coasts* report.[1100] That report notes that around 85% of the Australian population live in the coastal region,[1101] with 711,000 addresses being located within 3 kilometres of the shore and in areas below 6 metres in elevation.[1102] That report adopted a 1.1 metre sea rise as a plausible value for the purposes of a risk assessment and concluded that between 157,000 and 247,600 individual residential buildings across all coastal States and Territories were potentially at risk of inundation, with the highest number of at risk residential buildings being located in New South Wales (with 40,800 to 62,400 residential buildings) and the lowest number of at risk buildings being located in the Northern Territory (up to 180 residential buildings).[1103] The report noted that the Local Government Areas of Lake Macquarie, Wyong, Gosford, Wollongong, Shoalhaven and Rockdale represented

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1096 Affidavit of Laurie Nona sworn 14 February 2023 at [87]-[92].

1097 T1195.15, 1247.34 (Bettington) [TRN.0014.1172].

1098 See AS [219.1], [219.2], [220.1].

1099 See AS [219.4].

1100 DCC, *Climate Change Risk to Australia's Coasts* (2009) [APP.0001.0019.0007] (**DCC 2009 Coastal Risks Report**), referred to at footnotes 16, 443, 499, 1217-1222.

1101 DCC 2009 Coastal Risks Report [APP.0001.0019.0007] at [.0007], [0015].

1102 DCC 2009 Coastal Risks Report [APP.0001.0019.0007] at [.0076].

1103 DCC 2009 Coastal Risks Report [APP.0001.0019.0007] at [.0076]-[.0077].

over 50 per cent of the residential buildings at risk in NSW,[1104] and provided various inundation maps depicting 1.1m sea level rises.[1105]

673. In summary, the Commonwealth accepts that some Torres Strait Islanders may be more vulnerable than others to the impacts of climate change, and that those impacts may affect Torres Strait Islanders' ability to practice *Ailan Kastom*. However, the applicants' submission that Torres Strait Islanders are in a uniquely vulnerable position in relation to the impacts of climate change cannot be accepted without some qualification.

Knowledge

674. This salient feature is concerned with whether the putative tortfeasor has actual or constructive knowledge that the conduct at issue will cause harm to the applicant.

675. It may be accepted that the Commonwealth was aware of the contents of the *State of the Climate Report* (2014) authored by the CSIRO and Bureau of Meteorology,[1106] the various components of the IPCC *Fifth Assessment Report* (September 2013 to October 2014), the IPCC *Special Report on 1.5°C* (October 2018), the IPCC *Special Report on the Ocean* (September 2019) and the various components of the IPCC *Sixth Assessment Report* (August 2021 to April 2022) at or around the time of their publication.[1107] It may also be accepted that, at all material times, the Commonwealth understood that human influence is warming the climate system and that limiting climate change will require substantial and sustained reduction of GHG emissions[1108] — indeed, that was the premise of its participation in the UNFCCC and Paris Agreement.

676. While the Commonwealth notes that some of the materials upon which the applicants rely post-date relevant decisions at issue in these proceedings,[1109] it

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1104 DCC 2009 Coastal Risks Report [APP.0001.0019.0007] at [.0078].

1105 See, eg, DCC 2009 Coastal Risks Report [APP.0001.0019.0007] at [.0082], [.0089].

1106 AS [228]; see, eg, UNFCCC Taskforce Issues Paper [EVI.2001.0001.2517 at .2519], referring at Endnote i to the CSIRO and BOM, *State of the Climate 2014* (2015) [APP.0001.0003.0006].

1107 AS [229]; Defence at [77](b); see also T1362.38-.39 (Gardiner) [TRN.0016.1342].

1108 AS [229].

1109 For example, AS [231.4] refers to the *State of the Climate Report* (2022) [APP.0001.0003.0010] which was published after the 2022 NDC Update (which may be inferred from the circumstance that the update was conveyed to the UNFCCC Secretariat on 16 June 2022 (Media Release, *Stronger action on climate change* (16 June 2022) [EVI.2001.0001.1915]) and the State of the Climate Report contains reference to clean air measurements at the Gape Grim Baseline Air pollution Statement from June 2022 [APP.0001.0003.0010] at [.0021].

accepts that it was generally aware that climate change posed risks to small and low-lying islands and coastal areas, including the Torres Strait Islands, at all relevant times from at least 2011.[1110]

677. However, the Commonwealth reiterates the point, made at [197] above, that the knowledge of the global scientific community about the causes and risks of climate change and the actions that could be taken to mitigate climate change, and the attitude of the global community towards climate change and its impacts has evolved over time. Therefore, it will be important to consider allegations of breach in light of the scientific understanding and global attitudes at the time.

Control

678. As outlined at [84]-[86] above, the salient feature of control concerns whether the putative tortfeasor has control over the risk of the harm the applicants are said to have suffered. The authorities suggest that the mere fact that a public authority has control over some aspect of a physical environment is in itself unlikely to found a duty of care, and that a respondent will not have control in the relevant sense where the control over the risk of harm is "fragmented" between many bodies.[1111]

679. The Commonwealth submits that the Court could not accept on the evidence before it that the Commonwealth had control over the risk of the harm (or harms) the applicants are alleged to have suffered in these proceedings.

680. In particular, the Court could not accept that the Commonwealth could exert any material control over the risk of harm through the setting of national GHG emissions targets or the adopting of measures to reach those targets (that is, by taking the steps at 3FASOC [82]). The short point is that the experts agree that climate change is a global problem requiring a global solution, and it is not a problem that Australia can avoid or fix or even exert any material influence on due to its very small relative contribution to GHG emissions (see at [228] above). In that sense, the Commonwealth's ability to control the risk of harm caused by global GHG emissions is akin to the position of the local council in *Graham*

1110 Defence at [77(c)].

1111 See *Graham Barclay Oysters* at [152], [154] (Gummow and Hayne JJ) [APP.0001.0020.0065].

Barclay Oysters, which was held to be insufficient to found a duty of care to consumers of contaminated oysters.

681. The applicants' submissions at AS [237]-[241] do not and cannot overcome this:

a) As to AS [237], the fact that the Commonwealth can take steps to set its own targets and control its own emissions does not give it control over the risk of harm.

b) As to AS [238], the Commonwealth is not attempting to downplay its contribution to global warming. It is merely being realistic about its ability to control the risk of harm. This is not inconsistent with the Minister's statement that "*what we do counts*".[1112] The Commonwealth accepts that what every country does "*counts*" in the sense that cooperation from *all* countries is required to stabilise global temperatures. In that context, it accepts that is desirable that each country do as much as it can to reduce GHG emissions within its territory. However, that is a different thing to saying Australia has *control* over the risk of harm. It does not.

c) As to AS [239] (repeated in AS [241]), that submission does not take the applicants very far. In the CCA's 2014 report, the CCA noted that the 2020 target of 15% plus carryover would be "*broadly comparable with the current actions of other key countries considered in this review, including the United States*" before noting that "*[a] stronger Australian target could have a positive influence on the actions of other countries by demonstrating that emissions-intensive economies can pursue and achieve ambitious targets*".[1113] When asked whether she agreed with that general assessment, Ms Pearce said "*that's a potential outcome, yes*".[1114] In discussing Australia's influence, the CCA characterised Australia as "*a small but important part of the global picture on climate change*" and noted that "*[w]hile Australian influence on global efforts should not be overstated*" there were certain ways that Australia could influence other countries.[1115] Evidence of this kind falls far short of any reasonable

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1112 Guardian Australia "Pods" podcast, interview of Chris Bowen with Catherine Murphy (**Bowen Interview**), [APP.0001.0013.0021].

1113 See AS [234.4]; 2014 CCA Report, [APP.0001.0004.0015] at [0053].

1114 T1512.44 (Pearce) [TRN.0018.1455].

1115 2014 CCA Report at [0072].

conception of *control*. There is no evidence, for example, as to the nature or scope of Australia's impact on other countries.

d) As to AS [241], the relevance of these submissions is unclear. Observations on material contribution are not relevant to control; and in any case, the observations of the judges in *Sharma FC* on material contribution rather undermine the applicants' case. This will be addressed in more detail in Part E5 below.

682. Finally, the applicants' ultimate submission on control in the context of the Primary Duty case (at AS [240]) applies the wrong test. The applicants submit that the Commonwealth "*had extensive control over the level of GHG emissions in Australia*". It is then suggested that "*[i]t therefore plainly had control over the risk of harm flowing from the setting of Australia's GHG emissions target*". However, the question that the Court is required to ask is not whether the Commonwealth had control over the level of GHG emissions in Australia, but whether it had control over the *risk of harm* that the applicants are said to have suffered. On the evidence before the Court, the answer to that question could only be "*no*".

Reliance and assumption of responsibility

683. As outlined at [87] and [627]-[628] above, a public authority may place itself in such a position as to create a self-imposed duty of care if it has a practice upon which others have come to rely. However, it is not sufficient that the class to whom it is alleged the duty is owed simply relies upon the government to the same extent as other members of the polity.

684. None of the three matters relied upon by the applicants at AS [246]-[248] demonstrate a relevant assumption of responsibility by the Commonwealth over Torres Strait Islanders, nor that Torres Strait Islanders rely on the Commonwealth in any way that goes beyond general political reliance of the kind referred to by Allsop CJ in *Sharma FC*.

685. *First*, the applicants say that, by entering into the Torres Strait Treaty (AS [246] and [604]-[609]), the Commonwealth has assumed responsibility towards Torres Strait Islanders to protect their traditional way of life, their livelihood, their marine environment and indigenous fauna and flora in the vicinity of the Torres

Strait Islands. As outlined at [620] above, under the Torres Strait Treaty the Commonwealth has assumed obligations to the other State party to that treaty under international law, namely Papua New Guinea. That Treaty does not give rise to legal obligations owed by the Commonwealth to individual Torres Strait Islanders.

686. Further, under the Torres Strait Treaty, the Commonwealth is required to adopt and apply only the measures set out in the Torres Strait Treaty. The only specific measure to which the applicants refer is Art 13, which requires the Commonwealth to "*take legislative and other measures necessary*" to protect and preserve the marine environment in and in the vicinity of the Protected Zone. The reference to "*legislative and other measures*" in that article highlights the fact that the Commonwealth undertook to take measures through the political process — that is by legislation or otherwise — to protect Torres Strait Islanders. The only responsibility the Commonwealth could be said to have assumed by entry into a treaty containing such an obligation is a responsibility to determine, through the ordinary political or legislative process, the measures by which it would satisfy its obligations under a treaty. It cannot be said that this is an assumption of responsibility of the kind that gives rise to a duty of care in negligence.

687. Moreover, although the Commonwealth accepts that it is a purpose of the Torres Strait Treaty to protect Torres Strait Islanders' "*traditional way of life*" as outlined in [619] above, it is not correct to say that the Treaty imposes an "*obligation*" on the Commonwealth to do so (cf AS [605], [609]). Article 10(2) requires the parties to adopt and apply the measures in relation to the Protected Zone in accordance with the provisions of the Treaty, and the Treaty does not specifically require the Commonwealth to take any measures to protect Torres Strait Islanders' "*traditional way of life*". The requirement that treaties must be adhered to and performed in good faith does not impose obligations on treaties that do not arise on its terms.

688. *Secondly*, the applicants submit that the Commonwealth has at all relevant times known about the vulnerability of Torres Strait Islanders to the impacts of climate change and their limited ability to mitigate those impacts (AS [247]). The Commonwealth accepts that it had the knowledge at [676] above; however, it does not accept the unqualified proposition to the effect that it has known that Torres Strait Islanders were relying on it to "*mitigate the impacts of climate*

change". The Commonwealth denies that Torres Strait Islanders could possibly rely on the Commonwealth to *avoid* the impacts of climate change in the Torres Strait Islands, and the harm to the applicants and group members therefrom, in circumstances where Commonwealth plainly does not have control over the risk of harm.

689. *Thirdly*, the applicants rely on the fact that the Commonwealth has taken or funded a number of actions in the Torres Strait Islands in order to mitigate the impacts of and projected impacts of climate change in the Torres Strait Islands (AS [248]). As a general proposition, the mere fact that the Commonwealth has provided funding for a project, or has otherwise taken action for the purpose of mitigating the impacts of climate change, cannot on its own establish reliance that weighs in favour of the recognition of a duty of care. The Commonwealth funds or is otherwise involved in a vast range of projects for many different purposes, including the mitigation of climate change, throughout the country, and it cannot be said that every time the Commonwealth decides to fund or otherwise participate in a project it assumes responsibility for those who will benefit from it, or that those persons rely on the Commonwealth, in the sense in which the laws of negligence are concerned with those concepts.

690. Further, the steps taken by the Commonwealth to which the applicants refer are varied and relate to a climate change in specific ways. The only matters on which the applicants rely are the Commonwealth's provision of funding for the seawalls project which is being implemented by the TSIRC,[1116] the commitment by the Commonwealth of $15.9 million over four years to the Torres Strait Climate Centre of Excellence [1117] (which was committed in the October 2022-2023 budget), [1118] the fact that the Commonwealth provided funding to James Cook University to study erosion and inundation on the six most vulnerable islands in the Torres Strait in 2010,[1119] the monitoring of tidal gauges in the Torres Strait,[1120] the creation of a National Climate Resilience and Adaptation Strategy in 2015,[1121] and the fact that the TSRA has established the Adaptation and

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1116 AS footnote 549, which refers to AS [614]-[617].
1117 AS footnote 550.
1118 The Commonwealth, Budget October 2022-23 Budget Measures Budget Paper No 2 (October 2022) at p 60 (.2297), [EVI.2001.0004.2224].
1119 AS footnote 550, which refers to AS [618].
1120 AS footnote 551, which refers to AS [619].
1121 AS footnote 552.

Resilience Plan 2016-2021.[1122] Each of those matters is related to a specific response to climate change and it is not apparent how they can give rise to a generalised assumption of responsibility on the part of the Commonwealth to take reasonable measures to protect Torres Strait Islanders from the current and projected impacts of climate change. Further, some of those matters post-date the alleged breaches of the Alternative Duty and therefore cannot constitute steps said to give rise to that duty.

691. None of those matters are akin to actions of the kind that have been held in other cases to create a self-imposed duty of care by engaging in conduct upon which others have come to rely. In each of the authorities referred to in the judgment of Mason J in *Heyman*,[1123] the defendant had engaged in a specific act said to give rise to reliance by the plaintiff, namely:

a) In *Mercer v South Eastern and Chatham Railway Companies Managing Committee*, the defendant railway company had put in place a practice of keeping the gate locked if a train was approaching, and unlocked when no train was approaching.[1124] The Court found that the company gave a 'tacit invitation' by leaving the gate unlocked, and the plaintiff acted upon that invitation by crossing the line, which resulted in injury by an approaching train.[1125]

b) In ***Morash*** *v Lockhart & Ritchie Ltd*, the practice of insurance agents notifying clients that their policy was about to expire and should be renewed, which clients expect and rely upon, created a standard of reasonable care.[1126] Accordingly, the defendant's failure to notify the plaintiff who then suffered loss when his house was destroyed while uninsured meant the defendant was liable in contributory negligence.[1127]

c) In ***Knight*** *v Sheffield Corporation*, the defendant public authority was found to have imposed upon itself a duty by, every night, illuminating a sign placed above a hole in the pavement.[1128] The plaintiff had placed

1122 AS footnote 552, which refers to AS [625].
1123 *Heyman* at 461 (Mason J), 486 (Brennan J), [APP.0001.0020.0162], cited at AS footnote 540.
1124 [1922] 2 KB 549, 552, 554, [CTH.0004.0001.1141].
1125 *Mercer* at 552, 554, [CTH.0004.0001.1141].
1126 (1978) 95 DLR (3d) 647 at [8]-[9] [CTH.0004.0001.1147].
1127 *Morash* at [9] [CTH.0004.0001.1147].
1128 [1942] 2 All ER 411, 411 [CTH.0004.0001.0974].

some reliance on seeing the illuminated sign, which he had become accustomed to see.[1129]

d) In ***Bird*** *v Pearce; Ex parte Somerset County Council*, it was found that given that the defendant public authority created a pattern of traffic flow by marking white lines on the road, drivers could be expected to rely in some degree upon it.[1130] Thereafter the authority was under a duty of care to all road users to take reasonable care to see that the system it had imposed would not deteriorate so as to create a hazard.

692. In each of these cases, a specific act of assumption of responsibility created a specific kind of reliance to which the duty of care related quite specifically. By contrast, the applicants seek to draw from a diverse range of steps taken by the Commonwealth, which relate to climate change in some way, a broad and general duty of care to protect Torres Strait Islanders from the impacts of climate change. There is no analogy between the reliance cases outlined in the paragraph above and the duty of care the applicants seek to have this Court recognise.

693. The applicants also submit at AS [248] (by reference to [622]) that the Commonwealth, through the Council of Australian Governments, agreed with States on a range of matters relevant to climate change adaptation that evidence the Commonwealth's assumption of responsibility. This is a reference to the COAG Agreement, which is outlined at [400]-[401] above. However, the applicants make no submission about what specifically the Commonwealth is said to have assumed responsibility for under that agreement. As outlined at [400]-[401] above, the COAG Agreement acknowledges that the Commonwealth has responsibility for various matters, including taking stewardship of the national economy and taking a leadership role to position Australia to adapt to climate change, whereas State and Territory and local governments have responsibility for other matters at a more local level. This does not suggest that the Commonwealth, as opposed to the other levels of government, has assumed responsibility to take reasonable steps to protect Torres Strait Islanders from the impacts of climate change. To the contrary, it highlights that all levels of government in Australia have complementary roles to play in addressing the threats posed by climate change. In any event, to the extent that the

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1129 *Knight* at 414 [CTH.0004.0001.0974].

1130 [1979] RTR 369, 375 [CTH.0004.0001.0017].

Commonwealth has assumed any relevant responsibilities in the COAG Agreement, those obligations are of a political nature, and are precisely of the kind that Gummow J suggested would not be justiciable under the laws of negligence in *Day*.[1131]

694. The applicants also seek to rely on the fact that the Commonwealth funds the TSRA, which undertakes extensive activities relating to mitigating and adapting to climate change, as evidencing Torres Strait Islanders' reliance on the Commonwealth (AS [248]). It is true that the Commonwealth provides funding to the TSRA, and that the TSRA undertakes extensive activities relating to mitigating and adapting to climate change. However, it does not follow that the Commonwealth has assumed responsibility for all the activities undertaken by the TSRA. Relevant background to the TSRA is outlined in Part D.11.3 above. As outlined in that Part, the TSRA is an elected body and a separate legal entity to the Commonwealth. It is not a party to these proceedings. Any activities undertaken by the TSRA relating to climate change are not matters for which the Commonwealth can be said to have assumed responsibility under the laws of negligence. Further, in light of ss 142R, 142T, 142U and 142V of the Aboriginal and Torres Strait Islander Act and the terms of the group definition, the members of the TSRA are likely to be group members in the proceeding.

Determinacy

695. As outlined at [88], the salient feature of determinacy is concerned with the ascertainability of the class, but this may include consideration of whether the nature of the likely claims can be ascertained, as well as whether the time over which a person may suffer relevant loss (and therefore become a claimant) is uncertain.

696. The Commonwealth submits that the class of persons to whom the alleged Primary Duty is owed is indeterminate for two reasons (cf AS [250]-[253]).

697. *First*, the nature of the likely claims is indeterminate. As noted at [582] above, the Commonwealth proceeds on the assumption that the risks of harm the Commonwealth is alleged to be required to take reasonable precautions to avoid are property damage, personal injury and loss of fulfilment of *Ailan Kastom*. The

[1131] (1998) 192 CLR 330 at [182].

applicants' case appears to be that any such harm is a result of the Commonwealth failing to take reasonable precautions to protect Torres Strait Islanders from the enumerated "*Current and Projected Impacts of Climate Change in the Torres Strait Islands*", being the broad list of non-exhaustive impacts at [57] and [59] of the 3FASOC.

698. The very broad range of both current and projected impacts of climate change against which the applicants allege the Commonwealth has a duty to take reasonable precautions to protect Torres Strait Islanders means that it is not possible for the Commonwealth, nor the Court, to ascertain the likely nature of claims against it. This is compounded by the fact that the alleged Primary Duty would presumably require the Commonwealth to take reasonable steps to prevent any of those impacts of climate change from causing any of the kinds of harm that the applicants allege Torres Strait Islanders may have suffered, namely any kind of property damage, any kind of personal injury and any loss of fulfilment of *Ailan Kastom*.

699. *Secondly*, the difficulties in ascertaining the nature of the likely claims against the Commonwealth are further compounded by the uncertain timescales over which individual Torres Strait Islanders may suffer property damage, personal injury or loss of fulfilment of *Ailan Kastom* due to one or more of the Current and Projected Impacts of Climate Change in the Torres Strait Islands. As explained at [220]-[222] above, there is a time lag in relation to several impacts of climate change and those impacts may manifest many years into the future. The applicants' submissions as to causation apparently lead to the result that, once it is accepted that the Commonwealth's breach of duty has made a material contribution to GHG emissions, it is liable for all damage suffered by Torres Strait Islanders caused by climate change thereafter. Thus, the Commonwealth's liability is uncapped and unknowable. There is nothing the Commonwealth can do now to ascertain or limit that liability.

700. For the reasons outlined above, the Commonwealth submits that there are real issues with indeterminacy of the class, which weigh significantly against the recognition of the Primary Duty of Care.

Coherence

701. The principles relating to the salient feature of coherence are outlined at [89] above. The Commonwealth submits that any recognition by this Court of the alleged Primary Duty would subject the Commonwealth to a duty that would be incompatible with its existing duties and which would cut across existing legal principles.

702. At the *domestic level*, the recognition of the Primary Duty would result in a lack of coherence between the alleged duty and the terms of the *Climate Change Act 2022* (Cth). Section 10(1)(a) of that Act provides that "*Australia's greenhouse gas emissions reduction targets are as follows: ... reducing Australia's net greenhouse gas emissions to 43% below 2005 levels by 2030: (i) implemented as a point target; and (ii) implemented as an emissions budget covering the period 2021-2030*". Section 10(1)(b) provides that a further aspect of Australia's GHG emissions reductions target is "*reducing Australia's net greenhouse gas emissions to zero by 2050*". The recognition of the Primary Duty is inconsistent with the terms of s 10 of the Act. Moreover, it would tend to follow from the applicants' argument as a matter of logic that in enacting the *Climate Change Act 2022* (Cth), the Commonwealth Parliament breached a duty of care to the applicants. Further, the Commonwealth notes the potential for incoherence between the private law duty that would exist if the Primary Duty is recognised and the various functions under Commonwealth legislation referred to in [893].

703. At an *international level*, the recognition of the Primary Duty would also appear to result in some incoherence. That is because, as discussed above at [172], the Paris Agreement itself acknowledges that the function of an NDC is to communicate an intention to achieve. The Paris Agreement also acknowledges that national circumstance may also be considered in arriving a contribution that is communicated in an NDC. The posited Primary Duty is inconsistent with both of those aspects of the Paris Agreement.

704. Further, for the reasons addressed in detail below in Part E6.3 below, loss of fulfilment of *Ailan Kastom* is not compensable under the laws of negligence. In those circumstances, recognition of the Primary Duty (insofar as it embraces obligations with respect to loss of fulfilment of *Ailan Kastom*) could not extend to harm of that kind or else it would also involve incoherence.

Justiciability

705. The issue of justiciability has been dealt with Part C.1.2 above. For the reasons outlined in those paragraphs, the Commonwealth submits that the alleged Primary Duty should not be recognised because it concerns matters of core policy and the exercise of quasi-legislative powers in respect of which it would be inappropriate to superimpose a duty of care.

E.3.5 Conclusion – Primary Duty of Care

706. For the reasons outlined above the Commonwealth submits that the Court should not recognise the Primary Duty. If it accepts this argument then the applicants' case on the Primary Duty necessarily fails.

E.4 If the Commonwealth owes the duty, it did not breach that duty (CQs 4, 7 and 8)

707. If, contrary to the submissions above, the Court were to find that the Commonwealth owed Torres Strait Islanders the Primary Duty, the Commonwealth submits that the applicants have failed to establish any breach of that duty.

E.4.1 Factors informing the standard of care

Reasonable foreseeability

708. The first step to ascertain the standard of care is to determine whether a reasonable person in the Commonwealth's position would have foreseen that the kind of carelessness it is alleged to have engaged in may result in harm to Torres Strait Islanders.

709. The applicants describe the kind of carelessness they allege against the Commonwealth as "*a failure to protect Torres Strait Islanders from the impacts of climate change through GHG mitigation efforts*" (at AS [275]), namely, setting GHG emissions reductions targets and implementing measures to reach those targets (see 3FASOC [82]).

710. While it may be accepted that the Commonwealth was generally aware that climate change posed risks to small and low-lying islands and coastal areas, including the Torres Strait Islands, at all material times from at least 2011, the Commonwealth submits it was not reasonably foreseeable that any breach of the Primary Duty would cause or materially contribute to the applicants' and group members' suffering that harm. In this regard, the Commonwealth repeats its submissions at [659]-[665] above.

711. The second step in ascertaining the standard of care is to determine what a reasonable person in the Commonwealth's position would have done by application of the negligence calculus (see at [94]-[95]). Taking each element of the calculus in turn, the Commonwealth submits as follows.

Probability of harm

712. The Commonwealth accepts that, at all material times since at least 2011, it knew that the Torres Strait Islands were already being affected by some impacts of climate change and the probability of the Torres Strait Islands being affected further in the future by some impacts of climate change, such as sea level rise and oceanic warming, was high – indeed, it was virtually certain due to the effects of past GHG emissions.

713. Of course, the nature and severity of future impacts in the Torres Strait Islands would depend on the degree of global temperature increase, which in turn depends on the actions of all nations and persons globally, and the Commonwealth could not (and cannot) predict that with any certainty. It also depends on how the impacts of climate change manifest locally, which, for the reasons at [208]-[212] and [223]-[226] above, it is very difficult to model. Further, the assertion in the last sentence in AS [284.1], regarding what was said to have been known about tipping points from at least 2007, is not supported by the evidence cited by the applicants.

Seriousness or magnitude of harm

714. The Commonwealth accepts that climate change poses significant risks for all people,[1132] including Torres Strait Islanders. However, it submits, essentially for

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[1132] Defence at [62(a)], [CRT.2000.0001.0001].

the reasons articulated at [659]-[665], that the magnitude of harm which could arise to Torres Strait Islanders *from any breach by the Commonwealth of the Primary Duty* is imperceptibly small.

715. For completeness, for reasons explained in detail at [208]-[212] above, the Commonwealth disputes the submission at AS [295] that the impacts of climate change in the Torres Strait Islands will increase linearly with increase in global average temperatures. The Commonwealth submits that the climate science does not establish that the relationship between global temperature increase and global average climate impacts is "linear", but even if it does, the expert evidence is agreed that the impacts are not linear on a regional scale. However, the Commonwealth accepts that some impacts of climate change are likely to increase in the Torres Strait Islands as global temperature increases.

Expense, difficulty and inconvenience of taking alleviating action

716. At the *macroeconomic level*, as discussed above in Part D, the UNFCCC Taskforce considered modelling prepared for the government in 2015 that addressed the impact of various emissions reduction target scenarios on Australia's Gross Domestic Product (**GDP**) and Gross National Income (**GNI**) in the lead-up to the adoption of the 2030 target in 2015. For illustrative purposes, the UNFCCC Taskforce, undertaking modelling for the government in 2015, noted that a "*high price*" scenario involving a 44% reduction below 2000 levels by 2030, using a broad based emissions trading scheme, would lead to a reduction of 2.6% of Australia's GDP in 2030 relative to a "*no further action after 2013*" base case.[1133] Based on Treasury modelling, the nominal cumulative GDP impact of that particular scenario would have been $633 billion. Those figures are illustrative of the range of anticipated economic impacts associated with the adoption of a more aggressive target relative to a less aggressive target even if they do not precisely match what the applicants contend was a "BAS" target.

717. Professor McKibbin modelled the estimated effects of post-2020 targets on both GDP and 2030 real GNI in the context of the UNFCCC Taskforce's review, and the results of that contemporaneous modelling were referred to in the Final

[1133] UNFCCC, *Setting Australia's post-2020 target for reducing greenhouse gas emissions Final Report* (**UNFCCC Taskforce Final Report**) [EVI.2001.0001.2411] at [.2464].

Report.[1134] Professor McKibbin's analysis disclosed that relative to holding emissions constant from 2020, a target of 26% below 2005 levels by 2030 would reduce Australia's GDP by 0.2-0.3%, whereas a 45% target would reduce GDP by 0.5 to 0.7%.[1135] Such figures represent material costs to the Australian economy at large. However, as the UNFCCC Taskforce Final Report noted, different sectors of the economy would be affected differently by targets, resulting in different impacts on different regions and jobs.[1136]

718. At a *policy level*, the contemporaneous evidence also discloses that there was a need to consider direct costs associated with pursuing mitigation measures envisaged by a particular target. In the context of the UNFCCC Taskforce, RepuTex Carbon prepared modelling of a marginal abatement cost curve for Australia from 2020 and 2030.[1137] This followed earlier analysis by McKinsey & Company and ClimateWorks that addressed sectoral abatement potential.[1138] The RepuTex analysis considered emissions reduction potential across the Australian economy, by analysing opportunities to reduce emissions across six key sectors, being power, forestry, industry, buildings, agriculture and transport.[1139] It found that, without additional policies (noting the extant $2.55 billion Emissions Reduction Fund),[1140] domestic emission reductions of 8-15% less than 2000 levels by 2030 were realistic.[1141] The total cost of implementing all emission reductions opportunities then identified by RepuTex was estimated to be $5.3 billion in 2020, increasing to $10.6 billion in 2030.[1142]

719. The above evidence indicates that more aggressive targets were modelled to carry increased costs both at the level of Australia's economic output and as a result of policy initiatives directed at reducing GHG emissions. This is a factor that must be considered in determining breach, particularly in the context of the

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1134 See, for example, UNFCCC Taskforce Final Report [EVI.2001.0001.2411] at [.2464].

1135 Prof Warwick McKibbin, Report 2: 2015 Economic Modelling of Australian Action under a New Global Climate Change Agreement (20 August 2015) [EVI.2001.0001.2377] at [.2381], [.2388]-[.2390].

1136 See, e.g., UNFCCC Taskforce Final Report [EVI.2001.0001.2411] at [.2465].

1137 Pearce Affidavit at [36.2], [WIT.2000.0001.0035]; RepuTex Carbon, *The Lost Years: Australian Abatement Cost Curve to 2020 & 2030* (April 2015) (**RepuTex 2015**) [PMC.2005.0001.0001].

1138 RepuTex 2015 [PMC.2005.0001.0001] at [.0006].

1139 RepuTex 2015 [PMC.2005.0001.0001] at [.0004].

1140 RepuTex 2015 [PMC.2005.0001.0001] at [.0007].

1141 RepuTex 2015 [PMC.2005.0001.0001] at [.0010].

1142 RepuTex 2015 [PMC.2005.0001.0001] at [.0007].

Commonwealth's countervailing responsibilities as the democratically elected government of Australia, addressed immediately below.

Other countervailing responsibilities

720. The Commonwealth, as a representative democratic government, has a number of countervailing responsibilities when formulating climate change policy, including adopting GHG emissions reduction targets. This is apparent from the evidence summarised in Part D.6, as well as at [594]-[600] and [601]-[610] of Part E.3.

721. In particular, as a representative democracy, it is necessary for the Commonwealth to consider the views, not only of Torres Strait Islanders, but also of the electorate as a whole. As Minister Bowen has explained in a podcast tendered by the applicants, "*the political debate is always contested in climate and energy*", and there is a spectrum of views in Australia in relation to the measures the Commonwealth should be taking in relation to climate change.[1143] It is necessary for the Commonwealth to have regard to all these views, including the views of business, community, environmental and Indigenous stakeholders.[1144] A particularly important part of the government's work in implementing climate change policy is "*working with communities*" who may be negatively affected by those policies and "*having difficult conversations*" to bring them on board.[1145]

722. Further, the Commonwealth must also consider the impacts of climate policy on its citizens as a whole, not just on the applicants and group members. In particular, as discussed immediately above at [716]-[719], in setting GHG emissions reduction targets, the Commonwealth has to balance its environmental aims against a range of factors including the economic costs and impacts on Australian society.[1146] These include impacts upon employment, wages and standard of living, as is clear from the UNFCCC Taskforce's work.[1147] Similar

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1143 Bowen Interview, [APP.0001.0013.0021].
1144 Pearce Affidavit at [23], [WIT.2000.0001.0035].
1145 Bowen Interview, [APP.0001.0013.0021].
1146 UNFCCC Taskforce Final Report [EVI.2001.0001.2411] at [.2422], [.2438], [.2440].
1147 UNFCCC Taskforce Final Report [EVI.2001.0001.2411] at [.2463-.2467].

considerations were clearly taken into account in the context of the 2021 NDC Update and 2022 NDC Update.[1148]

723. In addition, it is necessary for the Commonwealth to consider the impacts of its climate policies and actions on its foreign relations, including with its trading partners. In particular, Australia is a large energy supplier and it is important to its relationships with its trading partners that it continues to supply power while those countries work towards a transition to renewable energy.[1149]

724. These different responsibilities and considerations can obviously pull in different directions, and all need to be balanced and considered in developing national climate policy.

725. The existence of all these countervailing responsibilities and considerations is not in dispute. As addressed at [608]-[610] above, the applicants acknowledge that any standard of care imposed on the Commonwealth may ultimately require consideration of competing resource and policy demands, as well as financial constraints and budgetary imperatives, and posit the "*reasonable person*" to be a "*developed international actor*" with treaty obligations, multiple agencies and which received expert advice on climate change policy and mitigation initiatives from an independent statutory body. Likewise, the evidence, including the expert evidence, was that the setting of a target was a policy question which considered technical, economic and societal feasibility.[1150]

726. The Commonwealth submits that the existence of these countervailing responsibilities underscores the high policy nature of the actions and decisions under consideration, and are plain indications that they are not actions and decisions that can or should be regulated by tort law.

727. In the alternative, the Commonwealth submits these matters are critical factors in analysing the standard of care, and point to a standard that is flexible and has regard to these multiple other responsibilities. The fact that the Commonwealth is a government with extensive resources does not, as the applicants submit (see at

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[1148] Australian Government, *Australia's Long-Term Emissions Reduction Plan: A whole-of-economy plan to achieve net zero emissions by 2050* [EVI.2001.0001.0292]; Powering Australia Plan 2021 [EVI.2001.0001.1863]; *The Economic Impact of the ALP Powering Australia Plan, Summary of modelling results* (**RepuTex Modelling**) [EVI.2001.0001.1917].

[1149] Bowen Interview, [APP.0001.0013.0021].

AS [307]-[308]) mean that there is no burden in taking precautions. The applicants fail to engage with the economic (and other) consequences of taking precautions, and the need to balance the Commonwealth's actions in relation to climate change mitigation with its other weighty responsibilities to the Australian community, as outlined above.

Social utility of the activity causing risk

728. The Commonwealth submits that this element of the negligence calculus is inapt in this context, and underscores the inappropriateness of imposing a duty of care on the actions and decisions at issue. In particular, it is unclear what should be considered the "activity" causing the risk. Is it the activities of every single person and business in Australia which cause GHG emissions? In that case, many of those activities have very high social utility (such as agriculture and producing power for heating, cooking, essential services and manufacturing essential goods), whereas others have lower social utility.

729. The Commonwealth accepts, of course, that the social utility of taking measures to mitigate climate change is high (cf AS [309]-[310]), but that is not a separate element of the negligence calculus. That is another way of reframing issues of seriousness and probability of risk.

E.4.2 The standard of care

Standard of "developed international state actor"

730. As discussed above, at AS [306], the applicants posit that the standard required of the Commonwealth is that of a "*developed international state actor*" with treaty obligations, multiple agencies and which received expert advice on climate change policy and mitigation initiatives from an independent statutory body.

731. As noted above, the Commonwealth submits that this framing of the standard of care underscores how inappropriate it is to impose a duty of care in these circumstances. Further, AS [306] does not list all the circumstances relevant to the Commonwealth's "position". In particular, it does not recognise that the Commonwealth is a democratic polity, with a government responsible to the

electorate, and with numerous other (sometimes countervailing) responsibilities, apart from climate change policy.[1151]

732. Even this does not do justice to the multifaceted nature of the Commonwealth's role as the national democratic polity. It is impossible to reduce that role to a few key features or circumstances. However, for the purposes of argument, the Commonwealth proceeds on the basis that a reasonable "person" (government) in its position would at least:

a) be a representative democracy, with a government responsible to the electorate, and with numerous responsibilities in relation to the physical, social and economic welfare of its citizens; and

b) have the features listed at AS [306], subject to one qualification. The meaning, or relevance of the fact that the advice comes from an "*independent statutory body*" in this context is unclear. However, Commonwealth is prepared to assume for the sake of argument that a "*developed international state actor*" in the Commonwealth's position would have access to leading climate science.

Relevance of "best available science"[1152]

733. The applicants contend that, in responding to the threats of climate change, "*while a range of reasonable responses were and are available to the Commonwealth, the ordinary informed state would use the best available science in formulating the response*" (AS [312]; see similarly, AS [345]). However, the applicants' case goes further, and apparently asserts that the ordinary reasonable person (or government) would have regard *only* to the BAS in formulating a response. This is a necessary implication of the applicants' contention that the Commonwealth's targets, including its legislated targets, are not "BAS" targets.

734. The Commonwealth disputes the contention that its targets can be set only with regards to BAS, for reasons already explained. The Commonwealth, as a democratically elected government, must have regard to and balance a range of factors in setting government policy in relation to climate change, including, amongst other things, practicality, cost and the views of, and impacts on, the

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1151 See similarly, *Sharma FC* at [232] (Allsop CJ).

1152 Cf AS [311]-[345].

Australian community as a whole. It cannot act only with regard to scientific opinion. This was accepted by all the experts.[1153] Nor can it act only with regard to the interests of a particular group within broader society.

735. Contrary to AS [330]-[345], the UNFCCC and the Paris Agreement do not require the Commonwealth, as a matter of tort law, to determine a national GHG emissions reductions target to stabilise temperatures at 1.5°C in accordance with BAS as the sole factor, for several reasons.

736. *First*, as explained at [175]-[176], treaties cannot operate as a direct source of individual rights or obligations under domestic law unless and until the extent enacted in domestic law.[1154] The Commonwealth has not adopted those agreements wholesale into Australian domestic law, though in 2022 it legislated the target embodied in the 2022 NDC Update and for certain procedural steps to be taken in relation to the setting of future targets at the appropriate time.

737. *Secondly*, as explained at [171]-[172] above, the 1.5°C goal in the Paris Agreement is expressed as an aspirational aim, rather than an obligation. The agreement is to "*[h]old[] the increase in the global average temperatures to well below 2°C above pre-industrial levels*" and only to "*pursu[e] efforts*" to limit the temperature increase to 1.5°C.

738. *Thirdly*, neither the Paris Agreement, nor the UNFCCC, prescribe the ways in which nations should set their GHG emissions reductions targets. In particular, they do not prescribe that the targets must be set in accordance only with BAS. The requirement in Article 4.2(c) of the UNFCCC is to undertake GHG emissions *reporting* in accordance with BAS.[1155] Conversely, Article 4.3 requires NDCs to reflect a country's "*highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in light of the different national circumstances*". As noted at [237] above, Prof Meinshausen explained

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[1153] T889.24-25 (Karoly) [TRN.0009.0844]; T1126.20-34, 1128.14-20, 1136.37-1137.24 (Meinshausen) [TRN.0013.1118]; T1399.46-1400.3, 1401.14-1402.16 (Canadell) [TRN.0017.1379]. See also, Defence at [45], [49], [CRT.2000.0001.0001]. See also, AAS, The science of climate change: questions and answers (February 2015), p 31, [APP.0001.0007.0067] at [.0030].

[1154] *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at [490] (Keane J) [CTH.0002.0001.0106], referring (among other authorities) to *Dietrich v The Queen* (1992) 177 CLR 292 at 305 (Mason CJ and McHugh J) [CTH.0002.0001.0391]*; Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-287 (Mason CJ and Deane J), 298 (Toohey J), 303-304 (Gaudron J), 315 (McHugh J) [CTH.0002.0001.0391].

[1155] UNFCCC, [APP.0001.0003.0016].

that, not only could the parties to the Paris Agreement not agree on a single approach that must be taken; the consensus was that each country should be able to determine its own approach, in a "*bottom up*" manner.

739. Further, the applicants' submission at AS [307] that a "*developed international state actor*" would be "*guaranteed*" "*ready access*" to BAS on the matters listed there must be qualified. The Commonwealth accepts that a developed state actor like the Commonwealth has access to leading climate science. However, as explained in detail above, that science has developed over time and still does not provide clear information on all the matters listed at AS [307]. In particular, there is, and throughout the relevant period has been, limited science on the precise projected impacts of climate change in the Torres Strait Islands. The science as to the steps that should be taken to mitigate climate change has also developed, in particular, from a focus on 2°C towards 1.5°C over time. Further, the BAS cannot be conceptualised as monolithic in all cases. Although there is a consensus opinion on many aspects of BAS, there are others on which even leading scientists disagree, exemplified by Prof Karoly and Prof Pitman's disagreement in relation to regional modelling and the ability to attribute certain trends in the Torres Strait to climate change.

740. Finally, for reasons explained at [573]-[579], and contrary to AS [319]-[323], the evidence does not establish, and certainly since 2014 the BAS has not been to the effect that, 1.5°C is a "limit" for the Torres Strait Islands.

The hypothetical standard

741. The Commonwealth submits that there is significant artificiality in attempting to describe the standard of care in relation to conduct that is, for the reasons explained above, so unsuited to a duty of care in tort and in respect of which Prof Meinshausen has said there is no standard.

742. However, attempting to do so, the Commonwealth submits as follows.

743. As noted above, for the sake of argument, the Commonwealth proceeds on the basis that the standard would be that of a "*developed international state actor*" with the characteristics at [732] above.

744. The Commonwealth submits that such a "*developed international state actor*" (that is a representative democracy), in making a decision about what GHG emissions reduction target to set or measures to reach that target would have regard to multiple relevant factors including (but not limited to): the climate science; costs; the consequences of imposing particular targets and adopting particular mitigation strategies, including economic impacts, such as on standard of living and employment; the multiple other responsibilities the government has and balancing those responsibilities against its actions in relation to climate change; its international obligations; its relations with other nations and governments; the practicalities and achievability of various options; the views of stakeholders; and in particular the attitudes and social license given by the electorate, which the government serves.

745. The Commonwealth submits the Court is not in a position to weigh how those factors ought to be balanced, which is one of the critical problems with imposing a duty of care in respect of a high policy decision like this one, but in any case, if a duty was imposed, that would have to be done.

746. Further, the Commonwealth submits that the standard should not be any higher than the spectrum of approaches amongst other "*developed international state actors*". By analogy, in cases of medical negligence, the High Court has held that, although the standard to be observed by medical practitioners was not to be determined solely by the standard of other medical practitioners, nonetheless such evidence is relevant and may be decisive in particular circumstances.[1156]

The "reasonable response"

747. The applicants submit that, in response to the risk of climate change to Torres Strait Islanders, the reasonable "*developed international state actor*" would have taken the steps in response thereto pleaded at 3FASOC [82] (see also at AS [346], [376]), namely, it would have:

> a. *identified the Current and Projected Impacts of Climate Change in the Torres Strait Islands;*

[1156] See *Rogers v Whitaker* (1992) 175 CLR 479 at 489; *Rosenberg v Percival* (2001) 205 CLR 434 at [7] (Gleeson CJ). See also, *Karpik v Carnival PLC* [2023] FCA 1280 at [682] (Stewart J).

b. *identified the risk, scope and severity of Current and 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 and Projected Impacts of Climate Change to small and low lying islands, such as the Torres Strait Islands;*

d. *identified a Best Available Science Target reflecting the Global Temperature Limit identified at sub-paragraph (c) above to prevent or minimise the Current and Projected Impacts of Climate Change in the Torres Strait Islands; and*

f. *implemented such measures as are necessary to reduce Australia's GHG emissions consistent with the Best Available Science Target identified at sub- paragraph (d) above.*

748. Those contentions cannot be accepted.

749. As to (a)-(b), the Commonwealth accepts that the "*developed international state actor*" in the Commonwealth's circumstances would have considered the impacts of climate change globally and in Australia, in setting GHG emissions targets and determining measures to implement those targets. The Commonwealth submits that it could not, as a democratically elected polity representing all Australians, have regard only to the risks in the Torres Strait Islands in setting those targets.

750. As to (c), for reasons explained above, the Commonwealth does not accept that a "*developed international state actor*" would have identified "*the Global Temperature Limit*" (i.e. 1.5°C). The climate science does not support the contention that 1.5°C is such a "*limit*" for the Torres Strait Islands, and in particular, in 2014/2015 the focus globally was on 2°C. Nor is 1.5°C a "limit" in the Paris Agreement; the aim is rather to hold global increase to well under 2°C while pursuing efforts to reach 1.5°C.

751. As to (d) and (f), as has already been addressed, a "*developed international state actor*" would not make such decisions *only* with regard to BAS, but rather with regard to all relevant factors, including the climate science and the other factors listed at [744].

E.4.3 The Commonwealth did not fall below the standard of care

752. The applicants submit (at AS [379]) that the Commonwealth breached the Primary Duty by each of the 2030 Target and by each of the NDC Updates in 2020, 2021 and 2022. That submission must be rejected. The submissions below address each allegation of breach in turn.

The 2030 Target (August 2015)

753. The Commonwealth submits that the 2030 Target of 26-28% was within the range of targets a reasonable "*developed international state actor*" in its circumstances would adopt at the time, for the following reasons:

a) The target was reasonable in light of the various factors and competing duties and considerations that are required to be balanced in determining an NDC (as to which, see [594]-[600] and [601]-[610] and [716]-[727]);

b) It is within the range of targets adopted by other developed international state actors at the time (as to which, see [285]-[287]);

c) Prof Meinshausen's hypothetical alternative 2014 targets are based on hindsight analysis and he does not contend that the Commonwealth could or should have adopted them at the time (as to which, see [297]). Accordingly, his evidence is irrelevant in considering what target the Commonwealth should have set at the time, so the applicants have not established that the Commonwealth ought to have adopted some other target;

d) Alternatively, as Prof Meinshausen accepted the setting of a target was a policy decision, for which there was no agreed approach, and indeed the only agreement was that countries would set their own targets, Prof Meinshausen's targets do not constitute a "baseline" above which the Commonwealth's targets ought to have been set (see at [235]-[240]). Prof Meinshausen accepts his hypothetical 2014 targets were more aggressive than the targets of any other nation at the time (see at [286]);

e) Prof Meinshausen does not opine that the Commonwealth should have adopted the target recommended by the CCA in 2014. Prof Karoly does not opine that the CCA was a source of the "BAS". Therefore, the target

recommended by the CCA, which additionally incorporated policy judgements, in 2014 is not a "BAS" target;

f) Although it was not derived purely from BAS (in the sense that it was set after considering the numerous factors referred to at [744] above), the 2030 Target was set having regard to BAS and also considering the CCA reporting (as to which, see [251]-[266]). Further, although the target recommended by the CCA was not adopted, the Commonwealth substantially met the GHG emissions budget for 2013-2020[1157] and is still within the budget for 2013-2050,[1158] so the Commonwealth's actual emissions are consistent with the CCA's advice that it received at the time and considered (see at [259]-[262]);

g) Further, the 2030 Target was reasonable in light of the fact that, at the time, the focus of the climate science and the global community was on stabilising temperatures at 2°C rather than 1.5°C.

754. The applicants' submissions at AS [388]-[392] also tend to parse and debate the contents of the UNFCCC Taskforce's Final Report as though the report was prepared and presented to government in a vacuum. Ms Pearce gave unchallenged evidence under cross-examination that the climate science was "*accepted*" and considered to be "*unequivocal*".[1159] As discussed above in Part D, both the Issues Paper and UNFCCC Taskforce Final Report commenced by acknowledging the climate science,[1160] as the premise for the analysis that followed.

1157 The CCA 2014 report recommended a national CO2-e budget for 2013-2050 of 4,193 MtCO2-e: : see p. 9, [APP.0001.0004.0015]. Dr Canadell's report shows that, during that period, Australia's emissions were in total 4,195.44 MtCO2-e: see Canadell 1 at Table 4, pp. 7-8, [EXP.2000.0001.0196].

1158 The CCA 2014 report recommended a national CO2-e budget for 2013-2050 of 10.1 GtCO2-e: : see p. 9, [APP.0001.0004.0015]. As per the above, Dr Canadell's report shows that Australia has only used around 4.6 Gt CO2-e of that budget up to 2021. Assuming the same level of emissions in 2022 and 2023 (as Dr Canadell does in Canadell 2, as those emissions have not yet been reported), takes this to 5.6 GtCO2-e.

1159 T1515.39-T1516.6 (Pearce) [TRN.0018.1455].

1160 Issues Paper, [EVI.2001.0001.2517] at [.2519], referring at Endnote i to the CSIRO and BOM, *State of the Climate 2014* (2015), [APP.0001.0003.0006]; UNFCCC Taskforce Final Report, [EVI.2001.0001.2411] at [.2428-.2429], referring in the references to the CSIRO and BOM, *State of the Climate 2014* (2015), [APP.0001.0003.0006].

755. The UNFCCC Taskforce Final Report also explicitly acknowledged the work of the IPCC (*cf* AS [389]).[1161] Ms Pearce's unchallenged evidence was that the CCA reports were "*part of the mix*" in advising government. The CCA report was summarised for the Prime Minister's office, and the UNFCCC Taskforce Final Report sat "*side-by-side*" with the CCA's conclusions.[1162] The UNFCCC Taskforce also modelled the CCA's target and presented the conclusions of the modelling to the government.[1163]

756. To the extent that the applicants complain that the 2015 NDC does not explain how it was fair and ambitious or contributed towards achieving the objectives of the Convention (AS [393]) that is incorrect. Moreover, the evidence does not disclose that other nations took a materially different approach to the relevant statement in their NDC communications.[1164] Ms Gardiner's evidence was that the targets expressed in the 2015 NDC were "*solidly in the range of other countries' targets*" and referred to the United States' target of 26-28% below 2005 levels.[1165] Finally, this complaint is not made in the 3FASOC and, in any case, it can have no causal consequence in circumstances where the target is not established to be below a "reasonable" target in the circumstances.

757. Further, to the extent that the applicants complain that the UNFCCC Taskforce Final Report did not make explicit reference to risks to Torres Strait Islanders, that is a function of the scope of the report, which was directed at consideration of the implications of emissions reduction targets for Australian society at large.

The 2020 NDC Update (December 2020)

758. The Commonwealth submits that the applicants have not established that the 2020 NDC Update (reaffirming the 2030 Target of 26-28%) was below the standard of

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[1161] UNFCCC Taskforce Final Report, [EVI.2001.0001.2411] at [.2428], Box 2.1, Final Paragraph.

[1162] T1516.41-.47 (Pearce) [TRN.0018.1455 22].

[1163] UNFCCC Taskforce Final Report [EVI.2001.0001.2411] at [2458], "*Scenario 6*".

[1164] See, eg, United States, *Intended Nationally Determined Contribution* (2015) [EVI.2002.0001.1057]; European Union, *Submission by Latvia and the European Commission on Behalf of the European Union and its Members States: Intended Nationally Determined Contribution of the EU and its Member States* (2015) [EVI.2002.0001.0451]; Korea, *Submission by the Republic of Korea: Intended Nationally Determined Contribution* (2015) [EVI.2002.0001.0683

[1165] T1371.13-.22 (Gardiner) [TRN.0016.1342].

a reasonable "*developed international state actor*" in the Commonwealth's circumstances, for the following reasons:

a) Reaffirming the target was reasonable in light of the various factors and competing duties and considerations that are required to be balanced in determining an NDC (as to which, see [594]-[600] and [601]-[610] and [716]-[727]);

b) The applicants have adduced no evidence as to what target the Commonwealth should have set in December 2020;

c) To the extent it is contended that the analysis as at 2014/2015 continues to apply, the Commonwealth repeats the points at [753];

d) As at 2020, full implementation of conditional and unconditional NDCs globally were consistent with a 66% chance of holding global temperature increase at 3°C,[1166] indicating that countries responsible for a majority of GHG emissions had not adopted NDCs consistent with holding global temperature increase to 1.5°C, as the applicants the Commonwealth should have done.

The 2021 NDC Update (October 2021)

759. The Commonwealth submits that the applicants have not established that the 2021 NDC Update (communicating a net zero target of 2050) was below the standard of a reasonable "*developed international state actor*" in the Commonwealth's circumstances, for the following reasons:

a) The NDC update was reasonable in light of the various factors and competing duties and considerations that are required to be balanced in determining an NDC (as to which, see [594]-[600] and [601]-[610] and [716]-[727]);

b) The applicants have adduced no evidence as to what target the Commonwealth should have set in October 2021;

[1166] UNEP Emissions Gap Report 2020 at p. xxi, [APP.0001.0007.0174].

c) To the extent it is contended that the analysis as at 2014/2015 continues to apply, the Commonwealth repeats the points at [753];

d) Even by 2022, less than half of parties to the Paris Agreement had set net zero targets. All of the net zero targets set by G20 countries were for 2050 or later, except Germany (2045) and Mexico (no net zero target) (see [288]). Therefore, the Commonwealth's net zero target was within the range of the targets set by developed international state actors at the time;

e) Similarly, the Paris Agreement seeks to achieve net zero "*in the second half of this century*" (Art 4.1). The Commonwealth's net zero target exceeds this ambition. This was a point Dr Canadell made in cross-examination;[1167]

f) It is clear that the government considered historical global emissions trends and Australia's contribution in setting the net zero by 2050 target in circumstances where these matters were addressed in the *Long Term Emissions Reduction Plan*.[1168]

The 2022 NDC Update (June 2022)

760. As to the 2022 NDC Update in June 2022, adopting the 43% target, the first point is that the 43% target was enacted into the *Climate Change Act 2022* (Cth) (s 10). Thus, in impugning this target, the applicants impugn, not only the policy making of the executive, but also the exercise of the Parliament's legislative power. The case law indicates that the passing of a valid enactment by Parliament can never ground a breach of a duty of care in negligence. As noted above, the Full Court observed in *Bienke v Minister for Primary Industries and Energy*[1169] "*in no case in Australia has a Minister of State or a public authority been held liable for the negligent proclamation of a policy or the making of an invalid rule or regulation or the issue of a plan for which statute makes provision*".

761. Further or in the alternative, the Commonwealth submits that the 2022 NDC Update was within the range of targets a reasonable "*developed international*

1167 T1398.20-34 (Canadell) [TRN.0017.1379].

1168 Australian Government, *Australia's Long-Term Emissions Reduction Plan: A whole-of-economy plan to achieve net zero emissions by 2050,* [EVI.2001.0001.0292] at [0321]-[.0326].

1169 (1996) 63 FCR 567 at 596.

state actor" in its circumstances would adopt at the time, for the following reasons:

a) The target is reasonable in light of the various factors and competing duties and considerations that are required to be balanced in determining an NDC (as to which, see [594]-[600] and [601]-[610] and [716]-[727]);

b) In particular, it is the target that the government took to the electorate and upon which they were elected (see [278]-[281]), indicating support for the target amongst Australians;

c) It is within the range of targets adopted by other developed international state actors at the time (as to which, see [288]);

d) As Prof Meinshausen accepted the setting of a target was a policy decision, for which there was no agreed approach, and indeed the only agreement was that countries would set their own targets, Prof Meinshausen's targets do not constitute a "baseline" above which the Commonwealth's targets ought to have been set (see at [235]-[240]);

e) Even on Prof Meinshausen's analysis, the 43% target is consistent with his grandfathering approach (see at [300]). Although Prof Meinshausen said that it may be inferred the budget he has calculated (though not accepted by the Commonwealth as the budget it was obliged to adopt) will be breached in the near future,[1170] he does not opine that there has been any breach to date;

f) Although the target was not derived purely from BAS (in the sense that it was set after considering numerous factors), the 2022 NDC Update was set having regard to BAS (as to which, see [278]-[282]);

g) In cross-examination, Dr Canadell opined that the 43% target was consistent with the temperature goal of the Paris Agreement, which was "*well below 2°C*" and that Australia was "*doing enough to meet the well below two degrees goal with its nationally determined contributions*" when considering the 43% target plus the net zero 2050 target;[1171]

1170 T1147.1-16 [TRN.0013.1118].

1171 T1398.20-44, 1399.14-19 (J.C.) [TRN.0017.1379].

h) As at 2022, full implementation of conditional and unconditional NDCs globally, plus all net zero commitments, were consistent with a 50% chance of holding global temperature increase to 1.7°C,[1172] indicating that, although NDCs have significantly improved, as at 2022, countries responsible for a majority of GHG emissions had not adopted targets consistent with holding global temperature increase to 1.5°C, as the applicants allege the Commonwealth should have done.

762. Finally, the submissions at [752]-[760] above address the allegations of breach at the points in time contended for by the applicants. However, of course, policies and actions to mitigate climate change do not end in 2022. The Commonwealth continues to work, together with other nations, to pursue efforts to limit temperature increase to 1.5°C above pre-industrial levels in accordance with the aim in the Paris Agreement. This is yet another reason why the Court cannot find that there has been a breach of the Primary Duty: it cannot be assumed that the 1.5°C aim will not be met.

763. In this regard, although the applicants appear to contend at AS [379.4] that the setting of the 43% target is an "ongoing" breach, they do not elaborate the basis for that contention in the submissions. The Commonwealth submits the Court could not find there is any continuing breach in circumstances where the target was reasonable when set and where it cannot be assumed that 1.5°C aim will not be met. The Commonwealth otherwise reserves its right to respond to this submission more fully if and when the applicants fully articulate it (and also reserves its rights in relation to any prejudice arising from the delay in doing so).

Summary

764. For the above reasons, even if (which is denied) the Commonwealth owes the Primary Duty, the applicants cannot establish any breach of that duty. In particular, responding to each of the summary ways in which the Commonwealth is alleged to have breached the Primary Duty at AS [380]:

a) **Failed to set a target based on any accepted carbon budget methodology for the setting of its target:** The meaning of this allegation is unclear. If it means that the Commonwealth failed to set a target based

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[1172] UNEP Emissions Gap Report 2022 at p. 36, [APP.0001.0007.0166].

on one of the three methodologies discussed by Prof Meinshausen, that does not establish breach of the duty of care for the reasons at [753.c)]-753.d)] above. Contrary to AS [324]-[329], the expert evidence does not establish that a reasonable "*developed international state actor*" in the position of the Commonwealth would have adopted one of Prof Meinshausen's targets – his evidence was expressly to the effect that there was no consensus approach.

b) **Failed to set a target based on BAS:** The experts are unanimous that a target cannot be set on BAS alone, and other nations do not typically set their targets this way. To the extent there was any obligation to consider BAS, that was done;

c) **Failed to set a target consistent with the "Global Temperature Limit":** Although the Commonwealth accepts that it is desirable to hold global temperature increase as low as possible, the evidence does not establish a "Global Temperature Limit" of 1.5°C. The Paris Agreement does not establish that limit. Certainly, in 2014-2015, the focus was on 2°C. Even now, the evidence does not establish that 1.5°C is a limit or cliff for the Torres Strait Islands (see at [573]-[579]) above;

d) **Failed to set a target consistent with avoiding the "worst" climate impacts for Torres Strait Islanders:** Again, the meaning of this allegation is unclear. The applicants have not identified what are the "worst" impacts (or the equivalent used in the pleading and elsewhere in the submissions, the "most dangerous" impacts). It is not possible for any target the Commonwealth sets to avoid or materially influence the climate impacts in the Torres Strait (see further below). For the reasons above, the Commonwealth submits that the applicants have not established that the targets it has set have been unreasonable.

E.5 If the Commonwealth breached the duty, it did not cause the applicants' loss or damage (CQs 11 and 12)

E.5.1 Introduction: difficulties with applicants' multi-step approach

765. As explained above, to succeed in their claim of negligence, the applicants and group members must prove that the Commonwealth's alleged breach of the duty of care *caused* their alleged loss or damage.

766. At AS [445], the applicants submit that the Commonwealth's breaches of the Primary Duty have caused, and will cause, the applicants to suffer loss in the following way:

> *445.1 there is a near-linear relationship between increased global emissions of GHGs and global temperature increase;*
>
> *445.2 at relevant timescales, a ton of CO2 or CO2-equivalent GHG contributes to global temperature increase in the same way no matter where in the world, by whom, or when it was emitted;*
>
> *445.3 it is therefore the cumulative effect of global GHG emissions that is the cause of global temperature increase;*
>
> *445.4 the impacts of climate change in the Torres Strait Islands are caused by global temperature increase;*
>
> *445.5 emissions from Australia are therefore a cause of the impacts of climate change in the Torres Strait Islands, in the sense that emissions from Australia have contributed to the cumulative effect of global GHG emissions, and therefore contributed to global temperature increase;*
>
> *445.6 if the Commonwealth had not failed to take the reasonable steps summarised at [444] above, Australia's GHG emissions would have decreased as a result, which in turn would have lessened its causal contribution to the impacts of climate change in the Torres Strait Islands;*
>
> *445.7 the Commonwealth's breach of the Primary Duty of Care therefore was a cause of the impacts of climate change in the Torres Strait Islands.*

767. The Commonwealth disputes that the applicants can establish causation in this way. In particular, the Commonwealth notes that the applicants' contentions only address causation of *the impacts of climate change in the Torres Strait Islands*.

They do not address the proper question, which is whether the Commonwealth's alleged breaches of duty caused the applicants' and group members' claimed *loss or damage*.

768. The Commonwealth anticipates the applicants will say that can be addressed by simply adding an eighth step to the end of AS [445], to the effect that the impacts of climate change in the Torres Strait Islands in turn caused the applicants' and group members' loss. The Commonwealth submits that is not the proper approach because it obscures necessary considerations in the causal inquiry, including whether the loss or damage that has occurred was caused *since the alleged breach* and *by the alleged breach*. The applicants' approach tends to suggest that the Commonwealth may be responsible for any loss or damage from the impacts of climate change in the Torres Strait Islands, perhaps even in the past, due to the fact that the Commonwealth has made a contribution to it at some point. That is, the approach implies that the loss suffered by the applicants and group members from climate change is one indivisible loss, when in fact it is multiple instances of loss or damage since the alleged breaches of duty in the various heads of damages claimed.

769. A further problem with the applicants' approach is that it assumes that all harm caused by an event or incident of a type that *might* be an impact of climate change in the Torres Strait Islands was necessarily caused by climate change. However, even if it be established that an impact of climate change is that some kind of event (say storm surges of a given height) occur with greater frequency, that does not mean it can be assumed that harm caused by a particular storm surge of that height was caused by climate change. There is a science around the attribution of such causal nexus (namely, event attribution)[1173] that the applicants have not addressed at all.

770. For all these reasons, the Commonwealth submits that the applicants' approach to causation in AS [445] is flawed. However, even if the approach were to be seen as valid (and assuming it has an eighth step as above), the Commonwealth submits that it does not establish causation for the reasons addressed below. The Commonwealth also makes the following preliminary comments.

[1173] See T1309.31-1310.9 (Pitman) [TRN.0015.1271]. See also, generally, Lane et al, [APP.0001.0017.0002].

771. *First*, the question whether the Commonwealth "caused" the impacts of climate change in the Torres Strait Islands in the way contended for at AS [445] is a common question. If the applicants cannot establish that the Commonwealth caused the impacts of climate change in that way, then causation cannot be established for *any* member of the class and the claim in relation to the Primary Duty fails for all. However, even if the applicants can establish that the Commonwealth "caused" the impacts of climate change in the Torres Strait Islands in accordance with AS [445], in order to recover damages, they, and each group member who seeks damages, must establish that those impacts in turn caused them loss or damage. That is an individual inquiry, except to the extent that the applicants contend that the group members have "collectively" suffered loss of *Ailan Kastom* as a result of the impacts of climate change in the Torres Strait.

772. Some sub-classes of the group will raise particular issues that may further complicate causation. For example, the impact on Torres Strait Islanders who do not inhabit the Torres Strait Islands will raise particular questions as to remoteness and loss and damage.[1174] There may also be questions as to whether some loss or damage claimed by some group members is caused or substantially caused by factors other than climate change. This may be a particular issue in relation to any claims of impacts on human health. As such issues do not arise on the applicants' claims, the Commonwealth does not further address these issues at this time.

773. *Secondly*, there is no dispute that the applicants cannot establish causation in accordance with the usual "but for" test. The applicants therefore frame their arguments in relation to causation as an allegation of "material contribution" to harm, in the sense it is used in *Bonnington Castings*. However, the applicants make little attempt to explain how the Commonwealth's contribution can be said to be *material*. As can be seen from AS [445], those contentions are directed towards establishing that the Commonwealth's breach of duty made *a contribution* to the impacts of climate change in the Torres Strait Islands. They do not engage at all with the materiality of that contribution. This will be addressed further below.

[1174] See Amended CSR [31].

774. Alternatively, the applicants contend that the Commonwealth can be held liable for materially contributing to the *risk of harm* faced by the applicants.[1175] The Commonwealth notes that the applicants did not advance this contention in the 3FASOC, or give any other notice of it, as they properly should have.[1176] As the submission is just a formal one (see AS [470]) and not elaborated upon in any detail, it is difficult to assess whether the Commonwealth may be prejudiced by the late raising of this issue. In circumstances where the approach is not open to the Court, it is unnecessary to address that issue. However, the Commonwealth reserves its rights for the purposes of any appeal.

775. The Commonwealth submits that the contentions at AS [445] do not establish that the Commonwealth caused the applicants' and group members' loss or damage for the following reasons.

E.5.2 Causal connection between target and GHG emissions not established

776. First, the Commonwealth submits that, for the purposes of tort law, the setting of a GHG emissions target cannot be characterised as making a "contribution" to GHG emissions, and therefore to the impacts of climate change in the Torres Strait Islands.

777. It is no doubt important for all nations, including the Commonwealth, to set ambitious targets. However, the setting by a nation of a GHG emissions target does not directly either cause or reduce GHG emissions. If an overly ambitious target is set, it may not be met. Alternatively, if a lower target is set, it may be exceeded, or it may be changed. Either way, the target does not directly cause (emit) GHG emissions and therefore does not make a direct "contribution" to global temperature increase and any climate impacts caused thereby.[1177]

778. This is illustrated by considering the targets set by the Commonwealth. In 2015, the Commonwealth set a target of a 26-28% reduction in GHG emissions over 2005 levels by 2030. By 2021, the Commonwealth projected it was on track to beat that target by 4-9 percentage points.[1178] In 2022, the Commonwealth revised

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[1175] AS [417].

[1176] See, for example, *Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd* [2004] QSC 457 at [15] [CTH.0005.0001.0578].

[1177] See, in this regard, T890.1-5 (Karoly) [TRN.0009.0844].

[1178] DISER, Australia's emissions projections 2021, [EVI.2002.0004.0223].

its GHG emissions target for 2030 to a 43% reduction over 2005 levels.[1179] In December 2022, the Commonwealth was not projected to achieve that target, with the projections being 32% under a baseline scenario and 40% with additional measures (**WAM**) in 2030.[1180] By December 2023 (the most current projections), those projections had improved to 37% and 42% in 2030 on a point target basis. On an emissions budget basis, the Commonwealth is projected to be 1% above in the baseline scenario and 1% below in the WAM scenario. That is, in the WAM, the target is met when assessed on a budget basis.[1181]

779. This is consistent with Prof Meinshausen's evidence that typically State Parties "*ratchet up*" their targets over time;[1182] and each time they do, it can take some years thereafter for the measures to catch up with those targets: he called this the "*sequential nature of target setting and then putting policies in place to meet those targets*".[1183] Further, Prof Meinshausen explained that countries did not have to take a straight-line path to zero, or their target; what path they take is also a policy decision. For example, a country could exceed a straight-line path in the early years, and offset that with deeper reductions later on.[1184]

780. For these reasons, even if, for example, the applicants establish (which is denied) that the Commonwealth breached the Primary Duty by setting a 26-28% target in 2015, or affirming that target in 2020, it cannot be assumed that the breach led to additional GHG emissions over what would have occurred had it set an alleged "BAS target" and, if so, in what amount. For the purposes of making a point about materiality, the evidence of Dr Canadell *assumes* that it does because he was asked to assume that, if a different target had been adopted, then Australia would have reduced its emissions in a straight line to hit that target.[1185] But the applicants have not established that the Commonwealth was obliged to follow a

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[1179] Section 10 of the *Climate Change Act 2022* (Cth) contemplates the preparation and communication of future NDCs representing an enhancement of Australia's level of ambition (see s10 (4)-(5)).

[1180] DCCEEW, Australia's emissions projections 2022, [EVI.2002.0017.0308]. A "baseline scenario" includes existing federal, state and territory policies and measures, as well as some policies under the Powering Australia Plan, which have been implemented already or where the detailed design is well progressed: see p. 3.

[1181] DCCEEW, Australia's emissions projections 2023, [EVI.2002.0023.0006].

[1182] T1127.5-10 (Meinshausen) TRN.0013.1118.

[1183] T1162.35-1163.7 (Meinshausen) TRN.0013.1118.

[1184] T1142-1143 (Meinshausen) TRN.0013.1118.

[1185] Canadell 1 [EXP.2000.0001.0196] at [.0230-1031].

straight-line path to the target and Prof Meinshausen's evidence is that is not what typically occurs.

781. The applicants do not attempt to grapple with this issue. They have not, for example, adduced any expert evidence as to what measures could have or should have been taken to implement one of Prof Meinshausen's targets or the trajectory the Commonwealth could or should have followed to that target, or to show that the Commonwealth fell short of those measures. They have not even adduced any evidence to demonstrate that it was technically or practically possible to implement one of those targets. Nor do the applicants grapple with the fact that, even if they established that the Commonwealth breached its duty of care in setting the target in 2015 or 2020, that was corrected by the revised target in 2022.

782. Accordingly, causation cannot be made out. In effect, the applicants have failed to establish the sixth step (at AS [445.6]) of their causal chain.

E.5.3 No contribution to harm from process failures

783. The above observations apply with even more force to any alleged failure to take the steps in 3FASOC [82(a)-(c)], that is, to take certain steps in order to set a BAS target. In their submissions, the applicants contend that the Commonwealth failed to follow those steps in setting its GHG emissions reductions targets.[1186] However, process failures alone can have no causal connection to any loss or damage on the part of the applicants and group members. To establish causation of loss or damage, the applicants must, *at the very least* establish that the Commonwealth's targets were lower than they should have been to establish the step at AS [445.6] (though the Commonwealth contends this is insufficient, for the reasons just given in Part E.5.2).

E.5.4 No contribution to harm from increase in GHG emissions

784. Further or in the alternative, even if the applicants were to establish that the alleged breaches of the Primary Duty caused an increase in GHG emissions, that would not constitute a "contribution", for the purposes of tort law, to the impacts of climate change, let alone the loss or damage suffered by the applicants. This is because, as Beach and Wheelahan JJ explained in *Sharma FC* (see at [123]-[124]

1186 See also, AS at [386]-[394].

above) any additional GHG emissions arising from the breach did not contribute directly to the impacts of climate change; rather, at most, they contributed only to temperature increase, which in turn increased the risk of consequential impacts of climate change.[1187]

785. The present is not a case where one is considering whether the respondent's conduct made a direct contribution to the harm suffered, such as exposing a worker to a particle that directly causes a disease (the harm suffered). The allegation in the present case is that the Commonwealth did not set a better GHG emissions reduction target, which led to a greater amount of GHG emissions from Australia than would have been the case if a higher target had been set (and, presumably met), which led to a greater global accumulation of GHG emissions, which led to a rise in global average surface temperatures, which (sometimes through multiple steps) led to an increase prospect of certain impacts (such as inundation events) including in the Torres Strait, which (if the impact actually occurred as a result of that increased prospect and was not an impact that might have occurred anyway, or as a result of other natural causes of the same kinds of events) leads to some kind of damage or loss to the applicants. The "contribution" by the Commonwealth is the choice of regulatory target. Even if the "contribution" can extend to any additional GHG emissions resulting from the lower target, it is not a contribution to the harm. It is a contribution to something that causes something that increases the chances of something which might cause harm. Thus, the reasoning in *Sharma FC* is apt.

786. The applicants contend that the statements of the Full Court in *Sharma FC* were "*passing comments*" and do "*not fully grapple*" with the causation issue[1188] and therefore should not be followed.[1189] That submission should be rejected for several reasons.

787. *First*, as is evident from the extracts at [122]-[124], the Full Court's analysis was well considered and much more than "*passing comments*". While *obiter dicta* does not bind this Court, the High Court has made clear that first instance judges should give great weight to an intermediate appellate court's seriously considered

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[1187] See especially, *Sharma FC* [APP.0001.0020.0101] at [436]-[437] (Beach J), [882] (Wheelahan J). This is the position "at most" because for some impacts of climate change there may be additional steps in any causal chain.

[1188] AS at [430].

[1189] See generally AS at [430]-[439].

dicta where that dicta concerns the common law of Australia or uniform national legislation.[1190] Here, as the Full Court's analysis in *Sharma FC* concerned the development of the principles of causation applying to the tort of negligence (including as amended by the Civil Liability Acts), this Court should give great weight to the Full Court's analysis.

788. *Secondly*, the distinction that the applicants attempt to draw at AS [430] is inapt. Contrary to the applicants' submission, the evidence in *Bonnington Castings* was that "*pneumoconiosis is caused by a gradual accumulation in the lungs of minute particles of silica over a period of years*".[1191] In other words, the evidence was that the silica particles directly did the damage to the applicant's lungs; there were no intervening steps. Conversely, here, the loss or damage alleged to be suffered by the applicants and group members (loss of *Ailan Kastom* and property damage, and potentially, for some group members, personal injury), as noted above, is several steps removed from the Commonwealth's actions (even on the applicants' case).

789. *Thirdly*, as to AS [432], it may be accepted that no harm had occurred in *Sharma FC* so the focus was on a risk of harm. However, it is clear that each of the judges was making comments on causation, though in the context of reasonable foreseeability of causation of harm.[1192] It is also to be noted that Beach J considered, not only the "tipping points" analysis (which the applicants accept is "*more analogous to the Fairchild line of cases*",[1193] and do not appear to rely on in this case: see AS [445]), but also the "*non-tipping point causation thesis dealing with the linear correlation between increasing CO2 emissions and temperature*", being the thesis relied on by the applicants in this case. His Honour

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1190 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 151-152 [135] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ [CTH.0005.0001.0134]; *Hill v Zuda Pty Ltd* (2022) 275 CLR 24 at [25]-[26] per curiam [CTH.0005.0001.0219]. See also *Massoud v Nationwide News Pty Ltd* (2022) 109 NSWLR 468 per Leeming JA at [40], Mitchelmore JA and Simpson AJA agreeing at [293] and [294], respectively [CTH.0005.0001.0291]; *Robinson v BMF Pty Ltd (in liq) (No 2)* [2022] FCA 1191 at [189] per Mortimer J (as her Honour then was) [CTH.0005.0001.0470].

1191 *Bonnington Castings v Wardlaw* [1956] AC 613 at 621 (Lord Reid), [APP.0001.0020.0023]. At footnote 856, the applicants cite Lord Reid at 613, 617-618 to the contrary, but those passages are not part of Lord Reid's judgment, nor do they support the matters contended for.

1192 *Minister for the Environment v Sharma* (2022) 291 FCR 311 at [327] (Allsop CJ), [433] (Beach J), clearly hypothesising a future scenario in which "*personal injury to members of the claimant class or some of them may occur*", [882] (Wheelahan J), [APP.0001.0020.0100].

1193 See AS at [445], [469].

concluded that both theses were contentions as to contribution to risk, rather than harm.[1194]

790. *Fourthly*, the extracts from cases and submissions at AS [434]-[437] do not assist. Here, there is no dispute that the accumulation of GHG emissions causes global temperature increase; no inference is required to make that connection. The issue is that, that connection being accepted, it is only one step in a causal chain with multiple steps which means that any breach by the Commonwealth's could, at most, be said only to increase the risk of harm, rather than contribute directly to it.

791. This is another reason why the steps at AS [445.5-6] are not made out.

E.5.5 Link between avoided GHG emissions and impacts in the Torres Strait Islands not established

792. In addition to the reasons in *Sharma FC*, there is a further reason why the Commonwealth's alleged breaches of duty cannot be said, for the purposes of tort law, to have contributed to the applicants' and group members' harm.

793. Prof Pitman's evidence is that it is impossible to know whether the very small incremental contribution to global temperature increase referable to the Commonwealth's alleged breaches had any impact at all on the Torres Strait Islands.[1195] This is because (as agreed by Prof Karoly) the effects of climate change vary geographically so, although it may be accepted that any additional GHG emissions caused by the Commonwealth's alleged breach incrementally contributed to global temperature increase, it cannot be known if that tiny incremental increase contributed to the manifestation of climate impacts in a particular region, such as the Torres Strait Islands. As Prof Pitman said, just because one can calculate mathematically that an amount of additional emissions had an incremental impact on global temperature increase, it "*doesn't logically follow that everywhere on the planet necessarily sees an impact from that*".[1196] This is consistent with the IPCC, which reports that "*[r]egional climate change is subject to the complex interplay between multiple external forcings and internal*

1194 *Sharma FC* at [437].

1195 Expert Report of Professor Andrew Pitman (**Pitman**) at [41]; T1330.40-41 (Pitman) [TRN.0015.1271].

1196 T1330.40-41 (Pitman) [TRN.0015.1271].

variability".[1197] This makes it difficult to conclude that any incremental GHG emissions caused by the Commonwealth's alleged breaches of duty contributed to the *harm alleged to have been suffered by the applicants and group members*, even if it is accepted that those emissions contributed to average global temperature increase.

794. The applicants have two responses to this.

795. *First*, at AS [458]-[459], the applicants contend this issue can be overcome by the submission that, just because science cannot establish what the effect of any incremental additional GHG emissions caused by any breach of duty by the Commonwealth was, that cannot be used to justify an assumption that they had no effect. However, as noted at [325] above, Prof Pitman's evidence was the scientific method did not justify an assumption that there *is* an effect. The numbers are too small to know.

796. In any case, even if it is assumed the Commonwealth's alleged breaches had an incremental effect on climate impacts across the world, the tiny scale of the contribution does not allow the Court to assume that there was any incremental effect on the impacts of climate change *in the Torres Strait Islands*, much less that the breaches contributed to the ultimate harm suffered by the applicants and group members from any climate impacts experienced in the Torres Strait since the alleged breaches of duty.

797. *Secondly*, at AS [460], the applicants contend that "*seeking to identify the impact of Australia's contributions to global GHG emissions in order to answer the binary question of whether Australia's emissions in excess of a certain amount caused a particular set of impacts asks the wrong question"* because "*[t]he cause of the impacts of climate change is the aggregate of GHG emissions across the globe since the pre-industrial era*". As the Commonwealth understands it, the applicants are making the point that, where the harm is caused by multiple causes, the respondent's actions being one material contributor, the applicant does not have to prove that the respondent's actions had a divisible impact that can be quantified; it is enough to prove that the respondent's actions materially contributed to the overall harm. Further, they say, if the applicant can do this,

[1197] IPCC AR6 WGI, Technical Summary at [4.2.3], p 117 [APP.0001.0007.0112].

they succeed, even if the precise impact of the respondent's contribution cannot be quantified.

798. It may be accepted that, where multiple respondents make direct, material contributions to indivisible harm suffered by applicants, it is not necessary to prove what quantum of the harm is referable to each contribution. A direct, material contribution to indivisible harm being proved, a respondent is liable for the whole loss or damage, subject to issues of apportionment and contribution and the like. If the harm is divisible, the respondent is only liable for its contribution.[1198]

799. However, the applicants have not proved that the Commonwealth contributed to a single indivisible loss in this case. Here, the *harm* alleged to have been suffered by the applicants and group members is loss of fulfilment of *Ailan Kastom* and instances of property damage (and, if relevant, personal injury) said to have been caused by the Commonwealth's alleged breaches of duty. Of course, such loss or damage is restricted to that suffered *after* the alleged breaches of duty because it is a physical impossibility for the Commonwealth's alleged breaches to contribute to harm suffered *before* the breaches. Further, each of the instances of property damage (or personal injury) in respect of which damages are claimed must be considered separately because they are not a monolith. Moreover, the loss of fulfilment of *Ailan Kastom* is also not itself a monolith (so far as the concept can be understood). Aspects of it may be lost over time and as a result of different events. If it were possible to get compensation for this (which is denied), it would be necessary for there to be evidence as to which aspects were harmed, by what and when and in that way determine whether any increased GHG emissions following the Commonwealth's alleged breaches of its duties had a sufficient causal connection. The applicants do not attempt this.

800. For these reasons, the submission at AS [460], though it may be apt in other circumstances, is not apt here.

[1198] See, for example, *I&L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at [69], [100]-[102], [112] (McHugh J) [CTH.0008.0001.0023]; *Patrick Operations Pty Ltd v Comcare* (2006) 68 NSWLR 131 at [22]-[23] (Giles JA, Ipp and Tobias JJA agreeing) [CTH.0008.0001.0128]; *Allianz Australia Insurance Ltd v Pomfret* (2015) 88 NSWLR 192 at [48]-[50], [58], [82] (Meagher JA, Beazley P, McColl and MacFarlan JJA agreeing) [CTH.0008.0001.0001]. See also, *Sienkiewicz v Greif (UK) Ltd* [2011] 2 AC 229 at [90] (Lord Phillips of Worth Matravers PSC) [CTH.0008.0001.0167].

801. Further, the Commonwealth submits that any breach of the Primary Duty did not make any direct contribution to the impacts of climate change in the Torres Strait Islands, let alone (which is more critical) any loss or damage suffered by the applicants and the group members therefrom. The submission at AS [460] underscores why the judges of the Full Court were correct to conceive the causal theory in *Sharma FC* as a contribution to risk rather than a direct contribution to the end harm suffered by the applicants. It also shows the dangers of the applicants' focus only on the Commonwealth's alleged contribution to the impacts of climate change in the Torres Strait Islands, rather than its contribution to *loss or damage*, as outlined at [768] above.

802. There is a further, related, issue, which makes it difficult to link any incremental increase in GHG emissions from the Commonwealth's alleged breaches of duty to the impacts of climate change in the Torres Strait Islands since 2014, namely, the lag between GHG emissions and climate impacts. In particular, the evidence is that sea level rise is delayed relative to changes in global temperature.[1199] The applicants have not established that any harm arising from sea level rise is connected to conduct occurring after 2014.

E.5.6 Any contribution was not material

803. Further or in the alternative, even if, contrary to the submissions above, any breaches of the Primary Duty could be said to make a "contribution" to harm, that contribution was not "material" for the purposes of tort law.

804. Global action is required in order to have a meaningful impact on climate change. As set out at [242]-[244] above, Australia's GHG emissions since 2014 have comprised only a very small proportion (about 1%) of global emissions. They comprise an even smaller proportion of all GHG emissions globally since around 1850, the accumulation of which have caused climate change.

805. Dr Canadell's evidence is to the effect that, if Australia had adopted Prof Meinshausen's contraction & convergence target in 2015, and it is assumed emissions would have reduced thereafter on a straight line basis to the target, a

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[1199] Expert Report by Professor David Karoly (**Karoly** 1) at [105], [APP.0001.0003.0093]; Expert Report of John Church (**Church**) at [24], [99], [APP.0001.0009.0002].

best estimate of 0.000218°C of global temperature increase would have been avoided (with an uncertainty range of 0.00013-0.00030°C).[1200]

806. It does not appear to be controversial that that is a temperature increase that cannot be measured by scientific instruments, let alone discerned by people.[1201] Further, as already noted, Prof Pitman's evidence is to the effect that it cannot be assumed that such a contribution to global temperature increase caused (or increased the frequency or severity of) any particular impact in the Torres Strait Islands.[1202] But even if it could be assumed, adopting the applicants' "linear" approach, the effect (if any) on the impacts of climate change in the Torres Strait Islands would likewise be miniscule. It is not a "material" contribution for the purposes of tort law.

807. It is Dr Canadell's figures in relation to Prof Meinshausen's contraction & convergence target that must be used when considering whether any breach resulted in a material contribution. Of course, for the reasons already articulated, the Commonwealth disputes that it was obliged to use any of the three example methods used by Prof Meinshausen in setting targets, but even assuming it was, it cannot be held to the highest standard where Prof Meinshausen's evidence is there is no consensus on the approach. In any case, the same observations apply to the slightly larger figures for the "equality" approach.[1203] A contribution of 0.0012°C is likewise not "material" for the purposes of tort law. As noted above, Prof Pitman's unchallenged evidence was that "*[a] value of 0.010°C and very probably 0.10°C would be equally impossible to link to a change in any climate variable over the Torres Strait. This indicates that if Canadell's calculations were incorrect by a factor of 100 and very probably a factor of 1000, my assessment… would remain the same*".[1204]

808. As noted above, the applicants do not spend much time explaining why the Commonwealth's alleged contribution to harm should be considered a material

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[1200] Canadell 2, at p. 2, [EXP.2000.0004.0001].

[1201] See Professor Pitman Expert Report (**Pitman**), at [30] and footnote 56, [EXP.2000.0001.0286].

[1202] Pitman at [30], [44], [45] [EXP.2000.0001.0286]; T1389.36-1390.7-12 (Canadell) [TRN.0017.1379].

[1203] See Canadell 2 at p. 3, [EXP.2000.0004.0001] at [0.0012°C], with uncertainty range of [0.00073-0.0016°C].

[1204] Pitman at [45], [EXP.2000.0001.0286].

one. It is not addressed at all in AS [445]. Elsewhere in the submissions, the applicants appear to make three points.

809. *First*, at AS [461]-[463], the applicants submit that, if Australia's contribution is not considered material, then no contribution from any nation could be considered material, and "*the upshot would be that no nation could bear responsibility for climate change*". However, that does not follow. The Court is not asked to determine *where exactly* the line is that makes a contribution material; the Court need only decide whether or not the Commonwealth's alleged contribution is material. If it is determined not to be so, that does not necessarily preclude a finding that a significantly larger contribution is in fact material in another factual matrix.

810. Further, a finding that the Commonwealth's contribution was not material in this case does not have the effect that "*no nation could bear responsibility for climate change*". Rather, a finding that there is no causation has the effect that the Commonwealth is not legally responsible *in tort* to a subset of the Australian population for breach of a duty of care when making policy decisions about the national response to climate change. The Commonwealth is still responsible to the electorate for those policy decisions and, if the electorate disagrees with them, then the political processes provide remedies, namely, lobbying for different policies or electing a different government.

811. *Secondly*, in oral opening, the applicants submitted that *every* contribution of GHG emissions around the world "*no matter how minor*" contributes to global warming and, "*in circumstances where the harm from CO2 causing temperature increase is catastrophic to group members*", every contribution must be regarded as a material contribution.[1205] This appears to be a submission that, because the harm is severe, a contribution should be considered material even if it is miniscule and in fact not material.

812. That submission must be rejected. The concept of a "material" contribution must import some quantitative minimum standard. That standard cannot be met by such a negligible contribution to the harm as is the case here. To accept that the Commonwealth's "contribution" in this case exceeds that bar would render the requirement for a *material* contribution meaningless. It must be remembered that

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[1205] T18.38-43, 13-15 (Applicants' oral opening) [APP.0001.0012.0004].

the aim of the causal inquiry in negligence is to determine those persons to whom it is appropriate to attribute legal responsibility for the harm suffered by the applicant (see at [98] above). This has been described as the search for the "direct" or "proximate" or "real effective" cause of the applicant's harm, though use of those terms is now out of favour.[1206] Any breach by the Commonwealth cannot be described as such.

813. Further, the test at common law is a commonsense one: whether, as a matter of commonsense, the respondent's breach of duty was a cause of the harm. That also cannot be said of any breach of duty by the Commonwealth. Whether the Commonwealth breached the Primary Duty or not, the applicants and group members would be in the same position, as the Commonwealth's incremental contribution to GHG emissions has no discernible effect on the impacts of climate change they are experiencing. Therefore, as a matter of commonsense, the Commonwealth's alleged breaches of the Primary Duty are not a cause of any harm they are suffering as a result of those impacts.

814. This may be contrasted with *Bonnington Castings*, where there were only two contributors and the swing hammers, though perhaps not the largest contributor to the plaintiff's lung disease, had significantly contributed to it and may indeed have been sufficient to cause the lung disease in the absence of the other source[1207] (though the state of medical science did not enable that to be established on the balance of probabilities). That is a situation far removed from the miniscule contribution here. The Commonwealth's contribution is more analogous to Mr Booth's three brief childhood exposures to asbestos, which the High Court held were "*dwarfed*" by his occupational exposure to asbestos as a motor mechanic.[1208]

815. *Thirdly*, at AS [465], the applicants contend that "*the degree of impact caused by the Commonwealth's breaches is increased because of the negative influence of the Commonwealth's emissions ambition of [presumably, on] other countries*". In support of this submission, the applicants rely on Ms Pearce's agreement in cross-

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1206 See *March v Stramare* at 509-510 (Mason CJ).

1207 *Bonnington Castings v Wardlaw* [1956] AC 613 at 622 (Viscount Simonds agreeing, 623-4 (Lord Tucker), 626 (Lord Keith of Avonholm), [APP.0001.0020.0023].

1208 *Amaca Pty Ltd v Booth* (2011) 246 CLR 36 at [9]-[10] (French CJ), [APP.0001.0020.0008].

examination to statements to the effect that that Australia's actions on climate change could influence other nations.

816. It may be accepted that the actions of one or more nations on climate change may influence others. However, the applicants have not adduced evidence to establish how Australia's influence could or would have unfolded in the complex bilateral and multilateral forums in which Australia is engaged on issues relating to climate change, nor the scope or quantum of any impact Australia's actions may have on other nations' targets, or, more relevantly, on GHG emissions. This possibility cannot therefore convert a *de minimis* impact on global warming into a material one.

817. For completeness, the Commonwealth notes that Ms Pearce's evidence summarised at AS [465.3] was in relation to Australia "*[d]rawing back from its international commitments*". The Commonwealth submits that is not an accurate characterisation of its actions in dispute in this case. Although the applicants contend the Commonwealth should have done more, there can be no question that over time the Commonwealth has increased its international commitments and taken more ambitious action on climate change.

E.5.7 No causation by material increase in risk

818. At AS [438], the applicants recognise that the *Fairchild* principle does not form part of Australian law. Moreover, the Commonwealth understands from the "formal" nature of their submission at AS [470] the applicants accept that it is not open for this Court to apply that principle in this case.

819. Given the formal nature of the submission, it is not necessary to address it in any detail. However, in short, the Commonwealth submits it is not appropriate for Australian law to adopt the *Fairchild* principle in the circumstances of this case. Further, even if that principle were adopted, for the reasons at [803]-[817], any incremental increase in risk that resulted from the Commonwealth's alleged breaches of the Primary Duty was not material. The Commonwealth otherwise reserves its position on the issue.

E.5.8 Remoteness

820. Further or in the alternative to the above submissions, the Commonwealth contends that claimed loss or damage is too remote. In this regard, the Commonwealth repeats its submissions at [708]-[711] above. To the extent those submissions are not accepted in relation to the tests of reasonable foreseeability at the duty or breach stage, the Commonwealth submits they should be accepted at this stage, given the narrower test for the purposes of causation (see at [118] above). In this regard, the Commonwealth notes that the extracts from Allsop CJ's judgment in *Sharma FC* at AS [483] do not directly apply here as they were made in the context of duty not causation.

821. Moreover, a number of impacts identified by the applicants are too remote to be causally related to any conduct about which the applicants complain. For example, Dr Selvey gives evidence to the effect that instances of ciguatera fish poisoning may increase with warm weather in circumstances where such poisoning has not been documented in the Torres Strait.[1209] Similarly, she gives evidence about gastrointestinal disease arising from untreated sewerage which appears to assume a number of intermediate causal steps.[1210]

E.5.9 Other considerations relevant to scope of liability

822. Further or in the alternative, the Commonwealth submits that it is not appropriate for liability to extend to the Commonwealth for the following reasons. These submissions also respond to matters raised by the applicants at AS [474]-[485]

823. *First*, the Commonwealth repeats its submissions in Part E.3 in relation to the duty of care. In particular, the Commonwealth submits it is not appropriate for the Commonwealth's liability to extend to the loss and damage claimed here for the three reasons given by Allsop CJ in *Sharma FC*, addressed at [44] (contra. AS [476]).

824. *Secondly*, the Commonwealth submits that a finding that the Commonwealth caused the applicants' and group members' loss and damage claimed here is inconsistent with the overarching test, and the underlying purpose of, the causal inquiry, essentially for the reasons at [812]-[813]. It would hold the

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1209 Selvey, [APP.0001.0003.0094] at [89].
1210 Selvey, [APP.0001.0003.0094] at [93].

Commonwealth wholly responsible for harm that it could not be said to have "caused" on any commonsense notion, and could not stop or control. It would also hold the Commonwealth solely responsible for harm that has been contributed to by almost every single person, company and nation in the world.

825. *Thirdly*, accepting that such a relatively "tiny" contribution to harm or risk constitutes a "material" contribution would dramatically change the test for causation and dramatically expand the scope of liability in negligence. It would essentially remove any *de minimis* limitation, and mean that any contribution to harm, whether or not material, is sufficient to establish causation. There is no principled reason why this approach should be restricted to cases relating to the setting of GHG emissions reductions targets. For reasons of consistency and coherency in the law, it must apply broadly. Thus, it will result in the expansion of liability in negligence, beyond those who have control over and have caused the risk on a commonsense test.

826. *Fourthly*, at AS [477], the applicants contend that liability should be imposed because Australia has made a "*disproportionate*" contribution to climate change, in essence, because it has had higher GHG emissions during the relevant period than warranted by its population. Even if true, that does not convert an otherwise immaterial contribution into a material one, or provide a justification for departing from the requirement that there be a *material* contribution. The Commonwealth's GHG emissions were too small for the alleged breaches of duty to have any effect on the loss or damage suffered by the applicants and group members; the fact that they could have been even smaller does not change this. In any case, the Commonwealth submits that Australia's contribution during the period was not "disproportionate" when regard is had to the nature of its economy and national circumstances.[1211] Further, the Commonwealth notes that, on a per capita basis, the emissions reductions required by the 2022 NDC Update are stronger than is required by the commitments of many G20 countries, including Argentina, Brazil, China, the EU and Japan, and higher than the G20 average.[1212]

[1211] See, for example, 2015 INDC, [EVI.2001.0001.1958] at [.1958]; 2020 NDC Update, [EVI.2001.0001.0980] at [.0986]; 2021 NDC Update, [EVI.2001.0001.0248] at [.0262]; 2022 NDC Update, [EVI.2001.0001.0272] at [.0283].

[1212] See UNEP Emissions Gap Report 2022 at Table 3.2, pp. 19-20 [APP.0001.0007.0166]. Australia's unconditional NDC requires a 44% reduction on per capita emissions as at 2015. The G20 average is a 7% reduction. Argentina is -11%, Brazil is -9%, China is +18%, EU27 is -39% and Japan is -35%.

827. *Fifthly*, as to AS [478], the applicants submit that recognising causation here "*accords with basic notions of equity*" because "*if other countries exceeded their budgets in the same manner, then the prospects of remaining within the global budget would disappear*". The applicants have not adduced any evidence as to the extent to which other countries have "*exceeded their budgets*" or not, and to what extent, and what effect that would have on the global budget, so there is no evidentiary basis for this submission. In this regard, Prof Meinshausen's evidence in Table 1 of his supplementary report[1213] is not apt because it assumes that all countries were obliged to adopt the same target as Australia, which he confirmed in cross-examination was "*absolutely not*" the case.[1214]

828. *Sixthly*, as to AS [479], the Commonwealth repeats its submissions at [622]-[623] above regarding the relevance of treaties to duties of care in tort.

829. *Finally*, at AS [480], the applicants contend that imposing responsibility on the Commonwealth would be "*consistent with foreign decisions*", citing decisions from the Netherlands, Belgium and France. The relevance of foreign decisions has been addressed at [624]-[656] above. The Commonwealth submits that those cases, decided in different legal contexts (specifically, civil law systems, with differing tests for causation) and in different factual matrices, are not relevant in determining the issues before the Court. The Commonwealth also notes that there are a number of cases in which tort or similar claims in relation to climate change have not succeeded.[1215]

E.5.10 Future impacts

830. The submissions above address the applicants' contention (at 3FASOC [86], and the subject of CQ11) that the Commonwealth's breaches of duty *have caused* the

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[1213] Meinshausen 2, Table 1, pp. 8-9, [APP.0001.0015.0010].

[1214] T1156.29-46 [TRN.0013.1118].

[1215] See, e.g. *Native Village of Kivalina v Exxon Mobil Corp* 696 F 3d 849 (9th Cir 2012) [CTH.0004.0001.1164]; *Connecticut v American Electric Power Co*, 564 US 410 (2011) [CTH.0004.0001.0062]; *City of New York v BP P. L.C.* 325 F Supp 466 (SD NY, 19 July 2018) ; *Friends of the Earth v. Canada (Governor in Council)*, 2008 FC 1183 (appeal to Federal Court of Appeal dismissed, 2009 FCA 297; application for leave to appeal to Supreme Court dismissed, No. 33469) [CTH.0004.0001.0220]; *Greenpeace Norway v Norway*, Supreme Court of Norway (18-060499ASD-BORG/03, 2020) [CTH.0004.0001.0360]; *Friends of the Irish Environment v Fingal County Council* [2017] IEHC 695 [CTH.0004.0001.0260]; *Greenpeace Netherlands v State of Netherlands* (C/09/600364) [CTH.0004.0001.0352]; *Mathur v His Majesty the King in Right of Ontario* (2023) ONSC 2316 [CTH.0004.0001.1085].

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loss and damage suffered by Torres Strait Islanders as a result of climate change. The applicants also contend that the Commonwealth's ongoing breach of duty will continue to cause "*an increase in GHG emissions; and/or a material contribution to the Impacts of Climate Change in the Torres Strait Islands*" (at 3FASOC [87], the subject of CQ12).

831. The applicants have not given any separate consideration to 3FASOC [87] or CQ12 in their submissions. The Commonwealth therefore reserves its right to respond to that allegation further once the applicants' position (if they have one) is made clear, and also reserves its position in relation to any prejudice arising from the late disclosure of the applicants' case.

832. However, at a high level, in response to that allegation, the Commonwealth repeats the submissions above, and also in Part E.6 in relation to loss of fulfilment of *Ailan Kastom*. The Commonwealth submits that the Court could not be satisfied that any ongoing breach of the Primary Duty would "*continue to be a cause*" of Torres Strait Islanders collectively the loss or damage claimed in circumstances where the applicants have not established that the Commonwealth's contributions were "*a cause*" of any loss to date. Further, it cannot be known with any certainty what the Commonwealth's "contribution" will be in the future. The Commonwealth may change the target, or other countries may change their NDCs, increasing or lowering the relative "contribution" of the GHG emissions from the Commonwealth's alleged continuing breaches. For these reasons, the Commonwealth submits there is no basis on which the Court can find that any alleged breaches of duty by the Commonwealth *will make* a material contribution to any future loss or damage.

E.6 The applicants are not entitled to the relief sought (CQs 16 and 17)

833. In the event that the Court reached the question of relief, it could not conclude that the applicants had suffered any loss or damage. While the applicants advance claims for damages in relation to alleged property damage, injury and disease (AS [529]-[533]), they have not led evidence to establish their interests in relevant property, the extent of the damage to property arising from relevant acts and omissions, the existence, nature and extent of any injury or disease, or the quantum of compensation that they allege ought to be awarded.

834. There are also two common questions that deal with relief. The first asks whether loss of fulfilment of *Ailan Kastom*, arising from damage to or degradation of the land and marine environment of the Torres Strait Islands, is compensable under the law of negligence. The second asks whether the declaratory and injunctive relief sought by the applicants can be granted and, if so, whether it should be granted. For the reasons developed below, each of those questions should be answered "*No*".

E.6.1 No evidence of property damage

835. The applicants have not led evidence to establish that they have suffered property damage as a result of the alleged acts and omissions of the Commonwealth and there are no common questions dealing with the issue of property damage.

836. At AS [530]-[531], the applicants summarise the evidence in the proceedings concerning property damage. To the extent that evidence concerns persons other than the applicants, it is not necessary for the Court to make findings with respect to the alleged damage because there is no common question dealing with property damage. In the event that the Court were minded to make findings despite the absence of common questions relating to property damage, the Commonwealth submits that the evidence does not establish that any relevant property damage was caused by any breach of duty on the part of the Commonwealth.

837. In circumstances where the entirety of the applicants' cases are to be determined at the initial hearing in the usual manner,[1216] the Court would be required to make findings with respect to the property damage alleged by the applicants in the event that it reached the question of relief.

838. In relation to Mr Pabai, the evidence of alleged property damage is summarised at AS [531]. As is evident from Mr Pabai's affidavit evidence, the alleged flooding of his downstairs toilet and laundry and the rusting of poles supporting his house occurred in 2007[1217] — 8 years before the Paris Agreement and communication of the 2015 NDC and well outside of applicable limitation periods. The evidence concerning Mr Pabai's garden and his family garden also suggests that any loss or damage arose before the acts and omissions at issue in the proceedings. As Mr

[1216] Orders of 4 March 2024, Order 1(a).
[1217] Pabai Pabai Affidavit at [169]-[170], [APP.0001.0009.0008] at [.0044].

Pabai notes "*in 2013 or 2014 soil tests were done about all over the island, so that we could try and relocate the gardens, but all of the tests said the soil is too salty*".[1218] Insofar as a claim is advanced in relation to Mr Pabai's house, campsite and the structure on the campsite,[1219] there is no evidence to establish ownership of the relevant property or the nature or extent of Mr Pabai's legal interest in it. As noted below at [843]-[845], the applicants have disavowed any reliance on native title rights including those held, or managed, by relevant RNTBCs over land and associated fixtures.

839. In relation to Mr Kabai, the evidence of alleged property damage is summarised at AS [532]. As is evident from Mr Kabai's affidavit evidence, the flooding that allegedly damaged his appliances (being tools and a washing machine) occurred in 2012[1220] — 3 years before the Paris Agreement and communication of the 2015 NDC. Mr Kabai's washing machine and tools were apparently also "*affected*" by a flood in 2020, though the evidence does not establish the nature of the relevant effects or the tools that were said to be affected.[1221] The evidence suggests that this particular damage was associated with a king tide. For reasons outlined above in Part E.5, the Commonwealth submits that any such damage could not be causally linked to any alleged act or omission in these proceedings. In any case, no attempt has been made to adduce evidence to identify with any precision the property that was damaged or to quantify the alleged loss, and no sum of damages could be awarded with respect to it.

E.6.2 No evidence of injury, disease or death

840. As the applicants acknowledge at AS [533], they have not led evidence to establish that they have suffered any injury, disease (or death). There are no common questions dealing with those issues. As a result, the Court can conclude that neither of the applicants is entitled to any award in respect of the damages claimed at 3FASOC [86](d).

1218 Pabai Pabai Affidavit at [121], [APP.0001.0009.0008] at [.0031].
1219 Pabai Pabai Affidavit at [125]-[141], [APP.0001.0009.0008] at [.0032]-[.0037].
1220 Kabai Affidavit at [131] [APP.0001.0009.0005] at [.0027].
1221 Kabai Affidavit at [131], [APP.0001.0009.0005] at [.0030].

E.6.3 Loss of fulfilment of *Ailan Kastom* not compensable

841. Contrary to the contention at AS [513]-[528], loss of fulfilment of *Ailan Kastom* is not compensable under the law of negligence. As the applicants' submissions regarding the "*trend*" or "*trajectory*" of tort law implicitly acknowledge (AS [521], [528]), no Court has taken the step of awarding damages simply for loss of fulfilment of traditional customs. Recognition of such a head of damage would be contrary to principle.

The applicants' case on Ailan Kastom

842. Before addressing the principles that are applicable to the resolution of this aspect of the case, and the arguments advanced at AS [513]-[528], it is important to identify clearly the case that was advanced by the applicants on loss of fulfilment of *Ailan Kastom*.

843. The pleading initially contained a number of allegations concerning rights held by the applicants and Group Members under the NTA and at common law,[1222] and alleged that loss and damage suffered by the applicants and group members included loss of native title rights.[1223] However, as noted above at [139], the group member definition has never encompassed any RNTBCs that hold, or manage, relevant native title rights and interests and, self-evidently, neither of the applicants is an RNTBC.

844. Prior to the hearing in November 2023, an issue arose as to whether the native title aspects of the claim could proceed as then pleaded by the applicants following correspondence from Gur A Baradharaw Kod Sea and Land Council Torres Strait Islander Corporation (**GBK**), which is the peak body for the RNTBCs in the Torres Strait.[1224] As a result of that issue having been raised, shortly prior to the resumption of the hearing , the applicant sought to "*take off the table their claims in relation to native title rights*" and confirmed that their "*claims for property damage and loss of fulfilment of Ailan Kastom … do not*

[1222] 3FASOC at [3], [4], [6](c), [54](c), [62A], [67A], [81A](c), [82A](c)(ii), [84] and [85], [APP.0001.0015.0003].

[1223] 3FASOC at [86](c), [APP.0001.0015.0003].

[1224] Transcript of CMH on 9 October 2023, T3.27-.29, T11.13-.30 [CRT.2000.0005.0005].

involve any claim for loss of native title rights".[1225] This was formalised by the filing of the 3FASOC by the applicants on 3 November 2023.

845. This position was confirmed during the November hearing.[1226] The applicants made clear that they were "*not making a claim for loss of native title … in respect of any group member*".[1227] They did, however, clarify that "*the associated cultural practices … and the family connection*" were said to be compensable.[1228] It was then said that the applicants "*broadly view the loss of [Ailan Kastom] as a head of damage, not as arising from or connected to the native title right, not dependent on that native title right*".[1229] The 3FASOC that was filed on 3 November 2023 maintained some of the references to native title rights,[1230] but struck out various paragraphs that related to the claim for loss and damage associated with native title rights,[1231] in addition to paragraphs that had been deleted in an earlier iteration of the pleading.[1232]

846. The developments summarised above at [842]-[845] are relevant in assessing the applicants' claims with respect to the alleged loss of fulfilment of *Ailan Kastom*. The Court in this proceeding is not required to determine the issue of whether loss, diminution, impairment of, or other effect, on native title or native title rights and interests as defined in s 223(1) of the NTA is compensable under the law of negligence (which would raise a different set of complexities). It is instead dealing with a claim regarding the fulfilment of traditional customs or culture *per se*.

The concept of "loss of fulfilment of Ailan Kastom"

847. The applicants do not explain with any precision what the concept of "*loss of fulfilment of Ailan Kastom*" entails or *how* the law attaches significance to the alleged loss in question.

1225 Transcript of CMH on 30 October 2023, T6.32-T7.7 and T11.46 [CRT.2000.0005.0005].
1226 T1523.12-T1527.27 [TRN.0018.1455]; T1538.3-37, T1544.3-.20 (Lloyd) [TRN.0019.1530].
1227 T1525.46-T1526.5 [TRN.0018.1455].
1228 T1526.29-.39 [TRN.0018.1455].
1229 T1544.16-.18 [TRN.0019.1530].
1230 3FASOC at [3], [4], [54](c), [62A] and [67A] at [APP.0001.0015.0003].
1231 3FASOC at [54](c) (definition and particulars), [81A](c), [82A](c)(ii) and [86](c), [APP.0001.0015.0003].
1232 3FASOC at [6](c), [84] and [85] [APP.0001.0015.0003.

848. The applicants plead that Torres Strait Islanders include persons who have a distinctive customary culture, known as *Ailan Kastom,* which creates a unique spiritual and physical connection with the Torres Strait Islands and surrounding waters.[1233] It is alleged that:[1234]

> Ailan Kastom *is the body of customs, traditions, observances and beliefs of Torres Strait Islanders generally, or of a particular community or group of Torres Strait Islanders. It includes, among other things:*
>
> *(a) connection to the marine and terrestrial environment, including as part of cultural ceremony;*
>
> *(b) participating in cultural ceremony;*
>
> *(c) use of plants and animals for food, medicine and cultural ceremony;*
>
> *(d) burying Torres Strait Islanders in local cemeteries and performing mourning rituals;*
>
> *(e) visiting sacred sites, including on uninhabited islands; and*
>
> *(f) dugong and marine turtle hunting, and other marine hunting and fishing.*

849. It is then alleged that connection to sea country and marine hunting is integral to *Ailan Kastom* in the Torres Strait Islands and that marine hunting and fishing, and sourcing other food, in the Torres Strait Islands is an important food source for Torres Strait Islanders.[1235]

850. In the section of the 3FASOC that deals with the vulnerability of Torres Strait Islanders to climate change and the degree of hazard, it is alleged that "*Torres Strait Islanders have rights and interests possessed under traditional laws and customs, recognised by the common law of Australia, which create a unique connection with the land and waters of the Torres Strait Islands*" (at [62A]). Reference is made in this regard to s 223(1) of the NTA (which contains the definition of native title and native title rights and interests) and to the allegations referred to above at [847]-[849]. It is then alleged at [62B] of the 3FASOC that "*the unique connection of Torres Strait Islanders to the land and waters of the Torres Strait Islands*" (identified by reference to the paragraph that alleges the existence of rights and interests by reference to the common law and NTA) "*is*

1233 3FASOC at [54](d), [APP.0001.0015.0003].
1234 3FASOC at [55], [APP.0001.0015.0003].
1235 3FASOC at [56(a)] and [56(b)], [APP.0001.0015.0003].

vulnerable to the Current and Projected Impacts of Climate Change in the Torres Strait". As a result, the pleading and submissions appear to assume a degree of equivalence between *Ailan Kastom* and the traditional laws and customs that underlie the rights and interests asserted by the applicants as being held by Torres Strait Islanders and recognised by the common law and NTA.

851. It has not been proven that the impacts of climate change will put at risk the continuity of the connection of Torres Strait Islanders to the land and waters of the Torres Strait Islands. There is no evidence to suggest that the unique connection between Torres Strait Islanders and their land and waters is liable to be lost. At most, it is suggested that the impacts of climate change may interfere with some instances of the observance of the traditional laws and customs.

852. Attempts are made to identify "*loss*" at AS [516]-[520] by reference to labels such as "*cultural loss*" and "*spiritual loss*", suggestions that connection to land "*will be erased or irrevocably damaged by climate change impacts*", and by reference to concepts such as "*sadness and worry*", and impacts upon the passing of knowledge, fulfilment of obligations, enjoyment of "*cultural practices*" and "*cultural knowledge*", and the "*identities and communities*" of the applicants and group members. However, the applicants have not identified a right recognised by the common law, the infringement of which could be made the subject of an action in negligence.

Loss of fulfilment of Ailan Kastom not a recognised head of damage

853. As is noted above at Part C.4.2, the compensatory principle "*is concerned with the measure of damages required to remedy <u>compensable</u> damage*",[1236] and it is necessary for the Court to ask in that context whether the loss and damage claimed by an applicant is the loss of something for which the applicant should and reasonably can be compensated.[1237]

854. It appears to be uncontroversial that loss of fulfilment of *Ailan Kastom* is not a recognised head of damage under the law of negligence (AS [521], [528]), though

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1236 *Lewis v Australian Capital Territory* (2020) 271 CLR 192 at [65] (Gordon J) (emphasis in original) [APP.0001.0020.0086], referring to *Amaca Pty Ltd v **Latz*** (2018) 264 CLR 505 at [41] (Kiefel CJ and Keane J), [CTH.0001.0001.0077].

1237 *Lewis* at [70] (Gordon J) [APP.0001.0020.0086], referring to *Pickett v British Rail Engineering Ltd* [1980] AC 136 at 149 (Lord Wilberforce), [CTH.0001.0001.1335].

the applicants do assert a general principle that Aboriginal and Torres Strait Islander persons can "*recover damages for loss of cultural fulfilment*" (AS [522]).

855. The cases relied upon by the applicants do not provide a principled basis for the contention that the law of negligence ought to be expanded to provide for such a head of loss. In each case where traditional customs have been considered in the course of awarding or assessing compensation, the relevant court was concerned with the infringement of a recognised statutory or common law right rather than impacts upon traditional customs or loss of cultural fulfilment in the abstract. In circumstances where the applicants have expressly disavowed reliance upon native title rights, there is no such right at issue in this case that has been put forward by the applicants as a recognised statutory or common law right and each of the cases discussed in AS [522]-[525] is also distinguishable. Each case is addressed in turn below.

Timber Creek

856. At AS [522], the applicants suggest that the High Court in *Northern Territory v Griffiths* (2019) 269 CLR 1 (***Timber Creek***) "*maintained*" an asserted "*principle*" that Australian Courts have long recognised that applicants "*can recover damages for loss of cultural fulfilment*". That submission should not be accepted.

857. In *Timber Creek*, the High Court was concerned with the amount of compensation payable by the Northern Territory to the Ngaliwurru and Nungali Peoples pursuant to Pt 2 of the NTA for loss, diminution, impairment or other effects of certain acts on their native title rights and interests over lands in the area of Timber Creek.[1238] In that case, the majority of the compensable acts were previous exclusive possession acts (**PEPAs**) within the meaning of s 23B of the NTA, the validation of which resulted in extinguishment of native title under s 23E.[1239] There were also a number of Category D past acts within the meaning of s 232, most of which were followed by subsequent PEPAs affecting the same lots, which extinguished native title over those lots.[1240]

858. Section 23J(1) of the NTA relevantly provided that native title holders were entitled to compensation in accordance with Div 5 for the extinguishment under

1238 *Timber Creek* at [1].
1239 *Timber Creek* at [35]
1240 *Timber Creek* at [36].

Div 2B of their native title rights and interests by an act (here, relevantly, the PEPAs). As a result, in relation to the PEPAs, the native title holders were entitled to compensation in accordance with Div 5 of the extinguishment of their native title rights and interests.[1241] For the Category D past acts, which were *not* followed by subsequent PEPAs, the native title holders were entitled to compensation under s 20 (in Div 2 of Pt 2), which in turn provided that they were entitled to compensation under s 17(1) or (2) on the assumption that s 17 applied to those past acts.

859. Where an entitlement to compensation was established under Div 2, Div 2A, Div 2B, Div 3 or Div 4 of Pt 2, compensation was payable in accordance with Div 5 by virtue of s 48. Section 51 of the NTA identified the criteria for determining compensation. Section 51(1) relevantly provided that the entitlement to compensation "*is an entitlement on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests*".

860. The concepts of native title and "*native title rights and interests*" are relevantly defined in s 223 of the NTA. In particular, s 223(1) is in the following terms:

> Common law rights and interests
>
> *(1) The expression* ***native title*** *or* ***native title rights and interests*** *means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:*
>
> *(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and*
>
> *(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and*
>
> *(c) the rights and interests are recognised by the common law of Australia.*

861. The language of s 223(1)(a) and (b) is plainly based on what was said by Brennan J in *Mabo (No 2)*.[1242] Section 223(2) relevantly provides that the reference to "*rights and interests*" in s 223(1) includes "*hunting, gathering, or fishing, rights*

[1241] *Timber Creek* at [37].

[1242] *Western Australia v* ***Ward*** (2002) 213 CLR 1 at [16] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), [APP.0001.0020.0185], referring to *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (***Mabo (No 2)***) at 70 (Brennan J), [APP.0001.0020.0090].

and interests". Sections 223(3), (3A) and (4) contain further provisions relevant to the concepts defined in s 223(1). The definition in s 223 must be understood in light of:

a) the objects of the NTA in s 3, which include providing for "*the recognition and protection of native title*";

b) s 10 of the NTA, which provides that "*[n]ative title is recognised, and protected, in accordance with this Act*"; and

c) the existing common law with which the NTA engaged.

862. As the plurality observed in *Yorta Yorta* (emphasis in original):[1243]

> Mabo (No 2)[1244] *decided that certain rights and interests relating to land, and rooted in traditional law and custom, survived the Crown's acquisition of sovereignty and radical title in Australia. It was* ***this*** *native title that was then 'recognised and protected' in accordance with the Native Title Act and which, thereafter, was not able to be extinguished contrary to that Act".*

863. The Court's judgment in *Timber Creek*, including the observations to which reference is made at AS [523], must be understood within the statutory context outlined above. The High Court was concerned with compensation for the loss, diminution, impairment or other effect of an act on "*native title rights and interests*" within the meaning of s 223(1) of the NTA in the context of the provisions outlined above at [857]-[859].

864. In discussing s 51(1) of the NTA, the majority observed that the task of assessment under that section "*is necessarily undertaken in the particular context of the Native Title Act, the particular compensable acts and the evidence as a whole*".[1245] The task required "*a number of separate but inter-related steps, that included: identification of the compensable acts; identification of the native title holders' connection with the land or waters by their laws or customs; and then consideration of the particular and inter-related effects of the compensable acts on that connection*".[1246] In *Timber Creek*, consideration of the connection the native title holders' connection with the land and waters by their laws and

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1243 *Members of the* ***Yorta Yorta*** *Aboriginal Community v State of Victoria* (2002) 214 CLR 422 at [75]-[77] (Gleeson CJ, Gummow and Hayne JJ), [APP.0001.0020.0095].

1244 *Mabo (No 2),* [APP.0001.0020.0090].

1245 *Timber Creek* at [218].

1246 *Timber Creek* at [218].

customs represented a step in determining the existence and extent of the effect of the relevant act on the native title group's native title rights and interests.

865. The majority also observed, in the course of its reasons, that loss or diminution of "*traditional attachment*" to land or connection to country, or the loss of rights to gain spiritual sustenance from the land was referred to by the parties and the Courts below as "*non-economic loss*" or "*solatium*" but that it was better expressed as "*cultural loss*".[1247] For that reason, the applicants' appeal to the "*increasing cognizance of non-economic loss*" in tort law (at AS [521]) is inapt.

866. In light of the statutory context in which *Timber Creek* was decided, it provides limited assistance to the applicants. In these proceedings, the applicants' claims for loss of fulfilment of *Ailan Kastom* do not arise from and are not connected with or dependent upon any native title right.

<u>Personal injury and copyright cases</u>

867. In addition to *Timber Creek*, the applicants rely upon a number of previous authorities, which they suggest involved awards of "*similar damages*" (AS [524]). On analysis, none of those authorities lends support to the proposition that an applicant may recover damages for loss of fulfilment of *Ailan Kastom.* Dealing first with the personal injury cases:

a) In *Roberts v Devereaux*,[1248] the defendant punched the plaintiff on the jaw causing him to fall to the ground and rendering him unconscious. The plaintiff sued to recover damages with respect to the assault. In assessing damages, under the head of "*loss of enjoyment of life*", his Honour awarded damages of $1,000. The plaintiff gave evidence that he was unable to play his full part in ceremonies involving loud singing because of the limitation of his jaw movement. While the Court felt the plaintiff had exaggerated this complaint, it was a factor to be taken into account and formed part of the $1,000 assessment for loss of enjoyment of life.

[1247] *Timber Creek* at [1], footnote 102; see also [53]-[54].

[1248] *Roberts v Devereux* (Unreported, 22 April 1982, Forster CJ, Supreme Court of the Northern Territory), noted in C R McDonald, 'Roberts v Devereux' (1982) 1(4) *Aboriginal Law Bulletin* 29, [APP.0001.0020.0004].

b) In ***Napaluma** v Baker*,[1249] the plaintiff, who was a Pitjantjatjara man, suffered head injuries in a car accident, which led to a mental impairment and a lack of coordination.[1250] He was unable to throw a spear and participate in sport.[1251] He was also unable to take on certain community roles and was left out of certain ceremonies because he could not be trusted with secret knowledge nor learn to pass it on adequately.[1252] He was awarded $10,000 for loss of amenities associated with "*basically a loss of position in the aboriginal community*", which made up a part of a general award of $35,000 for pain and suffering and loss of amenities.[1253]

c) In ***Dixon** v Davies*,[1254] the plaintiff was negligently struck by a car driven by the defendant while crossing Memorial Drive in Alice Springs when he was 5 years old.[1255] As a result of his injuries, he would be "*extremely unlikely*" to achieve full adult status through participation in ceremonies and initiation.[1256] He would be deprived of cultural knowledge and would remain a juvenile in the eyes of his community.[1257] Justice O'Leary considered that this was a more serious case of cultural loss than *Napaluma* because the plaintiff would never be able to be initiated into adulthood. The plaintiff was awarded $20,000 for "*loss of cultural fulfilment*", which was included in an overall amount for damages for pain and suffering and loss of amenities of $45,000.[1258]

d) In ***Weston** v Woodroffe*,[1259] the plaintiff was injured when a car he was travelling in with the defendant collided with a power pole.[1260] The plaintiff lost his left leg below the knee as a result of injuries that he sustained in the accident.[1261] He had been active as a hunter, athlete and dancer.[1262] While he could participate in ceremonies after his accident, he

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1249 *Napaluma v Baker* (1982) 29 SASR 192, [APP.0001.0020.0113].
1250 *Napaluma* at 193, [APP.0001.0020.0113].
1251 *Napaluma* at 194, [APP.0001.0020.0113].
1252 *Napaluma* at 194, [APP.0001.0020.0113].
1253 *Napaluma* at 194-5, [APP.0001.0020.0113].
1254 *Dixon v Davies* (1982) 17 NTR 31, [APP.0001.0020.0046].
1255 *Dixon* at 31, [APP.0001.0020.0046].
1256 *Dixon* at 34, [APP.0001.0020.0046].
1257 *Dixon* at 34, [APP.0001.0020.0046].
1258 *Dixon* at 34-5, [APP.0001.0020.0046].
1259 *Weston v Woodroffe* (1985) 36 NTR 34, [APP.0001.0020.0186].
1260 *Weston* at 35, [APP.0001.0020.0186].
1261 *Weston* at 35, [APP.0001.0020.0186].
1262 *Weston* at 44-5, [APP.0001.0020.0186].

could not play a physically active role in them.[1263] Evidence was led from a member of his clan that the loss of the plaintiff's bone and the spilling of his blood had significantly diminished his chances of marrying under traditional law.[1264] Acting Chief Justice Muirhead held that the plaintiff's participation in Indigenous life was greatly reduced,[1265] and awarded $45,000 in general damages for pain and suffering and loss of amenities encompassing this circumstance and others, but did not identify a separate sum attributable to culturally-influenced loss of amenities.

e) In ***Mulladad*** *v Palmer*,[1266] the plaintiff suffered injuries to his left femur and liver when a motor vehicle he was a passenger in failed to turn whilst travelling on a dirt road and rolled, throwing the plaintiff from the vehicle.[1267] As an aspect of the plaintiff's claim for damages for pain and suffering and loss of amenities, he contended that his ability to participate fully in traditional tribal activities was significantly reduced.[1268] The plaintiff was not able to participate in dancing and was confined to the role of a passive onlooker because he could not squat or stand for any great period of time.[1269] He was also unable to hunt euros (wallaroos) due to his inability to climb rocks and was restricted in his ability to participate in communal gatherings and to collect large logs.[1270] As a result he had given up any thoughts of marriage.[1271] The plaintiff's claims were largely rejected on the evidence,[1272] but in assessing damages for loss of amenities of life, some allowance was made for the fact that the plaintiff would be unable to indulge in communal dancing and hunting to the extent that he formerly did.[1273] A global figure of $30,000 was awarded for pain and suffering and loss of amenities.[1274]

1263 *Weston* at 45, [APP.0001.0020.0186].
1264 *Weston* at 45, [APP.0001.0020.0186].
1265 *Weston* at 45, [APP.0001.0020.0186].
1266 *Mulladad v Palmer* (Unreported, Northern Territory, Supreme Court, Rice J, 5 May 1987), [APP.0001.0020.0106].
1267 *Mulladad* at 1-2, [APP.0001.0020.0106].
1268 *Mulladad* at 6, [APP.0001.0020.0106].
1269 *Mulladad* at 6, [APP.0001.0020.0106].
1270 *Mulladad* at 6, [APP.0001.0020.0106].
1271 *Mulladad* at 6, [APP.0001.0020.0106].
1272 *Mulladad* at 13-5, [APP.0001.0020.0106].
1273 *Mulladad* at 16, [APP.0001.0020.0106].
1274 *Mulladad* at 16, [APP.0001.0020.0106].

f) In ***Namala*** *v Northern Territory*,[1275] the plaintiff sustained damage to her uterus during a caesarean section performed at the Royal Darwin Hospital during the birth of her first and only child.[1276] Justice Kearney awarded damages under the head of "*subjective suffering*", which were said to result from "*a loss of cultural fulfilment through an inability to fully participate in traditional cultural ceremonies and activities*".[1277] His Honour also awarded damages under the head of "*subjective suffering*" as a result of evidence that the plaintiff's injuries would prevent her from having children, in circumstances where there was "*cultural importance of having a large number of children within her community*".[1278] The damages for "*subjective suffering*" were not separated from damages attributable to other heads of damage, and the plaintiff was ultimately awarded $80,000.

g) In ***Cubillo*** *v Commonwealth of Australia (No 2)*,[1279] the applicants were forcibly removed from their families as children and detained in institutions against their will.[1280] As the applicants note at AS [524.8], liability in negligence was not established but, in *obiter*, O'Loughlin J made the observation that he did not think it could be argued that "*the cultural loss that a part Aboriginal person has suffered does not sound in damages*",[1281] referring to *Napaluma*, *Dixon*, *Weston* and *Milpurrurru* (below at [868]). In circumstances where the observations in question were obiter and based upon cases already discussed, *Cubillo* is of limited assistance. To the extent that it contains discussion of the compensability of "*cultural loss*", it does not rise higher than the authorities referred to, each of which involved consideration of such loss within established heads of damages and in response to a finding that depended upon infringement of a right arising under statute or the common law.

h) In ***Trevorrow*** *v South Australia (No 5)*,[1282] the applicant was taken to hospital as an infant in need of medical treatment. He was subsequently

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1275 *Namala v Northern Territory* (1996) 131 FLR 468, [APP.0001.0020.0112].
1276 *Namala,* [APP.0001.0020.0112].
1277 *Namala* at 474*,* [APP.0001.0020.0112].
1278 *Namala* at 474*,* [APP.0001.0020.0112].
1279 *Cubillo v Commonwealth of Australia (No 2)* (2000) 103 FCR 1, [APP.0001.0020.0038].
1280 *Cubillo* at [1], [APP.0001.0020.0038].
1281 *Cubillo* at [1499], [APP.0001.0020.0038].
1282 *Trevorrow v South Australia (No 5)* (2007) 98 SASR 136, [CTH.0004.0001.1846].

(and unlawfully) placed in long-term foster care without his parents' consent.[1283] Justice Gray concluded that the torts of misfeasance in public office, false imprisonment and negligence were established.[1284] In assessing loss and damage, Gray J referred to the plaintiff's inability to "*rejoin his community or take part in their cultural activities*" in the course of discussing the applicant's anxiety and depressive state.[1285] Justice Gray additionally referred to his "*loss of Aboriginal culture and identity*" in this context.[1286] His Honour concluded that the plaintiff was to be compensated for suffering brought about "*through the loss of his Aboriginal identity and culture*".[1287]

868. In ***Milpurrurru*** *v Indofurn Pty Ltd*,[1288] the respondents were involved in the import and sale of carpets that were manufactured in Vietnam and reproduced certain artworks, the copyright in which was owned by the applicants.[1289] Justice von Doussa found that the applicants' copyright was infringed,[1290] and was required to assess the appropriate award of damages under ss 115(2) and 115(4) of the *Copyright Act 1968* (Cth). As the applicants note at AS [524.6], s 115(4)(b) permitted an award of "*additional damages*" having regard to "*all other relevant matters*", which could include a component for personal suffering caused by insult and humiliation.[1291] His Honour awarded "*additional damages*" of $70,000, which incorporated a component for personal distress as a result of the artists being exposed to "*embarrassment and contempt within their communities*" and a component of "*cultural damage*", which was said to have involved "*the pirating of cultural heritage*".[1292]

869. In each of the personal injury and copyright cases discussed above at [867]-[868], the consideration of cultural loss or damage occurred in the course of assessing damage arising from infringement of an established common law or statutory right. In each case, the consideration also occurred in the context of assessing

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1283 *Trevorrow* at [1]-[5], [1228]-[1238], [CTH.0004.0001.1846].
1284 *Trevorrow* at [1233]-[1234], [CTH.0004.0001.1846].
1285 *Trevorrow* at [1194], [CTH.0004.0001.1846].
1286 *Trevorrow* at [1195], [CTH.0004.0001.1846].
1287 *Trevorrow* at [1201], [CTH.0004.0001.1846].
1288 *Milpurrurru v Indofurn Pty Ltd* (1994) 54 FCR 240, [APP.0001.0020.0099].
1289 *Milpurrurru* at 243, 249-50, [APP.0001.0020.0099].
1290 *Milpurrurru* at 257ff, [APP.0001.0020.0099].
1291 *Milpurrurru* at 277, [APP.0001.0020.0099].
1292 *Milpurrurru* at 277, [APP.0001.0020.0099].

loss or damage by reference to established heads of damage including pain and suffering and loss of amenities. None of the cases referred to in [867]-[868] is authority for the proposition that the common law recognises a freestanding entitlement to damages for loss of cultural fulfillment or impacts upon traditional customs *per se*.

Other authorities

870. Finally, the applicants refer to the New Zealand Supreme Court's judgment in *Smith*[1293] and the Full Court's judgment in *Tipakalippa*.[1294]

871. As is evident from the summary of the tikanga Māori claims in *Smith*,[1295] the apparent juristic basis of the claims in that case are quite distinct from those at issue in the present proceedings. As a result, the observations of the Supreme Court in the context of an appeal from a successful strike out application are of limited relevance to the present proceedings.[1296]

872. The observations of Kenny and Mortimer JJ in *Tipakalippa* were also made in a distinct legal context[1297] — they were directed at the identification of an "*interest*" in the EMBA ("*the environment that may be affected by the activities*"),[1298] rather than a right the infringement of which may sound in damages. The point made by their Honours was that an interest of the relevant kind, "*without any proprietary overlay*", was "*acknowledged in federal legislation, such as, for example, the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth).*"[1299] That is uncontroversial.

873. Neither case provides support for the proposition that common law recognises a freestanding entitlement to damages for loss of cultural fulfillment or impacts upon tradition, or that the common law should be developed so as to recognise such an entitlement.

1293 ***Smith*** *v Fonterra Co-operative Group Ltd* [2024] NZSC 5, [APP.0001.0020.0153].
1294 *Santos NA Barossa Pty Ltd v* ***Tipakalippa*** (2022) 296 FCR 124, [APP.0001.0020.0148].
1295 *Smith* at [59]-[61], [APP.0001.0020.0153].
1296 AS [525], referring to *Smith* at [182]-[188], [APP.0001.0020.0153].
1297 *Tipakalippa* at [68], [APP.0001.0020.0148].
1298 *Tipakalippa* at [21](b)(ii), [APP.0001.0020.0148].
1299 *Tipakalippa* at [68]-[74], [APP.0001.0020.0148].

Conceptual difficulties with the Ailan Kastom claim

874. The fundamental difficulty with the applicants' claim with respect to loss of fulfilment of *Ailan Kastom* is that, in abandoning their reliance upon native title rights, they fail to identify a relevant statutory or common law right the infringement of which is capable of sounding in damages. As noted above at [846], a claim for damages in the present context on the basis of an infringement of native title rights recognised by the common law and NTA would present its own set of complexities. However, in seeking to rely upon *Ailan Kastom* alone the applicants' claims proceed from an unsound conceptual premise.

875. As is evident from the discussion of *Yorta Yorta* above at [860]-[862], *Mabo (No 2)* decided that rights and interests relating to land and rooted in traditional law survived the Crown's acquisition of sovereignty and radical title. Those rights, which were characterised by the High Court as native title rights, were subsequently recognised by the NTA and, as a matter of principle, are capable of enforcement or protection in a manner consistent with the nature of those rights.

876. In *Fejo*, the majority made the following observations regarding the relationship between traditional laws and customs and native title rights recognised by the common law:[1300]

> *Native title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title. Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law. There is, therefore, an intersection of traditional laws and customs with the common law.*

877. In *Ward*, the majority addressed "*[t]he difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms or rights and interests*".[1301] Their Honours observed that the process contemplated by the NTA, by which the "*spiritual or religious is translated into the legal*", required "*the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations*

[1300] ***Fejo*** *v Northern Territory* (1998) 195 CLR 96 at [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), [CTH.0004.0001.0158].

[1301] *Ward* at [14] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), [APP.0001.0020.0185].

which go with them".[1302] As a result, not all aspects of traditional laws or customs find recognition in the common law.

878. That being said, the common law can, depending upon the circumstances, be invoked where *native title rights* are infringed. As Brennan J recognised in *Mabo (No 2)*, native title rights may be protected by "*such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence, whether proprietary or personal and usufructuary in nature and whether possessed by a community, a group or an individual*".[1303] The majority in *Fejo* also acknowledged that actual or claimed native title rights may be enforced or protected by Court order.[1304] As noted above, no reliance is placed on such rights in the present proceedings.

Loss of fulfilment of Ailan Kastom not compensable

879. For the reasons outlined above at [841]-[874], the Court should conclude that the loss of fulfilment of *Ailan Kastom*, in the manner alleged by the applicants, is not compensable as a head of damage under the law of negligence.

E.6.4 Limitation periods

880. As noted above at [30], the limitation periods applicable to the present claims are found in ss 11 and 16B of the *Limitation Act 1985* (ACT). Section 11(1) supplies the general limitation period that applies under the *Limitation Act 1985* (ACT). It provides that "*an action on any cause of action is not maintainable if brought after the end of a limitation period of 6 years running from the date when the cause of action first accrues to the plaintiff or to a person through whom he or she claims*." To the extent the applicants claim loss or damage for damage to property or loss of *Ailan Kastom*, their claims are statute barred insofar as the relevant loss or damage arose more than 6 years prior to the commencement of proceedings.

881. Section 16B applies to a cause of action for damages for personal injury other than particular causes of action that are presently irrelevant. The section imposes

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1302 *Ward* at [14] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), [APP.0001.0020.0185].

1303 *Mabo (No 2)* at 61 (Brennan J), [APP.0001.0020.0090].

1304 *Fejo* at [22] (Gleeson CJ, Gaudrom, McHugh, Gummow, Hayne and Callinan JJ), [CTH.0004.0001.0158].

a 3-year limitation period. While this provision is not relevant to the applicants' claims in circumstances where they no longer press personal injury claims, the Court ought to resolve CQ15 by identifying s 16B as the statutory limitation period applying to group members insofar as those group members press claims for personal injury.

E.6.5 The Court should not grant the declarations sought

882. The declarations sought by the applicants are identified in the Amended Originating Application at prayers 1 and 2, and are set out at AS [487].

883. While it is uncontroversial that the Court's power to grant declaratory relief is wide (AS [488]), the Court will not grant a declaration that would involve answering a hypothetical question or giving an advisory opinion,[1305] and it will not grant a declaration where there is no utility in doing so.[1306] It is doubtful that the Court can make a declaration recording a finding that a duty of care was owed, or that the duty of care was breached, in the absence of any finding that the relevant breach caused loss or damage.[1307] That is because damage is an essential element of the cause of action of negligence, and a finding in the abstract that a duty of care was owed, or that the duty of care was breached, does not amount to a final determination of whether the applicant has a cause of action in negligence.[1308] As a result, the making of a declaration recording such an intermediate finding would amount to an interlocutory declaration, which is not a form of order known to the law.[1309]

884. The Court must also be astute to avoid making provisional statements of entitlement (or disentitlement) in relation to group members.[1310] In representative proceedings, the Court should only make factual findings and resolve legal

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1305 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 [APP.0001.0020.0019] at [47]-[48] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

1306 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 [APP.0001.0020.0006] at 582.

1307 ***Dovuro** Pty Ltd v Wilkins* (2003) 215 CLR 317 [APP.0001.0020.0048] at [142]-[144] (Hayne and Callinan JJ, with whom Heydon J agreed); *Graham Barclay Oysters* [APP.0001.0020.0065] at [128] (Gummow and Hayne JJ).

1308 *Dovuro* [APP.0001.0020.0048] at [142]-[143] (Hayne and Callinan JJ).

1309 *Dovuro* [APP.0001.0020.0048] at [143] (Hayne and Callinan JJ); see also *Sharma FC* [APP.0001.0020.0101] at [763]-[781] (Wheelahan J).

1310 ***Dillon** v RBS Group (Australia) Pty Ltd* (2017) 252 FCR 150 at [30]-[31] (Lee J) [CTH.0004.0001.0077]; *Lloyd v **Belconnen Lakeview** Pty Ltd* (2019) 377 ALR 234 at [376], [383]-[384] (Lee J) [CTH.0004.0001.0981] (overturned on appeal but not in relation to this issue: see *Belconnen Lakeview Pty Ltd v Lloyd* (2021) 156 ACSR 273, [CTH.0006.0001.0334]).

questions "*which cannot be affected by different facts being found in the cases of group members*".[1311] Because the resolution of common questions and the making of orders under s 33ZB of the FCA Act amounts to a form of statutory estoppel,[1312] the Court would be required to conclude that individual circumstances could not shape any entitlement to declaratory relief on a case-by-case basis.

885. Applying the principles identified at [883]-[884] above, in circumstances where neither of the applicants has established that they have suffered compensable loss, and the claims of group members are not resolved at the initial trial except insofar as the Court provides answers to common questions, the Court could not grant generalised declaratory relief in respect of Torres Strait Islanders of the kind sought.

886. The questions of: (a) whether or not a duty is owed; and (b) whether or not a duty has been breached will depend upon the individual circumstances of group members. For example, the alleged duty to "*protect Torres Strait Islanders*" may involve different analysis depending upon whether a Torres Strait Islander lives in the Torres Strait or, indeed, depending upon *where* in the Torres Strait the relevant person lives. The scope of the duty and the steps required to discharge the duty may also depend on those matters, and other factors. Finally, the issue of whether or not group members have suffered loss or damage may vary from person to person having regard to where they live and how they are affected by climate change. In this case, the group member definition encompasses Torres Strait Islanders who no longer inhabit the islands, and there are significant variations in the evidence concerning alleged risks and likely impacts among the islands in respect of which evidence has been led. The group member definition also depends upon a person establishing that they have suffered loss or damage as a result of the conduct of the Commonwealth,[1313] which may also depend upon individual facts for the reasons above. In circumstances where there is potential variation between the claims of group members and CQ17 asks "*[c]an the declaratory and injunctive relief sought by the applicants be granted and, if so, should it be granted*" the Court must be astute to ensure that any declaratory relief

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1311 *Belconnen Lakeview Pty Ltd v Lloyd* [2021] FCAFC 187 at [384] (Lee J), [APP.0001.0020.0020].

1312 *Timbercorp Finance Pty Ltd (in liq) v Collins* (2016) 91 ALJR 37 at [52], [CTH.0004.0001.1802].

1313 3FASOC at [1], [APP.0001.0015.0003].

would be appropriately granted in respect of *all* group members and in *all* circumstances.

887. The declaratory relief should also be refused insofar as it invites the Court to make declarations with respect to the applicants' prospective claim that the Commonwealth's breach of duty *will* cause the Projected Impacts of Climate Change in the Torres Strait islands in the future, at which point the Torres Strait Islanders *will* suffer harm.

888. The declarations sought by the applicants with respect to both the existence of the Duty of Care and breach are expressed in the continuing present tense, expressly encompass current and projected impacts, and do not distinguish between past and future conduct. In circumstances where the applicants' claims have a prospective element, the declarations encounter the difficulty that they extend beyond the respondents' apprehended conduct and address a future *state of affairs*.[1314] Insofar as the declarations sought by the applicants relate to future conduct, they: (a) do not amount to a declaration in respect of a completed cause of action; and (b) to the extent they relate to projected impacts, have a speculative element that could not properly be made the subject of declaratory relief.

E.6.6 The Court should not grant the injunction sought

889. The injunction sought by the applicants is identified in the Amended Originating Application at prayer 3 and is set out at AS [494], though the applicants' submissions purport to amend the relief sought to introduce the qualification "*reasonable*" to the part of the chapeau that requires the Commonwealth to take "*such measures as are necessary*" to achieve the broadly stated objectives in sub-paragraphs (a) to (c).

890. The difficulty with the injunctive relief sought by the applicants is immediately apparent when one has regard to the terms of the orders sought. In framing the relief by reference to objectives that are qualified by subjective concepts such as reasonableness and necessity:

[1314] J D Heydon et al, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (5th ed, 2015) at [19-160] ("*Futurity*").

a) the Commonwealth would be placed in a position where it could not ascertain with clarity what is expected of it in complying with the injunction;[1315] and

b) the Court would likely be drawn into a supervisory exercise whereby it could be called upon to adjudicate whether the subjective elements of the order had been satisfied.

891. That is an undesirable and unsatisfactory outcome given the serious consequences of non-compliance with an injunction. As the Court of Appeal observed in *Naoum v Dannawi*, an injunction that is granted in aid of legal or equitable rights "*should indicate the conduct which is enjoined or commended to be performed, so that the defendant knows what is expected of him or her as a matter of fact*".[1316] In the same case, the Court observed that it is undesirable to frame an injunction so "*as to leave the issues in the case open for determination on a contempt proceeding, rather than at a final hearing*".

892. The difficulties with an uncertain and subjectively framed injunction are compounded in the present case, where the evidence suggests that the steps that may be required both to "*protect the land and marine environment of the Torres Strait Islands*" and to reduce Australia's emissions consistent with what the applicants term a "*Best Available Science*" target will themselves involve questions of high public policy and the allocation of public resources. As the evidence concerning both the climate science and the setting of the Commonwealth's emissions reduction targets discloses, there is scope for debate as to what is "*reasonable*" or "*necessary*" to achieve outcomes of the kind that are the subject of the prayer for injunctive relief. There is also very significant risk that the content of obligations of the kind sought to be imposed by the injunction may shift over time.

893. The failure to specify the "*measures*" that the injunction would require the Commonwealth to take tends to obscure the real nature of the relief that the applicants seek, and both its wide-ranging consequences and the difficulties it

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1315 *Optus Networks Pty Ltd v City of Boroondara* [1997] 2 VR 318 at 336-7 (Charles JA), [CTH.0004.0001.1276].

1316 *Naoum v Dannawi* (2009) 75 NSWLR 216 at [36] (McColl JA, with whom Beazley and Macfarlan JJA agreed), [CTH.0004.0001.1156].

poses as a matter of principle. The terms of the proposed injunction beg a number of questions. For example:

a) In requiring that the Commonwealth implement such measures as are necessary (or reasonably necessary) to "*reduce Australia's GHG emissions consistent with the Best Available Science Target*" do the applicants seek to compel the Commonwealth repeal s 10(1) of the *Climate Change Act 2022* (Cth) and legislate a different target?

b) In circumstances where 3FASOC [76](c) alleges that the Commonwealth has control over, and/or the ability to "*control GHG emissions through existing statutes and regulations*" such as the EBPC Act, *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth), the *Renewable Energy (Electricity) Act 2000* (Cth) and the *Clean Energy Finance Corporation Act 2012* (Cth), do the applicants seek to compel the Commonwealth and statutory corporations to exercise powers and functions under legislation in a particular way?

c) If the applicants do seek to compel the Commonwealth and statutory corporations to exercise powers and functions in a particular way:

    i) Which statutory powers and functions?

    ii) In what way should the powers and functions be exercised?

    iii) How do the applicants say that the powers and functions can be exercised having regard to the terms of the injunction in circumstances where relevant powers and functions must be exercised having regard to mandatory relevant considerations identified in the relevant legislation?

d) If the applicants are suggesting that the Commonwealth could take steps with respect to the reduction of GHG emissions in the absence of a statutory power, what are those steps and what is the legal basis upon which the applicants allege such steps could be taken?

e) Do the applicants envisage that the Court could be approached each time the applicants contend that a power or function has been exercised in a manner that they allege is not consistent with the reduction of GHG emissions in a manner consistent with Best Available Science? Or is

compliance with the target to be ascertained, for example, in 2030 and/or 2050 (or some other reference year)?

f) Do the terms of the injunction accommodate changes or developments in what may be characterised as "*Best Available Science*" and, if so, who is to judge whether particular science is "*Best Available Science*" and how?

g) Does the proposed injunction require the Commonwealth to take particular steps in its external and foreign relations with respect to GHG emissions and, if so, what are those steps?

894. Regardless of their answers, the questions above reveal some of the many practical difficulties with the administration of an injunction in the terms sought by the applicants.

895. Further, while equity may act to restrain the commission or completion of a tort or to prevent further occurrence of damage where the tort is ongoing,[1317] the jurisdiction is only enlivened "*upon the apprehension or occurrence of a legal wrong which will cause imminent danger to a claimant*".[1318] This requires that attention be given "*to the existence or imminence of a relationship between the parties to an application that will give rise to a legal wrong*".[1319] As noted above at [887], the applicants advance a number of claims with respect to the Projected Impacts of Climate Change and, in large part, the injunctive relief appears to be directed at those aspects of the applicants' claims. In light of the evidence discussed above concerning the nature, quality, certainty and timescale of those impacts, the Court could not conclude that the requisite imminence has been established in this case.

896. For the reasons above, the Court should not grant the injunctive relief sought by the applicants.

1317 *Sharma FC* at [759] (Wheelahan J), [APP.0001.0020.0101], citing *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at [33] (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ). [APP.0001.0020.0121] and *Redland Bricks Ltd v Morris* [1970] AC 652 at 664 (Lord Upjohn, Lord Reid, Lord Morris of Borth-y-Gest, Lord Hodson, and Lord Diplock agreeing), [CTH.0004.0001.1369].

1318 *Sharma FC* at [760] (Wheelahan J), [APP.0001.0020.0101].

1319 *Sharma FC* at [760] (Wheelahan J), [APP.0001.0020.0101].

F. The Alternative Duty Case

897. In this section, the Commonwealth responds to each of the common questions that relate to the Alternative Duty case. It also considers any matters that are not common questions but are necessary to determine the applicants' case in full in accordance with order 1(a) of this Court dated 4 March 2024 (namely, the question whether, assuming the applicants establish duty and breach of the Alternative Duty, they have shown that any such breach has caused them to suffer loss of a compensable kind, and, if so, what is the quantum of that loss).

898. There has been some movement in the way this part of the applicants' case is put as between the pleadings, the further particulars of those pleadings provided on 12 and 20 November 2023 and the applicants' closing submissions. It is therefore necessary to set out, briefly, how the Commonwealth understands the applicants now put this part of the case, and provide a brief overview of the Commonwealth's response to that case before turning to each of the specific questions that arise in relation to this part of the proceeding.

The Alternative Duty

899. In the 3FASOC at [81A],[1320] the applicants allege that the Commonwealth owes a duty to Torres Strait Islanders to take reasonable care to avoid causing:

> *(a) property damage;*
>
> *(b) loss of fulfilment of Ailan Kastom; and/or*
>
> *(c) injury disease or death,*
>
> *arising from a failure to implement, or adequately implement, adaptation measures to prevent or minimise the Current and Projected Impacts of Climate Change in the Torres Strait Islands.*

900. It should be noted that CQ 5, which is directed to the existence of the Alternative Duty, is slightly narrower in that it is framed as a duty to take reasonable care to protect Torres Strait Islanders "*against marine inundation and erosion*", rather than the Current and Projected Impacts of Climate Change more generally. The Commonwealth proceeds on the basis that the Alternative Duty now alleged is in this narrower form.

[1320] This is consistent with the way the Alternative Duty is framed at AS [175.2].

901. The applicants set out eight different "*Alternative Duties*" at AS [653]-[671], which specify what the Commonwealth was required to do in respect of each of the six islands with which the Seawalls Project is concerned.[1321] The Commonwealth understands that these eight "*Alternative Duties*" set the standard of care to which the applicants say the Commonwealth should be held if it is found to owe the Alternative Duty. Accordingly, the Commonwealth addresses the matters set out at AS [653]-[671] in the course of addressing the standard of care.

Standard of care

902. In the 3FASOC at [82A], the applicants plead that the Alternative Duty required the Commonwealth to take reasonable steps to implement adaptation measures to prevent or minimise the Current and Projected Impacts of Climate Change in the Torres Strait Islands (as that term is defined in the 3FASOC at [57] and [59]), including but not limited to:

> *(a) providing adequate infrastructure to protect the Torres Strait Islands from the impacts of sea level rise, storm surges and flooding, such as seawalls;*
>
> *(b) providing adequate infrastructure to protect Torres Strait Islanders in the Torres Strait Islands from the impacts of heatwaves, such as air conditioning and adequate infrastructure; and*
>
> *(c) implementing such other measures as are reasonably necessary to protect:*
>
> > *(i) the land and marine environment of the Torres Strait Islands;*
> >
> > *(ii) the cultural and customary rights, including the right to fulfilment of Ailan Kastom of Torres Strait Islanders, including the Applicants and Group Members,*
> >
> > *(iii) the health and safety of Torres Strait Islanders, including the Applicants and the Group Members*
>
> *from the Current and Projected Impacts of Climate Change in the Torres Strait Islands.*

[1321] More specifically, the eight Alternative Duties are at AS at [656], [661]-[664], [668]-[670].

903. However, the applicants' case has narrowed from what is pleaded at [82A] of the 3FASOC. After some discussion about the scope of that paragraph during the course of the trial on 10 November 2023,[1322] the Court directed the applicants to provide the Commonwealth with a document that set out with precision what the applicants say was required of the Commonwealth in relation to the Alternative Duty.[1323] The applicants' letter to the Commonwealth dated 12 November 2023 contains that response. That letter contained five particulars of what the applicants say the Commonwealth was required to do to discharge the Alternative Duty.[1324] The first four particulars relate to the funding of the Seawalls Project, namely, the applicants allege the Commonwealth was required to:

a) provide adequate funding as required to complete Seawalls Project Stage 1 as scoped;

b) provide additional funding as required to complete Seawalls Project Stage 2 as scoped;

c) pay approved funding for Seawalls Project Stage 1 without delay; and

d) pay approved funding for Seawalls Project Stage 2 without delay.

904. The fifth particular was a more general allegation that the Commonwealth was required to "*lead and implement effective inundation protection measures*".[1325] Following oral argument in respect of this fifth particular on 13 November 2023, the Court ruled that it was open to the applicants to argue that the Alternative Duty required the Commonwealth to do something more than take a passive approach and provide funding for the Seawalls Project without doing more, but not that the Commonwealth should have investigated other inundation protection measures, such as raising the land.[1326]

905. The letter made no mention of the matters pleaded in [82A(b)] or [82A(c)] of the 3FASOC, and Senior Counsel for the applicants confirmed in the course of the trial on 13 November 2023 that the "*health adaptation case*" (which the

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[1322] T1003-1021 [TRN.0011.0992].
[1323] T1021.35-39 [TRN.0011.0992].
[1324] Letter from the applicants' solicitors to the Commonwealth's solicitors dated 12 November 2023 at [5], [11], [16], [18], [EVI.2002.0010.0001].
[1325] Letter from the applicants' solicitors to the Commonwealth's solicitors dated 12 November 2023 at [20] [EVI.2002.0010.0001].
[1326] T1163.37-1164.6 [TRN0013.1118]. See also T1542.13-40 [TRN.0019.1530].

Commonwealth understands to be pleaded at [82A(b)] and [82A(c)(iii)]) is no longer pressed.[1327] On 23 November 2023, the Court indicated that it was not open to the applicants to pursue a case in relation to adaptation measures other than seawalls (used in the broad sense to include wave return walls and bunds) under [82A].[1328]

906. It follows from the foregoing that the applicants' case on the Alternative Duty is now confined to an allegation that the Commonwealth was required to take various steps in relation to funding the Seawalls Project. That is reflected in CQ 6, which addresses the standard of care required of the Commonwealth in order to discharge the Alternative Duty. CQ 6 asks whether the Alternative Duty required the Commonwealth 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 Project).*

907. The applicants' submissions set out the standard of care with greater specificity. However, each specific statement of the standard of care falls within one of the two categories set out in CQ 6. The applicants submit that the Commonwealth was required to do the following to protect the applicants and group members from "*the foreseeable risks of marine inundation and erosion caused by sea level rise and extreme weather events*".

a) In relation to all six islands (AS [656]): "*the Commonwealth was required to establish and lead and coordinate a coherent plan for the funding to construct the seawalls on all 6 islands*".

b) In relation to Poruma, the Commonwealth was required to:

1327 T1081.28 (Boston) [TRN.0012.1080].

1328 T1542.43-1543.5 [TRN.0019.1530].

i) "*lead and coordinate the funding of seawalls on Poruma under Stage 1*" (AS [661]);

ii) "*establish non-competitive and predictable funds/grants to fund the seawalls on Poruma under Stage 1*" (AS [662]);

iii) "*lead and coordinate the provision of the additional funding required to construct the seawalls on Poruma during stage 1*" (AS [663]); and

iv) "*provide additional funding required to construct the seawalls on Poruma during Stage 1*" (AS [664]).

c) In relation to Iama, Masig and Warraber, the Commonwealth was required to:

i) "*lead and coordinate the funding of seawalls on those islands*" (AS [668]);

ii) "*establish non-competitive and predictable funds/grants to fund the seawalls on those islands*" (AS [669]); and

iii) "*provide additional funding required to construct the seawalls on those islands*" (AS [670]).

Breach of duty

908. The Commonwealth understands the applicants to submit that the Commonwealth breached the Alternative Duty as follows.

a) *First*, by failing to establish a "*coherent plan*" for the funding of the Seawalls Project that identified:

i) the Commonwealth's role in funding seawalls in the Torres Strait;

ii) the source/s of the Commonwealth's funding of the seawalls in the Torres Strait;

iii) the amounts available and any further contingency amounts for the construction of seawalls in the Torres Strait; and

iv) the role of the Queensland government in the funding of the seawalls in the Torres Strait.

The applicants submit that this breach is evidenced by the fact that there was no "*definitive*" source of funding for the Seawalls Project Stage 1, the funding for Stage 1 was "*unpredictable*", and also because the funding for both Stage 1 and Stage 2 was "*inadequate*" and "*delayed*" (at AS [710]-[711]).

b) *Secondly*, in relation to Poruma specifically, the applicants contend that the Commonwealth failed to provide funding for seawalls on Poruma as part of Seawalls Project Stage 1 (at AS [713]-[720]).

c) *Thirdly*, in relation to Iama, Masig and Warraber, the applicants contend that the Commonwealth failed to provide funding for the seawalls on those islands, first under Seawalls Project Stage 1 and then again under Seawalls Project Stage 2 (at AS [722]).

909. In essence, the applicants' case in relation to the Alternative Duty is that the Commonwealth was required to take positive steps to secure funding in a particular manner for the construction of seawalls in the Torres Strait Islands, and that it omitted to do so.

Causation and loss

910. The applicants submit that, but for the Commonwealth's breaches of the Alternative Duty, erosion and marine inundation on the six islands would have been avoided (AS [755]). They refer to various inundation events occurring as early as 2006 (see AS [743.1]).

The applicants should not be permitted to expand their case on breach

911. In their closing submissions, the applicants appear to contend — for the first time — that the Alternative Duty of Care was breached prior to 2012 in relation to that part of their case that concerns all six islands.[1329] Although it is not clear from the

[1329] The applicants' submissions make clear that the breaches in relation to Poruma occurred from 11 December 2011 and 3 May 2016: AS at [713] and the breaches in relation to Iama, Masig and Warraber occurred from 11 December 2011, 3 May 2016, 8 March 2022 and 5 May 2023: AS at [722].

submissions addressing breach of the Alternative Duty precisely when the alleged breach relating to all six islands is said to have occurred (see AS [673] to [711]), the applicants appear to rely on inundation events occurring on Saibai and Boigu since 2006 as having caused them damage: see AS [743]–[749]. Plainly, for events going back to 2006 to be relevant to damage, the Commonwealth must have owed a duty of care at that time which it had breached. The applicants have not sought leave to amend their case to allege breach of duty by omission going back to 2006 or earlier. Even if they did, leave should be refused for the reasons that follow.

912. The applicants' closing submissions contend that requests for funding for seawalls were made to the Commonwealth by community leaders, the TSIRC and the TSRA since "*about 2001*" (see AS [537], [558.2], [709.1], [741], [760.2]). There is no allegation to this effect in the 3FASOC. No mention of such an allegation is made in the applicants' further particulars of breach, which were provided during the trial in November 2023. The further particulars provided at that time suggest only that the Commonwealth was required to provide funding for the Seawalls Project (which, on the view most generous to the applicants, commenced in late 2011 when the TSIRC entered an expression of interest for a grant under RDAF Round 2 — see Part D.12.3 above). The applicants' oral opening did not allege any breach of the Alternative Duty going back to 2001. The applicants did not seek discovery of any material predating the TSIRC's expression of interest in 2011.[1330] No witness called by the applicants gave evidence about such requests, and the applicants' counsel did not put any questions about such requests to any Commonwealth witness.

913. The only evidence relied on for the proposition that there were requests for funding for seawalls going back to 2001 is a set of minutes from a meeting of the TSRA's Torres Strait Coastal Management Committee dated 23 November 2011. The applicants included this document in their proposed documents to tender on 24 October 2023 — that is, prior to November 2023, when they were given a

[1330] Discovery was given by reference to discovery categories set out in order 3 and the Annexure to the orders of Justice Mortimer (as her Honour then was) dated 19 October 2022 [CRT.2000.0005.0001]. Each category called for documents "for the period 1 January 2014 to present", including the category specifically directed at the Seawalls Project (category 3), and the categories directed at adaptation measures more generally (categories 2 and 5).

further opportunity to particularise their case.[1331] Those minutes state: "*Community leaders in the Torres Strait have been calling for government assistance for over a decade to reduce the impact of these events through the construction of suitable coastal engineering solutions*", and note that applications had been made under the Natural Disasters Mitigation Program in 2007 (but no detail is given about what those applications were for or why they did not succeed).[1332]

914. The Commonwealth has not been put on notice of an allegation of breach of the Alternative Duty that predated the TSIRC's expression of interest in RDAF Round 2 funding in late 2011, and has not had an opportunity to put on evidence as to whether any requests were in fact made to the Commonwealth government, and, if so, any reasons as to why such a request may not have been granted. The applicants have been given numerous opportunities to particularise their case as to the breach of the Alternative Duty, including during the trial. The applicants' attempt in closing to reformulate their breach case to include omissions dating back to that time will prejudice the Commonwealth and should not be permitted.

915. For completeness, it is noted that, despite the indication at AS [743]-[749] that the breach allegation includes conduct back to 2006 or earlier, the applicants' submissions in relation to the existence of the Alternative Duty support the view that the duty is only sought to be established from about 2011, and therefore, as a matter of logic that the breach allegation is limited to conduct (more particularly, omissions) after 2011. In support of the existence of the Alternative Duty, the applicants rely on the requests for funding made to the Commonwealth on 15 February 2012 and 21 June 2018, and the provision of funding in response to those requests, as part of the circumstances said to demonstrate "*a clear nexus or closeness*" between the Commonwealth and the Torres Strait Islanders such as to justify the imposition of the Alternative Duty (see AS [558.2] and [558.3]). They also rely on Commonwealth funding for tidal gauge monitoring and further adaptation research, although the government only announced its decision to

[1331] The applicants included this document in the consolidated index to the November Court Book which the solicitors for the applicants provided to the Court on 24 October 2024 pursuant to order 5 of the Orders dated 9 October 2023.

[1332] Torres Strait Coastal Management Committee, FOI Decision, [APP.0001.0014.0025] at [.0004], relied on at AS [558.2], [709], [760].

provide this funding in May 2010.[1333] To the extent that those circumstances are a necessary part of the context said to support recognition of the Alternative Duty, the duty could not have come into existence prior to those events and could not have been breached.

916. The Court should limit the allegation of breach of the Alternative Duty to the failure, from 2011, to implement funding in the manner that the applicants allege was required. So limited, the allegations relating to inundation events in 2006, 2007, 2009 and 2010,[1334] and any loss or damage alleged to flow therefrom,[1335] should be disregarded.

Overview of the Commonwealth's response to the Alternative Duty case

917. The Commonwealth submits that the applicants have failed to establish any element of a cause of action in negligence in relation to the Alternative Duty.

918. The Court should not recognise the Alternative Duty for the reasons outlined in Part F.1 below. By way of overview, three matters requiring rejection of the posited duty are noted.

919. *First*, recognition of this duty would impose obligations on the Commonwealth to take the lead on local climate change adaptation measures, which would be in tension with the policy position, agreed among the Commonwealth and State and Territory governments, reflected in the COAG Agreement. The COAG Agreement reflects a high-level framework to guide governments to manage climate risks.[1336] It contemplates cooperation between the three tiers of government in various aspects of managing the adaptation response to climate change, whilst identifying particular spheres of primary responsibility for each level of government.

920. The very existence of the agreement illustrates that the division of roles and responsibilities of different levels of government in relation to climate change

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[1333] There is no dispute between the parties that this funding was announced in May 2010, but for completeness the document relied upon by the applicants to evidence this funding is at FOI Decision, [NIA.2009.0036.8142].

[1334] AS at [743], [747] and [749].

[1335] These allegations are set out in the submissions at AS at [743.1]-[743.3], [745.1] (insofar as Mr Kabai gives evidence about the 2012 flood), [747], [749.2], [749.3].

[1336] The COAG Agreement also contemplates the role of private parties, but that is not relevant for present purposes.

adaptation involves political questions that are not apt for resolution by the Court through the prism of the law of negligence. Further, it suggests that it would be inappropriate to impose a duty of care in respect of climate change adaptation on any one level of government in circumstances where it has been agreed as a matter of policy that each level of government in Australia has "*differentiated, yet complementary, roles in helping Australia adapt to the impacts of climate change*".[1337]

921. In this regard, the COAG Agreement does not contemplate that the Commonwealth's role is to take the lead on local adaptation measures. Although it is framed at the level of general principle, it anticipates that local governments have a "*critical role*" to play in relation to local adaptation measures given their understanding of local circumstances, including informing State and Commonwealth Governments about the needs of local communities.[1338] That is not to deny that the Commonwealth in fact plays a role in local adaptation measures — as, indeed, it did in the Seawalls Project by partially funding that project. But it would run contrary to the policy position reflected in the COAG Agreement to impose a duty of care on the Commonwealth to take the lead on local adaptation measures in the Torres Strait in circumstances where the COAG Agreement does not contemplate that the Commonwealth has such a role, and contemplates that local governments have a critical role to play in that domain (as the local government in fact did in the Seawalls Project). As in *Graham Barclay Oysters*, the policy position reflected in the COAG Agreement is a "*fundamental governmental choice*" which "*falls outside the scope of any common law duty of care that might otherwise arise*".[1339]

922. *Secondly*, recognising the Alternative Duty would effectively require the Court to assess the reasonableness of the processes for, and decisions regarding, allocation of the Commonwealth budget. The Commonwealth's determination of how to allocate its resources involves matters of core policy. The Australian Government Budget process is the decision-making process for allocating public resources to the government's policy priorities. It is through the Budget process that the government gains the Parliament's authority to spend relevant money through the

1337 COAG Agreement, [EVI.2001.0006.2001] at [0693].

1338 COAG Agreement, [EVI.2001.0006.2001] at [0697].

1339 *Graham Barclay Oysters Pty Ltd v Ryan [2002] 211 CLR 540* at 606 [175]-[176] (Gummow and Hayne JJ, with whom Gaudron J agreed at 570 [58]), [APP.0001.0020.0065].

passage of the annual appropriation acts and other legislation that establishes special appropriations. This process, as well as the process for allocating funds within appropriations, is governed by a legal and policy framework, including constitutional constraints requiring that funds may only be appropriated by legislation, and involves the balancing of competing priorities. It requires consideration of questions best suited to the executive and Parliament rather than the judiciary.

923. *Thirdly*, although not pleaded as such, the Alternative Duty requires the Commonwealth to take positive action; it is a duty to take reasonable care to implement, or adequately implement, adaptation measures to prevent or minimise the impacts of climate change in the Torres Strait Islands, more specifically, inundation and erosion: see [899]-[900] above. In the absence of any allegation that the tortfeasor's conduct created the risk of harm, the law does not generally impose a duty of care requiring a person to protect another from the risk of harm.[1340] As outlined further in Part F.1.7 below, there is nothing about the circumstances of this case that could justify the imposition of a duty on the Commonwealth to take positive action to protect Torres Strait Islanders from harm from the impacts of climate change.

924. These matters require that the Alternative Duty not be recognised. The relevant salient features of the relationship between the Commonwealth and Torres Strait Islanders also point overwhelmingly against recognition of the duty.

925. If, contrary to the Commonwealth's contention, the Court does recognise the Alternative Duty, then it should find that there was no breach of that duty for the reasons outlined in Part F.2 below. The following matters are noted by way of overview.

926. As outlined in Part F.2.1, although the Commonwealth admits that it was reasonably foreseeable that some Torres Strait Islanders may suffer harm of a compensable kind if the seawalls on the six islands were not funded so as to enable them to be constructed, it does not accept that it was reasonably foreseeable that Torres Strait Islanders would suffer harm if the Commonwealth did not lead and coordinate and establish a coherent plan for funding the Seawalls

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1340 *Graham Barclay Oysters* at 575-576 [81] (McHugh J), [APP.0001.0020.0065]; *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 at [114]-[118] (Gummow, Hayne and Heydon JJ), [127] (Crennan and Kiefel JJ), [APP.0001.0020.0161.

Project, or provide funding in the particular manner that the applicants allege was required.

927. As outlined in Part F.2.2, when consideration is given to the magnitude and probability of the risk of harm, as well as the burden of taking precautions and the Commonwealth's competing responsibilities, all that could be expected of the Commonwealth, acting reasonably, was that it:

a) consider whether to provide funding for the Seawalls Project, consistent with the legal and policy framework that applies in relation to the provision of Commonwealth funding; and

b) provide funding up to the amount sought, if it considered it appropriate to do so.

The Commonwealth did both of these things. At both Stage 1 and Stage 2 of the Seawalls Project, it provided the full amount of funding sought from it. There is evidence that it is taking steps to investigate whether further funding might be provided for a potential Stage 3 of the Seawalls Project. It follows that there has been no breach of the Alternative Duty; nor is there any ongoing breach.

928. The applicants' submissions about the standard of care owed by the Commonwealth, and as to breach, should not be accepted for the reasons outlined in Part F.2.3.

929. If the Court finds that the Commonwealth owed the Alternative Duty and that there was one or more breaches of that duty, then:

a) the applicants have not demonstrated that they have suffered any loss of a compensable kind, let alone that any such loss was caused by any breach by the Commonwealth, for the reasons outlined in Part F.3.1 below; and

b) the only common questions in relation to causation of loss relate to whether any breach (including an ongoing breach) of the Alternative Duty has caused a collective loss of fulfilment of *Ailan Kastom*. For the reasons outlined in Part F.3.2 below, although the applicants refer to inundation events that have occurred on the six islands, they have not sought to argue that any of those inundation events have caused a loss of fulfilment of *Ailan Kastom*. It follows that there is no evidence of relevant loss to which the principles of causation can be applied.

F.1. The Commonwealth does not owe the Alternative Duty (CQ 5)

930. For the reasons that follow, the Commonwealth submits that it does not owe Torres Strait Islanders the Alternative Duty.

931. The principles relating to when courts should recognise a novel duty of care are set out in Part C.1 above. The analysis of whether to recognise the Alternative Duty overlaps to some extent with the analysis of whether to recognise the Primary Duty. Specific areas of overlap are identified below, by reference to the analysis in Part E.3 above.

F.1.1 Relevant contextual features to the relationship between the Commonwealth and Torres Strait Islanders

932. As noted in Part C.1.1 above, it is important, before turning to the salient features analysis, to consider the context of the relationship between the Commonwealth and Torres Strait Islanders as a whole.

933. As in relation to the Primary Duty, the applicants submit that the relevant context is the special relationship between the Commonwealth and Torres Strait Islanders (AS [558], referring to [180]-[190]). Consistently with its response to the alleged Primary Duty, the Commonwealth accepts that the relationship between the Commonwealth and Torres Strait Islanders is part of the background against which the salient features analysis should be undertaken, subject to its comments in response to the applicants' arguments about the nature of that relationship at [961] below.

934. However, there are two other contextual matters that are of particular importance in considering whether to recognise the Alternative Duty. Those matters, together or separately, are sufficient reason for the Court to refuse to do so.

Contextual matter one: The Alternative Duty would be in tension with the COAG Agreement, and invite judicial scrutiny of intergovernmental relationships

935. First, recognition of this duty would impose obligations on the Commonwealth to take the lead on local climate change adaptation measures, which would be in tension with the policy decisions reflected in the COAG Agreement. The COAG Agreement reflects a high-level framework to guide governments to manage

climate risks. It contemplates cooperation between the three tiers of government in various aspects of managing the adaptation response to climate change, whilst identifying particular spheres of primary responsibility for each level of government. These roles and responsibilities were affirmed in the National Climate Resilience and Adaptation Strategies in 2015[1341] and 2021.[1342]

936. The COAG Agreement forms an essential part of the factual context in which the relationship between the Commonwealth and Torres Strait Islanders is to be considered for the purpose of determining whether to recognise the Alternative Duty. The policy reflected in the COAG Agreement, as well as the National Climate Resilience and Adaptation Strategies, indicates that the Court should not recognise the Alterative Duty for two reasons.

937. The first reason is that the mere existence of the COAG Agreement illustrates that the division of roles and responsibilities of different levels of government in relation to climate change adaptation involves political questions that are not apt for resolution by the Court through the prism of the law of negligence. In particular, it would be inappropriate to impose a duty of care with respect to climate change adaptation on any one level of government in circumstances where it has been agreed as a matter of policy that each level of government in Australia has "*differentiated, yet complementary, roles in helping Australia adapt to the impacts of climate change*".[1343]

938. The question of how the different levels of government divide responsibility for adaptation to climate change is inherently political. Decisions as to the appropriate functions to be undertaken by different levels of government within a federation to address climate change adaptation involve choices as to capacity and suitability that have budgetary consequences for governments, and impact the measures that are able to be implemented and the processes by which decisions as to which measures to implement are made. These are issues that are not apt to be assessed by the Court according to the standard of reasonableness.

939. As contemplated by the COAG Agreement, the implementation of adaptation measures throughout Australia that involve the Commonwealth government are likely to involve input from different levels of government. Recognising the

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1341 [APP.0001.0007.0149].

1342 [APP.0001.0007.0157],

1343 COAG Agreement, [EVI.2001.0006.2001] at [0693].

Alternative Duty is therefore likely to subject intergovernmental relations to judicial scrutiny. As noted at [59] above, intergovernmental dealings are matters of a kind that are "*not cognisable by the tort of negligence*".[1344]

940. The Seawalls Project is a good example of the way in which multiple levels of government may be involved in implementing adaptation measures. As outlined in Part D.11 above, there are three levels of government in the Torres Strait Islands, and the TSRA also plays a role in governance. The TSIRC has led the implementation of the Seawalls Project, which is appropriate given its understanding of the local area. The role of the Commonwealth and Queensland governments is to provide funding, as well as to participate in the PGC (see Parts D.12.3 and D.12.4 above) in order to provide a high-level governance and probity mechanism. Any Commonwealth decision-making in relation to funding the Seawalls Project therefore necessarily involved interaction with governments at the State and local level. Any adjudication of the reasonableness of the Commonwealth's conduct in relation to funding such projects would require scrutiny of the way in which the Commonwealth navigates its relationship with those levels of government. Indeed, the applicants argue that, in order to discharge the Alternative Duty, the Commonwealth was required to devise a "*coherent plan*" that addressed, among other things, "*the role of the Queensland government in the funding of the seawalls in the Torres Strait*" (AS [710]). This highlights that the Alternative Duty, if recognised, would require the Court to pass judgment on the reasonableness of the way in which the Commonwealth interacts with other levels of government.

941. The second reason is that the COAG Agreement does not contemplate that the Commonwealth's role is to take the lead on local adaptation measures. Although it is framed at the level of general principle, it makes clear that local governments, being "*on the frontline in dealing with the impacts of climate change*",[1345] are responsible for ensuring adaptation responses consider local circumstances and their role is to contribute "*appropriate resources to prepare, prevent, respond and recover from detrimental climatic impacts*".[1346] The Commonwealth's

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[1344] *Pyrenees Shire Council (previously known as the President, Councillors & Ratepayers of the Shire of Ripon) v Day* (1998) 192 CLR 330 at [182] (Gummow J), [APP.0001.0020.0131].

[1345] Roles and Responsibilities for Climate Change Adaptation in Australia, [EVI.2001.0006.2001] at [0697].

[1346] Roles and Responsibilities for Climate Change Adaptation in Australia, [EVI.2001.0006.2001] at [0698].

responsibilities include providing leadership on national adaptation reform, whilst State governments bear other responsibilities, including working with the Commonwealth to implement national adaptation reform. State and local governments are responsible for managing risks and impacts to public assets owned and managed by them. That is of course not to suggest that the Commonwealth does not in practice play a role in relation to local adaptation projects — as, indeed, it did in the Seawalls Project. But it highlights the inappropriateness of imposing a legal duty of care on the Commonwealth to lead local adaptation projects in circumstances where it has been agreed as a matter of policy that local government has a critical role to play in that matter.

942. In *Graham Barclay Oysters*, the High Court refused to recognise that the State of New South Wales owed consumers of contaminated oysters a duty of care because such a duty would run counter to a policy decision made by the State as to the manner in which the oyster industry would be regulated.[1347] The present case is relevantly analogous. The policy decision of the Council of Australian Governments in 2012 provides high-level principles to guide governments to manage climate risks. The Alternative Duty would impose an obligation on the Commonwealth that runs counter to that policy choice because it would effectively require the Commonwealth to take the lead on local adaptation projects in the Torres Strait, whereas the COAG Agreement does not contemplate that the Commonwealth plays such a role and instead contemplates that local governments play a "*critical role*" in such projects given their understanding of local circumstances.

943. It would be inappropriate for the Court to recognise a duty of care that is in tension with the policy reflected in the COAG Agreement. Recognition of such a duty would subject intergovernmental relations to judicial scrutiny, and necessarily require the Court to assess the reasonableness of decisions involving political judgments. As outlined further below, these are not matters that are apt for resolution by the Court.

[1347] *Graham Barclay Oysters* at [175]-[176] (Gummow and Hayne JJ), [58] (Gaudron J, agreeing with Gummow and Hayne JJ), see also at [27] (Gleeson CJ), [APP.0001.0020.0065].

Contextual Matter Two: The Alternative Duty would invite judicial scrutiny over the way in which the Commonwealth allocates its budget

944. The second important matter pointing strongly against recognition of the Alternative Duty is that the duty would effectively require the Court to assess the reasonableness of the Commonwealth's budget decisions, including both the processes by which funding decisions are made and particular decisions as to which projects to fund.

945. The Commonwealth's determination of how to allocate its resources involves matters of core policy. As outlined further below, funding decisions are governed by a legal and policy framework and involve the balancing of competing priorities. Such decisions inherently require consideration of matters best suited to the executive and Parliament rather than the judiciary (as to which, see the discussion of *Graham Barclay Oysters* and *Brodie v Singleton Shire Council* at [63]-[65] and [68] above).

946. As to the legal framework, the grant of funds by the Commonwealth is regulated in a number of ways. The framework outlined in [947a) and b)] below, and the history of the funding decisions for the Seawalls Project outlined in [951] to [958] below, illustrate that the regime for regulation of Commonwealth expenditure is to enable a process for transparent and accountable decision-making in relation to expenditure of public funds. These processes necessarily take time, involving multi-stage decision-making, and are inconsistent with the funding regime that the applicants contend was required in this case, in which unlimited funds would be set-aside to fund infrastructure in the Torres Strait Islands, with additional funds being available immediately in the event that project budgets are exceeded.

947. Without being exhaustive, the Commonwealth's power to grant funds are (and have been at all relevant times) subject to the following legal requirements.

948. *First*, no money can be drawn from the Treasury of the Commonwealth except under appropriation made by law.[1348] It is through the Australian Government Budget process that the Executive gains the Parliament's authority to spend relevant money through the passage of the annual appropriations acts and other legislation that contain special appropriations (also called standing

[1348] Constitution, s 83.

appropriations). This highlights the inappropriateness of judicial scrutiny of the Commonwealth's budgetary decisions, given that any finding by a Court that further funds should be provided to discharge the Alternative Duty will either interfere with the Commonwealth's decision as to how to allocate funds within an existing appropriation or will require the passing of a different appropriation law, which is a matter for Parliament.

949. *Secondly*, the use and management of public resources is governed by legislation and rules made thereunder. Subjecting decisions of Commonwealth officials about how to allocate public funds to judicial scrutiny creates the potential for interference with this system of regulation. For example:

a) at the time the Seawalls Project Stage 1 was initiated in late 2011, the administration of grants was subject to the *Financial Management Act 1997* (Cth) (**FMA Act**),[1349] as well as the *Financial Management and Accountability Regulations 1997* (Cth) (**FMA Regulations**). Those regulations relevantly provided as follows:

i) Regulation 7A empowered the Finance Minister to issue "Commonwealth Grant Guidelines" (**CGG**), with which an official performing duties in relation to grants administration was required to comply.[1350] The CGGs provided that a Minister must not approve a grant without first receiving agency advice on the merits of the proposed grant.[1351]

ii) Regulation 8 relevantly provided that a person must not enter into an arrangement (defined as a contract or agreement under which public money is payable) unless a spending proposal had been approved under regulation 9; and

iii) Regulation 9 relevantly provided that an approver "*must not approve a spending proposal unless the approver is satisfied, after making reasonable inquiries, that giving effect to the spending proposal would be a proper use of Commonwealth resources*

1349 Affidavit of Christopher Connolly sworn on 15 May 2023 (**Connolly Affidavit**) at [27], [WIT.2000.0001.0015].

1350 The Commonwealth Grant Guidelines are exhibited to Tab 2 to Exhibit CC-1 to the Connolly Affidavit, [WIT.2000.0001.0015].

1351 Tab 2 to Exhibit CC-1 to the Connolly Affidavit at [3.19], [INF.2006.0001.0001].

(within the meaning given by s 44(3) of the FMA Act)." Section 44(3) defines a "*proper use*" of resources as the "*efficient, effective and ethical use that is not inconsistent with the policies of the Commonwealth*".

b) since 2013, the use and management of public resources has been governed by the PGPA Act. That Act relevantly provides as follows:

   i) Under s 15(1)(a), the "*accountable authority*" of a Commonwealth entity must govern their entity in a way that promotes the "*proper*" (efficient, effective, economical and ethical) use and management of public resources for which they are responsible. This duty applies to the expenditure of relevant money.

   ii) Under s 21, the accountable authority of a non-corporate Commonwealth entity must govern their entity in a way that is not inconsistent with the policies of the Australian Government. This includes taking steps to ensure that their entity complies with any government policies that relate to grants.

   iii) Under s 71, a Minister must not approve a proposed expenditure of relevant money unless the Minister is satisfied, after making reasonable inquiries, that the expenditure would be a proper use of the relevant money.

c) from June 2014, the administration of Commonwealth grants has been subject to the *Commonwealth Grants Rules and Guidelines* (**CGRGs**), which were issued by the Finance Minister under s 105C of the PGPA Act.[1352] A further version of the CGRGs was issued in 2017.[1353] The 2017 version of the CGRGs relevantly provide as follows (emphasis in original):

   i) accountable authorities *must* govern entities in a way that promotes proper use and management of public resources. In managing the affairs of the entity, accountable authorities *must* comply with the Constitution, the PGPA Act, the PGPA Rule and any other relevant

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1352 [CTH.0006.0001.0383].

1353 [CTH.0006.0001.0422].

law. In addition, accountable authorities of non-corporate Commonwealth entities must govern the entity in a way that is not inconsistent with the policies of the Australian Government (at [3.2]);

ii) accountable authorities and officials involved in grants administration *must* comply with government policies and legislation relevant to grants administration (at [4.3]);

iii) where an accountable authority or an official approves the proposed commitment of relevant money in relation to a grant, the accountable authority or official who approves it *must* record, in writing, the basis for the approval relative to the grant opportunity guidelines and the key principle of achieving value with relevant money (at [4.5]); and

iv) Ministers *must* not approve a grant or group of grants without first receiving written advice from officials on the merits of the grant or group of grants. That advice *must* meet the requirements of the CGRGs (at [4.6]).

950. As to the policy framework, the inappropriateness of overlaying that process with the laws of negligence is demonstrated by considering the various ways in which the actual decision-making process about funding the Seawalls Project involved balancing policy considerations.

Seawalls Project Stage 1

951. In relation to Stage 1, and as outlined in Part D.12.3 above, funding was provided via a $5 million grant from RDAF Round 2, as well as $7 million paid from the Indigenous Housing and Infrastructure (**IHI**) Appropriation.

952. As to the RDAF Round 2 grant, a defined pool of money was appropriated by the Commonwealth for the RDAF program ($1 billion, in respect of which $200 million was available for Round 2). The Commonwealth developed grant

guidelines for the RDAF Round 2, which established how applications for grants would be assessed.[1354]

953. The RDAF Round 2 process illustrates the way in which the Commonwealth is required to balance competing priorities in determining how to allocate its finite resources, and the systems that have been developed by the executive to determine the balance of those priorities. Applicants for funding from across the country submitted an expression of interest to their local RDA Committee, which then ranked the top three projects according to the policy considerations set out in the grant guidelines.[1355] It was a typical competitive grants program administered by DIRD in that applications for grants were assessed against the RDAF Round 2 grant guidelines, and applications went through a multi-stage assessment process within DIRD which included consultation with relevant Commonwealth and/or State entities.[1356] DIRD's overview of its assessment of the TSIRC's application for funding shows that this process involved assessing the application against various policy considerations, including the extent to which the project would contribute to and sustain regional economic growth, the extent to which it would provide a community benefit and the extent to which the application had leveraged funds from other sources.[1357]

954. DIRD's assessments of each application were then ranked by an advisory panel according to their merit. As is apparent from the advisory panel's minutes, they were required to weigh the merits of 125 applications for funding from across the country, whilst trying to ensure that the $200 million to be allocated amongst those projects would maximise the impact of those funds in regional Australia.[1358] The advisory panel's advice was then used to brief the Minister for Regional Australia, Regional Development and Local Government, who then exercised his discretion, within the legal confines of the FMA Act, the FMA Regulations and the CGG, as to which projects to fund.

955. The RDAF Round 2 process illustrates the need for the Commonwealth to follow processes that allow it to weigh competing calls on its budgetary resources across

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1354 Tab 1 to Exhibit CC-1 to the Connolly Affidavit, [WIT.2000.0001.0015].

1355 Tab 1 to Exhibit CC-1 to the Connolly Affidavit at Attachment D, [INF.2004.0001.0001] at [.0040].

1356 See Connolly Affidavit at [23], [WIT.2000.0001.0015].

1357 Tab 9 to Exhibit CC-2, [INF.2000.0002.0373].

1358 RDAF Round Two advisory panel's minutes, [INF.2004.0001.0065], see in particular at [.0065].

the country and in relation to a range of different policy objectives. This is exactly the kind of "core policy" decision-making in respect of which courts have cautioned against recognising a duty of care as outlined in Part C.1.2 above. As the RDAF Round 2 example illustrates, such decision-making requires consideration of an array of competing policy considerations. This is a matter best suited to the administrative arm of government, which can weigh those considerations using structured decision-making processes that are subject to strict legal frameworks for ensuring the proper use of public funds, and permit consultation with different Commonwealth and State entities about the proposed project. With respect, this is not a matter suited for judicial determination.

956. The $7 million funded from the IHI Appropriation similarly highlights the inappropriateness of the Court adjudicating upon the reasonableness of the Commonwealth executive's decision to fund projects. As set out at [427.f)], although the funding was ultimately provided from the IHI Appropriation, this required consideration of the fact that this would mean that less funds were left within that appropriation for other critical and essential services in remote Indigenous communities across Australia. To determine the reasonableness of the Commonwealth's decision in relation to funding the Seawalls Project, the Court would need to consider the reasonableness of how the Commonwealth allocated its resources amongst many competing and worthwhile priorities. This is simply not a matter that is appropriate for judicial determination.

Seawalls Project Stage 2

957. The way in which funding was allocated for the Seawalls Project Stage 2 similarly illustrates the balancing of competing priorities that is inherent in the Commonwealth's funding decisions, and the legal framework that governs those decisions. As noted at [445] above, the $20 million provided by the Commonwealth for the Seawalls Project Stage 2 was funded under the IAS. Before deciding to fund the project under this program, the Minister was required to obtain advice on whether such funding was permitted under the IAS Grant Guidelines (as to which, see [949.c)iv)] above), and had to consider whether funding for the Seawalls Project under the IAS was justified, given that funding the project from the finite funds available under the IAS would necessarily reduce the funding available under that program for other projects.

Investigation of potential further funding for Seawalls Project Stage Three

958. Finally, the evidence of Dr Shay Simpson about steps that have been taken to investigate the possible provision of further funding for the Seawalls Project highlight a further way in which it would be inappropriate to subject Commonwealth decisions as to budgetary matters to the laws of negligence. As Dr Simpson explains, further funding may have to go through the Australian Government budget process. Typically, the first step in that process is for the relevant portfolio Minister to determine whether to support the development of a New Policy Proposal (**NPP**). If the Minister supports the NPP then he or she will seek approval to put the NPP before the Expenditure Review of Cabinet (**ERC**) for consideration of whether to fund the proposal as part of the yearly budget or as part of the Mid-Year Economic and Fiscal Outlook (**MYEFO**). The decision whether to provide funding for the NPP is a decision for Cabinet.[1359]

959. Each of these matters point up fundamental difficulties in recognising the Alternative Duty, because it would necessarily involve the Court adjudicating on the reasonableness of the Commonwealth decisions as to how it allocates its budget, which is not a matter appropriate for judicial determination. In any event, the Court does not (and could not) have all the relevant evidence before it about what competing priorities the Commonwealth was balancing, nor what its budgetary constraints were generally, at any relevant time in relation to the Seawalls Project. It therefore could not make an informed assessment of whether the Commonwealth acted reasonably in all the circumstances.

Conclusion — these two contextual matters mean the Alternative Duty should not be recognised

960. Viewed in the factual context in which the Alternative Duty is sought to be established, it is apparent that the applicants invite the Court to recognise a duty of care that will run counter to the policy decision made by the Commonwealth and State and Territory governments, as reflected in the COAG Agreement, about the role that each level of government within Australia should play in relation to climate change adaptation, and will require judicial scrutiny of intergovernmental relationships. Further, recognition of the Alternative Duty will necessarily require

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[1359] Affidavit of Dr Shay Simpson affirmed on 7 November 2023 (**Simpson Affidavit**) at [9]-[11], [WIT.2000.0002.0001].

adjudication of the reasonableness of core policy decisions. For the reasons explained above, these matters are inapt for resolution by the Court. Those matters alone are sufficient reason to refuse to recognise the Alternative Duty. Nevertheless, for completeness, the Commonwealth addresses the salient features analysis below, which leads to the same conclusion.

The "special relationship" between the Commonwealth and Torres Strait Islanders

961. To the extent that the applicants rely on AS [180]-[190] in the context of the Alternative Duty, the Commonwealth refers to and repeats its submissions at [611]-[623] above. In AS [558], the applicants also refer to various additional matters relating to the relationship between Torres Strait Islanders and the Commonwealth which are said to be of "*particular relevance to the Alternative Duty of Care*". The applicants' submissions make no attempt to explain how each of those matters is said to be relevant to the existence of the Alternative Duty. Nonetheless, the Commonwealth responds to each as follows:

   a) as to AS [558.1], the Torres Strait Treaty is dealt with by the Commonwealth at [617]-[620] and [622] above;

   b) as to AS [558.2], the Commonwealth submits that the alleged request for funding in 2001 is outside the scope of the applicants' case as pleaded, and that they should not be given leave to rely upon it in order to avoid prejudice to the Commonwealth as noted at [911]-[916] above. However, it accepts that requests for funding were made to the Commonwealth on 15 February 2012 in relation to the Seawalls Project Stage 1 (although for completeness it notes that the TSIRC had in fact lodged an expression of interest with the RDA Committee for Far North Queensland on 1 December 2011 as outlined at [425] above) and on 21 June 2018 in relation to the Seawalls Project Stage 2. Both requests for funding were ultimately granted in full by the Commonwealth. It is not clear how either request could support a finding that the Commonwealth owed Torres Strait Islanders a duty to provide more funding than it was asked to provide. Nor is it clear how a funding request in June 2018 could support the existence of the Alternative Duty from 2011. Further, for the reasons outlined at [951]-[959] above, the process by which funding was provided

highlights that this is a matter of core policy in respect of which it would be inappropriate to recognise a duty of care. These matters do not assist the applicants.

c) as to AS [558.3]-[558.4], the matters in these paragraphs are accurate. However, again, it is unclear why these matters would support recognition of the Alternative Duty. They are instances of the federal government providing funding for a range of matters relating to adaptation to climate change. Which projects the federal government funds, and the amount of funding it considers appropriate for those projects, is a matter of core government policy for the reasons outlined in [951]-[959] above.

d) as to AS [558.5], the Commonwealth accepts that the NTA and the *Aboriginal and Torres Strait Islander Act* recognise the disadvantage of Torres Strait Islanders (and Aboriginal peoples). It also accepts that that disadvantage is recognised by the Closing the Gap policy. But neither of these matters suggest that it is appropriate to superimpose the alleged duty of care at common law over the relationship between the Commonwealth and Torres Strait Islanders. As to the applicants' submissions about the Commonwealth's obligations under international law, the Commonwealth refers to and repeats [622] above.

e) as to AS [558.6], the Commonwealth does not accept that:

   i) Torres Strait Islanders have *no* ability to protect themselves from the marine inundation and erosion impacting their islands. Although the Commonwealth accepts that some Torres Strait Islanders have a degree of vulnerability to the impacts of marine inundation and erosion impacting their islands, there is evidence before the Court that some group members have taken certain steps to protect themselves against suffering harm of a compensable kind by reason of marine inundation and erosion. That evidence is outlined at [670] above. It therefore overstates the evidence to say that Torres Strait Islanders have *no* ability to protect themselves from the impacts of marine inundation and erosion; and

   ii) Torres Strait Islanders have no power to influence the Commonwealth to fund the seawalls on the Torres Strait Islands.

To the contrary, the evidence is that, in relation to both Stage 1 and Stage 2 of the Seawalls Project, Torres Strait Islanders were successful in obtaining the entire amount of funding they sought from the Commonwealth through the TSIRC and TSRA.

f) as to AS [558.7], the relevance of the fact that the Commonwealth established the TSRA on the question of whether the Commonwealth owes Torres Strait Islanders a duty of care is dealt with at [694] above.

F.1.2 Reasonable foreseeability

962. As outlined at [82] above, the question is "*whether it is reasonably foreseeable as a possibility that careless conduct of any kind on the part of the Commonwealth may result in damage of some kind*" to Torres Strait Islanders.[1360] The threshold for satisfaction of the test is low — the risk will be "*foreseeable*" if it is "*not far-fetched or fanciful*".[1361]

963. The Commonwealth accepts that it was reasonably foreseeable that some Torres Strait Islanders may suffer harm of a compensable kind if the seawalls on the six islands were not funded so as to enable them to be constructed. However, as explained further below in the context of breach, it does not accept that it was reasonably foreseeable that Torres Strait Islanders would suffer harm if the Commonwealth did not lead and coordinate and establish a coherent plan for funding the Seawalls Project or provide funding in the particular manner that the applicants allege was required.

964. Reasonable foreseeability alone is insufficient to give rise to a duty of care.[1362] It is for this reason that courts engage in the salient features analysis for the purpose of determining whether the relationship is one of sufficient neighbourhood or proximity that a legal duty of care is owed. In the following sections, the Commonwealth outlines why it says there are no salient features that justify recognition of the Alternative Duty.

1360 *Sharma* (2022) 400 ALR 203 at [417] (Beach J) (emphasis added), [APP.0001.0020.0101].

1361 *Sullivan v Moody* (2001) 240 CLR 537 at [42] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ), [CTH.0001.0001.2019].

1362 *Sullivan v Moody* at [25], [42] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ), [CTH.0001.0001.2019].

F.1.3 Vulnerability

965. As outlined at [83] above, the salient feature of "vulnerability" is concerned with whether an applicant has the capacity to protect themselves from the consequences of a respondent's want of reasonable care. In a case where the risk of harm is said to be caused by the impacts of climate change, the relevant question is not whether the person is vulnerable to the impacts of climate change, but rather whether they are unable to protect themselves against suffering harm of a compensable kind caused by those impacts. Whether a class of persons is "vulnerable" in the relevant sense is not necessarily binary — as Gummow and Hayne JJ held in *Graham Barclay Oysters*, the salient feature of vulnerability is concerned with "*the* degree *of vulnerability*" of the applicant.[1363] It follows that the extent to which a class of persons is considered "vulnerable" may inform the weight to be given to this salient feature.

966. At AS [560]-[586] the applicants set out twelve reasons they say that Torres Strait Islanders are vulnerable in the relevant sense. None of those factors grapple with the central issue in determining whether Torres Strait Islanders are vulnerable in the relevant sense. They are all directed to establishing that Torres Strait Islanders are vulnerable to the impacts of climate change, more specifically inundation and erosion, and that they cannot protect themselves from those impacts of climate change, rather than establishing that they are unable to protect themselves from suffering harm of a compensable kind which may be caused by inundation and erosion.

967. The first, second, eleventh and twelfth factors set out at AS [562]-[570] and [585]-[586] are about the risk of inundation and erosion on the Torres Strait Islands. The Commonwealth has admitted that some Indigenous peoples in Australia are more vulnerable to the impacts of climate change than other peoples.[1364] More specifically, it admits that the Torres Strait Islands are vulnerable to the impacts of climate change, including sea level rise and storm surges, and that Torres Strait Islanders may be vulnerable to the impacts of

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1363 *Graham Barclay Oysters Pty Ltd v Ryan* [2002] 211 CLR 540 at [149] (emphasis added), [APP.0001.0020.0065].

1364 Defence to Second Further Amended Statement of Claim (**Defence**) at [29(b)], [CRT.2000.0001.0001].

climate change. It also admits that some of the Torres Strait Islands have been subject to inundation events prior to and since 2014.[1365]

968. The extent to which islands in the Torres Strait will be vulnerable to marine inundation and erosion will vary from island to island, and the applicants have only adduced evidence in relation to some of those islands. There is therefore no evidence that *all* islands in the Torres Strait are vulnerable to the impacts of marine inundation and erosion. The Commonwealth confines its analysis to whether there is evidence that the six islands the subject of the Seawalls Project are vulnerable to erosion and inundation, noting of course that this cannot found the basis for a more general finding that the Torres Strait Islands are vulnerable to the impacts of marine inundation and erosion.

969. The Commonwealth accepts that each of the six islands the subject of the Seawalls Project is vulnerable to the impacts of marine inundation and erosion. However, the extent of that vulnerability varies between islands, therefore it is necessary to say something about the limited evidence relied on in relation to Poruma, Warraber, Iama and Masig.

a) **Poruma:** The only evidence relied upon by the applicants (at AS [562]) are two photos of events on Poruma in February 2019 and August 2023 which Mr Bettington estimates to have been ~.1m and ~.2m above HAT respectively.[1366] The pictures appear to depict the water level rising above the jetty and up the boat ramp, but do not depict any flooding on the island which would suggest damage to property.

b) **Warraber:** The only evidence relied upon by the applicants (at AS [562]) is a photo of a flooding event in January 2006, which Mr Bettington estimates to be .25 above HAT, and which appears to show the water encroaching just beyond the existing seawall but does not appear to depict large scale flooding causing property damage.[1367]

c) **Iama:** The only evidence of an event on Iama relied upon by the applicants (at AS [562]) is a photo of an inundation event on Iama in 2006 which Mr Bettington estimates to have been 0.18m above HAT. Without

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1365 Defence at [53(b)], [CRT.2000.0001.0001].

1366 Bettington Supplementary Report, [APP.0001.0015.0011] at [.0005-.0006].

1367 Bettington Supplementary Report at Table 9, [APP.0001.0015.0011] at [.0008].

any other evidence from Iama it is difficult to put the extent of flooding depicted in this photo in context, but it is not readily apparent that the flooding is affecting any property in this photo.

d) **Masig:** the applicants rely on no evidence whatsoever from Masig to establish a risk of inundation/erosion.

970. The applicants also rely on general evidence about predicted sea level rise to argue that Torres Strait Islanders are vulnerable to inundation and erosion (AS [569]-[570]), but without evidence about the specific risks on particular islands, and how those risks are predicted to increase in line with sea level rise, it is not possible to say that the Torres Strait Islands generally are vulnerable to inundation and erosion.

971. The third to eighth factors set out at AS [571]-[581] seek to demonstrate that Torres Strait Islanders have limited ability to either construct or seek funding for seawalls themselves. The Commonwealth does not suggest that Torres Strait Islanders can reasonably be expected to build engineered seawalls or other coastal protection measures themselves, but it submits that the applicants' submission that Torres Strait Islanders have limited ability to seek funding for seawalls is contrary to the evidence before this Court. As to the matters relied on by the applicants in support of that argument:

a) it is not to the point that individual Torres Strait Islanders have been unable to seek funds (cf AS [574]), or that the TSIRC itself was unable to fund seawalls (cf AS [575]), in circumstances where two government bodies that represent the local area, the TSIRC and the TSRA, have been successful in seeking funds from both the Queensland and the Commonwealth governments on behalf of Torres Strait Islanders. As outlined in Parts D.12.3 and D.12.4 above, Torres Strait Islanders have succeeded in seeking, via the TSIRC and TSRA, a total of $64 million from the Commonwealth and Queensland governments (plus an additional $2.2 million from the TSRA) to fund the Seawalls Project. There is evidence that the NIAA and TSRA are currently investigating the provision of further funds for a potential third stage of the Seawalls Project.

b) it is true that the applicants and group members did not have the ability to influence the timing of funding decisions made by the Queensland and Commonwealth governments (AS [576]). However, as outlined in Parts D.12.3 and D.12.4 above, decisions relating to funding had to go through ordinary government decision-making processes. The fact that government decision-making processes take time, particularly when all three levels of government are involved in a project, surely cannot mean that a relationship between the governed and the governing is characterised as one of vulnerability.

c) the evidence does not provide any support for the argument that the applicants and group members did not have any ability to influence the amount of funding sought (AS [576]). No witness gave evidence that they had wanted to seek greater funding from the Commonwealth and Queensland governments than what was ultimately sought by the TSIRC and the TSRA. Although Mr Nona gave evidence that "*we've just got given the amount that the Commonwealth thinks they — that is needed to be spent up here*" (AS [576.5]),[1368] his evidence is contradicted by the clear documentary evidence about how specific amounts of funding were sought from the Commonwealth and Queensland governments at Stage 1 and Stage 2 of the Seawalls Project. As outlined in Part D.12.3 above, at Stage 1 of the Seawalls Project, the TSIRC sought $26 million for the project, all of which was provided. At Stage 2 of the Seawalls Project, the TSRA sought $20 million from the Commonwealth to match the $20 million provided by Queensland. This entire amount was provided. At both stages the amount sought was based on the projected cost of the project.

d) the applicants are simply wrong in saying that the seawalls as planned on Iama, Masig and Warraber remain unfunded (cf AS [577.2]). As outlined at [450]-[454], [474], [478], [481] above, although it is true that some aspects of the Seawalls Project as planned under Stage 2 had to be descoped due to escalating construction costs, projects remain underway on each of those islands, and there is funding available for them. As to the parts of the projects on those islands that were descoped, Dr Simpson gave

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1368 T421.45-47 (Nona) [APP.0001.0012.0002].

evidence that the NIAA and TSRA had been investigating possible options for funding a third stage of the Seawalls Project, but that this would have to go through ordinary government decision-making processes (see [418] above).

972. The ninth and tenth factors are about Torres Strait Islanders' limited ability to adapt to sea level rise and consequent marine inundation by reason of their close connection to the land and sea (AS [582]-[584]). As outlined at [340] and [967] above respectively, the Commonwealth does not contest that Torres Strait Islanders have a close connection to the land and sea, nor that the Torres Strait Islands are vulnerable to the impacts of climate change.

973. However, the question is not whether Torres Strait Islanders are vulnerable to the impacts of climate change, but whether they can reasonably be expected to protect themselves from harm of a compensable kind (which the Commonwealth submits does not include loss of fulfilment of *Ailan Kastom* for the reasons outlined in Part E.6 above) that might result from those impacts. None of the matters at AS [560]-[586] establish this. To take an example, the only harm of a compensable kind that is referred to in the applicants' submissions on vulnerability at AS [560]-[586] is their reliance on Mr Kabai's evidence that in 2012 his washing machine and some of his tools were damaged by flooding (at AS [564.5]). Yet the applicants make no argument (and have adduced no evidence) that Mr Kabai could not reasonably be expected to protect himself from that damage (for example, by elevating his washing machine and tools so as to avoid damage by inundation). As the applicants note in their submissions at AS [583], houses on Saibai and Boigu are raised on stilts, which provides a measure of protection against marine inundation. This suggests that some measures are available to residents of those islands to protect at least some of their personal property against inundation by storing them in their houses. The applicants have therefore not established that Mr Kabai (or Torres Strait Islanders more generally) are vulnerable in the relevant sense.

F.1.4 Knowledge of the risk

974. The Commonwealth accepts that it had actual knowledge, from at least 2007,[1369] that at least some of the Torres Strait Islands faced a risk of marine inundation and erosion from sea level rise and extreme weather events.

975. However, as the applicants note at AS [588], the significance of a respondent's knowledge of a risk will depend on the facts of a case.[1370] That requires consideration of the broader context of the relationship between the Commonwealth and Torres Strait Islanders.

976. In the facts of the present case, the Commonwealth's knowledge that climate change posed certain risks to the Torres Strait Islands is not a factor that weighs strongly (or at all) in favour of the recognition of the Alternative Duty. The Commonwealth is the federal government with responsibility for providing national science and information in relation to climate change (as to which, see [401.a)] above). It is to be expected that it has knowledge of a wide range of risks posed by climate change. Indeed, the Commonwealth has admitted that it had knowledge of the extent of scientific consensus in relation to the risks and projected impacts of climate change (including, but not limited to, the risks of climate change for small and low-lying islands).[1371]

977. It does not follow that the Commonwealth owes a legal duty of care to protect a class of people from harm caused by particular impacts of climate change simply because it has knowledge of the risk of those impacts. There are a wide range of risks posed by climate change, and these will affect different parts of the Australian community in different ways. The Commonwealth needs to balance competing priorities in responding to these risks (in addition to prioritising the way it allocates its resources amongst the many other subject matters over which the Commonwealth has responsibility). Mere knowledge that climate change poses a particular risk to a community is not a sufficient reason for recognising a duty of care, or else the Commonwealth may find itself subject to many (potentially irreconcilable) legal duties of care.

1369 See IPCC AR4 WG2 Ch III [APP.0001.0019.0010] at [0533].

1370 Referring to *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at [87] (McHugh J), [APP.0001.0020.0189].

1371 Defence at [77(b)], [CRT.2000.0001.0001].

F.1.5 Assumption of responsibility

978. The applicants submit that the Commonwealth has assumed responsibility to take care to avoid causing loss and damage to the applicants and group members, which they submit is evidenced in 15 ways (AS [604]-[626]). None of these matters demonstrate a relevant assumption of responsibility by the Commonwealth.

979. As with each of the salient features, whether the Commonwealth should be understood to have assumed responsibility for protecting Torres Strait Islanders from marine inundation and erosion generally, or even more specifically in relation to the Seawalls Project, needs to be assessed in light of the relationship between the Commonwealth and Torres Strait Islanders. The Commonwealth funds or is otherwise involved in a vast range of projects in communities across Australia. It cannot be said that the Commonwealth assumes responsibility for a class of persons capable of giving rise to a legal duty of care every time it funds research or projects. This may result in the Commonwealth owing duties of care to many different classes of persons within the community, and may subject it to countervailing duties in trying to balance priorities in determining how to allocate its (finite) resources.

980. Further, as a general observation, the Commonwealth notes that a number of the 15 matters relied upon by the applicants post-date some of the alleged breaches of the Alternative Duty. Those matters obviously cannot constitute an assumption of responsibility giving rise to a legal duty of care before they occurred. In any event, for the reasons outlined below, the Commonwealth denies that any of these matters are capable of constituting an assumption of responsibility in the relevant sense.

981. The first matter relied upon by the applicants is the Torres Strait Treaty (AS [604]-[609]). For the reasons outlined at [685]-[687] in relation to the Primary Duty, the Commonwealth's entry into that treaty did not amount to an assumption of responsibility.

982. The second matter relied upon (at AS [611]-[613]) is Australia's obligations under Arts 17 and 27 of the ICCPR, as well as the UNDRIP. Australia's entry into an international treaty, or its endorsement of an international declaration, do

not amount to an assumption of responsibility capable of giving rise to a legal duty of care (as to which, see [621]-[622] above).

983. The third and fourth matters relied upon (as AS [614]-[615]) are effectively that, in relation to both Stage 1 and Stage 2 of the Seawalls Project the Commonwealth provided the funding sought from it by the TSIRC and the TSRA[1372] with full knowledge of the risk of marine inundation and erosion facing the Torres Strait Islands. It is difficult to see how the provision of a set amount of funding could amount to an assumption of responsibility to do anything more than provide that amount of funding. Indeed, it was an explicit term of each of the relevant funding agreements that the Commonwealth's liability to provide funding was limited to the agreed amount of funding, namely:

a) As noted at [430] above, the $5 million provided by DIRD for the Seawalls Project Stage 1 was initially provided under the DIRD-TSIRC Funding Agreement, which provided that the Funding payable under the agreement was $5 million.[1373]

b) As noted at [429] above, the remaining funds provided by the Commonwealth for the Seawalls Project Stage 1 were paid to the TSRA, who then paid the funds to the TSIRC under the TSRA-TSIRC Funding Agreement, which provided that the maximum total funding to be provided for the Seawalls Project under the TSRA-TSIRC Funding Agreement was $21,237,456 (excluding GST), comprising $2,237,456 from the TSRA, $7 million from the Commonwealth via the PM&C and $12 million from the State of Queensland.[1374]

c) As noted at [447]-[448], the $20 million payable by the Commonwealth for the Seawalls Project is payable from the NIAA to the TSRA under the Working Arrangements Agreement, and from the TSRA to the TSIRC under the Torres Strait Seawalls Programme Stage 2 MIOP Capital Works

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1372 It should be noted that the applicants submit that it was the TSIRC who requested funding for the Seawalls Project Stage 2, but this request actually came from the TSRA: see TSRA, Incoming letter from TSRA - Torres Strait Seawalls Stage 2 Queensland Government budget, [NIA.2002.0001.0014].

1373 Definition of "Funding", read with Australian Government Department of Infrastructure and Regional Development, TSI Coastal Protection final at cl 4.1 and cl 2.1 of the Schedule, [INF.2000.0001.0565] at [.0571, .0574, .0600].

1374 TSRA, MIP Agreement, [INF.2005.0001.0065] at [.0072].

Agreement. Both of those agreements limit the funding payable by the Commonwealth to $20 million.[1375]

984. The fifth matter (at AS [616]) is simply a reference to a statement in a Ministerial brief dated 19 October 2018 that the Mayor of the TSIRC had made statements criticising the lack of Commonwealth funding for the Seawalls Project.[1376] The applicants do not explain how this is said to evidence an assumption of responsibility by the Commonwealth.

985. The sixth matter (at AS [617]) is a reference to Dr Simpson's evidence that, since 15 May 2023, the NIAA and TSRA have been investigating options for funding a third stage of the Seawalls Project. Dr Simpson's evidence does not establish any assumption of responsibility in relation to the provision of further funding for the Seawalls Project. To the contrary, her evidence explains that in order for further funding to be approved this may have to go through the ordinary budget process, which involved core policy decisions, including at the Cabinet level.[1377]

986. The seventh matter (at AS [618]) is that the Commonwealth engaged James Cook University to undertake a series of studies about climate change driven erosion and inundation and potential adaptation options in the Torres Strait. The funding of studies into the impacts of climate change and potential adaptation options does not amount to an assumption of responsibility to protect Torres Strait Islanders from the impacts of erosion and inundation. The same can be said of the eighth matter relied upon by the applicants at AS [619] (namely that the Commonwealth announced additional funding for tidal gauge monitoring and further research in the Torres Strait Islands in May 2010).

987. The ninth matter is that the Commonwealth was represented at both the PGC Stage 1 and the PGC Stage 2 (AS [620]).[1378] The role of the PGC at both stages is outlined at [432.a)] and [449] above. The Commonwealth's role in the PGC

1375 **Working Arrangements Agreement:** Simpson Affidavit at [22], [35], Tabs 9 and 13 to Exhibit SS-1, [WIT.2000.0001.0046]; **Torres Strait Seawalls Programme Stage 2 MIOP Capital Works Agreement:** Tab 8 to Exhibit SS01 at p 17, [NIA.2000.0001.0324].

1376 See Findings of the independent evaluation of the TSRA Seawalls Stage 1 funding at [4], [NIA.2002.0001.0022].

1377 Simpson 2 at [8]-[16], [WIT.2000.0002.0001].

1378 For completeness, the Commonwealth notes that the Department of Local Government, Community Recovery and Resilience (DLGCRR) is a Queensland government department (cf AS at [620]). However, it accepts that the Commonwealth was represented by the Department of Families, Housing, Community Services and Indigenous Affairs and DIRD in the PGC Stage 1 and by the NIAA in the PGC Stage 2.

does not amount to an assumption of responsibility to protect Torres Strait Islanders from the impacts of marine inundation and erosion generally, nor does it amount to an assumption of responsibility in respect of the Seawalls Project. As outlined in Parts D.12.3 and D.12.4 above, it was the TSIRC who implemented the Seawalls Project, with the PGC at both stages functioning as a high-level governance and probity mechanism. Further, the very makeup of the PGC at both stages of the Seawalls Project makes plain that it was not a project for which the Commonwealth had assumed responsibility, but rather a project in which all levels of government played a role. The PGC Stage 1 was made up of representatives of the Queensland government, the Commonwealth government, the TSRA and the TSIRC.[1379] The PCG Stage 2 was similarly made up of representatives of the Queensland government, Commonwealth government, the TSRA and the TSIRC, plus the Program Manager (Black & More) and the manager of the trust under which funds are held by the TSRA as trustee for the MIP Trust.[1380] The Commonwealth played a role as a funding body, and the extent of its funding was governed by the various funding agreements in place in Stage 1 and Stage 2 respectively.

988. The tenth matter is two statements, made by the Minister for Families, Community Services and Indigenous Affairs and the Minister for Regional Australia, Regional Development and Local Government, in a joint press release dated 4 June 2012 in which the Commonwealth government announced that it would provide $12 million in funding for the Seawalls Project. None of the statements set out at AS [621] indicate any assumption of responsibility to protect Torres Strait Islanders from the effects of marine inundation and erosion beyond a commitment to provide the funding announced (and which was in fact provided). Further, a statement by a Minister in a press release about a government initiative should be understood as a political commitment, not an assumption of responsibility capable of giving rise to a legal duty of care.

989. The eleventh matter (at AS [622]) relates to the COAG Agreement. In that regard, the Commonwealth repeats its submissions at [693] above.

990. The twelfth and thirteenth matters (at AS [623]-[624]) rely on Australia's entry into the UNFCCC and the Paris Agreement. As noted at [622] above, consistent

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1379 2013-2017 Project Implementation Plan at s 9.2, [INF.2005.0001.0001 at 0018].

1380 PIP Stage 2 at s 2.1, Tab 10 to Exhibit SS-1 to the Simpson Affidavit, [WIT.2000.0001.0046].

with the well-established principle that an international treaty "*can operate as a source of rights and obligations under Australian law only if, and to the extent that, it has been enacted by Parliament*",[1381] neither the UNFCCC nor the Paris Agreement gave rise to rights and obligations under Australian law. The Commonwealth's entry into those international agreements can therefore not constitute an assumption of responsibility giving rise to a legal duty of care under the common law.

991. The fourteenth matter (at AS [625]) is that the applicants allege that the Commonwealth, *through the TSRA*, has developed the Adaptation and Resilience Plan. The applicants do not explain what aspect of that plan is said to give rise to an assumption of responsibility on the part of the Commonwealth to protect Torres Strait Islanders from the impacts of inundation and erosion. The plan is summarised at [408]-[413] above, from which it is apparent that the plan was developed by the TSRA in collaboration with the TSIRC and TSC and was guided by various values, including self-determination. The plan expressly states that those bodies "*will actively seek to partner with both the Australian and Queensland Governments to implement this plan*".[1382] It also identifies "*support agencies*" for various actions items, none of which include Commonwealth agencies or departments other than the TSRA. Further, it is difficult to see how any plan developed by the TSRA, which is a separate legal entity to the Commonwealth with a particular statutory remit (as set out at [393]-[395] above) could assume responsibility for protection of Torres Strait Islanders on the Commonwealth's behalf in the exercise of those statutory functions.

992. The fifteenth matter (at AS [626]) is that the Commonwealth "*established itself as an essential partner*" in the Seawalls Project and "*actively chose to assume such a central role in the project*". The extent of the Commonwealth's role has been outlined at [983] and [987] above: it was to provide a particular amount of funding, in accordance with the funding arrangements at [428] and [446]-[448], and to be one of various parties (including State and local government representatives) on the PGC in order to provide a high-level governance and

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1381 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at [490] (Keane J) [CTH.0002.0001.0106], referring (among other authorities) to *Dietrich v The Queen* (1992) 177 CLR 292 at 305 (Mason CJ and McHugh J) [CTH.0002.0001.0253]*; Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-287 (Mason CJ and Deane J), 298 (Toohey J), 303-304 (Gaudron J), 315 (McHugh J) [CTH.0002.0001.0391].

1382 Adaptation and Resilience Plan 2016-2021, [EVI.2001.0003.2961] at [.2965].

probity mechanism. These roles did not amount to an assumption of responsibility over the project giving rise to a legal duty of care.

993. It follows that none of the matters raised by the applicants in AS [560]-[586] suggest that the Commonwealth has assumed responsibility for Torres Strait Islanders in the relevant sense.

F.1.6 Known reliance

994. None of the matters set out at AS [629]-[632] demonstrate that Torres Strait Islanders are relevantly reliant on the Commonwealth to protect them from the impacts of marine inundation and erosion.

995. The Commonwealth does not dispute that Torres Strait Islanders are, as a group, disadvantaged in Australian society and that some of them are exposed to risks associated with marine inundation and erosion (see AS [629]-[630]).

996. However, it does not follow that Torres Strait Islanders are "*wholly reliant on the Commonwealth to protect them from the impacts of marine inundation and erosion through the provision of funding for the construction of seawalls*" (cf [630]). The Seawalls Project has been funded by the Commonwealth government, the Queensland government and the TSRA. Any reliance could not be "*wholly*" on the Commonwealth government.

997. Further, any such reliance on the Commonwealth could only be characterised as "*general political reliance*", rather than reliance capable of founding a legal duty of care.[1383] The Commonwealth agreed to provide specific amounts of funding requested from it for the Seawalls Project, being a government project in which all three levels of government participated. If an undertaking by the Commonwealth to provide funding for projects was sufficient to give rise to reliance on those who stood to benefit from the project then it may follow that there are many classes of person who are considered to rely on the Commonwealth in this way, which may lead to the Commonwealth owing many duties of care which are incompatible with one another. Such a finding may also have a chilling effect on the projects the Commonwealth undertakes to fund.

[1383] See *Sharma FC* at [706]-[712], [APP.0001.0020.0101].

F.1.7 Control

998. The Commonwealth submits that it did not have control in the relevant sense over the risk of harm.

999. As Gummow and Hayne JJ recognised in *Graham Barclay Oysters*, the factor of control is of "*fundamental importance in discerning a common law duty of care on the part of a public authority*".[1384] The authorities that consider whether a public authority has control in the relevant sense make plain that a public authority must have a significant degree of control over the risk of harm in order to found a duty of care, particularly where, as here, it is alleged that the public authority had a positive duty to exercise its powers:

   a) In *Brodie v Singleton Shire Council*, the council had a "*significant and special*" measure of control over the risk of harm arising from a failure to maintain the roads.[1385] It was the council's failure to exercise its power to maintain the roads that constituted the direct source of harm to road users. This was of "*fundamental importance*" to the conclusion that it owed a duty of care.[1386] In coming to this conclusion, Gaudron, McHugh and Gummow JJ distinguished authorities having control of highways from other public authorities, noting that highway authorities have "*physical control over the object or structure which is the source of the risk of harm*", whereas other authorised often "*have no control over the source of the risk of harm*".[1387]

   b) Similarly, in *Day*, the council held a significant and special measure of control over the safety from fire of persons at particular premises. In that case, the council had previously exercised its powers of fire prevention by writing a letter to the former tenants of the premises, but had not taken any further steps to prevent a fire occurring at the premises despite being the only party (other than the former tenants) to have knowledge of the risk of fire. This measure of control was the "*touchstone*" of its duty of care.[1388]

[1384] *Graham Barclay Oysters Pty Ltd v Ryan* [2002] 211 CLR 540 at [150], [APP.0001.0020.0065].
[1385] *Brodie v Singleton Shire Council* [2001] 206 CLR 512 at [102], [APP.0001.0020.0025].
[1386] *Brodie v Singleton Shire Council* at [102], [APP.0001.0020.0025].
[1387] *Brodie v Singleton Shire Council* at [103], [APP.0001.0020.0025].
[1388] *Day* at [168] (Gummow J), [APP.0001.0020.0131].

c) By contrast, in *Graham Barclay Oysters*, the local council was considered to have a much less significant degree of control over the risk of harm. In concluding that no duty of care was owed, Gummow and Hayne JJ held that, unlike *Brodie* or *Day*, the council did not exercise control over the direct source of harm (that is, the oysters). Although all land-based sources of pollution that may have caused the oysters to become contaminated may have been subject to the council's control via regulation, that was not sufficient to constitute control in the relevant sense. Their Honours held that mere control over "*some aspect of a relevant physical environment is unlikely to found a duty of care where the relevant harm results from the conduct of a third party beyond the defendant's control*". Their Honours ultimately concluded that the council did not have control in the relevant sense because control over the safety of the oysters for consumption was fragmented among many intervening levels of decision-making.[1389]

d) Further, in *Stuart v Kirkland-Veenstra*, the High Court considered the question of whether police officers, who had failed to intervene in events that led to a man's suicide when they encountered him in a carpark, owed him and his wife a duty of care. For Gaudron, Gummow and Hayne JJ, the absence of the police officers' relevant control over the risk of harm was of critical significance in denying that the duty of care was owed.[1390] Their Honours' reasoning on this point suggests that some greater level of control was required before the police officers would be found to owe a duty to intervene to prevent the risk from eventuating than would be required in a case where the putative tortfeasor has actually created the risk.[1391]

1000. This is not a case like *Brodie* or *Day*. Unlike *Brodie*, this is not a case where the Commonwealth's alleged failure to act has caused the risk of harm (being harm caused by inundation and erosion in the Torres Strait Islands). It is also unlike *Brodie* and *Day* in the sense that the Commonwealth cannot be said to be the one entity responsible for ensuring the risk of harm does not arise — as outlined

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1389 *Graham Barclay Oysters* at [152]-[154], [APP.0001.0020.0065]

1390 *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 at [114], [APP.0001.0020.0161].

1391 See *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 at [114]-[118], [APP.0001.0020.0161].

above, all levels of government in Australia have a role to play in climate change adaptation.

1001. The present case is more analogous to *Graham Barclay Oysters* and *Kirkland-Veenstra*. Like *Graham Barclay Oysters*, the most that can be said of the Commonwealth's control is that it has some ability, through the exercise of its legislative and executive powers, to fund projects in the Torres Strait that might prevent or minimise some of the impacts of climate change. It is not the only body who might exercise such power — as outlined above, both the State and local government play a role in adaptation to climate change (and indeed, the implementation of local projects is primarily a matter for the local government). Any control that the Commonwealth has over the risk of harm is therefore necessarily fragmented.

1002. A similar analysis to that which applied in *Kirkland-Veenstra* is also relevant in the present case. Given that the Commonwealth did not, by some positive act, create the risk of harm, the applicants need to demonstrate that the Commonwealth has some particular level of control over the Torres Strait Islands that would require it to intervene so as to protect Torres Strait Islanders from harm. The Commonwealth submits that the applicants have demonstrated no such level of control. It is not alleged that the Commonwealth occupied the relevant land, for example. The most that is alleged is that the Commonwealth had capacity to fund adaptation projects in the Torres Strait Islands.

1003. Further, the applicants do not grapple with the fact that any level of control that the Commonwealth has in relation to the Seawalls Project is necessarily fragmented amongst the other entities who play a role in the project. As outlined at Parts D.12.3 and D.12.4 above, the Seawalls Project has been implemented by the TSIRC. It is jointly funded by the Queensland and Commonwealth governments (and Stage 1 was also funded in part by the TSRA).

1004. The nature of the Commonwealth's power that is said to constitute "control" points to a second reason why the Court should not recognise that the Commonwealth had "control" in any relevant sense. At AS [636]-[648], the applicants submit that the Commonwealth had "*a significant and special measure of control over the safety of the person or property of*" the applicants and group members because it:

a) has utilised its powers under s 51(xxvi) of the Constitution to pass legislation such as the NTA and the *Aboriginal and Torres Strait Islander Act* (AS [637]-[638]);

b) has established the TSRA (AS [639]-[640]);

c) has established the NIAA, and prior to that had established an Indigenous Affairs Group within the PM&C (AS [642]-[645]);

d) provided funding for the Seawalls Project (AS [646]);

e) provided funding for James Cook University to undertake research on risks associated with erosion and inundation of various islands in the Torres Strait (AS [647]); and

f) entered into the Torres Strait Treaty (AS [648]).

1005. Although these matters suggest that the Commonwealth has power to enter into Treaties, enact legislation, form agencies and fund projects that concern the Torres Strait Islands, none of them constitutes a special measure of control over the risk of harm sufficient to justify the imposition of a duty requiring positive action to prevent harm. Any capacity to control the risk of harm that the Commonwealth does have as a result of the matters relied upon by the applicants (that is, through legislation or the exercise of executive power to grant funding) entails balancing of policy considerations. It is not appropriate to overlay the laws of negligence upon functions of this kind.

F.1.8 Determinacy

1006. If recognised, the Alternative Duty would give rise to a real risk that the Commonwealth's liability would be indeterminate. In essence, the applicants argue that the Alternative Duty should be recognised on the basis that Torres Strait Islanders as a class are vulnerable to the impacts of climate change, being impacts that the Commonwealth knows about and has taken steps to address through the provision of funding. If the Alternative Duty were recognised on this basis, then it is difficult to see why it would not follow that the Commonwealth owes a similar duty to many if not most other communities across the country who are vulnerable to the impacts of climate change. However, given the wide range of potential impacts of climate change and the many communities that may

be vulnerable to one or more of those impacts it would simply not be possible for the Commonwealth to ascertain the class of persons to whom a duty of care is owed. This is a factor that weighs strongly against recognition of the Alternative Duty.

1007. It is noted that the applicants do rely on the special relationship between Torres Strait Islanders in support of their argument that the Alternative Duty should be recognised. However, as outlined at [961] above, none of those matters support the recognition of the Alternative Duty. The Commonwealth submits that those matters do not distinguish Torres Strait Islanders from other members of the Australian community for the purposes of determining whether the Commonwealth owes a duty of care to implement climate change adaptation measures to protect against compensable harm. It follows that, if the Alternative Duty were recognised, there is a real risk that the Commonwealth would face indeterminate liability.

F.2 The Commonwealth has not breached the Alternative Duty (CQs 6, 9 and 10)

1008. For the reasons outlined in Part F.1 above, the Commonwealth does not owe Torres Strait Islanders the Alternative Duty. It follows that CQs 6, 9 and 10, which relate to the alleged breach of that duty of care, should be answered "unnecessary to answer".

1009. However, in the event the Court concludes that the Commonwealth owed the Alternative Duty, the standard of care to which it should be held is not that contended for by the applicants. Rather, for the reasons outlined in Part F.2.1 below, at most, the Commonwealth could be required to:

a) consider whether to provide funding for the Seawalls Project, consistent with the legal and policy framework that applies in relation to the provision of Commonwealth funding; and

b) provide funding up to the amount sought, if it considered it appropriate to do so.

1010. For the reasons outlined in Part F.2.2 below, the Commonwealth met that standard and there was no breach (including an ongoing breach) of the Alternative

Duty. For completeness, in Part F.2.3 below the Commonwealth outlines why the standard of care advocated for by the applicants should not be accepted.

F.2.1 The standard of care (CQ 6)

Reasonable foreseeability

1011. There is no dispute between the applicants and the Commonwealth that the reasonable foreseeability test at the breach stage is that stated at [93] above.[1392] However, the applicants make no attempt to apply this test in their submissions on the alleged breach of the Alternative Duty in Part T of their closing submissions.[1393] Instead, the applicants' submissions focus on establishing that the "risk of marine inundation as a result of sea level rise and extreme weather events" is not insignificant (at AS [679]-[698]). With respect, that is not the proper enquiry for two reasons:

a) *First*, as outlined at [93] above, the relevant risk is not the risk of inundation and erosion. It is the risk that, *if the Commonwealth is careless in the manner alleged*, then Torres Strait Islanders will suffer harm to their person or property (that is, compensable harm). Of course, the risk of inundation and erosion is the risk against which the applicants allege the Commonwealth has a duty of care to protect Torres Strait Islanders, but the reasonable foreseeability test will not be met by establishing that the risk of inundation and erosion alone was foreseeable. It must be shown that it was foreseeable that the Commonwealth's alleged negligence, in failing to provide funding for seawalls on the six relevant islands in the manner that the applicants contend was required, may cause harm of a compensable kind to Torres Strait Islanders.

b) *Secondly*, the "not insignificant" risk threshold only applies to cases governed by civil liability legislation. The present case is governed by the common law for the reasons outlined in Part B above, so it is only

1392 See AS at [274].

1393 At various parts of the applicants' submissions in Part T they cross-refer back to submissions about reasonable foreseeability, but these cross-references are erroneous and it is not apparent what they are meant to refer to: see AS at [699.1], [712.1], [721.1].

necessary for the applicants to establish that the risk was foreseeable as a "not far-fetched or fanciful" possibility.

1012. As outlined at [906]-[907] above, the applicants submit that the Commonwealth was broadly required to do two things in relation to the Seawalls Project to discharge the Alternative Duty, namely:

a) provide access to predictable funding, including additional funding as required, that was sufficient to construct seawalls on the Torres Strait Islands. However, the applicants make no allegation that the Commonwealth fell below this standard of care in relation to Boigu and Saibai; they only allege that it did so in relation to Poruma, Warraber, Masig and Iama; and

b) lead and coordinate and establish a coherent plan for the provision of funding for the protection of Torres Strait Islanders from the adverse effects of sea level rise, inundation and erosion through the construction of seawalls.

1013. The proper question for this Court is therefore whether it was reasonably foreseeable that, if the Commonwealth failed to do one or both of the things set out in [1012] above, Torres Strait Islanders may suffer damage to their person or property.

1014. This requires consideration of the risk of marine inundation or erosion on each of the six islands with which the Seawalls Project is concerned (which would be mitigated by the completion of the seawalls planned under those projects), and whether it was reasonably foreseeable that Torres Strait Islanders would suffer compensable harm as a result of any failure to provide access to predictable funding for those measures.

1015. Much of the applicants' submissions about the risk of marine inundation or erosion at AS [679]-[698] concern the projected risk of flooding in 2050 or 2100, taking into account projected sea level rise under different SSP scenarios rather than the risk of inundation and erosion at the alleged time of the breaches (which are apparently alleged to have occurred between 2011 and the present day). The Commonwealth submits that the Court should focus its attention on the risk of erosion and inundation as at the time of the alleged breaches for two reasons:

a) *First*, as noted at in Part C.4.1 above, a cause of action in negligence is only complete when damage has occurred. An applicant cannot seek compensation for a risk of harm that may eventuate in the future. The applicants' case is that, by reason of the Commonwealth's failure to take certain steps to fund the Seawalls Project, they and group members have suffered harm (and will continue to suffer harm) because a risk that was reasonably foreseeable in fact materialised. It follows that the enquiry should be whether the risk of harm that has in fact eventuated was foreseeable at the time of the alleged breach;

b) *Secondly*, and relatedly, there is good reason why this Court should not consider, in assessing any past failure of the Commonwealth to fund seawalls in the Torres Strait, what that will mean in 2050 or 2100 in terms of risk of marine inundation or erosion. That is because the Court cannot assume that measures will not be taken in the intervening period that will mitigate that risk. Further measures may be put in place between now and 2050 or 2100 by Queensland, Commonwealth and/or local governments. Given that the industry standard design life of seawalls is 50 years (and that the seawalls on Saibai, Boigu, Poruma, Warraber and Iama have been designed by reference to this standard),[1394] it is entirely possible that steps will be taken in the future by the local council, with or without financial support from Queensland and/or the Commonwealth, to upgrade the seawalls that have already been built, and which are to be built shortly as part of the Stage 2 Seawalls Project.

1016. It follows that the matters on which the applicants rely at AS [683], [686]-[687], [690]-[691], [694] and [697] are irrelevant in assessing the present extent of the risk of marine inundation and flooding.

1017. The Commonwealth accepts that each of the six islands the subject of the Seawalls Project were at risk of inundation or erosion at the time of the alleged breaches. However, it is necessary to set out the Commonwealth's position on the evidence relied upon by the applicants, and whether it is sufficient to establish

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[1394] T1242.7-15 (Bettington) [TRN.0014.1172]; NIA.2013.0001.0005 (Exhibit R4) at [0011]; NIA.2009.0029.4430 (Exhibit R5) at [4436]; NIA.2005.0001.0284 (Exhibit R9) at [0287]; INF.2000.0002.0249 (Exhibit R7) at [0295]. For completeness, the Commonwealth notes that there is no specific evidence dealing with the design life of the seawalls on Masig.

that the risk that Torres Strait Islanders would suffer compensable harm was reasonably foreseeable:

a) **Saibai and Boigu:** the Commonwealth submits that Dr Harper's calculations as to the extreme water levels at present on Saibai and Boigu should be preferred to those of Mr Bettington for the reasons outlined at [496] above, and that the use of "*Township Inundation Events*" are not a meaningful metric in assessing the extent to which Saibai and Boigu are at risk of flooding for the reasons outlined at [500]-[502]above (cf AS [684]-[685], [688]-[689]).

b) **Poruma:** as the applicants note at AS [692], even on Mr Bettington's calculations of extreme water levels on Poruma (which are more favourable to the applicants than those of Dr Harper), a Township Inundation Event on Poruma currently has an average recurrence interval (ARI) of more than 500 years.[1395] The only other evidence relied upon by the applicants are two photos of events on Poruma in February 2019 and August 2023 which Mr Bettington estimates to have been ~.1m and ~.2m above HAT respectively. The pictures appear to depict the water level rising above the jetty and up the boat ramp, but do not depict any flooding on the island which would suggest damage to property.

c) **Warraber:** if Dr Harper's calculations of extreme water levels on Warraber are preferred (which the Commonwealth submits they should be for the reasons outlined at [500]-[502] above), then a Township Inundation Event has an ARI of more than 500 years. Even if Mr Bettington's figures are accepted, such an event would only be expected to occur once in 100 years.[1396] The only other evidence relied upon by the applicants is:

   i) a photo of a flooding event in January 2006, which Mr Bettington estimates to be .25 above HAT, and which appears to show the water encroaching just beyond the existing seawall but does not appear to depict large scale flooding causing property damage;[1397]

[1395] Bettington Supplementary Report at Table 9, [APP.0001.0015.0011] at [.0008].
[1396] Bettington Supplementary Report at Table 9, [APP.0001.0015.0011] at [.0008].
[1397] Bettington Supplementary Report at Table 9, [APP.0001.0015.0011] at [.0008].

ii) a record in some PGC minutes dated 5 February 2018 of "*climate events*" that took place on 29/30 January 2018. In respect of Warraber there is a partially illegible note that the seawall was overtopped and the trees were down and there were broken windows, but there is no indication as to what aspect of the climate event caused trees to fall and windows to break. There is a note that the PGC is "*not aware of any inundation to homes or roads*";[1398] and

iii) in oral evidence, Mr Billy gave evidence that during a storm event in January 2023, about 2 metres of erosion occurred on the northeast side of Warraber and that a shed was washed away.[1399] Photos depicting the shed, and the place where the shed had been after it was washed away, are set out at [2]-[5] of the outline of supplementary evidence of Boggo Billy dated 21 April 2023. Mr Billy marked the spot where this had occurred as "2" on an aerial photograph which was admitted as Exhibit A16. The applicants have not demonstrated that this is an area that would be protected by the seawalls to be built as part of the Seawalls Project.

d) **Iama:** the applicants do not make any specific submissions about the risk of inundation or erosion on Iama. The applicants did not call any witness from Iama to give evidence, nor did they ask Mr Bettington to calculate extreme sea levels for Iama or create maps to depict the extent of flooding that would occur on that island during extreme events of different heights. The only evidence of an event on Iama relied upon by the applicants is a photo of an inundation event on Iama in 2006 which Mr Bettington estimates to have been 0.18m above HAT. Without any other evidence from Iama it is difficult to put the extent of flooding depicted in this photo in context, but it is not readily apparent that the flooding is affecting any property in this photo. The Commonwealth submits that the applicants have failed to adduce sufficient evidence to satisfy the Court that there is a risk of inundation and/or erosion on Iama such that it was reasonably foreseeable that Torres Strait Islanders would suffer harm if the

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[1398] Project Governance Committee (5 February 2018), [INF.2005.0001.0116] at [.0117].

[1399] (15 June 2023) T665.21-27, 667, 675 (Billy) [APP.0001.0012.0008].

Commonwealth failed to do one or both of the things set out at [1012] above.

e) **Masig:** the applicants rely on no evidence whatsoever from Masig to establish a risk of inundation/erosion. It follows that they have failed to adduce sufficient evidence to satisfy the Court that there is a risk of inundation and/or erosion on Masig such that it was reasonably foreseeable that Torres Strait Islanders would suffer harm if the Commonwealth failed to do one or both of the things set out at [1012] above.

1018. As to the Commonwealth's alleged failure in [1012.a)], the Commonwealth accepts that there was a reasonably foreseeable risk that some Torres Strait Islanders might suffer harm of a compensable kind if funding for seawalls in the Torres Strait was not provided such that those seawalls could not be built. However, the applicants also appear to suggest that this aspect of the standard of care required the Commonwealth to "*establish non-competitive and predictable funds/grants*" to fund the construction of seawalls on those islands (see [907] above). It is not clear how it is reasonably foreseeable that a failure to fund the Seawalls Project in this specific way, as opposed to the way in which the Seawalls Project was in fact funded, would give rise to a risk of compensable harm if the funding actually provided by the Commonwealth meant that the seawalls could still be built.

1019. As to the Commonwealth's alleged failure in [1012.b)], the Commonwealth does not accept that it was reasonably foreseeable that its failure to "*lead and coordinate and establish a coherent plan*" for funding the Seawalls Project may cause harm to Torres' Strait Islanders' person or property. As outlined in Parts D.12.3 and D.12.4 above, the Seawalls Project was at all times a project implemented by the TSIRC. It was the TSIRC and the TSRA who determined the level of funding to be sought jointly from the Commonwealth and Queensland governments. This division of responsibility, where government authorities with a local presence take responsibility for local projects, is consistent with the COAG Agreement. The Commonwealth's role was confined to providing funding in response to specific requests from the TSIRC and TSRA, and to being one member of the PGC Stage 1 and PGC Stage 2 in order to provide a high-level governance and probity mechanism. It was not reasonably foreseeable that the

Commonwealth's failure to "*lead and coordinate a coherent plan*" for funding would cause harm of a compensable kind to Torres Strait Islanders because it was, and continues to be, the TSIRC (and to some extent, the TSRA) who play that role. It was reasonable for the Commonwealth to act consistently with the arrangements and responsibilities established by the COAG Agreement, which reflects an agreed intergovernmental policy for management of climate change risks. It follows that the Commonwealth cannot have reasonably been expected to lead and coordinate and establish a coherent plan for the provision of funding for the Seawalls Project, and its failure to do so cannot constitute a breach of the Alternative Duty of Care.

1020. As outlined at [92] above, what is reasonably required of a person is to be assessed at the time of the breach. Both aspects of the standard of care formulated by the applicants involves impermissible hindsight analysis. The amounts originally sought and provided for Stage 1 and Stage 2 of the Seawalls Project were based on, what have turned out to be, significant underestimates of the construction costs, with the consequential need to revise the scope of works during both stages of the project. With knowledge of those events, the applicants now contend that the Commonwealth should have established and led and coordinated a "*coherent plan*" for funding to construct the seawalls on each of the six islands, established non-competitive and predictable funds/grants and provided additional funding when required to enable seawalls to be constructed on Poruma, Iama, Masig and Warraber. However, at the time the Commonwealth was considering whether to provide funding for the Seawalls Project, it was reasonable for the Commonwealth to have relied on the costings that informed the funding requests as sufficiently accurate, and to have provided funding in accordance with the requests rather than taking over leadership of the funding aspects of the projects. In the circumstances at the time, there was no basis for the Commonwealth to think that if funding was not provided in the particular manner that the applicants now contend was required, the seawalls might not be built. Accordingly, the applicants cannot establish reasonable foreseeability.

The negligence calculus

1021. As outlined at [94]-[95] above, the next question in setting the standard of care is to determine whether a reasonable person in the Commonwealth's position would

have taken steps to prevent the risk of harm from eventuating and, if so, what precautions it would have been reasonable to take. This is assessed at the time of breach. This requires consideration of the magnitude of the risk of harm, the probability of its occurrence, the expense, difficulty and inconvenience of taking alleviating action and any other countervailing responsibilities the Commonwealth may have. These are each considered in turn.

The magnitude of the risk and the probability of harm

1022. The Commonwealth's response to the evidence the applicants rely upon to demonstrate the magnitude of the risk of harm and the probability of that risk eventuating is set out at [1017] above. That is, the Commonwealth accepts that, prior to the completion of the seawalls on those islands, there was a risk of inundation and erosion on Boigu and Saibai capable of causing harm of a kind that is compensable under the laws of negligence. It is prepared to accept, for the purposes of the negligence calculus, that the magnitude of the risk of harm to Torres Strait Islanders' property on those islands was moderate, having regard to the limited evidence of property damage adduced by the applicants.

1023. However, the Commonwealth submits that the applicants have failed to prove that the magnitude of the risk at present on Poruma, Warraber, Iama and Masig is high for the reasons outlined at [1017] above.

1024. In any event, even if the magnitude of the risk and the probability of harm resulting from marine inundation is characterised as high, the expense, difficulty and inconvenience of imposing standards of care of the kind advocated for by the applicants, and the way in which this would conflict with the intergovernmental arrangements reflected in the COAG Agreement and the Commonwealth's competing responsibilities, point firmly against the Court finding that the standard of care required by the Commonwealth is that alleged by the applicants.

The expense, difficulty and inconvenience of taking alleviating action

1025. The precautions that the Commonwealth could reasonably be expected to take, in the event it owes Torres Strait Islanders the Alternative Duty, need to be assessed in light of the expense, difficulty and inconvenience of taking that action.

1026. In essence, the applicants' complaint in relation to the Alternative Duty appears to be that the Commonwealth did not provide enough funds for the Seawalls Project, and that it did not provide funds quickly enough. It therefore appears to be a premise of each of the standards of care advanced by the applicants that the Commonwealth, acting reasonably, would have provided as much funding as was required to complete the Seawalls Project (including topping up funds as and when the project ran over budget), immediately and regardless of the cost or the ordinary processes that had to be followed in order to make a grant of Commonwealth funds. The applicants have not even attempted to explain how, consistently with the legal and policy framework governing Commonwealth decision-making in relation to funding of such projects, an unlimited source of funds for the construction of seawalls could have been made available.

1027. Where, as in the present case, the project was initiated, scoped and implemented by a local government and the Commonwealth's role was essentially to provide funding, it cannot be the case that the Commonwealth, acting reasonably, was required to do anything beyond provide the amount of funds sought by the project applicant at each stage of the project. As outlined at Parts D.12.3 and D.12.4 above, that is what the Commonwealth did.

<u>Other countervailing responsibilities</u>

1028. As outlined at [944]-[959] above, the Commonwealth's decision-making process in relation to granting funds is governed by a strict legal regime, and necessarily requires the Commonwealth to balance many competing policy priorities in determining how to allocate its finite resources. These are matters that the Court should take into account in determining what the Commonwealth was reasonably required to do in order to discharge the Alternative Duty. Without inappropriately fettering the Commonwealth's discretion to determine which projects to fund, the Court could do no more than require that the Commonwealth consider whether to provide funding for the Seawalls Project, consistently with the regulatory framework applicable to funding grants, and, if it considered it appropriate to do so, provide funding up to the amount sought.

1029. The nature of the Commonwealth's function in administering funds lawfully and consistently with government policy priorities established by specific grant

guidelines is also relevant to the reasonableness of the timeframes in which decisions relating to the funding of both stages of the Seawalls Project were made.

Conclusion on standard of care

1030. For the above reasons, the Commonwealth submits that if, which is denied, the Commonwealth owed the Alternative Duty, the standard of care could not be any higher than as set out at [1009] above.

F.2.2 Breach (CQs 9 and 10)

1031. The Commonwealth submits that it did not breach the standard of care outlined in [1030] above.

1032. In relation to the Seawalls Project Stage 1, the Commonwealth provided the entire $12 million in funding sought from it. This, in combination with the funding sought from the Queensland government and the TSRA, was sufficient to cover the entire estimated cost of the project as initially scoped and costed by AECOM.[1400] A government could not reasonably be expected to have done more in those circumstances. Further, it cannot be said that the time taken for the Commonwealth to provide funding for the Seawalls Project Stage 1 after the Minister's decision to grant $5 million for the project under RDAF Round 2 on 31 May 2012 was an unreasonable delay capable of constituting a breach of the Alternative Duty (cf AS [711.3]). As outlined at [427] above, there were a range of factors that contributed to the passage of time between the decision to grant funding and the execution of the DIRD-TSIRC Funding Agreement, including the need to confirm partner funding and agree upon the PIP Stage 1 amongst the various stakeholders, as well as a Federal election and the need for the incoming government to determine where the funding should be drawn from given competing priorities for those funds.

1033. In relation to the Seawalls Project Stage 2, the Commonwealth once again provided the entire amount sought from it, and so again it could not reasonably be expected to have done more.

[1400] See Attachment A Seawalls Eval Report, [NIA.2000.0001.0140] at [.0178-.0179].

1034. To the extent that further funds are required to complete the parts of the Seawalls Project on Warraber, Iama and Masig that were removed as a result of the descoping of the project in May 2023, as noted in [1017] above, the applicants have failed to adduce sufficient evidence to establish the extent of the risk of inundation and erosion on those islands such that it is not possible to weigh what was reasonably required of the Commonwealth in light of the expense of taking those measures and its competing priorities. Nonetheless, Dr Simpson's evidence establishes that the NIAA and the TSRA have been taking preliminary steps to investigate the potential to provide further funding for those projects in accordance with the ordinary government processes for the provision of funding for such projects. That is all that could be reasonably required of the Commonwealth in the circumstances. Further, it cannot be said that there was any unreasonable delay when regard is had to the matters set out at Parts D.12.3 and D.12.4 above. The applicants have failed to establish a breach of the Alternative Duty in relation to the Seawalls Project Stage 2.

F.2.3 Response to applicants' submissions on breach

1035. The applicants contend that the Commonwealth should be held to a different standard of care to that set out at [1009] above. The standard of care for which the applicants contend is not reasonable, and the applicants' submissions on breach should not be accepted, for the following reasons.

1036. *First*, the applicants submit that the Commonwealth should have had a "*pre-set and coherent plan*" to fund the seawalls on the 6 islands (AS [708]-[711]). On the applicants' case, the plan should have explained the Commonwealth's role in funding seawalls in the Torres Strait, the source/s of Commonwealth funding, the amounts available and any further contingency amounts and the role of the Queensland government in funding seawalls in the Torres Strait. As outlined at [1019] above, it was not reasonably foreseeable that any failure by the Commonwealth to establish such a plan would create a risk of Torres Strait Islanders suffering compensable harm. However, if that contention is not accepted then the Commonwealth nevertheless submits that the posited standard of care is not reasonable for three reasons:

a) The Seawalls Project was a project initiated and implemented by the TSIRC. The only assistance sought from the Commonwealth was to

provide funding, which it did in the full amount sought. It was not reasonable to expect the Commonwealth to second-guess the budget that had been prepared for the project. Nor would it be reasonable to expect the Commonwealth to provide more funding than was requested, in circumstances where it is required to balance many competing priorities in determining how to allocate finite public resources (and it is not clear how such an approach would have been justifiable as a proper use of public resources when, at the time, the Commonwealth was only being requested to provide a set amount of funds for the project).

b) Relatedly, holding the Commonwealth to such a standard is in tension with the COAG Agreement, and the legal framework in which Commonwealth funding grants are administered. Some examples of this are outlined at [944]-[959] above. The applicants appear to suggest that it was a breach of the Alternative Duty for the Commonwealth not to have "*pre-set*" funding for the Seawalls Project before a request had even been made for funding, and before the Commonwealth had had the opportunity to determine where it could draw funds from within existing appropriations (see AS [711.1]). It is also said to be a breach that the merits of the project were assessed through the administration of a competitive grants process (see AS [711.2]). It cannot seriously be contended that the Commonwealth government acted unreasonably by determining how to allocate its finite resources through an open, competitive grants process that involved a transparent decision-making process. In any event, the TSIRC was successful in its application and therefore it is unclear how it can be said that the requirement that the TSIRC participate in a competitive grant process disadvantaged Torres Strait Islanders.

c) It is not reasonable to require the Commonwealth to develop a plan that addressed the role that the Queensland government would play in funding. If the applicants are suggesting that the Commonwealth would do this unilaterally, it is unclear how the Commonwealth government could be expected to determine how the Queensland government allocates its budget. To the extent the applicants are suggesting that the Commonwealth should have come to an agreement with the Queensland

government, that is a matter of intergovernmental relations that is clearly inappropriate for judicial scrutiny.[1401]

1037. *Secondly*, none of the applicants' specific contentions in relation to Poruma should be accepted. Those contentions, and the Commonwealth's responses, are as follows:

a) From about 11 December 2011, the Commonwealth should have "*established a non-competitive and predictable funds/grants allocated to specifically and fully fund the seawalls on Poruma under Stage 1*" (AS [713.1]). As outlined at [1036.b)], it cannot seriously be suggested that the Commonwealth acted unreasonably in assessing the TSIRC's application for funds through a transparent, competitive grants process. In any event, as noted at [92] above, what is reasonably expected of the alleged tortfeasor is assessed as at the time of the alleged breach. In December 2011 it was anticipated that $12 million was required from the Commonwealth to fund in full the Seawalls Project as scoped in the TSIRC's application. It therefore acted reasonably to fund the seawalls on Poruma in full at that time, and it is difficult to see how this conduct could possibly constitute a breach of the Alternative Duty.

b) From about 11 December 2011, the Commonwealth should have led and coordinated the funding of the seawalls on Poruma under Stage 1 (AS [713.2]). The Commonwealth repeats [1036] above.

c) From about 3 May 2016, the Commonwealth should have led and coordinated the provision of additional funding required to construct the seawalls on Poruma under Stage 1 (AS [713.3]). The Commonwealth refers to and repeats [1036] above. In addition, it notes that additional funding for the seawalls project on Poruma was provided as part of the funding for the Seawalls Project Stage 2 and that project has now been completed.

d) From about 3 May 2016, the Commonwealth should have provided the additional funding required to construct the seawalls on Poruma under stage 1 (AS [713.4]). As noted above, that funding has now been provided and the project completed, so the only question is whether the

1401 *Day* at [182] (Gummow J), [APP.0001.0020.0131].

Commonwealth breached the Alternative Duty by deciding to provide funding for the Poruma seawall on 16 December 2019. As noted at [433], Stage 1 of the Seawalls Project was completed in November 2017. As outlined at [434] to [435], from early 2018 until the decision to grant funding for the Stage 2 Seawalls Project was made, there were a range of steps that were undertaken for the purpose of the Commonwealth determining whether to provide further funding for the Seawalls Project. These steps included commissioning the Enmark Report in order to understand how funding had been spent during Stage 1, briefing the Minister on those findings, investigating where funds could be drawn from within existing appropriations and negotiating with GBK. There was also a Federal election and a change of Ministers, which required the decision to be reconsidered. These matters demonstrate that there was no unreasonable delay in the decision to fund the seawalls project on Poruma.

1038. *Thirdly*, none of the applicants' specific contentions in relation to Iama, Masig and Warraber should be accepted. The matters relied upon, and the Commonwealth's response, are as follows:

a) The Commonwealth should have "*established a non-competitive and predictable funds/grants allocated to specifically and fully fund the seawalls on Iama, Masig and Warraber under Stage 1*" (AS [722.1]). The Commonwealth repeats [1037.a)] above.

b) From about 11 December 2011, the Commonwealth should have led and coordinated the funding of the seawalls on Iama, Masig and Warraber under Stage 1 (AS [722.2]). The Commonwealth repeats [1036] above.

c) From about 3 May 2016, the Commonwealth should have led and coordinated the provision of additional funding required to construct the seawalls on Warraber, Iama and Masig under Stage 1 (AS [722.3]). The Commonwealth repeats [1036] above.

d) From about 3 May 2016, the Commonwealth should have provided the additional funding required to construct seawalls on Iama, Masig and Warraber under Stage 1. The Commonwealth repeats [1037.d)] insofar as it sets out the steps that the Commonwealth took in the lead up to its decision to fund stage 2.

e) From about 8 March 2022, the Commonwealth should have led and coordinated the provision of additional funding required to construct the seawalls on Iama, Masig and Warraber under Stage 2 (AS [722.5]). The Commonwealth refers to and repeats [1036] above.

f) From about 8 March 2022, the Commonwealth should have provided the additional funding required to construct the seawalls on Iama, Masig and Warraber under stage 2 (AS [722.6]). As outlined in Part D.12.5 above, the projects on Iama, Masig and Warraber (albeit as reduced in scope in May 2023) have funding and are ongoing. The applicants have not adduced any evidence to suggest that the reduction in scope was unreasonable.

g) From about 5 May 2023, the Commonwealth should have led and co-ordinated the provision of additional funding required to construct the seawalls on Iama, Masig and Warraber (AS [722.7]). As outlined above, the applicants have not adduced any evidence to suggest that the reduction in scope of the Seawalls Project was unreasonable, nor to suggest why the Commonwealth, acting reasonably, was required to fund the additional projects that were descoped under Stage 2. In any event, as outlined at [418] above, there is evidence that the Commonwealth, through the NIAA, has been investigating the provision of further funding (although those investigations have to go through the ordinary government process). There can be no suggestion that this falls below the standard of care to which the Commonwealth should be held in the event it owes Torres Strait Islanders the Alternative Duty.

F.3 Causation and Remoteness (CQs 13 and 14)

1039. This part of the proceeding is to determine the entirety of the applicants' claims as well as the common questions annexed to the Court's orders dated 4 March 2024. The questions that therefore arise in relation to causation are:

a) first, whether any of the alleged breaches of the Alternative Duty caused the applicants to suffer damage of a compensable kind; and

b) secondly, the answers to CQs 13 and 14.

1040. These are each considered in turn.

F.3.1 The applicants' claims

1041. The applicants' submissions do not identify any evidence of compensable harm suffered by either of the applicants as a result of the alleged breaches of the Alternative Duty.

Mr Kabai

1042. Mr Kabai is from Saibai, where the Seawalls Project was completed in 2017 (see [455]-[456] above). The applicants rely on the fact that inundation events occurred on Saibai in 2006, 2009, 2010 and 2012 (AS [743]). However, any damage suffered from any of those events could not be said to have flowed from any failure by the Commonwealth to fund the Seawalls Project. As outlined at [912]-[916] above, the applicants should not be given leave at this late stage of the proceeding to argue that requests for funding had been made of the Commonwealth since 2001. Therefore, the earliest relevant request for Commonwealth funding for the seawalls came from the TSIRC in late 2011. Any failure by the Commonwealth to fund the Seawalls Project in the manner alleged by the applicants after late 2011 could not possibly have caused damage from inundation events that occurred in 2006, 2009 and 2010. Further, even if the Commonwealth had provided funding instantaneously upon the TSIRC's request (which was not possible given the need for the Commonwealth to decide whether to provide funding with due regard to the regulatory framework and competing policy considerations), there is nothing to suggest it would have been feasible for seawalls to have been constructed in the Torres Strait in sufficient time to avoid the effects of an inundation event in 2012. There is no evidence to suggest Mr Kabai suffered compensable harm following any alleged breach of the Alternative Duty prior to the completion of the Seawalls Project on Saibai.

1043. The Commonwealth notes that the applicants also make passing reference to the fact that marine inundation occurred on Saibai in January 2018, after the completion of the Saibai seawall (AS [744]). However, it is not apparent how that relates to any of the alleged breaches, none of which put the adequacy of the Saibai seawall in issue. Further it is noted that there is no allegation that this inundation event caused any damage.

Mr Pabai

1044. Mr Pabai Pabai is from Boigu, where the Seawalls Project was completed in March 2022 (see [462] above). The applicants set out various statements from Mr Pabai's evidence about flooding on Boigu over the past 20 years (at AS [747]-[749]). However, evidence of the following inundation events cannot possibly be caused by the alleged breaches of the Alternative Duty:

   a) Inundation events that occurred prior to the first alleged breach of the Alternative Duty. Although the exact date of the first alleged breach is not entirely clear, it could not be prior to the TSIRC's initial request for funding in late 2011. It follows that Mr Pabai's evidence of inundation events prior to that time cannot possibly be caused by the alleged breaches (see such allegations at AS [747], [749.2] (insofar as the inundation events over the "*last 20 years*" refers to things that happened prior to late 2011) and [749.4]).

   b) Inundation events that occurred after the completion of the Seawalls Project on Boigu, given that none of the alleged breaches put the adequacy of the Boigu seawall in issue (see AS [748]).

1045. It follows that the only remaining evidence of inundation is Mr Pabai's evidence that Boigu is inundated during king tides every few years in January, and his evidence that the sea water has inundated the cemetery on a number of occasions (AS [749]). The Commonwealth understands that this goes to Mr Pabai's claim that he has suffered loss of fulfilment of *Ailan Kastom*, rather than any claim for property damage. For the reasons outlined in Part E.6 above this is not loss of a compensable kind. Further, Mr Pabai's evidence does not specify when this occurred, and accordingly it is not possible to determine whether any such inundations would have been avoided had the Seawalls Project been completed on Boigu sooner. Neither of these matters establish that Mr Pabai has suffered compensable harm as a result of the alleged breaches of the Alternative Duty.

F.3.2 Common questions

1046. For the reasons in Parts F.1 and F.2, the Commonwealth did not owe Torres Strait Islanders the Alternative Duty, and, even if it did, the applicants have failed to establish any breach of that duty. It follows that CQs 13 and 14, which relate to whether the breach of that duty caused a collective suffering of loss of fulfilment of *Ailan Kastom*, should be answered "unnecessary to answer". However, if the Court considers it necessary to answer those questions, they should each be answered "No".

1047. As both CQs 13 and 14 make plain, the common issue for the Court to consider is the extent to which the alleged breaches of the Alternative Duty have caused a collective loss of fulfilment of *Ailan Kastom*. There is no common question about whether the alleged breaches have caused property damage or personal injury, because those are individual issues.

1048. However, the applicants' submissions on causation in relation to the alleged breaches of the Alternative Duty do not contend that the alleged breaches have caused a loss of fulfilment of *Ailan Kastom*. A brief summary of that evidence relating to each island is set out below to make good this proposition:

    a) **Saibai:** the evidence relating to Saibai is set out at [1042]-[1043] above. As outlined there, the events preceded the alleged breaches of duty, except for the inundation event in January 2018 (although it is unclear how any damage caused by that event could be causally linked to any of the alleged breaches).

    b) **Boigu:** the evidence relating to Boigu is set out at [1044]-[1045] above. The inundation events referred to in those paragraphs either preceded the alleged breach of the Alternative Duty, or post-date the completion of the Seawalls Project on that island so it could not possibly be caused by the Commonwealth's alleged breaches of the Alternative Duty.

    c) **Poruma:** at AS [763]-[768] the applicants allege that, because of the alleged breaches of the Alternative Duty, there was flooding on Poruma in January 2018 that caused damage to houses, .5m of erosion and fallen trees. However, the applicants make no submission that this caused a loss of fulfilment of *Ailan Kastom*.

d) **Iama:** at AS [773]-[774] the applicants allege that there were inundation events in January 2018 and January 2023 which caused flooding, inundation with debris, the relocation of 15 people and damage to 6 dwellings. However, there is no evidence that this caused a loss of fulfilment of *Ailan Kastom*.

e) **Masig:** at AS [775]-[777], the applicants allege that there were tide events on Masig in 2016, January 2018 and March 2019 that caused graves to be flooded, trees to fall, breaking windows, sand build up at the barge area, erosion and the destruction of buildings. However, there is no evidence that this caused a loss of fulfilment of *Ailan Kastom* (and, notably, the applicants did not call any witness from Masig to give evidence about these events or how they are said to have caused a loss of fulfilment of *Ailan Kastom*).

f) **Warraber:** at AS [778]-[779], the applicants allege that high tide events on Warraber in January 2018 and January 2023 caused sea water to overtop seawalls, bring trees down, break windows, cause erosion and wash away a shed. However, there is no evidence that this caused a loss of fulfilment of *Ailan Kastom*.

1049. It follows that, even if the Court considers that there was one or more breaches of the Alternative Duty, the applicants have failed to prove that any such breaches caused a loss of fulfilment of *Ailan Kastom*. It follows that CQs 13 and 14 should be answered "*No*".

1050. If the applicants had identified evidence of loss of fulfilment of *Ailan Kastom* (which they have not), the Court would then be required to consider whether it was satisfied that the applicants had established that any breach by the Commonwealth had caused that loss. The Commonwealth is not able to properly respond to that question, given that the applicants have not identified any particular loss of fulfilment of *Ailan Kastom*. However, as a general observation, it is noted that the applicants' submissions on causation in AS Part U appear to assume that all inundation events, and any damage caused by such events, would not have occurred but for the alleged breaches by the Commonwealth (see, for example, AS [755], [766], [781]). With respect, the analysis is not that simple for at least two reasons:

a) First, as outlined in Part D.12 above, the Seawalls Project was scoped to build particular coastal protection structures on specific parts of each of the six islands. On no island was it ever anticipated that structures would be built to offer protection from inundation and/or erosion on all parts of the island. Further, the scope of the proposed works on some islands changed as between Stage 1 and Stage 2 (for example, on both Warraber and Masig the project as scoped in Stage 2 (including as rescoped in May 2023) included additional measures that were not planned during Stage 1 of the project – see [476] to [481] above). In order to demonstrate that any inundation or erosion would not have occurred had the Commonwealth not breached the Alternative Duty the applicants would have to show, at the very least, that the inundation or erosion complained of occurred in places that the relevant coastal protection structure (that the applicants say should have been built prior to the inundation or erosion event) was designed to protect.

b) Secondly, and relatedly, the applicants' submissions on causation appear to be premised on the assumption that, once built, the seawalls would have provided complete protection from inundation events. The expert evidence of Mr Bettington, with which Dr Barnes and Dr Harper agreed, was clear that wave return walls (being the coastal protection structure designed to prevent flooding) are designed to "*mitigate*" flooding by "*reducing the impacts and frequency of severe events"* in order to give residents *"a higher quality of life because there is less inundation*", but not to stop inundation altogether.[1402] In addition to the matter outlined in [a)] above, it follows that, in order to establish causation the applicants would have to grapple with the question of whether any of the inundation events they refer to in Part U would have actually been avoided had the Seawalls Projects been finalised on the relevant islands prior to the alleged breaches of the Alternative Duty.

1051. The applicants have not attempted to demonstrate either of these matters. That is a further reason why the Court cannot be satisfied that any alleged breaches of the Alternative Duty have caused the Applicants and Group Members to suffer a loss of fulfilment of *Ailan Kastom*.

[1402] T1200.41-1201.47 (Bettingon/Barnes/Harper) [TRN.0014.1172].

F.4 The applicants are not entitled to the relief sought

1052. As outlined in Part V of their submissions, the applicants seek relief in the form of damages and declarations in relation to the Alternative Duty case. The applicants are not entitled to any of the relief sought because:

a) the Court should not recognise the Alternative Duty;

b) even if it does recognise the Alternative Duty, the applicants have failed to establish a breach of that duty; and

c) even if the applicants have established a breach of the Alternative Duty, neither of the applicants have adduced any evidence of compensable harm suffered by reason of the alleged breach of that duty.

1053. Further, the Commonwealth repeats the submissions in Part E.6 above insofar as it concerns relief sought in relation to the Alternative Duty case.

G. Proposed answers to common questions

G.1 Duty of care

1054. **Common question 1:** Has climate change had and does it continue to have any or all of the impacts described in [57] of the 3FASOC and the particulars thereto (the Current Impacts of Climate Change in the Torres Strait)?

Answer: "Unnecessary to answer" (by reason of the answers to questions 3 and 5 below)".

Alternatively, if this question is necessary to answer, then question 1 should be answered in accordance with Part E.1 of the submissions.

1055. **Common question 2**: Will climate change in the future have any of the impacts described in [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: "Unnecessary to answer" (by reason of the answers to questions 3 and 5 below".

Alternatively, if this question is necessary to answer, then question 2 should be answered in accordance with Part E.2 of the submissions.

1056. **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?

(See paragraph [81] of the 3FASOC)

Answer: "No". See Part E.3 above.

1057. **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?

(See paragraph [82] of the 3FASOC)

Answer: "Unnecessary to answer" (by reason of the answer to question 3).

Alternatively, if question 3 is answered "yes", the Commonwealth submits that this question should be answered "no" for the reasons outlined in Part E.4 above.

G.2 Alternative duty of care

1058. **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?

(See paragraph [81A] of the 3FASOC)

Answer: "No". See Part F.1 above.

1059. **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).

(See paragraph [82A] of the 3FASOC, the particulars set out in the applicants' letters dated 12 November 2023 and 20 November 2023 and his Honour's rulings on 14 and 23 November 2023)

Answer: "Unnecessary to answer" (by reason of the answer to question 5).

Alternatively, if question 5 is answered "yes", then the answer to common question 6 should be: "No. The Alternative Duty of Care required the Commonwealth to:

c) consider whether to provide funding for the Seawalls Project, consistent with the Commonwealth legal and policy framework that applies in relation to the provision of Commonwealth funding; and

d) provide funding up to the amount sought, if it considered it appropriate to do so." See Part F.2.1 above.

G.3 Breach of duty of care

1060. **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?

(See Paragraphs [82] and [83] of the 3FASOC and the particulars thereto)

Answer: "Unnecessary to answer" (by reason of the answers to questions 3 and 4).

Alternatively, if question 3 is answered "yes", the Commonwealth submits that this question should be answered "no" for the reasons outlined in Part E.4 above.

1061. **Common question 8**: If the answer to question 7 is "yes", is there an ongoing breach of the duty of care?

(See paragraph [89] of the 3FASOC)

Answer: "Unnecessary to answer" (by reason of the answers to questions 3, 4 and 7).

Alternatively, if question 3 is answered "yes", the Commonwealth submits that this question should be answered "no" for the reasons outlined in Part E.4 above.

G.4 Breach of alternative duty of care

1062. **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;

c) as part of the Seawalls Project Stage 1 and Stage 2 on Saibai, Boigu, Poruma, Iama, Masig and Warraber (the Seawalls Projects).

(See paragraphs [82A] and [83A] of the 3FASOC, the particulars set out in the applicants' letters dated 12 November 2023 and 20 November 2023 and his Honour's rulings on 14 and 23 November 2023)

Answer: "Unnecessary to answer" (by reason of the answer to question 5).

Alternatively, if the answer to question 5 is "Yes", then question 9 should be answered as follows: "The standard of care required by the Commonwealth to discharge the Alternative Duty of Care is that articulated in the Commonwealth's answer to question 6. The Commonwealth met that standard and there was no breach of the Alternative Duty of Care". See Part F.2.2 above.

1063. **Common question 10**: If the answer to question 9 is "yes", is there an ongoing breach of the alternative duty of care?

(See paragraph [89] of the 3FASOC)

Answer: "Unnecessary to answer" (by reason of the answers to questions 5, 6 and 9).

Alternatively, if the answer to question 5 is "yes", then question 10 should be answered as follows: "The standard of care required by the Commonwealth to discharge the Alternative Duty of Care is that articulated in the Commonwealth's answer to question 6. The Commonwealth continues to meet that standard and there is no ongoing breach of the Alternative Duty of Care". See Part F.2.2 above.

G.5 Causation, loss and damage

1064. **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?

    (See paragraph [86] of the 3FASOC)

    (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" (by reason of the answers to questions 3, 4 and 7).

    Alternatively, if questions 3, 4 and 7 are answered "yes", question 11 should be answered "no". See Part E.5 above.

1065. **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?

    (See paragraph [86], [87] and [89] of the 3FASOC and the particulars thereto)

    (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" (by reason of the answers to question 3, 4 and 8).

    Alternatively, if questions 3, 4 and 8 are answered "yes", question 12 should be answered "No". See Part E.5 above.

1066. **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?

    (See paragraph [86] of the 3FASOC and the particulars thereto)

(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" (by reason of the answers to question 5, 6 and 9).

Alternatively, if questions 5, 6 and 9 are answered "yes", question 13 should be answered "No". See Part F.3.2 above.

1067. **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?

(See paragraph [86] and [89] of the 3FASOC and the particulars thereto)

Answer: "Unnecessary to answer" (by reason of the answers to questions 5, 6 and 10).

Alternatively, if questions 5, 6 and 10 are answered "yes", question 14 should be answered "No". See Part F.3.2 above.

G.6 Relief

1068. **Common question 15**: What statutory law applies to the claims of the applicants and group members?

(See paragraphs [1b], [1c] and [86e] of the Further Amended Defence)

Answer: "The substantive law of the ACT applies to the applicants' and group members' claims relating to both the Primary Duty and the Alternative Duty. 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 Part B above.

1069. **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: "No". See Part E.6.3 above.

1070. **Common question 17**: Can the declaratory and injunctive relief sought by the applicants be granted and, if so, should it be granted?

(See prayers 1, 2 and 3 in the Amended Originating Application)

Answer: "No". See Part E.6.5 and E.6.6 above.

Date: 10 April 2024

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