

Dire Straits - *Pabai Pabai v Commonwealth of Australia (No. 2)*:
Tort-Based Climate Litigation to protect *Ailan Kastom*, Cultural Heritage, and
Indigenous Intellectual Property in the Torres Strait Islands
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Abstract

This paper provides an analysis of the decision of Wigney J of the Federal Court of Australia in *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 in respect of tort-based climate litigation mounted by Torres Strait Islanders, Uncles Pabai Pabai and Guy Paul Kabai. It explores how the Australian legal system deals with climate science, and the ‘tragedy of the commons’. It examines how the court considered evidence from Torres Strait Islanders about the impact of climate change not only on the terrestrial and marine environment of their homeland, but on *Ailan Kastom*, cultural heritage, and Indigenous intellectual property. This paper considers whether the tort law of negligence is well-adapted to deal with the climate crisis, particularly in respect of its impact upon Indigenous communities. It examines the deference of Wigney J to appellate courts in respect of climate litigation, and highlights an alternative jurisprudence which is sensitive to the legal challenges by the climate crisis. This paper explores the role of the Federal Government in addressing the climate crisis, and its failure to take action in accordance with the best available science. It charts the consideration of comparative and international law by Wigney J, and offers countervailing decisions in the Torres Strait Eight verdict and the International Court of Justice decision on the obligations of states in respect of climate change. It also considers larger questions in respect of climate ethics, human rights and climate justice, and Indigenous rights (particularly around cultural rights and Indigenous intellectual property). The conclusion explores the prospects of an appeal against the decision of Wigney J of the Federal Court in *Pabai Pabai v. Commonwealth of Australia (No 2)* [2025] FCA 796 to the Full Court of the Federal Court of Australia, and the High Court of Australia. It also highlights the future potential for human rights based climate litigation in Australia, and native title action over climate impacts.

Author Biography

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Introduction

Lawyers, researchers, and scholars have long anticipated climate litigation in the Torres Strait Islands because of the dire impact of climate change upon the environment and its peoples.¹

In 2021, a climate litigation case was brought by two applicants, Uncles Pabai Pabai and Guy Paul Kabai, both from the Guda Maluyligal Nation, on behalf of the traditional inhabitants of the Torres Strait Islands.² Pabai Pabai is from the island of Boigu, while Guy Paul Kabai is from Sabai. Pabai Pabai explains:

Boigu is extremely low-lying – the highest point is 3m above sea level – making it very vulnerable to flooding. The flooding is getting worse because of climate change. As a Boigu man I have specific responsibility to protect sacred cultural sites but the rising sea is making it impossible and could mean they disappear forever. Loss of these places would be devastating for Guda Maluyligal communities now and for generations to come. That’s why I’m bringing this case – I have a cultural responsibility to protect my community, our culture and spirituality from climate change.³

Guy Paul Kabai commented: ‘If we become climate refugees we will lose everything: our homes, community, culture, stories, and identity’.⁴ He emphasized: ‘We can keep our stories and tell our stories but we won’t be connected to Country because Country will disappear.’⁵ Guy Paul Kabai observed: ‘That’s why I am taking the government to court, because I want to protect my community and all Australians before it’s too late.’⁶

The Torres Strait Islander climate litigation was supported by the Grata Fund. The Grata Fund describes itself as ‘Australia’s first specialist non-profit strategic litigation incubator and funder’.⁷ Explaining what it does, ‘Grata develops, funds, and builds sophisticated campaign architecture around high impact, strategic litigation brought by people and communities in

¹ Owen Cordes-Holland, ‘The Sinking of the Strait: The Implications of Climate Change for Torres Strait Islanders’ Human Rights Protected by the ICCPR’, (2008) 9 (2) *Melbourne Journal of International Law* 405-438; and Donna Green and Kirsty Ruddock, ‘Could Litigation Help Torres Strait Islanders Deal with Climate Impacts?’ (2009) *Sustainable Development Law & Policy*, 23-29, 69-70.

² The Grata Fund, ‘The Australian Climate Case: The Case Timeline’, <https://australianclimatecase.org.au/the-case/climate-case-timeline/>

³ The Grata Fund, ‘The Australian Climate Case: About Us’, https://australianclimatecase.org.au/torres_strait_about/

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ The Grata Fund, ‘About Us’, https://www.gratafund.org.au/about_us

Australia.’⁸ The organisation explains: ‘We focus on communities, cases and campaigns that have the potential to break systemic gridlocks across human rights, climate action and democratic freedoms.’⁹ The organisation explains that it is focused on access to justice: ‘Grata removes the enormous financial barriers to court and supports people and communities facing injustice to integrate litigation with strategic movement-driven campaigns.’¹⁰ The Grata Fund notes: ‘We specialise in granting recoverable adverse cost relief (guarantees) and disbursements (hard legal costs), both responsively to applications from people, communities and their legal representatives, and proactively developing litigation as well as legal education and training where there are capacity gaps in Australia’s legal community.’¹¹ Founder Isabelle Reinecke has written a short book, which discusses the role of the Grata Fund in the Australian legal system.¹² The Grata Fund ran a website and a campaign about the litigation called the ‘Australian Climate Case’¹³ – although that name is a little confusing, as there have been multiple forms of climate litigation.

In their concise summary of the case, the lawyers acting for the Torres Strait Islander applicants argued: ‘The Commonwealth owes a duty of care to Torres Strait Islanders to take reasonable steps to protect them from the harms caused by climate change’.¹⁴ The lawyers commented: ‘In fulfilling its duty, the Commonwealth must have regard to the best available science in relation to climate change’.¹⁵ The lawyers maintained: ‘Since at least 2014, the Commonwealth has breached its duty of care by acting without regard to the best available science in assessing and addressing the current and projected harm to Torres Strait Islanders from climate change.’¹⁶ The lawyers insisted: ‘Mitigation of climate change requires having regard to the best available science including the reduction of greenhouse gas emissions so as to halt further climate change and minimise harms to Torres Strait Islanders.’¹⁷ The lawyers argued: ‘As a result of the Commonwealth’s breaches of the duty of care and the alternative duty of care as alleged, the

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Isabelle Reinecke, *Courting Power: Law, Democracy and the Public Interest in Australia*, Melbourne: Monash University Publishing, 2023.

¹³ The Grata Fund, ‘Australian Climate Case’, <https://australianclimatecase.org.au/>

¹⁴ Applicant’s Amended Concise Statement in *Pabai Pabai v Commonwealth of Australia* (No. 2) 16 May 2023, https://www.fedcourt.gov.au/_data/assets/pdf_file/0004/110857/Applicants-Amended-Concise-Statement.pdf

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

Applicants and all Torres Strait Islanders have suffered loss and damage.’¹⁸ The lawyers maintained: ‘Further, unless restrained, the Commonwealth’s ongoing breach of duty will cause further loss and damage to the Applicants and all Torres Strait Islanders.’¹⁹

In terms of relief, ‘the Applicants seek declarations recognising the Commonwealth’s duty of care and its alternative duty of care to Torres Strait Islanders and injunctive relief including requiring the Commonwealth to take reasonable care to protect Torres Strait Islanders and *Ailan Kastom* from harm caused by climate change.’²⁰ Moreover, the Applicants also sought damages and costs.²¹

The Australian Government Solicitor has been conscious of the rise in climate change litigation.²² In this matter, the Australian Government filed a defence in 2022; and an amended defence later in 2022. In reply, the Australian Government argued that ‘the alleged duty and alternative duty are also incoherent and/or inconsistent with administrative law principles and would lead to disproportionate and indeterminate liability.’²³ In their view, ‘the application of established principle requires rejection of the alleged duty of care and alternative duty of care’.²⁴ The Australian Government commented: ‘The Respondent’s position is supported by the recent decision of the Full Federal Court in *Minister for the Environment v Sharma* [2022] FCAFC 35.’²⁵

There were some procedural innovations to the matter. In a case-management hearing, the chief justice of the federal court Debra Mortimer dealt with practice and procedure, discovery, amendments to pleadings, and trial dates.²⁶ The judge recognised that the matter was one of urgency:

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² Australian Government Solicitor, ‘Recent Trends in Climate Change Litigation’, 1 June 2022, <https://www.ags.gov.au/sites/default/files/2022-06/lb-RecentTrendsInClimateChangeLitigation.pdf>

²³ Amended Concise Statement by the Commonwealth of Australia in Response in *Pabai Pabai v Commonwealth of Australia* (No. 2), 29 May 2023, at [4] https://www.fedcourt.gov.au/_data/assets/pdf_file/0005/110858/Respondents-Amended-Concise-Statement-in-Response.pdf

²⁴ Ibid. [5].

²⁵ Ibid. *Minister for the Environment v Sharma* [2022] FCAFC 35.

²⁶ *Pabai Pabai v Commonwealth of Australia* [2022] FCA 836.

There is no denying the unremitting march of the sea onto the islands of the Torres Strait. The reality for the people of the Torres Strait is that they risk losing their way of life, their homes, their gardens, the resources of the sea on which they have always depended and the graves of their ancestors. Whether the Commonwealth has legal responsibility for that reality, as the applicants allege in this proceeding, is a different question. However, the reality facing Torres Strait Islanders gives this proceeding some considerable urgency. The applicants, and the Torres Strait Islanders they represent, are entitled to know whether the Commonwealth is legally responsible in the way alleged, or not.²⁷

She ruled that the hearings should be split between lay evidence and expert evidence: ‘One advantage of splitting the lay and expert evidence is that the experts will have the benefit of the lay evidence in the consideration and finalisation of their expert opinions.’²⁸ The judge also held that community evidence should be heard on country: ‘I agree with the applicants that it is appropriate to take evidence in the Torres Strait, including probably a relatively extensive view.’²⁹ Mortimer CJ concluded that ‘there is a strong public interest in this matter being decided with reasonable expedition’, especially as ‘by June 2023 the proceeding will have been on foot for more than 18 months’.³⁰ She acknowledged: ‘For the people of the Torres Strait, it is a long time to be waiting, and watching the march of the sea on a daily basis.’³¹ Mortimer held: ‘It is in the interests of all parties that the important questions raised by this proceeding be determined, one way or the other, as soon as reasonably practicable’.³² (It should be noted that a Queensland piece of climate litigation similarly allowed on country evidence of First Nations witnesses.)³³

Accordingly, the judge Wigney J heard evidence in this matter on country from Torres Strait Islanders.³⁴ The court travelled to the Torres Strait and Cairns for three weeks of hearings.³⁵ In the second part of the trial, the court heard additional evidence in Melbourne for three another weeks – particularly focusing upon expert witnesses.³⁶

²⁷ *Pabai Pabai v Commonwealth of Australia* [2022] FCA 836 at [28]-[29].

²⁸ *Pabai Pabai v Commonwealth of Australia* [2022] FCA 836 at [31].

²⁹ *Pabai Pabai v Commonwealth of Australia* [2022] FCA 836 at [32].

³⁰ *Pabai Pabai v Commonwealth of Australia* [2022] FCA 836 at [37].

³¹ *Pabai Pabai v Commonwealth of Australia* [2022] FCA 836 at [37].

³² *Pabai Pabai v Commonwealth of Australia* [2022] FCA 836 at [37].

³³ *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 5)* [2022] QLC 4, 18 March 2022.

³⁴ Isabella Reinecke, ‘A Court among the Coconut Palms: When Justice Came to Visit the Torres Strait’, *The Guardian*, 9 October 2023, <https://www.theguardian.com/environment/2023/oct/09/climate-change-class-action-world-first-australia-torres-strait-boigu-island>

³⁵ The Grata Fund, ‘The Australian Climate Case: Timelines’, <https://australianclimatecase.org.au/the-case/climate-case-timeline/>

³⁶ *Ibid.*

While the High Court of Australia has generally sought to make its proceedings more widely accessible, the Federal Court of Australia has traditionally been quite restrictive in terms of access to legal materials in proceedings. Due to the public interest in the case, the judge made the arguments of the parties available on the public record.³⁷ This open access approach was commendable, and hopefully will be adopted more generally in the future by the Federal Court of Australia.

This litigation raises larger questions about climate ethics and climate justice – which are apposite for a special edition focused on applied philosophy. There is a significant body of work in respect of climate ethics.³⁸ There is also a great deal of research on climate justice – looking at the relationship between human rights and climate change.³⁹ There have been systematic efforts to map, track and record various forms of climate litigation.⁴⁰ There has been a consideration of various species of climate litigation – including public trust atmospheric

³⁷ *Pabai Pabai v Commonwealth of Australia*, Online File, Federal Court of Australia, <https://www.fedcourt.gov.au/services/access-to-files-and-transcripts/online-files/pabai-v-australia>

³⁸ Stephen Gardiner, Simon Caney, Dale Jamieson, and Henry Shue (ed.), *Climate Ethics: Essential Readings*, Oxford: Oxford University Press, 2010; Stephen Gardiner, *A Perfect Moral Storm: The Ethical Tragedy of Climate Change*, Oxford: Oxford University Press, 2011; Donald A. Brown, *Climate Change Ethics: Navigating the Perfect Moral Storm*, London and New York: Routledge, 2012; John Broome, *Climate Matters: Ethics in a Warming World*, New York and London: W.W. Norton & Company, 2012; Paul G. Harris, *Global Ethics and Climate Change*, Edinburgh: Edinburgh Studies in Global Ethics, Edinburgh University Press, 2016; Byron Williston, *The Ethics of Climate Change: An Introduction (Second Edition)*, Abingdon: Routledge, 2023; and Donald A. Brown, Kathryn Gwiazdon, and Laura Westra (ed.), *The Routledge Handbook of Applied Climate Change Ethics*, New York: Routledge, 2023.

³⁹ Stephen Humphreys (ed.), *Human Rights and Climate Change*, Cambridge: Cambridge University Press, 2010; Catriona McKinnon, *Climate Change and Future Justice: Precaution, Compensation, and Triage*, Abingdon: Routledge, 2012; Henry Shue, *Climate Justice: Vulnerability and Protection*, Oxford: Oxford University Press, 2014; Tracey Skillington, *Climate Justice and Human Rights*, New York: Palgrave Macmillan, 2017; Judith Blau, *The Paris Agreement: Climate Change, Solidarity, and Human Rights*, Cham (Switzerland): Palgrave Pivot, 2017; and Mary Robinson with Caitrona Palmer, *Climate Justice: Hope, Resilience, and the Fight for a Sustainable Future*, New York: Bloomsbury Publishing, 2018.

⁴⁰ Sabin Center for Climate Change Law, ‘Climate Change Databases’, Columbia Law School and Columbia Climate School, <https://climatecasechart.com/>; Joan Setzer and Catherine Higham, ‘Global trends in Climate Change Litigation: 2025 Snapshot’, the Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science, 2025, <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2025-snapshot/>; Pau De Vilchez Mora, *Climate in Court - Defining State Obligations on Global Warming Through Domestic Climate Litigation*, Cheltenham and Northampton (Mass.): Edward Elgar Publishing, 2022; Francesco Sindico, Kate McKenzie, Gastón A Medici-Colombo, and Lennart Wegener (ed.), *Research Handbook on Climate Change Litigation*, Cheltenham and Northampton (Mass.): Edward Elgar Publishing, 2024; and Margaretha Wewerinke-Singh and Sarah Mead (ed.), *The Cambridge Handbook on Climate Litigation*, Cambridge: Cambridge University Press, 2025.

climate litigation,⁴¹ clean air litigation,⁴² and tortious actions, such as negligence and nuisance.⁴³ There have been comparative studies of climate litigation.⁴⁴ There is also a growing literature on climate change and Indigenous rights.⁴⁵

This paper provides a critical analysis of the decision of Wigney J of the Federal Court of Australia in *Pabai Pabai v Commonwealth of Australia (No 2)* [2025].⁴⁶ This study builds upon the author's past work on Indigenous intellectual property, the environment, and climate

⁴¹ Mary Christina Wood, *Nature's Trust: Environmental Law for a New Ecological Law*, Cambridge: Cambridge University Press, 2014; Lee van der Voo, *As the World Burns: How a New Generation of Activists Is Leading the Landmark Case Against Climate Change*, Timber Press, 2020; and Nicole Rogers, *Law, Fiction and Activism in a Time of Climate Change*, Abingdon and New York: Routledge, 2020.

⁴² Richard J. Lazarus, *The Rule of Five: Making Climate History at the Supreme Court*, Cambridge (Mass): The Belknap Press of the Harvard University Press, 2020.

⁴³ David A. Grossman, 'Tort-Based Climate Litigation' in William C.G. Burns and Hari M. Osofsky (ed.), *Adjudicating Climate Change: State, National, and International Approaches*, Cambridge: Cambridge University Press, 2009, 193-229; Wendy Bonython, 'Tort Law and Climate Change' (2021) *University of Queensland Law Journal* 421-457; and Centre for Climate Engagement, 'Tort Law and Climate Change', *The Law and Climate Atlas*, <https://climatehughes.org/law-and-climate-atlas/tort-law-and-climate-change/>

⁴⁴ Joeline Lin and Douglas A. Kysar, (ed.), *Climate Change Litigation in the Asia Pacific*, Cambridge: Cambridge University Press, 2020; Asian Development Bank, *Climate Change, Coming Soon to a Court Near You: Climate Litigation in Asia and the Pacific and Beyond*, Asian Development Bank, 2020; Kim Bouwer at al., *Climate Litigation and Justice in Africa*, Bristol: Bristol University Press, 2024; Carla Gomes, Heloisa Oliveira, Armando Rocha, and Matteo Fermeglia (ed.), *Climate Change before International Courts: A Comparative Study*, Routledge, 2025; and Valéria Emília de Aquino, Claudia Loureiro, and Vinicius Villani Abrantes (ed.), *Climate Litigation in a Changing World: A Comparative Analysis of Similarities, Challenges and Pathways*, Springer, 2025.

⁴⁵ Randall Abate and Elizabeth Ann Kronk (ed.), *Climate Change and Indigenous Peoples: The Search for Legal Remedies*, Cheltenham and Northampton (Mass.): Edward Elgar Publishing, 2013; Mary Christina Wood, 'Tribal Trustees in Climate Crisis', (2014) 8 (2) *American Indian Law Journal* 518-546; Naomi Klein, *This Changes Everything: Capitalism vs. The Climate*, New York: Simon & Schuster, 2015; Francis Nona, 'Traditional Community-Based Knowledge for Envisioning Climate Change Action for the Torres Strait' (2024) 48 (5) *Australian and New Zealand Journal of Public Health* 100182; Francis Nona, Veronica Matthews, Nina Lansbury, Kristina Vine, and Lillian Ireland, *Indigenous-led Rights-Based Approaches to Climate Litigation*, Lowitja Institute, 2025, https://www.lowitja.org.au/wp-content/uploads/2025/06/Indigenous-led-Rights-based-Approaches-to-Climate-Litigation-a-discussion-paper_June-2025-1.pdf; and Victoria Reyes-García et al. (ed.), *Routledge Handbook of Climate Change Impacts on Indigenous Peoples and Local Communities*, Abingdon and New York: Routledge, 2023.

⁴⁶ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796.

change.⁴⁷ It also builds upon the author's case studies of climate litigation.⁴⁸ Part 1 focuses on the treatment of law and climate science in the decision by Wigney J. Part 2 examines the consideration of *Ailan Kastom* and Indigenous intellectual property. Part 3 focuses upon the discussion of negligence and torts law – particularly in respect of the duty of care, breach of such a duty, and loss and damage. Part 4 deals with the deference of Wigney J to appellate courts – particularly the Full Court of the Federal Court of Australia, and the High Court of Australia. Part 5 deals with the discussion by the judge of the role of the Federal Government in dealing with climate action. Part 6 focuses on how Wigney J deals with comparative law in respect of climate litigation. Part 7 deals with Wigney J's discussion of international law, the United Nations Human Rights Committee Torres Strait Eight ruling, and the subsequent International Court of Justice ruling on the obligation of states in respect of climate change. The conclusion explores the prospects of an appeal against the decision of Wigney J to the Full Court of the Federal Court of Australia and the High Court of Australia. It also highlights the potential of other modes of climate litigation – such as human rights-based climate litigation, and native title action over the impacts of climate change.

⁴⁷ Matthew Rimmer, 'Blame It On Rio: Biodiscovery, Native Title, And Traditional Knowledge' (2003) 7 *The Southern Cross University Law Review* 1-49; Matthew Rimmer, 'The World Indigenous Network: Rio+20, Intellectual Property, Sustainable Development, and the Future We Want', in Matthew Rimmer (ed.), *Indigenous Intellectual Property: A Handbook of Contemporary Research*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2015, 106-130; Matthew Rimmer, 'Intellectual Property, Indigenous Knowledge, and Climate Change', in Matthew Rimmer (ed.), *Indigenous Intellectual Property: A Handbook of Contemporary Research*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2015, 382-414; Matthew Rimmer, 'Northern Exposure: Climate Change, Indigenous Rights, and Atmospheric Trust Litigation in Alaska', in Matthew Rimmer (ed.), *Intellectual Property and Clean Energy: The Paris Agreement and Climate Justice*, Singapore: Springer, 2018, 639-686; Matthew Rimmer, 'The Alliance of Small Island States: Intellectual Property, Cultural Heritage, and Climate Change', in Christoph Antons and William Logan (ed.) *Intellectual Property, Cultural Property and Intangible Cultural Heritage*, Abingdon (Oxon) and New York: Routledge, 2018, 102-133; and Matthew Rimmer, 'The Torres Strait Eight: Climate Litigation, Biodiversity, Human Rights, and Indigenous Intellectual Property', in Charles Lawson, Michelle Rourke, and Frances Humphries (ed.), *Access and Benefit Sharing of Genetic Resources, Information, and Traditional Knowledge*, Abingdon (Ox.): Routledge, 2022, 259-287.

⁴⁸ Matthew Rimmer, 'Northern Exposure: Climate Change, Indigenous Rights, and Atmospheric Trust Litigation in Alaska', in Matthew Rimmer (ed.), *Intellectual Property and Clean Energy: The Paris Agreement and Climate Justice*, Singapore: Springer, 2018, 639-686; Matthew Rimmer, 'Divest New York: The City of New York, C40, Fossil Fuel Divestment, and Climate Litigation', (2019) 14 *The Newcastle Law Review* 51-77; and Matthew Rimmer, 'The Torres Strait Eight: Climate Litigation, Biodiversity, Human Rights, and Indigenous Intellectual Property', in Charles Lawson, Michelle Rourke, and Frances Humphries (ed.), *Access and Benefit Sharing of Genetic Resources, Information, and Traditional Knowledge*, Abingdon (Ox.): Routledge, 2022, 259-287.

1. Australian Law, Climate Science, and the Tragedy of the Commons

The case of *Pabai Pabai v Commonwealth of Australia (No 2)* could be viewed through the lens of law and science.⁴⁹ As Jessica Wentz has highlighted, climate science has informed legal arguments and judicial decisions across a range of climate changes:

Climate science plays an integral role in litigation aimed at clarifying legal obligations with respect to climate change mitigation, compensation, adaptation and disclosures. Courts rely on climate science to resolve factual questions about causation and foreseeability – such as whether and to what extent a defendant contributed to climate change-related harms and whether those harms were a foreseeable outcome of the defendant’s conduct. Courts can also use climate science to determine the scope of a defendant’s legal obligations with regard to greenhouse gas (GHG) emissions, compensation for climate harms and responses to climate impacts.⁵⁰

The law and science of climate change attribution is certainly evolving as a field.⁵¹ There has been increasing inter-disciplinary work on law and climate science.⁵²

The judge extensively considers expert and lay evidence in respect of the impacts of climate change upon the Torres Strait Islands.

The judge recognised: ‘As will be discussed in detail in this judgment, there is merit in many of the factual claims that underly the causes of action in negligence brought by the applicants, both on their own behalf and on behalf of the Torres Strait Islanders who comprise the group members in this proceeding.’⁵³ The judge acknowledged: ‘There could be little doubt that the

⁴⁹ Mario Biagioli (ed.), *The Science Studies Reader*, New York and London: Routledge, 1999.

⁵⁰ Jessica Wentz, ‘Climate Science and Litigation’, in Francesco Sindico, Kate McKenzie, Gaston A Medici-Colombo, and Lennart Wegener (ed.), *Research Handbook on Climate Change Litigation*, Cheltenham and Northampton (Mass.): Edward Elgar Publishing, 2024, 164-183 at 164.

⁵¹ Michael Burger, Jessica Wentz, and Radley Horton, ‘The Law and Science of Climate Change Attribution’, Sabin Center for Climate Change Law, <https://climate.law.columbia.edu/sites/climate.law.columbia.edu/files/content/docs/Executive%20Summary.Law%20and%20Science%20of%20Climate%20Change%20Attribution.pdf>

⁵² Joy Reyes, Nicholas Petkov, and Noah Walker-Crawford, ‘Bridging Disciplines: Law, Science and the Emergence of Climate Attribution’, Grantham Research Institute on Climate Change and the Environment, The London School of Economics and Political Science, 29 April 2025, <https://www.lse.ac.uk/granthaminstitute/news/bridging-disciplines-law-science-and-the-emergence-of-climate-attribution/>

⁵³ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [11].

Torres Strait and Torres Strait Islanders have in recent times been severely impacted by climate change.’⁵⁴

The judge heard from an array of scientists in respect of climate science, and loss and damage. The applicants adduced evidence from Professor David Karoly, Professor Malte Meinshausen, Professor Terry Hughes and Professor John Church, as well as Associate Professor Linda Selvey and Stuart Bettington. The Commonwealth adduced evidence from Dr Pep Canadell, Professor Andrew Pitman and other expert witnesses whose evidence, considered later, is again more relevant to issues relating to loss and damage and the Commonwealth’s defence to the applicants’ alternative adaptation case.

The judge provides an overview of global warming and climate change, discussing some basic uncontentious or ineluctable scientific facts. He also clarifies the key concept of the best available science in the case. The judge considered climate change, the greenhouse effect, major greenhouse gases and their global warming potential, the observed consequences of greenhouse gas emissions since the industrial revolution, and the near linear relationship between greenhouse gas emissions and global temperature increase.

The judge repeatedly refers to the work of the Intergovernmental Panel on Climate Change (IPCC) as authoritative.⁵⁵ The judge notes: ‘There could be no doubt that the Torres Strait Islands are small islands that are subject to the future risks referred to in the IPCC’s Sixth Assessment Reports.’⁵⁶ Jessica Wentz has commented, more broadly: ‘The value of IPCC reports and national climate assessments is that they reflect scientific agreement among experts in this field and they synthesize a huge body of scientific evidence.’⁵⁷ She commented that ‘courts tend to assign significant weight to these reports, and litigants are less likely to enter into a “battle of the experts” with regards to the findings contained therein’.⁵⁸ Wentz notes that ‘while IPCC reports and national climate assessments can be used to support injury and causation claims, there are some cases where more targeted detection and attribution research may be needed to establish a causal link between a defendant’s conduct and climate change-

⁵⁴ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [11].

⁵⁵ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [378]-[436].

⁵⁶ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [436].

⁵⁷ Jessica Wentz, ‘Climate Science and Litigation’, in Francesco Sindico, Kate McKenzie, Gaston A Medici-Colombo, and Lennart Wegener (ed.), *Research Handbook on Climate Change Litigation*, Cheltenham and Northampton (Mass.): Edward Elgar Publishing, 2024, 164-183 at 183.

⁵⁸ *Ibid.*

related injuries.’⁵⁹ Wentz comments that ‘although there are questions about how courts will engage with some scientific issues, it appears that the existing body of climate science is likely sufficient to support many of the lawsuits that have been filed to date.’⁶⁰

The judge observed that the science of climate change was clear and unequivocal. The judge emphasized that ‘it is scientifically clear and unequivocal that there is a near linear relationship between cumulative anthropogenic (human caused) CO₂ emissions and the increase in global surface temperature’.⁶¹ The judge also stressed: ‘It is also scientifically clear and unequivocal that every tonne (and every fraction of a tonne) of CO₂ emissions adds to global warming.’⁶² The judge commented: ‘The science is equally clear and unequivocal about the climate and environmental impacts of global temperature increases caused by CO₂ emissions.’⁶³

Naomi Oreskes and Erik M. Conway have written about how ‘Merchants of Doubt’ have sought to engage in climate denial, distraction, and delay.⁶⁴ As Michael E. Mann has attested, the fossil fuel industry has often sought to discredit climate scientists, and delegitimize climate science.⁶⁵ For his part, Wigney J has no patience for climate denial or doubt in his judgment.

The judge not only recognises that climate change is real, but it poses a real and present threat, with existential risks for Australia, and regions therein. The judge repeatedly emphasized that climate change was an ‘existential threat’ to the Torres Strait Islands; Australia; and, more broadly, humanity. At the outset, the judge observes: ‘The central issue in this difficult and novel case is whether the common law tort of negligence can and does provide Torres Strait Islanders with a remedy for what they claim has been the Commonwealth of Australia’s

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [24].

⁶² *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [24].

⁶³ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [25].

⁶⁴ Naomi Oreskes and Erik M. Conway, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming*, New York: Bloomsbury Press, 2010; and Naomi Oreskes, and Erik M. Conway, *The Big Myth: How American Business Taught Us To Loathe Government and Love the Free Market*, New York: Bloomsbury Press, 2023.

⁶⁵ Michael E. Mann, *The Hockey Stick and the Climate Wars: Dispatches from the Front Lines*, New York: Columbia University Press, 2012; Michael E. Mann and Tom Toles, *The Madhouse Effect: How Climate Change Denial Is Threatening Our Planet, Destroying Our Politics, and Driving Us Crazy*, New York: Columbia University Press, 2016; and Michael E. Mann and Peter Hotez, *Science Under Siege: How to Fight the Five Most Powerful Forces That Threaten Our World*, Scribe, 2025.

unreasonable and inadequate response to the existential risks posed by climate change and the impacts that it is having on the Torres Strait Islands.’⁶⁶ The judge reflects:

Climate change poses an existential threat to the whole of humanity. The wellbeing and way of life of many, if not most, communities in Australia are vulnerable to the impacts of climate change. The Torres Strait Islands and their inhabitants are, however, undoubtably far more vulnerable to the impacts of climate change than other communities in Australia.⁶⁷

The judge later notes: ‘As the UN Convention on Climate Change recognised, the existential threat posed by climate change makes it imperative that every country do as much as it can to reduce its greenhouse gas emissions.’⁶⁸

The judge recognises: ‘It is, however, nevertheless necessary to make some basic findings in respect of global warming and climate change, as well as the impacts of climate change, both generally and on the Torres Strait Islands, in case or in the event that this case finds its way to a higher court.’⁶⁹

The judge refers to an expert witness Professor Meinshausen discussing the climate crisis as a ‘Tragedy of the commons’. The judge commented: ‘Professor Meinshausen’s reasoning concerning the “tragedy of the commons” is, with respect, unassailable.’⁷⁰ He commented: ‘If every nation state approached the setting of their emissions reduction targets by simply asking whether, if they set a low reduction target, anyone would really notice the climate change impact of the resulting extra emissions, considered over a short period and in isolation from the emissions of all other nations, the planet would effectively be doomed because there would be no effective global action to reduce greenhouse gas emissions and slow the rate of global warming’.⁷¹ However, the judge noted: ‘That, however, does not alter the conclusion that, for the purposes of the Australian common law of negligence, it cannot be concluded that any breach of the targets duty of care by the Commonwealth materially contributed in the short term to any harm suffered by Torres Strait Islanders from the impacts of climate change.’⁷²

⁶⁶ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1].

⁶⁷ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [5].

⁶⁸ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [927].

⁶⁹ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [212].

⁷⁰ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1094].

⁷¹ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1094].

⁷² *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1094].

Dr Shannon Brincat from the University of the Sunshine Coast noted: ‘While acknowledging the severe impacts of climate change on Torres Strait Islander communities, the Court invoked the “tragedy of the commons” to illustrate the difficulty of attributing causality to Australia’s contribution.’⁷³

There has been philosophical debate as to whether the discourse of the ‘commons’ is sufficient to capture the ethics of climate change. Jouni Paavola has wondered whether climate change is the ultimate tragedy of the commons.⁷⁴ Maebh O’Gorman has considered various theories of the tragedy of the commons, and their application to climate change.⁷⁵ Anthony Patt is doubtful whether the framing is appropriate: ‘The tragedy of the commons framing made sense at a time when we believed that people needed to adjust the energy system at the margins, and believed that the cost of doing so would be high.’⁷⁶ The philosopher Stephen Gardiner has contended that the theoretical paradigm of the ‘commons’ is inadequate to account for climate change.⁷⁷ He has noted: ‘The tragedy of the commons has become the standard analytical model for understanding regional and global environmental problems in general and climate change is no exception.’⁷⁸ Nonetheless, Gardiner finds the commons analysis to be simplistic. He maintains that the ‘commons’ framework does not do a good job at dealing with questions of fairness and intergenerational justice.

There has also been a discussion as to whether climate change is an ‘anticommons’ problem – in which there is a suboptimal use of resources because of too many private rights holders.⁷⁹

⁷³ Scimex, ‘Expert Reaction: Landmark Australian Climate Case Ruling’, *Scimex*, 15 July 2025, <https://www.scimex.org/newsfeed/expert-reaction-australias-landmark-australian-climate-case>

⁷⁴ Jouni Paavola, ‘Climate Change: The Ultimate Tragedy of the Commons?’, in Daniel H. Cole and Elinor Ostrom (ed.), *Property in Land and Other Resources*, Cambridge (Mass.): Lincoln Institute of Land Policy, 2012, 417-433.

⁷⁵ Maebh O’Gorman, ‘Global Warming: A Tragedy of the Commons’, Osgoode Hall Law School of York University, 2010, <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1099&context=clpe>

⁷⁶ Anthony Patt, ‘Beyond the Tragedy of the Commons: Reframing Effective Climate Change Governance’ (2017) 34 *Energy Research & Social Science* 1-3 at 3.

⁷⁷ Stephen Gardiner, *A Perfect Moral Storm: The Ethical Tragedy of Climate Change*, Oxford: Oxford University Press, 2011.

⁷⁸ Ibid., 28.

⁷⁹ Lea Kosnik, ‘The Anticommons and the Environment’ (2012) 101 *Journal of Environment Management* 206-217. See also: Michael Heller, *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives*, New York: Basic Books, 2008; Michael Heller, ‘The Tragedy of the Anticommons: A Concise Introduction and Lexicon’ (2013) 76 *Modern Law Review* 6-25; and Michael Heller and James Salzman, *Mine!: How the Hidden Rules of Ownership Control Our Lives*, London: Atlantic Books, 2021.

A case note by Corrs Chambers Westgarth highlighted: ‘The Federal Court is willing to accept scientific evidence regarding the existence and impact of climate change’.⁸⁰ The lawyers suggested that this approach replicated ‘at a federal level the approach that some State courts have already taken, including the Queensland Land Court in *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* (No 6) [2022] and *Re Sungela Pty Ltd & Anor* [2025].’⁸¹

Justice Brian Preston reflects upon the role of judges in the climate crisis: ‘The fate of disputes concerning pressing environmental issues such as climate change, ought not turn on the personal or subjective views of the individual judge assigned to hear and determine the matter.’⁸² He commented: ‘For example, the outcome should not be dependent on whether the judge is a climate change believer or a climate change sceptic.’⁸³ Preston concludes: ‘Judges must adjudicate in accordance with principle and reason, technique and logic, to ensure consistency and predictability, and public confidence, in the administration of justice.’⁸⁴

Dr Wesley Morgan, a research associate with the Institute for Climate Risk & Response at the University of New South Wales UNSW, commented: ‘This ruling is not just about climate litigation, it’s about climate credibility’.⁸⁵ He observed: ‘The Court found that Australia failed to genuinely consider the best available science when setting past emissions targets’.⁸⁶ Morgan hoped that the decision would encourage the Government to take science-based action in the future: ‘As the government now weighs its 2035 target, it must ensure that science guides its decision’.⁸⁷ He highlighted: ‘How Australia responds will send a powerful signal to our Pacific neighbours about our commitment to climate justice and regional leadership.’⁸⁸

⁸⁰ Anna White, Louise Camenzuli, Phoebe Wynn-Pope, and Timothy Bunker, ‘Pabai Decision: Federal Court finds No Duty of Care to Protect Torres Strait Islanders from Climate Change’, Corrs Chambers Westgarth, 25 July 2025, <https://www.corrs.com.au/insights/pabai-decision-federal-court-finds-no-duty-of-care-to-protect-torres-strait-islanders-from-climate-change>

⁸¹ Ibid. *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* (No 6) [2022] QLC 21 and *Re Sungela Pty Ltd & Anor* [2025] QLC

⁸² Justice Brian Preston, ‘The Art of Judging Environment Disputes’, *Southern Cross University Law Review* 103-127 at 104 https://lec.nsw.gov.au/documents/speeches-and-papers/preston_the%20art%20of%20judging%20environmental%20disputes.pdf

⁸³ Ibid., 104.

⁸⁴ Ibid., 127.

⁸⁵ Scimex, ‘Expert Reaction: Landmark Australian Climate Case Ruling’, *Scimex*, 15 July 2025, <https://www.scimex.org/newsfeed/expert-reaction-australias-landmark-australian-climate-case>

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

2. The Protection of *Ailan Kastom*, Cultural Heritage, and Indigenous intellectual property

The case of *Pabai Pabai v Commonwealth of Australia (No 2)* raises larger questions about the impact of climate change upon Indigenous rights – particularly in respect of the protection of *Ailan Kastom*, cultural heritage, and Indigenous intellectual property.

Amongst other things, the applicants alleged that the Commonwealth owed a duty of care to Torres Strait Islanders to take reasonable care to protect them against ‘loss of fulfilment of *Ailan Kastom*’.⁸⁹ The judge summarized the argument of the defendants: ‘As for the allegation that Torres Strait Islanders had suffered a loss of fulfilment of *Ailan Kastom*, the Commonwealth contended that any such loss was not compensable under the common law of negligence and that any finding of liability for such loss would be contrary to principle.’⁹⁰

The presiding judge Wigney J acknowledged the climate concerns of the applicants. According to the judge, Pabai Pabai ‘fears that, if something is not done about climate change and its impacts in the Torres Strait Islands, Boigu will lose its ancestral, sacred, and ceremonial sites and he will lose his connection to country and culture.’⁹¹ Likewise, the judge related that Guy Paul Kabai is ‘worried that, if nothing is done in respect of climate change, his community will lose its sacred places, culture and traditions, and he will lose his connection to country and culture.’⁹² The judge recognised upfront that climate change posed a real and dangerous threat to the people of the Torres Strait Islands: ‘There could be little, if any, doubt that the Torres Strait Islands and their traditional inhabitants face a bleak future if urgent action is not taken to address climate change and its impacts.’⁹³

The judge received evidence from a range of Torres Strait Islanders about *Ailan Kastom*:

The evidence of individual Torres Strait Islanders concerning *Ailan Kastom* and the fundamental importance of it and its practice to their lives is discussed in more detail later. In general terms, *Ailan Kastom* includes, among other things: the connection of Torres Strait Islanders to the marine and

⁸⁹ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796. [47].

⁹⁰ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [70].

⁹¹ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [7].

⁹² *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [8].

⁹³ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [6].

terrestrial environment of the Torres Strait, including as part of cultural ceremony; participation in cultural ceremonies; the use of the plants and animals of the Torres Strait for food, medicine and cultural ceremony; burying Torres Strait Islanders in local cemeteries and performing unique mourning rituals; visiting sacred sites, including on uninhabited islands; and dugong and marine turtle hunting, and other marine hunting and fishing. Connection to sea, country and marine hunting is not only a particularly integral aspect of *Ailan Kastom*, it is also a traditional and important source of food for Torres Strait Islanders.⁹⁴

The judge explored the intergenerational transmission of *Ailan Kastom*: ‘Cultural education is a particularly important aspect of the practise of *Ailan Kastom*.’⁹⁵ The judge noted: ‘Torres Strait Islander culture and the connection of Torres Strait Islanders to their land and seas is passed on, mainly orally, from generation to generation.’⁹⁶ The judge commented that ‘many of their traditional and cultural practices are linked or tied to seasonal events and occurrences, such as the timing of the breeding or hatching of marine animals like turtles, or the migratory patterns of birds.’⁹⁷ The judge also acknowledged: ‘The use of traditional foods and hunting and gardening are also important aspects of *Ailan Kastom*.’⁹⁸ The judge related that ‘individual Torres Strait Islanders gave evidence about the changes they had observed in relation to the seasons, seasonal weather patterns and seasonal events in recent times’.⁹⁹ The judge commented that evidence was heard that climate change was disrupting Indigenous knowledge: ‘Those changes were, so it was said, making it harder for Torres Strait Islanders to pass on cultural and traditional knowledge, including hunting and gardening practices.’¹⁰⁰

The judge also commented that there was deep concern amongst Torres Strait Islands that *Ailan Kastom* was being harmed by climate change:

The evidence of individual Torres Strait Islanders, in general terms, indicated that *Ailan Kastom* is a central and unifying aspect of their daily lives that connects them to their traditional lands and waters. It also spiritually connects them to their ancestors. It is the very essence of being a Torres Strait Islander. Torres Strait Islanders are particularly fearful that climate change and its impacts may break those connections and take away their very identity. Torres Strait Islanders also have a particularly strong connection to their ancestors, who are mostly buried on their islands, and to sacred sites located

⁹⁴ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [186].

⁹⁵ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [187].

⁹⁶ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [187].

⁹⁷ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [187].

⁹⁸ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [187].

⁹⁹ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [187].

¹⁰⁰ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [187].

on their islands, as well as on other often uninhabited islands, reefs or sand cays in the Torres Strait. Torres Strait Islanders particularly fear that the damage that inundation and extreme weather events in recent years have wrought on their cemeteries and sacred sites is resulting in them losing their spiritual connection with their ancestors and is preventing them from engaging in their important spiritual practices.¹⁰¹

The judge noted that climate change was interfering with the spiritual link between Torres Strait Islands and their homelands.

Wigney J recognised that climate change was not only adversely impacting upon the physical land and marine environment of the Torres Strait Islands, but it was also affecting the culture and customs of the Torres Strait Island community:

The impacts of climate change on the land and marine environment of the Torres Strait Islands have had a profound impact on the customary way of life of the inhabitants and traditional owners of the Torres Strait Islands. They are finding it increasingly difficult to practise and observe the body of customs, traditions and beliefs, known generally as *Ailan Kastom*, which has sustained them for generations. Sacred sites, including burial and ceremonial sites, have been damaged and are constantly at risk of further inundation. The traditional owners who reside on the islands are increasingly unable to source traditional foods or engage in certain cultural ceremonies, particularly those involving hunting and gathering. Changing seasonal, migratory and stellar patterns make it increasingly difficult for elders to pass-on traditional knowledge to the next generations.¹⁰²

The judge recognised: ‘The ability of Torres Strait Islanders to practise their sacred traditions and customs – *Ailan Kastom* – has been severely impacted by the damage to their lands and the island ecosystems.’¹⁰³ The judge maintained, though, that ‘the applicants face a significant hurdle in establishing that the loss of fulfillment of *Ailan Kastom* that they and other Torres Strait Islanders have collectively experienced as a result of the impacts of climate change is recognised compensable loss or damage under the Australian common law of negligence.’¹⁰⁴

The judge commented:

¹⁰¹ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [188].

¹⁰² *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [4].

¹⁰³ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [27].

¹⁰⁴ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [13].

The applicants' case in respect of the loss of fulfilment of *Ailan Kastom* raises at least two questions. The first question concerns exactly what is included in or encompassed by the notion of loss of fulfilment of *Ailan Kastom* in the particular circumstances of this case. The second and more fundamental question is whether loss of fulfilment of *Ailan Kastom* is compensable under the common law of tort in Australia.¹⁰⁵

The judge also noted that the case would not consider the related question of the impact of climate change in respect of native title rights: 'As will be seen, the complicating or confounding circumstance in this case is that, for reasons that it is unnecessary to explain, the applicants made it clear that their claim in relation to loss of fulfilment of *Ailan Kastom* did not include any claim in respect of any loss of or harm to any native title rights held by Torres Strait Islanders.'¹⁰⁶

The judge noted that the applicants argued that 'the Court can and should either recognise a new and distinct head of damages which includes such losses, or should recognise that loss of fulfilment of *Ailan Kastom* falls within an existing head of damages by analogy with losses that have been found to be compensable under that existing head.'¹⁰⁷ The judge observed: 'In the applicants' submission, the Court should "proceed by analogy" and find that *Ailan Kastom* is an interest that can and should be recognised as capable of protection by law.'¹⁰⁸ The judge commented: 'The applicants relied on several cases which they submitted were sufficiently analogous to provide a basis for the Court to find that *Ailan Kastom* was an interest that was capable of protection by law.'¹⁰⁹ The Australian cases included *Northern Territory of Australia v Griffiths* (2019) (*Timber Creek*);¹¹⁰ *Roberts v Devereaux* (1982);¹¹¹ *Napaluma v Baker* (1982);¹¹² *Dixon v Davies* (1982);¹¹³ *Weston v Woodroffe* (1985);¹¹⁴ *Milpurrurru v Indofurn*

¹⁰⁵ *Pabai Pabai v Commonwealth of Australia* (No 2) [2025] FCA 796 at [1105].

¹⁰⁶ *Pabai Pabai v Commonwealth of Australia* (No 2) [2025] FCA 796 at [1105].

¹⁰⁷ *Pabai Pabai v Commonwealth of Australia* (No 2) [2025] FCA 796 at [1120].

¹⁰⁸ *Pabai Pabai v Commonwealth of Australia* (No 2) [2025] FCA 796 at [1120].

¹⁰⁹ *Pabai Pabai v Commonwealth of Australia* (No 2) [2025] FCA 796 at [1121].

¹¹⁰ *Northern Territory of Australia v Griffiths* (2019) 269 CLR 1 (*Timber Creek*).

¹¹¹ *Roberts v Devereaux* (unreported, Supreme Court of the Northern Territory 22 April 1982).

¹¹² *Napaluma v Baker* (1982) 29 SASR 192.

¹¹³ *Dixon v Davies* (1982) 17 NTR 31.

¹¹⁴ *Weston v Woodroffe* (1985) 36 NTR 34.

Pty Ltd (1994) (‘the Carpets Case’);¹¹⁵ *Namala v Northern Territory* (1996) 131 FLR 468;¹¹⁶ *Cubillo v Commonwealth of Australia (No 2)* (2000);¹¹⁷ *Trevorrow v South Australia (No 5)* (2007);¹¹⁸ and *Santos N A Barossa Pty Ltd v Tipakalippa* (2022).¹¹⁹

The lawyers acting for Pabai had highlighted that the Federal Court of Australia had previously accommodated cultural rights in matters of intellectual property. However, in this case particular, the judge Wigney J was not convinced by analogies drawn with respect to Indigenous intellectual property:

The decision in *Milpururru* also does not provide any real assistance to the applicants. It was a case which concerned the award of damages, including “additional damages”, arising from a breach of copyright under the *Copyright Act 1968* (Cth). That Act provided that additional damages could be awarded having regard to “all other relevant matters”. The additional damages awarded to the applicant included a component referable to “cultural damage” resulting from “the pirating of cultural heritage”. The decision in *Milpururru* is again distinguishable from this case because the award for “cultural damages” was a component of a recognised statutory head of damage for breach of copyright.¹²⁰

In the *Carpets* case, the Federal Court judge Justice von Doussa had shown black letter law creativity in using existing law to accommodate collective interests in respect of copyright law.¹²¹ Wigney J is perhaps too quick and hasty here to dismiss the relevance of this landmark precedent.

In conclusion, the judge held:

The critical question here, however, is whether loss of fulfilment of *Ailan Kastom* is a separate form of actionable damage. As the passage from Gleeson CJ’s judgment in *Cattanach* indicated, the answer to that question hinges on whether loss of fulfilment of *Ailan Kastom* can be said to be a “right or interest

¹¹⁵ *Milpururru v Indofurn Pty Ltd* (1994) 54 FCR 240 (‘the Carpets’ case). For a discussion, see Terri Janke, ‘Briefs: Copyright – the Carpet Case’, (1995) 3(72) *Aboriginal Law Bulletin* 36; Andrew Kenyon, ‘Australian Aboriginal Art, Carpets and Copyright’ (1996) 1(1) *Art, Antiquity and Law* 59-72; Martin Hardie, ‘What Wandjuk Wanted?’ in Matthew Rimmer (ed.), *Indigenous Intellectual Property: A Handbook of Contemporary Research*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2015, 155-176; and Colin Golvan, *Protecting Indigenous Art: From T-Shirts to the Flag*, Melbourne: Melbourne University Press, 2024, 94-128.

¹¹⁶ *Namala v Northern Territory* (1996) 131 FLR 468.

¹¹⁷ *Cubillo v Commonwealth of Australia (No 2)* (2000) 103 FCR 1.

¹¹⁸ *Trevorrow v South Australia (No 5)* (2007) 98 SASR 136.

¹¹⁹ *Santos N A Barossa Pty Ltd v Tipakalippa* (2022) 296 FCR 124.

¹²⁰ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1127].

¹²¹ *Milpururru v Indofurn Pty Ltd* (1994) 54 FCR 240 (‘the Carpets’ case). See also Colin Golvan, *Protecting Indigenous Art: From T-Shirts to the Flag*, Melbourne: Melbourne University Press, 2024.

recognised as capable of protection by law”. None of the cases relied on by the applicants establish, or provide any support for the proposition, that loss of fulfilment of *Ailan Kastom* is such a right or interest. I was not taken to any case which establishes that the participation in, or enjoyment or observance of, any of the sorts of customs, traditions, observances and beliefs that fall within the meaning of *Ailan Kastom* constitutes or comprises a right or interest that is recognised as capable of protection by law.¹²²

The judge held: ‘While I have some considerable sympathy for the applicants’ contention that *Ailan Kastom* should be recognised as capable of protection by law, I do not consider that it is open to me, sitting as a single judge of this Court, to recognise, apparently for the first time, that participation in, or enjoyment or observance of, customs, traditions, observances and beliefs, can constitute or comprise rights or interests capable of protection by law.’¹²³

The judge concluded: ‘Accordingly, I decline to find that fulfilment of *Ailan Kastom* is a right or interest the loss or harm to which is compensable under the Australian common law of negligence.’¹²⁴ The judge reiterated: ‘I am not persuaded that, on the current state of authority, loss of fulfilment of *Ailan Kastom* is a right or interest the loss or harm to which is compensable under the Australian common law of negligence.’¹²⁵

The judge did recognise that climate change was adversely affecting cultural sites: ‘I accept that the evidence indicated that there was a significant risk of damage to sacred sites and communal areas, such as cemeteries, on Boigu and Saibai, that were culturally and spiritually important to Torres Strait Islanders and their practice of *Ailan Kastom*.’¹²⁶ The judge commented that the cultural knowledge of the Torres Strait Islanders was being hurt: ‘I would also readily accept that Torres Strait Islanders were deeply affected by that damage and were deeply concerned by the risk of further damage to those important areas’.¹²⁷ However, the judge doubted that such harm fitted within the legally recognised categories: ‘The weight to be given to that consideration must, however, be tempered to some extent by the fact that, for the reasons already given, I am not persuaded that harm constituted by the loss of fulfilment or the ability to practise *Ailan Kastom* is compensable under the law of negligence’.¹²⁸

¹²² *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1131].

¹²³ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1131].

¹²⁴ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1132].

¹²⁵ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1135].

¹²⁶ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1198].

¹²⁷ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1198].

¹²⁸ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1198].

The leading Indigenous intellectual property lawyer, Terri Janke, is from the Torres Strait Islands.¹²⁹ She has become increasingly interested in the interaction between Indigenous intellectual property and the environment. Discussing some New South Wales climate litigation, Janke and her colleagues note: ‘Court decisions like Bushfire Survivors shine a light on the opportunities that government bodies like the EPA have to engage with First Nations peoples in the development of objectives, guidelines and policies that meet their statutory duties and realise the value of traditional practices.’¹³⁰ Likewise, Torres Strait Islander scholar and researcher, Francis Nona, has highlighted the importance of Indigenous knowledge in respect of climate action.¹³¹ Anne Poelina, Mary Graham, Michelle Maloney and others have argued that there is a need to better reconcile Indigenous and western laws in Australia’s diverse legal system.¹³²

3. A Duty of Care in the Climate Crisis? Torts in the Torres Strait Islands

There has been much disciplinary debate as to whether tort law could provide an avenue for climate litigation in Australia – through the doctrine of negligence or some other cause of action, such as the doctrine of nuisance.¹³³ There have been differing opinions in this regard. Some judges, lawyers, and researchers are of the view that tort law is not well-adapted to deal with the impact of the climate crisis. However, there is a growing number of lawyers who have been arguing that tort law can and should accommodate the various challenges of climate change and the environment. Nicole Rogers notes that ‘the urgency of the climate crisis is more clearly understood, and provides a more pressing imperative for effective judicial decision-making when framed within the context of governmental duties of care and hazardous

¹²⁹ Terri Janke, *True Tracks: Respecting Indigenous Knowledge and Culture*, Sydney: NewSouth Publishing, 2022.

¹³⁰ Terri Janke, Clara Klemiski, and Laura Melrose, ‘Bushfires, Climate Change and Indigenous Ecological Knowledge: a New Perspective for a Changing World’, *Terri Janke and Company*, 9 September 2021, <https://www.terrijanke.com.au/post/bushfires-climate-change-indigenous-ecological-knowledge-a-new-perspective-for-a-changing-world>

¹³¹ Francis Nona, ‘Traditional Community-based Knowledge for Envisioning Climate Change Action for the Torres Strait’ (2024) 48 (5) *Australian and New Zealand Journal of Public Health* 100182

¹³² Anne Poelina et al., *Declaration of Peace for Indigenous Australians and Nature: A Legal Pluralist Approach to First Laws and Earth Laws*, Singapore: Springer, 2024.

¹³³ David A. Grossman, ‘Tort-Based Climate Litigation’ in William C.G. Burns and Hari M. Osofsky (ed.), *Adjudicating Climate Change: State, National, and International Approaches*, Cambridge: Cambridge University Press, 2009, 193-229; Wendy Bonython, ‘Tort Law and Climate Change’ (2021) *University of Queensland Law Journal* 421-457; and Centre for Climate Engagement, ‘Tort Law and Climate Change’, *The Law and Climate Atlas*, <https://climatehughes.org/law-and-climate-atlas/tort-law-and-climate-change/>

negligence.’¹³⁴ The tort of negligence has previously evolved to respond to other technological innovations and industrial revolutions in the past.¹³⁵ Surely, the tort of negligence could evolve once again to deal with the environmental and climate consequences of the industrial revolutions.

In the case of *Pabai Pabai v Commonwealth of Australia (No 2)*, the plaintiffs presented two scenarios – the primary one was that the Commonwealth had a duty to set greenhouse gas targets, and the secondary one was that the Commonwealth had a duty to take adaptation action, such as building sea walls to protect the Torres Strait Island.

The judge made the following conclusions in respect of the applicants’ primary or targets duty case. Wigney J observed: ‘The applicants have failed to make out their case against the Commonwealth based on the alleged targets duty of care’.¹³⁶ The judge noted: ‘Indeed, the applicants have failed to prove any of the essential elements of their case’.¹³⁷ The judge commented: ‘I am not satisfied that the Commonwealth owed Torres Strait Islanders the targets duty of care’.¹³⁸ Moreover, Wigney J said: ‘Even if the Commonwealth was subject to that duty of care, I am not satisfied that the standard of care that the Commonwealth was required to exercise was as alleged by the applicants’.¹³⁹ He observed: ‘Nor am I satisfied that any breach of the alleged targets duty caused the applicants to suffer any compensable loss or damage, or materially contributed to any compensable loss or damage suffered by them’.¹⁴⁰ Wigney also maintained: ‘Finally, I am not persuaded that, on the current state of authority, loss of fulfilment of *Ailan Kastom* is a right or interest the loss or harm to which is compensable under the Australian common law of negligence’.¹⁴¹

In the matter of the sea walls, the judge concluded: ‘The applicants have failed to make out their case against the Commonwealth based on the alleged alternative duty of care’.¹⁴² Again,

¹³⁴ Nicole Rogers, *Law, Fiction and Activism in a Time of Climate Change*, Abingdon and New York: Routledge, 2020, 48.

¹³⁵ Ken Oliphant, ‘Tort Law, Risk, and Technological Innovation in England’ (2014) 59 (4) *McGill Law Journal* 820-845.

¹³⁶ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1135].

¹³⁷ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1135].

¹³⁸ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1135].

¹³⁹ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1135].

¹⁴⁰ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1135].

¹⁴¹ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1135].

¹⁴² *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1235].

the judge observed: ‘Indeed, the applicants have failed to prove any of the essential elements of their case’.¹⁴³ The judge commented: ‘I am not satisfied that the Commonwealth owed Torres Strait Islanders the alternative duty of care’.¹⁴⁴ Wigney J observed: ‘Even if the Commonwealth was subject to that duty of care, I am not satisfied that the Commonwealth breached that duty of care.’¹⁴⁵ He commented: ‘Nor am I satisfied that any breach of the alternative duty caused the applicants to suffer any compensable loss or damage, or materially contributed to any compensable loss or damage suffered by them’.¹⁴⁶ Wigney observed: ‘Finally, I am not persuaded that, on the current state of authority, loss of fulfilment of *Ailan Kastom* is a right or interest the loss or harm to which is compensable under the Australian common law of negligence.’¹⁴⁷

In the overall conclusion, the judge found that ‘the common law of negligence in Australia was an unsuitable legal vehicle through which the applicants could obtain relief in respect of the type of governmental action or inaction which was in issue in this case, or relief in respect of their loss of fulfilment of *Ailan Kastom*’.¹⁴⁸ Wigney J noted: ‘That will remain the case unless and until the law in Australia changes, either by the incremental development or expansion of the common law by appellate courts, or by the enactment of legislation’.¹⁴⁹ His Honour observed: ‘Until then, the only recourse that those in the position of the applicants and other Torres Strait Islanders have is recourse via the ballot box.’¹⁵⁰

Professor Lee Godden from The University of Melbourne noted: ‘The judge did signal that he was bound by the limitations of current negligence law and current causation tests which left the plaintiffs without a legal avenue of redress’.¹⁵¹ Godden observed that the judge ‘indicated the need for an appellate court to advance the law or for legislative change.’¹⁵²

¹⁴³ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1235].

¹⁴⁴ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1235].

¹⁴⁵ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1235].

¹⁴⁶ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1235].

¹⁴⁷ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1235].

¹⁴⁸ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1275].

¹⁴⁹ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1275].

¹⁵⁰ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1275].

¹⁵¹ Scimex, ‘Expert Reaction: Landmark Australian Climate Case Ruling’, *Scimex*, 15 July 2025, <https://www.scimex.org/newsfeed/expert-reaction-australias-landmark-australian-climate-case>

¹⁵² *Ibid.*

There was frustration, though, by some commentators at the inflexibilities of Australian torts law. Dr Kathleen Birrell, a Senior Lecturer at the La Trobe University Law School, commented: ‘The decision can be understood, in part, as a lament for the limits of law, where the crises of our times may exceed its frame of reference’.¹⁵³ She suggested that there is a need to overcome such intransigence: ‘To properly address climate harm, we must address both the inertia of government policy and the inflexibility of legal tools.’¹⁵⁴

It should also be noted that there has been significant experimentation with torts law in climate matters in the United States. There has been consideration of the potential liability of governments for the failure to prepare for climate change.¹⁵⁵

There has been a host of climate litigation brought by cities, municipalities, local governments, and states against fossil fuel producers, alleging various tort claims, including negligence, nuisance, and various other matters.¹⁵⁶ Such actions have faced an array of procedural and substantive obstacles.¹⁵⁷ Moreover, the Trump Administration has been focused on blocking climate litigation in its second term.¹⁵⁸ Fossil fuel companies have called on the Trump Administration and the United States Congress to provide for legal immunity from climate lawsuits.¹⁵⁹

¹⁵³ Scimex, ‘Expert Reaction: Landmark Australian Climate Case Ruling’, *Scimex*, 15 July 2025, <https://www.scimex.org/newsfeed/expert-reaction-australias-landmark-australian-climate-case>

¹⁵⁴ Ibid.

¹⁵⁵ Jennifer Klein, ‘Potential Liability of Governments for Failure to Prepare for Climate Change’, Sabin Center for Climate Change Law, Columbia Law School, August 2015, <https://climate.law.columbia.edu/sites/climate.law.columbia.edu/files/content/docs/others/Klein-2015-08-Liability-US-Gov-Failure-to-Prep-Climate-Change.pdf>

¹⁵⁶ ‘Climate Change Litigation in the US’, Law and Climate Atlas, 2025, https://lawclimateatlas.org/resources/climate-change-litigation-in-the-us/#_ednref14 The Law and Climate Atlas refers to a range of matters, including *City of New York v. BP p.l.c.* 2021; *City of New York v Exxon Mobil Corp* 2021; *Connecticut v Exxon Mobil Corporation* 2022; *Vermont v Exxon Mobil Corp* 2022; *City of Hoboken v Exxon Mobil Corp* 2022; *City of Oakland v BP p.l.c.* 2022; *Mayor & City Council of Baltimore v BP p.l.c.* 2023; *City of Charleston v Brabham Oil Co.* 2023; *City & County of Honolulu v Sunoco LP* 2023; *Rhode Island v Shell Oil Products Co.* 2023; *County of San Mateo v Chevron Corp* 2023; *State v American Petroleum Institute* 2023; *Delaware v BP America Inc.* 2023; *District of Columbia v Exxon Mobil Corp* 2023; and *Board of County Commissioners of Boulder County v Suncor Energy*, 2023.

¹⁵⁷ For a survey, see The Sabin Center for Climate Change Law, ‘U.S. Climate Change Litigation: Common Law Claims’, <https://climatecasechart.com/case-category/common-law-claims/> For a case study, see Matthew Rimmer, ‘Divest New York: The City of New York, C40, Fossil Fuel Divestment, and Climate Litigation’, (2019) 14 *The Newcasttle Law Review* 51-77.

¹⁵⁸ Dharna Noor, ‘Trump aims to Crush Legal Curbs on his Climate Rollback – But It May Not Be Easy’, *The Guardian*, 1 January 2025, <https://www.theguardian.com/us-news/2024/dec/31/trump-climate-policy>

¹⁵⁹ Centre for Climate Integrity, ‘Report: Big Oil is asking Trump and Congress for Legal Immunity’, Centre for Climate Integrity, 25 March 2025, <https://climateintegrity.org/news/view/report-big-oil-is-asking-trump-and-congress-for-legal-immunity>

There has been greater recognition in tort-based climate litigation in the European Union – particularly at first instance in the *Urgenda* case (which will be discussed further in Section 6, the comparative section of this article).

4. Judicial Conventions about Climate Change

Climate change has posed a challenge to the judiciary, and its legal order. As Nicole Rogers has observed, ‘the chaotic, radical and unpredictable phenomenon of climate change cannot be neatly accommodated within existing legal systems.’¹⁶⁰

The judge displayed a high level of judicial deference and humility, emphasizing that the matter would be better dealt with by an appellate court. The judge was no doubt conscious of the progress and the outcome of the negligence case of *Sharma v Minister of the Environment* in the Federal Court of Australia,¹⁶¹ and the Full Court of the Federal Court of Australia.¹⁶² The judicial creativity shown by Bromberg J at first instance in *Sharma v Minister of the Environment* received a stern rebuke from the Full Court of the Federal Court of Australia.¹⁶³

The *Sharma* decision nonetheless attracted a lot of academic and scholarly attention.¹⁶⁴ Moreover, policy-makers are sought to address the outcome of the Full Court of the Federal Court of Australia decision with a legislative bill.¹⁶⁵ In response to the decision, Independent

¹⁶⁰ Nicole Rogers, *Law, Fiction and Activism in a Time of Climate Change*, Abingdon and New York: Routledge, 2020, 31.

¹⁶¹ *Minister for the Environment v Sharma* (2022) 291 FCR 311.

¹⁶² *Minister for the Environment v Sharma* [2022] FCAFC 35.

¹⁶³ *Minister for the Environment v Sharma* (2022) 291 FCR 311 and *Minister for the Environment v Sharma* [2022] FCAFC 35

¹⁶⁴ Neve Worthy and Alex Gardner, ‘The *Sharma* Decision: Establishing an Evidentiary Precedent for Future Climate Litigation’ (2022) 49(6) *Brief* 28-32; Libby Douglas, ‘*Sharma v Minister for the Environment*’, (2023) 42(2) *Australian Resources and Energy Law Journal* 98-101; Brandon Stewart, ‘*Sharma v Australia (Minister For the Environment)*: A Unique ‘Anns-wer’ To Public Authority Non-Liability For Climate Change Harms In Canada?’ (2022) 18 (2) *McGill Journal of Sustainable Development Law* 181-220; Michelle Maloney, ‘Duties to Not Harm Ecological Systems, Plants, and Animals’ in Donald A. Brown, Kathryn Gwiazdon, and Laura Westra (ed.), *The Routledge Handbook of Applied Climate Change Ethics*, New York: Routledge, 2023. Faith Gordon, ‘Climate Harm and Future Generations: Young People Pushing for Australian Law to Change with the Times’, *Court of Conscience*, UNSW Law School, 2024, 47-52, https://issuu.com/unswlawsociety/docs/court_of_conscience_-_issue_18_2024/60; and Janice Gray, ‘A Nun, Some Children, Climate Change, and a Novel Duty of Care – *Sharma* Considered’, in Klaus Bosselmann, Kathryn Gwiazdon, and Virginia Zambrano (ed.), *Ecological Integrity and International Law: Peace, Public Health, and Global Security*, London: Routledge, 2025.

¹⁶⁵ Jo Lauder, ‘Prominent Australians Call for Climate Laws to Protect Future Generations’, *ABC News*, 11 January 2025, <https://www.abc.net.au/news/2025-01-11/letter-demands-climate-laws-to-protect-future-generations/104789312>

ACT Senator David Pocock proposed a duty of care bill in the Australian Parliament.¹⁶⁶ Pocock commented:

Put another way, it is our role, the role of legislators, of parliamentarians to ensure we have a duty of care to our children and the ones still to come. I am proud to be working with Anjali Sharma to try and ensure we have that duty. It's up to us, as legislators, to ensure that we do what is right for Australia's young people, children and future generations. This Bill will address the current failure to consider the health and wellbeing of Australian children and future generations when decisions are made that result in substantial greenhouse gas emissions.¹⁶⁷

While the Australian Greens and the Teal community independents supported the bill, the governing Australian Labor Party and the opposition coalition of the Liberal Party and the National Party did not endorse the legislation.

Wigney J provides this gloss on the dispute over *Sharma*: ‘That decision warrants particularly close consideration because, while distinguishable in certain respects from this case, the circumstances are somewhat analogous.’¹⁶⁸ Wigney J comments on the debate in the Federal Court of Australia and the Full Court of the Federal Court of Australia:

The primary judge found that the Minister owed such a duty of care. The Full Court (Allsop CJ, Beach and Wheelahan JJ) unanimously found that the imposition of the duty of care should be rejected, primarily because, at least insofar as Allsop CJ and Wheelahan J were concerned, the posited duty of care would throw up for consideration “core policy questions unsuitable in their nature and character for judicial determination” (Allsop CJ at [7]) or issues involving “political considerations” and “the making of value judgments” the resolution of which was “uniquely suited to elected representatives and executive government responsible for law-making and policy-making” and “inappropriate for judicial resolution” (Wheelahan J at [868]).¹⁶⁹

The judge observes: ‘While it may be accepted that the facts and circumstances in *Sharma* were different to and distinguishable from the facts and circumstances of this case, some of the

¹⁶⁶ Senator David Pocock, https://adutyofcare.davidpocock.com.au/the_story and *Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023* (Cth).

¹⁶⁷ Senator David Pocock, ‘Second Reading Speech on the *Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023* (Cth)’, Hansard, Australian Senate, Australian Parliament, 3 August 2023, 3291, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F27117%2F0042%22>

¹⁶⁸ *Pabai Pabai v Commonwealth of Australia* (No 2) [2025] FCA 796 at [128].

¹⁶⁹ *Pabai Pabai v Commonwealth of Australia* (No 2) [2025] FCA 796 at [129].

observations of Allsop CJ and Wheelahan J are nevertheless particularly pertinent and persuasive in considering whether it would be inappropriate and impractical to impose the posited duty of care in this case.’¹⁷⁰

Wigney J refers to the work of Allsop CJ of the Federal Court of Australia over forty times in his judgment. This reflects a desire to maintain consistency and continuity with his fellow judges. Wigney J notes for instance that: ‘Those were, Allsop CJ concluded (at [247]), “matters of so-called ‘core’ policy” or “public policy of the highest importance” and (at [248]) it was “not the function of the Judicial branch to rule upon any lack of adequacy or any lack of wisdom of government policy by reference to the law of torts”.’¹⁷¹

The judge does observe that there is a closer relationship between the Commonwealth and the Torres Strait Islands community than the *Sharma* case. The judge commented: ‘I reject the Commonwealth’s submission that those contextual considerations compel the conclusion that the relationship between the Commonwealth and Torres Strait Islanders is relevantly nothing more than one between the governing and the governed in a democratic polity.’¹⁷² Wigney J observed: ‘Torres Strait Islanders are undoubtedly a group of people who are, broadly speaking, governed by the Commonwealth, though the nature of their relationship with the Commonwealth relevantly extends beyond that’.¹⁷³ He qualified that statement, observing: ‘I would not, however, go so far as to conclude that the relationship was or is a “special protective relationship” as the applicants contended.’¹⁷⁴

While Wigney J is pessimistic about the prospects of climate litigation, his judgment does not explore the many instances of judicial innovation in respect of climate litigation in Australia. It is somewhat frustrating that his judgment does not really engage with this jurisprudence. There is certainly also a cohort of Australian judges who have sought to adapt Australian law to better to deal with the consequences of climate change. In New South Wales, Preston CJ of the New South Wales Land and Environment Court rejected an open coal mine because of its climate impact.¹⁷⁵ Amongst other things, Preston CJ highlighted the impact of the mine on

¹⁷⁰ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [856].

¹⁷¹ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [132].

¹⁷² *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [877].

¹⁷³ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796.

¹⁷⁴ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796.

¹⁷⁵ *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7.

‘Aboriginal culture and connection to Country and impact on heritage-scenic quality.’¹⁷⁶ Also, in New South Wales, bushfire survivors successfully brought an action in the NSW Land and Environment Court, in which it was found that the Environmental Protection Agency has a legal duty to take action on climate change.¹⁷⁷ In Queensland, there was a landmark decision, in which the Land Court of Queensland recommended that applications for a proposed major new coal mine should be rejected on the grounds of human rights.¹⁷⁸ At a Federal level, there has been successful action taken against Volkswagen over the ‘Dieselgate’ controversy, in which the car company made false and misleading representations about its carbon emissions.¹⁷⁹ There has also been various decisions and settlements resulting from regulators such as the ACCC and ASIC taking action in respect of companies engaging in greenwashing.¹⁸⁰ If the *Pabai Pabai v Commonwealth of Australia (No. 2)* decision is reviewed by an appellate court, there will be a need to take address this growing jurisprudence in respect of climate litigation in Australia.

As Dr Riona Moodley from the University of New South Wales observed: ‘Today might not be that day, but Australian law will need to adapt to meet the challenges of climate change and hold decision-makers to account for harm caused by inaction.’¹⁸¹

5. The Commonwealth of Australia and the Climate Crisis

Early in the judgment, Wigney J discusses the role of the Federal Government and the Commonwealth Parliament in respect of climate decision-making:

The Torres Strait Islands are, both literally and figuratively, a world away from Canberra, the home of the Commonwealth Parliament. That is where many of the most important decisions are made about the nation’s response to climate change and its impacts. While there may have been, and perhaps still

¹⁷⁶ *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 at [341].

¹⁷⁷ *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* [2021] NSWLEC 92.

¹⁷⁸ *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21, 25 November 2022.

¹⁷⁹ *Australian Competition and Consumer Commission v Volkswagen Aktiengesellschaft* [2019] FCA 2166 (20 December 2019).

¹⁸⁰ For a recent summary, see Rosannah Healy, Tamim Rahimi and Clodagh Hussein, ‘Clean Up Green Claims or Risk Facing Regulatory Scrutiny’, *Allens*, 28 August 2025, <https://www.allens.com.au/insights-news/insights/2025/08/greenwashing-enforcement-reaches-new-heights/>

¹⁸¹ Scimex, ‘Expert Reaction: Landmark Australian Climate Case Ruling’, *Scimex*, 15 July 2025, <https://www.scimex.org/newsfeed/expert-reaction-australias-landmark-australian-climate-case>

are, some climate change doubters and deniers among the politicians and bureaucrats who are responsible for making those decisions, it is tolerably clear that the Commonwealth Government has for some time known about the perils of, and ongoing risks posed by, climate change. It has also recognised that it must play a part in the global response to climate change. The Commonwealth has also known and appreciated that the Torres Strait Islands and Torres Strait Islanders are particularly vulnerable to the impacts of climate change.¹⁸²

Wigney J posed the question: ‘But has the Commonwealth’s response to climate change been reasonable and adequate to protect Torres Strait Islanders and their traditional way of life from the ravages of climate change?’¹⁸³

The judge noted: ‘There is also much to be said for the proposition that many of the decisions that have been made by the Commonwealth Government to address climate change by limiting or reducing Australia’s greenhouse gas emissions have not paid sufficient regard to, or heeded the warnings of, the best available science.’¹⁸⁴ The judge also recognised: ‘There is also something to be said for the proposition that those steps that the Commonwealth have taken to provide appropriate funding for infrastructure to protect some of the Torres Strait Islands from the impacts of rising sea levels and extreme weather events have been too little and too late.’¹⁸⁵

Wigney J was critical that the Australian Government had often not taken climate action, in line with the best possible science. The judge concluded: ‘I have also found that the Commonwealth’s response to climate change and the threat it has posed, and continues to pose, to the Torres Strait Islands and their traditional inhabitants has, at least in some respects, been wanting.’¹⁸⁶ The judge maintained: ‘In particular, I have found that, when the Commonwealth identified and set Australia’s greenhouse gas emissions reduction targets in 2015, 2020 and 2021, it failed to engage with or give any real or genuine consideration to what the best available science indicated was required for Australia to play its part in the global effort to moderate or reduce climate change and its impacts.’¹⁸⁷ Media reporting of the case – particularly by *The Australian* – highlighted the criticism of successive Australian Governments in respect of their inadequate action on climate change.¹⁸⁸

¹⁸² *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [9].

¹⁸³ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [9].

¹⁸⁴ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [11].

¹⁸⁵ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [11].

¹⁸⁶ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1273].

¹⁸⁷ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1273].

¹⁸⁸ Paige Taylor, ‘Ruling “A Test for Climate Ambition”’, *The Australian*, 17 July 2025, 6.

The judge lamented that the Australian Government's actions were not consistent with the objectives and obligations set under the *Paris Agreement*:

The best available science was and is clear. To prevent the worst and most dangerous impacts of climate change, it was and is imperative for every country to take steps to reduce their greenhouse gas emissions so as to ensure that the increase in the global average temperature is held to well below 2°C above pre-industrial levels, and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels. Those critical objectives were enshrined in the Paris Agreement, to which Australia is a party. The evidence in this case indicated that the emissions reduction targets set by the Commonwealth in 2015, 2020 and 2021 were plainly not consistent with those objectives or its international obligations under the *Paris Agreement*.¹⁸⁹

In the conclusion, Wigney J noted: 'That will remain the case unless and until the law in Australia changes, either by the incremental development or expansion of the common law by appellate courts, or by the enactment of legislation'.¹⁹⁰ His Honour observed: 'Until then, the only recourse that those in the position of the applicants and other Torres Strait Islanders have is recourse via the ballot box.'¹⁹¹

The plaintiffs in the *Pabai Pabai v Commonwealth of Australia (No 2)* case have sought to publicise their case to politicians and policy-makers – as have the Torres Strait Eight.

However, it seems unlikely that the relatively small and dispersed Torres Strait Island community would be able to influence the outcome of a Federal seat in Queensland, let alone the results of a Federal election, or the policy of an incoming government. The Australian Bureau of Statistics estimated that there were 39,538 Torres Strait Islanders in Australia as of 2021 – of which 25,169 were resident in Queensland.¹⁹² It seems a hollow hope to recommend that Torres Strait Islanders seek 'recourse via the ballot box'. Even the most persuasive public advocacy by the Torres Strait Island community may well not have a decisive political impact. Independent Senator David Pocock was unable to get support for a duty of care bill in the wake

¹⁸⁹ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1274].

¹⁹⁰ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1275].

¹⁹¹ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [1275].

¹⁹² Australian Bureau of Statistics, 'Estimates of Aboriginal and Torres Strait Islander Australians', <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-aboriginal-and-torres-strait-islander-australians/latest-release>

of the *Sharma* case. A legislative bill to recognise a duty of care to the Torres Strait Island community may well face similar legislative opposition and obstacles.

For its part, the Albanese Government put out a muted press release on the outcome of the Federal Court of Australia decision in *Pabai Pabai v Commonwealth*.¹⁹³ The Hon. Senator Malarndirri McCarthy – the Minister for Indigenous Australians – and the Hon. Chris Bowen MP – the Minister for Climate Change and Energy noted that the action had been launched against the previous Coalition Government: ‘Beginning in 2021 during the former Morrison Liberal Government, this class action alleged that the Commonwealth breached a duty of care to protect Torres Strait Islanders, their environment and traditional way of life from the current and projected impacts of climate change.’¹⁹⁴ The Ministers commented: ‘Unlike the former Liberal Government, we understand that the Torres Strait Islands are vulnerable to climate change, and many are already feeling the impacts.’¹⁹⁵ The Ministers maintained: ‘Where the former Government failed on climate change, the Albanese Government is delivering – because it’s in the interest of all Australians.’¹⁹⁶ The Ministers insisted that they were focused on climate action:

That’s why we’re continuing to turn around a decade of denial and delay on climate, embedding serious climate targets in law and making the changes necessary to achieve them. Australia is now producing record renewable electricity, and energy emissions are lower than when we took office. We’re on track to achieve our ambitious but achievable targets of 43 per cent emissions reduction by 2030. But we know there is always more to do. The Albanese Labor Government remains committed to both acting to continue to cut emissions, and adapting to climate impacts we cannot avoid.¹⁹⁷

The press release promised: ‘We are finalising Australia’s first National Climate Risk Assessment and National Adaptation Plan to help all communities understand climate risk and build a more resilient country for all Australians.’¹⁹⁸ The press release was reluctant to deal with the details and specific findings of the case: ‘As the Commonwealth is carefully

¹⁹³ The Hon. Senator Malarndirri McCarthy and Hon. Chris Bowen MP, ‘Joint statement on *Pabai Pabai v Commonwealth*’, Australian Government, 15 July 2025, <https://ministers.pmc.gov.au/mccarthy/2025/joint-statement-pabai-pabai-v-commonwealth>

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

considering the detailed judgment, it would not be appropriate to comment on the specific findings while this occurs.’¹⁹⁹

The press release certainly shows that the Albanese Government has good intentions to seriously address the ravages of climate change in Australia. The press release, though, made no new commitments, particularly in respect of the matters raised in *Pabai Pabai v. Commonwealth*. There was no new announcement about greenhouse gas targets of the Australian Government. There was no offer of action in respect of building a sea wall to help better protect Torres Strait Islands from rising seas. There was no other climate adaptation measure put forward. More generally, there was a failure to consider what policy action was needed to better protect Indigenous Australians who were vulnerable to the various impacts of climate change.

The case of *Pabai Pabai v Commonwealth of Australia (No 2)* highlights some of the awkward contradictions between the climate policy of the Albanese Government, and the energy policy of the self-same government. As scholars have noted, the fossil fuel industry has maintained a hegemony over Australian politics – dictating policy choices in respect of energy, the environment, and climate change.²⁰⁰

Senator Penny Allman-Payne, a North Queensland based Senator of the Australian Greens, discussed the case of *Pabai Pabai v Commonwealth of Australia (No 2)* in the Australian Senate.²⁰¹ She expressed her solidarity with the people of the Torres Strait:

If you're watching this, my plea to you is this: don't give up hope, don't let the major parties lull you into accepting the climate collapse and don't listen when they say they're taking climate action while they're committing to the largest gas expansion in living memory. No more excuses; no more empty targets. The time for real, science based climate policy is now. And to the people of the Torres Strait: we see you, we hear you and we will fight alongside you. Your homes are not expendable, your culture is non-negotiable and your future is worth more than a gas company's profits.²⁰²

¹⁹⁹ Ibid.

²⁰⁰ Daniel Nyberg, Christopher Wright, and Vanessa Bowden, *Organising Responses to Climate Change: The Politics of Mitigation, Adaptation and Suffering*, Cambridge: Cambridge University Press, 2023.

²⁰¹ Senator Penny Allman Payne, ‘Speech on *Pabai Pabai v Commonwealth of Australia*’, Hansard, Australian Senate, Australian Parliament, 24 July 2025, 108, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F28818%2F0212%22>

²⁰² Ibid.

The Australian Greens Senator was critical of the position of the Australian Labor Party: ‘Let me be clear: this is climate violence, it's cultural erasure, and it's happening because the Labor Party has become the cheap political vanguard for fossil fuel companies’.²⁰³

In her response to the decision, Isabelle Reinecke, founder and Executive Director of Grata Fund, commented: ‘The government is continuing to make choices, open-eyed, to prioritise the vested interests of fossil fuel companies and political donations over the people it is supposed to serve.’²⁰⁴ She provided an example of this political behaviour: ‘In May the Australian Government approved a 40 year extension to the Woodside North West Shelf Gas project which will release 4.4 billion tonnes of climate pollution over its lifetime – it will be responsible for emissions greater than dozens of countries and many of the world’s biggest companies.’²⁰⁵

Isabella Reinecke contends that the legal system needs to make the political order more accountable: ‘The calm reasoning demanded by the courts is better able to consider these competing interests than skittish politicians who may be more easily intimidated by those who may hold the purse strings of electoral success.’²⁰⁶ She commented: ‘The wheels of justice may turn slowly and expensively, but they do have the ability to cut through otherwise intractable government failures, or wilful blindness.’²⁰⁷

6. The Comparative Law of Climate Litigation

The Grata Fund was inspired by the *Urgenda* case²⁰⁸ to bring a climate case focused on the duty of care, negligence, climate change in Australia. The Grata Fund explained the significance of the Dutch climate litigation:

The Australian Climate Case has been developed in partnership with the Urgenda Foundation, international legal experts who have a proven record of successful climate change litigation. It all started

²⁰³ Ibid.

²⁰⁴ The Grata Fund, ‘Federal Court says Climate Change poses an “Existential Threat to All of Humanity,” despite Finding Law does not “Currently” Support Claim’, the Australian Climate Case, *the Grata Fund*, 15 July 2025, <https://australianclimatecase.org.au/climate-decision/>

²⁰⁵ Ibid.

²⁰⁶ Isabelle Reinecke, *Courting Power: Law, Democracy and the Public Interest in Australia*, Melbourne: Monash University Publishing, 2023, 73.

²⁰⁷ Ibid., 73.

²⁰⁸ *Urgenda Foundation v State of Netherlands* [2015] HAZA C/09/00456689

in 2015, when the Urgenda Foundation helped 886 people in the Netherlands take the Dutch government to court for not doing enough to prevent climate change. They won the case in the District Court of the Hague and then won again at the two stages of appeal, with a final victory in the Supreme Court in 2019. The case was the first to establish that a government has a duty of care to protect people from climate harms. The court ordered the Dutch government to significantly reduce the Netherlands' greenhouse gas emissions within 5 years.²⁰⁹

The Grata Fund was struck by how instrumental the decision had been: 'As a result of the groundbreaking case, the Netherlands now has some of the strongest climate policies in the world and is closing coal-fired power stations and investing billions in renewable energy and energy efficiency.'²¹⁰ The Grata Fund was also impressed by subsequent climate litigation in the European Union: 'People in Belgium, Colombia, France, Germany and Ireland have also had success in the courts, and there are plenty of similar cases under way in other countries.'²¹¹

For his part, Wigney J was reluctant to accept comparative law in matters of climate litigation in his judgment of the state of Australian law. The judge was sceptical of the reliance by the applicants upon European law in respect of climate litigation. The judge noted: 'The applicants also relied on several decisions of European courts in which it was held, in broad terms, that a nation state (or in one case, a public company) had breached certain statutory provisions by failing to reduce greenhouse gas emissions.'²¹² The judge was doubtful of the relevance of such matters: 'As interesting as they may be, they provide little, if any, guidance or assistance in determining the issues in this case.'²¹³ Citing Gummow and Hayne JJ in *Neilson v Overseas Projects Corp (Vic) Ltd* (2005),²¹⁴ Wigney J expresses the view that such matters 'create no precedent.'²¹⁵

The judge commented that there were vast differences between the common law of Australia and the civil law systems of European countries:

²⁰⁹ The Grata Fund, 'First Nations Leaders sue Commonwealth over Climate Change', Press Release, *The Grata Fund*, 26 October 2021, https://www.gratafund.org.au/climate_case_page

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² *Pabai Pabai v Commonwealth of Australia* (No 2) [2025] FCA 796. [960].

²¹³ *Pabai Pabai v Commonwealth of Australia* (No 2) [2025] FCA 796. [960].

²¹⁴ *Neilson v Overseas Projects Corp (Vic) Ltd* (2005) 223 CLR 331

²¹⁵ *Pabai Pabai v Commonwealth of Australia* (No 2) [2025] FCA 796. [960].

The European decisions relied on by the applicants are all from civil law systems that are very different to the legal system in Australia. The applicants also sought to rely on the judgments without properly proving the law of the countries concerned. The relevance of the judgments cannot be properly considered in the absence of the relevant legal context. Foreign law is a question of fact that must be proved by expert evidence. The applicants did not adduce any such evidence. While some of the statutory provisions considered in these cases, and some of the decisions, use language, or employ concepts, that appear to be similar to the language and concepts in respect of the Australian common law of negligence, little, if any, real relevance to this case can be gleaned from the decisions in the absence of any evidence concerning the law of the jurisdictions in which the decisions were made.²¹⁶

The judge considered a number of judgements in the Netherlands, at the prompting of the applicants. There is a discussion of the District Court in *Urgenda Foundation v the State of the Netherlands* (2015).²¹⁷ There is also a discussion of subsequent decisions by the Court of Appeal and Supreme Court of the Netherlands. There is also a discussion of the ruling of the District Court of The Hague in *Milieudefensie v Royal Dutch Shell* [2021].²¹⁸ The judge notes: ‘This decision provides little assistance given that it is entirely unclear whether the “unwritten law” in the Netherlands about what may be regarded as “proper social conduct” bears any resemblance to the Australian common law concept of a duty of care.’²¹⁹

The judge also explored climate litigation decisions in Belgium. The judge considers the decision of the Court of First Instance in Brussels in *VZW Klimaatzaak v Kingdom of Belgium & Others* [2021],²²⁰ and the decision of the Court of Appeals in Brussels in *VZW Klimaatzaak v Kingdom of Belgium & Others* [2023].²²¹ The judge comments: ‘This case again provides limited assistance, particularly in respect of the question whether the Commonwealth owed Torres Strait Islanders the alleged targets duty of care’.²²² In his view, ‘Liability under the relevant Belgian statutory provisions did not appear to require the existence of any duty of care’.²²³ Wigney J comments: ‘Indeed, the concept of fault appeared to assume the existence of such a duty of care.’²²⁴ He concludes: ‘In short, the Belgian law considered in this case does

²¹⁶ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796. [961].

²¹⁷ *Urgenda Foundation v State of Netherlands* [2015] HAZA C/09/00456689

²¹⁸ *Milieudefensie v Royal Dutch Shell* [2021] ECLI:NL:RBDHA:2021:5339.

²¹⁹ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796. [968].

²²⁰ *VZW Klimaatzaak v Kingdom of Belgium & Others* [2021] 2015/4585/A.

²²¹ *VZW Klimaatzaak v Kingdom of Belgium & Others* [2023] 2021/AR/15gs 2022/AR/737 2022/AR/891

²²² *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [974].

²²³ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [974].

²²⁴ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [974].

not appear to be sufficiently similar or analogous to the Australian common law of negligence to provide any relevant assistance in this matter.’²²⁵

The judge also discusses climate litigation in France – namely, the decision of the Administrative Court of Paris in *Notre Affaire à Tous v France* [2021].²²⁶ Wigney J observes: ‘The applicants correctly acknowledged that the terms of the statutory provision in issue in that case were such that the question of liability was far removed from the Australian context’.²²⁷ The judge comments: ‘While the applicants submitted that the French court’s analysis nevertheless “demonstrates the ways in which precise assessment of particular state actions and policies can lead law affixing liability for the effects of climate change”, that does not relevantly assist in determining whether, having regard to the common law of Australia, the Commonwealth owes Torres Strait Islanders the alleged targets duty of care.’²²⁸

Summing up his comparative findings, the judge held: ‘I am not persuaded that any of the European cases relied on by the applicants supports the imposition of the novel duty of care alleged by them’.²²⁹ He observed: ‘The applicants failed to demonstrate that the statutory law considered in those cases was relevantly analogous to the common law of negligence in Australia as it presently stands.’²³⁰

Luisa Bedoya Taborda, an Environmental Lawyer and a PhD candidate at the University of Sydney, commented: ‘While [the] ruling did not establish legal accountability, it reinforced the urgency and established the base for legal, political, and international action as it happened with the *Urgenda* case in the Netherlands.’²³¹

It should be noted that there have been further important decisions on climate litigation in Europe – which have not necessarily been well covered in the Federal Court of Australia decision. In 2024, the European Court of Human Rights found that a climate litigation

²²⁵ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [974].

²²⁶ *Notre Affaire à Tous v France* [2021] No 1904967, 1904968, 1904972, 1904976/4-1

²²⁷ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [975].

²²⁸ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [975].

²²⁹ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [976].

²³⁰ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 at [976].

²³¹ Scimex, ‘Expert Reaction: Landmark Australian Climate Case Ruling’, *Scimex*, 15 July 2025, <https://www.scimex.org/newsfeed/expert-reaction-australias-landmark-australian-climate-case>

application by Portuguese youth against 33 countries was inadmissible.²³² In 2024, the European Court of Human Rights has found that the human rights of Swiss seniors and elders had been violated through climate inaction by the government of Switzerland.²³³ The human rights turn in climate litigation has become quite significant in the European Union, and neighbouring states.

Smith v Fonterra is a New Zealand climate litigation case led by an Indigenous plaintiff.²³⁴ In this matter, Michael John Smith (Ngāpuhi, Ngāti Kahu), climate change spokesperson for the Iwi Chairs' Forum, a Māori development platform, filed a case against seven high-emitting New Zealand companies in the agriculture and energy sectors – including Fonterra Co-Operative Group Ltd, Genesis Energy Ltd, Dairy Holdings Ltd, New Zealand Steel Ltd, Z Energy Ltd, Channel Infrastructure NZ Ltd and BT Mining Ltd. Smith claimed that the defendants' actions constituted (1) public nuisance, (2) negligence, and (3) breach of a duty to cease contributing to climate change. In 2020, the High Court of New Zealand struck out the first two causes of action, but allowed the third to proceed.²³⁵ Smith appealed – initially to no avail.²³⁶ In 2024, the Supreme Court of New Zealand allowed Smith's appeal, reinstated his statement of claim, and recognised that the matter should proceed to trial.²³⁷ The Supreme Court of New Zealand held that there was no basis to conclude that the law or torts (and in particular, public nuisance) in the realm of climate change in Aotearoa New Zealand had been displaced by statutes, such as the *Climate Change Response Act* 2002 (NZ) and the *Resource Management Act* 1991 (NZ).²³⁸ In its view, the New Zealand Parliament had left a pathway open for the common law to operate, develop and evolve amid that statutory landscape. In 2025, the High Court of New Zealand released an interlocutory decision.²³⁹ The full trial of the matter is expected to take place in 2027. There has been discussion as to whether there will be an emergence of a climate change tort in New Zealand.²⁴⁰

²³² *Duarte Agostinho v Portugal and Others* (2024) (ECtHR) <https://climatecasechart.com/non-us-case/youth-for-climate-justice-v-austria-et-al/>

²³³ *KlimaSeniorinnen v Switzerland* (2024) (ECtHR) <https://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-council-and-others/>

²³⁴ *Smith v Fonterra Cooperative Group Limited & Ors* (2024) NZSC 5.

²³⁵ *Smith v Fonterra Cooperative Group Limited & Ors* [2020] NZHC 419.

²³⁶ *Smith v Fonterra Cooperative Group Limited & Ors* [2021] NZCA 552.

²³⁷ *Smith v Fonterra Cooperative Group Limited & Ors* (2024) NZSC 5.

²³⁸ *Smith v Fonterra Cooperative Group Limited & Ors* (2024) NZSC 5.

²³⁹ *Smith v Fonterra Cooperative Group Limited & Ors* [2025] NZHC 940.

²⁴⁰ Richard Reynolds, 'The Emergence of a Climate Change Tort', *Bar News: The Journal of the NSW Bar Association*, 2024, <https://bn.nswbar.asn.au/article/the-emergence-of-a-climate-change-tort>; Jonathan Price and Jeremy Stewart, 'Claims in Tort for Climate Change Damage to Proceed to Trial', *Clifford Chance*, 15 February 2024, <https://www.cliffordchance.com/insights/resources/blogs/business-and-human-rights->

In the course of his judgment, Wigney J makes a few references to this ongoing matter in *Smith v Fonterra* taking place in New Zealand. The judge observed: ‘The applicants did not make any detailed submissions in respect of either *Smith v Fonterra* or *Tipakalippa*.’²⁴¹ Wigney J noted: ‘The court in *Smith v Fonterra* was considering an appeal from a decision striking out a claim in tort.’²⁴² He commented: ‘The court’s general observations about the role that “tikanga” (Māori customs and traditional values) may play in various types of cases in New Zealand (Aotearoa) provides no real support for the applicants’ contentions’.²⁴³ The judge also noted of an Australian case: ‘The same can be said about the observations of Kenny and Mortimer JJ in *Tipakalippa*, a case which concerned judicial review of a decision made under the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth).’²⁴⁴ It is surprising in some ways that the judge is so dismissive of parallel developments in New Zealand in respect of the law of torts, negligence, nuisance, and climate change – given the common legal heritage of Australia and New Zealand.

It should be noted that there are a number of other Indigenous-led pieces of climate litigation. In the United States, Nelson Kanuk – an Indigenous youth in Alaska – led climate action against the State of Alaska, claiming that climate inaction by the government was in breach of the constitution and the public trust doctrine.²⁴⁵ The Supreme Court of Alaska dismissed the complaint, ruling ‘in the absence of justiciable claims for specific relief, a declaratory judgment will not settle the parties’ controversy or otherwise provide them with clear guidance about the consequences of their future conduct’.²⁴⁶ A subsequent legal action in *Sagoonick v State of Alaska* also foundered.²⁴⁷ More generally, there has been an array of youth-led atmospheric

[insights/2024/02/claims-in-tort-for-climate-change-damage-to-proceed-to-trial.html](https://www.dlapiper.com/en-au/insights/publications/2022/1/tortious-claims-and-climate-change-where-are-we-now); and Alexander Chaize, Iain Thain, and Jesse Medlong, ‘Tortious Claims and Climate Change: Where Are We Now?’, DLA Piper, 2022, <https://www.dlapiper.com/en-au/insights/publications/2022/1/tortious-claims-and-climate-change-where-are-we-now>

²⁴¹ *Pabai Pabai v Commonwealth of Australia* (No 2) [2025] FCA 796 at [1128].

²⁴² *Pabai Pabai v Commonwealth of Australia* (No 2) [2025] FCA 796 at [1128].

²⁴³ *Pabai Pabai v Commonwealth of Australia* (No 2) [2025] FCA 796 at [1128].

²⁴⁴ *Pabai Pabai v Commonwealth of Australia* (No 2) [2025] FCA 796 at [1128].

²⁴⁵ Matthew Rimmer, ‘Northern Exposure: Climate Change, Indigenous Rights, and Atmospheric Trust Litigation in Alaska’, in Matthew Rimmer (ed.), *Intellectual Property and Clean Energy: The Paris Agreement and Climate Justice*, Singapore: Springer, 2018, 639-686.

²⁴⁶ *Kanuk v State of Alaska* (2014) Supreme Court of Alaska No. S-14776.

²⁴⁷ *Sagoonick v State of Alaska* (2022) Supreme Court of Alaska No. S-17297; and *Sagoonick v State of Alaska* (2025) Superior Court for the State of Alaska Case No. 3AN-24-06508CI.

trust litigation in the United States courts at both a state and a Federal level – with mixed results.²⁴⁸

There has been a rise in Indigenous-led climate litigation, particularly in South America under fundamental constitutional rights.²⁴⁹ Tigre from the Sabin Center for Climate Change Law at Columbia Law School has noted: ‘While Indigenous peoples remain disproportionately affected by the climate crisis, they are seeking climate justice through litigation’.²⁵⁰ Tigre highlights the diversity of legal arguments ‘from Indigenous rights, such as the right to FPIC, to traditional human rights, such as the right to life and health, to the innovative rights of nature, which were more recently recognized.’²⁵¹

It remains to be seen whether higher courts will be more likely to engage in a comparative consideration of other cases in respect of climate litigation.

Judi Storer, a PhD candidate at Flinders University, highlighted the comparative position of the Australian decision: ‘This lack of success of Australian climate change litigation is to be contrasted with decisions in equivalent cases in the Netherlands, Switzerland, South Africa, Pakistan, India, and the Philippines, where a right to life and the right to a clean and healthy environment are enshrined in their national constitutions’.²⁵² Storer noted: ‘In these countries, citizens have successfully held their governments to account for failing to adequately address climate change mitigation.’²⁵³ Storer lamented that ‘Australians have no such constitutional rights and no Bill of Human Rights’.²⁵⁴ She argued that there needed to be better recognition of human rights – particularly next generation rights related to health and the environment.

²⁴⁸ Our Children’s Trust, ‘Securing Children’s Fundamental Climate Rights’, <https://www.ourchildrenstrust.org/> and Mary Christina Wood, ‘On the Eve of Destruction’: Courts Confronting the Climate Emergency’ (2022) 97(1) *Indiana Law Journal* 239-295.

²⁴⁹ Maria Antonia Tigre, ‘Climate Change and Indigenous Groups: The Rise of Indigenous Voices in Climate Litigation’ (2022) 9 (3) *E-Publica* 214-260.

²⁵⁰ *Ibid.*, 247.

²⁵¹ *Ibid.*, 247.

²⁵² Scimex, ‘Expert Reaction: Landmark Australian Climate Case ruling’, *Scimex*, 15 July 2025, <https://www.scimex.org/newsfeed/expert-reaction-australias-landmark-australian-climate-case>

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

7. International Law, The Torres Strait Eight Verdict, and the International Court of Justice Climate Ruling

In the course of his judgment, Wigney J carefully considers the larger framework of international law. In particular, he refers to climate change agreements – such as the *United Nations Framework Convention on Climate Change* 1992, the *Kyoto Protocol* 1998 and the *Paris Agreement* 2015.²⁵⁵ He also mentions human rights covenants, such as the *International Covenant on Civil and Political Rights* 1966, and declarations, such as the *United Nations Declaration on the Rights of Indigenous Peoples* 2007.²⁵⁶ The judge also considers the significance of the *Torres Strait Treaty*.²⁵⁷

A. United Nations Human Rights Committee

The decision of Wigney J in *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 is at odds with the parallel international dispute involving the Torres Strait Eight.²⁵⁸ The United Nations Human Rights Committee ruled that the Australian Government had violated the human rights of the Torres Strait Eight through its climate inaction.²⁵⁹

The Committee highlighted that the climate inaction resulted in a violation of cultural rights. The Committee noted ‘the authors’ assertion that their ability to maintain their culture has already been impaired by the reduced viability of their islands and the surrounding seas, owing to climate change impacts’.²⁶⁰

The Committee commented: ‘The State party has not so far taken any adequate concrete measures to prevent the authors’ islands from becoming uninhabitable, or to address the real

²⁵⁵ *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994) *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 2303 UNTS 162 (entered into force 16 February 2005) and the *Paris Agreement to the United Nations Framework Convention on Climate Change*, opened for signature 12 December 2015 (entered into force 4 November 2016).

²⁵⁶ *International Covenant on Civil and Political Rights* 1966, and declarations, such as the *United Nations Declaration on the Rights of Indigenous Peoples* 2007.

²⁵⁷ *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* entered on 18 December 1978, in force from 15 February 1985 (Australian Treaty Series 1985 No 4).

²⁵⁸ *Daniel Billy and others v Australia (Torres Strait Islanders Petition)* (2022) CCPR/C/135/D/3624/2019

²⁵⁹ *Daniel Billy and others v Australia (Torres Strait Islanders Petition)* (2022) CCPR/C/135/D/3624/2019

²⁶⁰ *Daniel Billy and others v Australia (Torres Strait Islanders Petition)* (2022) CCPR/C/135/D/3624/2019

and foreseeable threat of the complete loss of the authors' cultures.'²⁶¹ The Committee observed that its 'jurisprudence supports the notion that environmental harm can lead to violations of fundamental human rights, given the dependence of indigenous minority cultures on a healthy environment, and the strong cultural and spiritual link between indigenous peoples and their traditional land.'²⁶²

The Committee considered that 'the information made available to it indicates that the State party's failure to adopt timely adequate adaptation measures to protect the authors' collective ability to maintain their traditional way of life, to transmit to their children and future generations their culture and traditions and use of land and sea resources discloses a violation of the State party's positive obligation to protect the authors' right to enjoy their minority culture.'²⁶³ Accordingly, the Committee considered that 'the facts before it amount to a violation of the authors' rights under article 27 of the Covenant.'²⁶⁴

The Committee also observed that the climate inaction also caused an arbitrary interference with the homelife of the Torres Strait Eight. The Committee considered that 'when climate change impacts – including environmental degradation on traditional [indigenous] lands in communities where subsistence is highly dependent on available natural resources and where alternative means of subsistence and humanitarian aid are unavailable – have direct repercussions on the right to one's home, and the adverse consequences of those impacts are serious because of their intensity or duration and the physical or mental harm that they cause, then the degradation of the environment may adversely affect the well-being of individuals and constitute foreseeable and serious violations of private and family life and the home'.²⁶⁵ The Committee concluded 'that the information made available to it indicates that by failing to discharge its positive obligation to implement adequate adaptation measures to protect the authors' home, private life and family, the State party violated the authors' rights under article 17 of the Covenant.'²⁶⁶

²⁶¹ *Daniel Billy and others v Australia (Torres Strait Islanders Petition)* (2022) CCPR/C/135/D/3624/2019

²⁶² *Daniel Billy and others v Australia (Torres Strait Islanders Petition)* (2022) CCPR/C/135/D/3624/2019

²⁶³ *Daniel Billy and others v Australia (Torres Strait Islanders Petition)* (2022) CCPR/C/135/D/3624/2019

²⁶⁴ *Daniel Billy and others v Australia (Torres Strait Islanders Petition)* (2022) CCPR/C/135/D/3624/2019

²⁶⁵ *Daniel Billy and others v Australia (Torres Strait Islanders Petition)* (2022) CCPR/C/135/D/3624/2019

²⁶⁶ *Daniel Billy and others v Australia (Torres Strait Islanders Petition)* (2022) CCPR/C/135/D/3624/2019

The majority of the Committee found that the right to life of the Torres Strait Eight had not been violated yet – but that it could be affected in the future.²⁶⁷ The Committee considered ‘that the information provided by the State party indicates that it is taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms in the Islands.’²⁶⁸ As a result, ‘Based on the information made available to it, the Committee is not in a position to conclude that the adaptation measures taken by the State party would be insufficient so as to represent a direct threat to the authors’ right to life with dignity.’²⁶⁹ Accordingly, the Committee considered that ‘the information before it does not disclose a violation by the State party of the authors’ rights under article 6 of the Covenant.’²⁷⁰

Committee Member Gentian Zyberi generally agreed with the Committee’s findings: ‘In this individual opinion, I explain my position on adaptation and mitigation measures, the law on international responsibility for countering climate change effects and adequate measures, and the violation of Article 27.’²⁷¹

A minority of the committee was of the opinion that the right to life of the Torres Strait Eight had already been compromised.²⁷² Committee Member Duncan Laki Muhumuza observed: ‘I am of the considered view that the State party has failed to prevent a foreseeable loss of life from the impact of climate change.’²⁷³ The Committee Member added: ‘The citizens of Torres Strait Islands have also lost their livelihood at the island due to the on-going climate changes and the State Party has not taken any measures to mitigate this factor.’²⁷⁴ Committee Members Arif Bulkan, Marcia V. J. Kran and Vasilka Sancin commented: ‘In addition to a violation of articles 17 and 27 found by the majority of the Committee, we would also find a violation of the right to life under article 6 of the Covenant.’²⁷⁵

²⁶⁷ *Daniel Billy and others v Australia (Torres Strait Islanders Petition)* (2022) CCPR/C/135/D/3624/2019

²⁶⁸ *Daniel Billy and others v Australia (Torres Strait Islanders Petition)* (2022) CCPR/C/135/D/3624/2019

²⁶⁹ *Daniel Billy and others v Australia (Torres Strait Islanders Petition)* (2022) CCPR/C/135/D/3624/2019

²⁷⁰ *Daniel Billy and others v Australia (Torres Strait Islanders Petition)* (2022) CCPR/C/135/D/3624/2019

²⁷¹ *Daniel Billy and others v Australia (Torres Strait Islanders Petition)* (2022) CCPR/C/135/D/3624/2019

²⁷² *Daniel Billy and others v Australia (Torres Strait Islanders Petition)* (2022) CCPR/C/135/D/3624/2019

²⁷³ *Daniel Billy and others v Australia (Torres Strait Islanders Petition)* (2022) CCPR/C/135/D/3624/2019

²⁷⁴ *Daniel Billy and others v Australia (Torres Strait Islanders Petition)* (2022) CCPR/C/135/D/3624/2019

²⁷⁵ *Daniel Billy and others v Australia (Torres Strait Islanders Petition)* (2022) CCPR/C/135/D/3624/2019

The United Nations hailed the decision as ‘groundbreaking.’²⁷⁶ There has since been much legal and scholarly discussion of the Torres Strait Eight verdict.²⁷⁷ The Torres Strait Eight, though, have been disappointed that the Australian Government has not accepted the recommendation that the claimants should be compensated for their loss and damage.²⁷⁸ In 2025, the Torres Strait Eight wrote an open letter to the PM, observing: ‘Torres Strait Islander peoples are on the frontlines of the climate crisis and urgent action is needed to ensure they can remain on their homelands and maintain their sacred connection to land, sea and sky.’²⁷⁹ The Torres Strait Eight commented: ‘King tides, erosion, seawater inundation and coral bleaching are threatening Torres Strait Islander peoples’ homes, while successive Australian Governments have refused to effectively address the climate crisis.’²⁸⁰ The Torres Strait Eight invited Australian Prime Minister Anthony Albanese to visit their homelands to see the impact for themselves.

While this is an international human rights decision, and the *Pabai Pabai v Commonwealth of Australia (No 2)* case is a matter of domestic law of negligence, there is a recognition of a

²⁷⁶ United Nations, ‘Australia: Groundbreaking Decision creates Pathway for Climate Justice on Torres Strait Islands’, United Nations News, 23 September 2022, <https://news.un.org/en/story/2022/09/1127761>

²⁷⁷ For a selection of the literature on the Torres Strait Eight verdict, see Sarah Joseph, ‘Climate Change and the Torres Strait Islands: UN Condemns Australia’, Law Futures Centre, Griffith University, 26 September 2022, <https://blogs.griffith.edu.au/law-futures-centre/2022/09/26/climate-change-and-the-torres-strait-islands-un-condemns-australia/>; Sarah Joseph ‘Climate Change and the Torres Strait Islands: Australia in the International Spotlight’, Oxford Human Rights Hub, 27 September 2022 <https://ohrh.law.ox.ac.uk/climate-change-and-the-torres-strait-islands-australia-in-the-international-spotlight/>; Connor Wright, ‘The Liability of States for Inadequate Climate Action under International Human Rights Law - *Billy v Australia* (UN Human Rights Committee)’, (2022) 29 *Australian International Law Journal* 223-229; Benjamin Hagiarian, ‘The Daniel Billy v Australia Case: Its Semantics and the Characterization of a Climate Threat as a Cause for Migration’, (2023) 15 *Amsterdam Law Forum* 3-12; Sofie Elise Quist and Annika Krafcik, ‘“Promising More than It Delivers”? A Critical Reading of the HRC’s *Daniel Billy et al v Australia* (2022) Decision Linking Climate Change and Human Rights’, (2023) 41 *UCLA Journal of Environmental Law and Policy* 411-440; Chhaya Bhardwaj, ‘Adaptation and Human Rights: a Decision by the Human Rights Committee *Daniel Billy et al. v Australia* CCPR/C/135/D/3624/2019’, (2023) 25(2) *Environmental Law Review* 154-161; Riccardo Luporni, ‘Climate Change Litigation before International Human Rights Bodies: Insights from *Daniel Billy et al. v Australia* (Torres Strait Islanders Case)’ (2023) 3(2) *The Italian Review of International and Comparative Law* 238-259; Laura Schuijers, ‘Australia’s Inaction on Climate Change Is a Violation of Torres Strait Islanders’ Human Rights: *Billy v Australia*’, (2023) 24 *Melbourne Journal of International Law* 140-155; Fiona McGaughey, Amy Maguire, and Sasha Purcell, ‘Torres Strait Islanders Leading the Charge on the Human Rights Implications of Climate Change: *Daniel Billy et al v Australia*’, (2023) 51 *University of Western Australia Law Review* 88-98; and Gabriel Lentner and Weronika Cenin, ‘*Daniel Billy et al v Australia (Torres Strait Islanders Petition)*: Climate Change Inaction as a Human Rights Violation’ (2024) 33 (1) *Review of European, Comparative & International Environmental Law* 136-143.

²⁷⁸ Client Earth, ‘One Year On From Historic Torres Strait UN Climate Victory, No Compensation Despite Legal Finding’, Press Release, Client Earth, 25 September 2023, <https://www.clientearth.org/latest/press-office/press-releases/one-year-on-from-historic-torres-strait-un-climate-victory-no-compensation-despite-legal-finding/>

²⁷⁹ ‘Torres Strait 8’s Open Letter to the PM’, *Echo Daily*, 27 May 2025, <https://www.echo.net.au/2025/05/torres-strait-8s-open-letter-to-the-pm/>

²⁸⁰ Ibid.

common matrix of facts. There is a discordance in the outcome of the two decisions. Comparing the two matters, Loughlin Gleeson of the Australian Human Rights Institute observed: ‘Whether *Pabai and Kabai* is ultimately resolved in the applicants’ favour, there is arguably mounting international pressure on Australia, as in other respects, to take seriously the impacts of climate change on First Nations peoples in particular.’²⁸¹

B. International Court of Justice

Coincidentally, the decision of Federal Court of Australia was published within a week of the International Court of Justice handing down its advisory opinion on the obligations of states in respect of climate change.²⁸²

A week after the decision in *Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796, the International Court of Justice released its advisory opinion on the obligations of states in respect of climate change.²⁸³ The advisory opinion comments: ‘Climate change may also impair the enjoyment of the rights of women, children and indigenous peoples.’²⁸⁴ It cites such authorities as the Joint Statement on “Human Rights and Climate Change”, Committee on the Elimination of All Forms of Discrimination against Women, Committee on Economic, Social and Cultural Rights, Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Committee on the Rights of the Child and Committee on the Rights of Persons with Disabilities, 16 September 2019, para. 3; Human rights and climate change, Human Rights Council resolution 53/6 of 12 July 2023; Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, 15 January 2009, UN doc. A/HRC/10/61, paras. 42

²⁸¹ Loughlin Gleeson, ‘*Pabai and Kabai v Commonwealth: A Duty of Care in light of Climate Change?*’, Australian Human Rights Institute, <https://www.humanrights.unsw.edu.au/students/blogs/pabai-kabai-duty-care-climate-change>

²⁸² Damien Carrick, ‘ICJ to deliver climate advisory opinion, *Pabai Pabai v Commonwealth*’, *ABC Law Report*. ABC Law Report, 22 July 2025. <https://www.abc.net.au/listen/programs/lawreport/icj-to-deliver-climate-advisory-opinion/105502554>

²⁸³ International Court of Justice, *Advisory Opinion on the Obligations of States in Respect of Climate Change*, 23 July 2025, <https://www.icj-cij.org/case/187> For a discussion of the matter, see Margaret Young, ‘The ICJ’s Advisory Opinion on Climate Obligations: Remarkable, Radical and Robust’, *EJIL: Talk!*, *European Journal of International Law*, 31 July 2025, <https://www.ejiltalk.org/ejil-the-podcast-episode-37-the-icjs-advisory-opinion-on-climate-obligations-remarkable-radical-and-robust/>

²⁸⁴ International Court of Justice, *Advisory Opinion on the Obligations of States in Respect of Climate Change*, 23 July 2025. [para. 382], <https://www.icj-cij.org/case/187>

et seq.²⁸⁵ The advisory opinion notes: ‘As recalled above, the preamble to the *Paris Agreement* provides that parties should, when taking action to address climate change, respect, promote and consider the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations as well as gender equality.’²⁸⁶ The advisory panel added that ‘the IPCC has found that women and indigenous peoples may be more severely affected by the impacts of climate change.’²⁸⁷

Notably, Charlesworth J – an Australian Professor of International Law and Human Rights - highlights the impact of climate change upon minority populations – such as Indigenous communities – in her separate opinion.²⁸⁸ She cites the Torres Strait Eight decision in her opinion: ‘In *Billy v. Australia*, the Human Rights Committee found that, by failing to implement adequate mitigation and adaptation measures to prevent climate change affecting the authors and the islands in the Torres Strait where they live, Australia had violated the authors’ rights under Article 17 (the right to be free from arbitrary interference with private life, family and home) and Article 27 (the right of members of a minority to enjoy their own culture) of the *International Covenant on Civil and Political Rights*.’²⁸⁹ Charlesworth commented: ‘Indigenous peoples, who are recognized as having a special relationship with the natural environment, are particularly vulnerable to the adverse effects of climate change.’²⁹⁰ She observed: ‘Participants described the loss of traditional harvesting sites and species as well as tangible Indigenous cultural heritage such as ancestral homes, burial grounds and other sacred sites from rising sea levels, landslides, cyclones and other natural disasters’.²⁹¹ Charlesworth also indicated that ‘Intangible heritage is also threatened by climate change.’²⁹² She said that ‘Participants chronicled how forced migration caused by climate change has led to the loss of Indigenous knowledge, rituals and customs.’²⁹³

²⁸⁵ International Court of Justice, *Advisory Opinion on the Obligations of States in Respect of Climate Change*, 23 July 2025, <https://www.icj-cij.org/case/187>

²⁸⁶ International Court of Justice, *Advisory Opinion on the Obligations of States in Respect of Climate Change*, 23 July 2025. [para. 382], <https://www.icj-cij.org/case/187>

²⁸⁷ International Court of Justice, *Advisory Opinion on the Obligations of States in Respect of Climate Change*, 23 July 2025, [para. 384], <https://www.icj-cij.org/case/187>

²⁸⁸ International Court of Justice, *Separate Opinion of Judge Charlesworth on the Obligations of States in Respect of Climate Change*, 23 July 2025, <https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-08-en.pdf>

²⁸⁹ Ibid.

²⁹⁰ Ibid.

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ Ibid.

The *Pabai Pabai* plaintiffs have expressed their solidarity with Pacific Island communities who have parallel concerns about the impact of climate change upon their vulnerable locations.²⁹⁴

Dr Aidan Craney, a Lecturer in Anthropology at La Trobe University, focused on understanding social change in the Pacific Islands region, commented that the decisions of the Federal Court of Australia and the International Court of Justice have ‘extra resonance as Australia woos Pacific states to partner with it on a bid to host the world’s largest climate gathering, COP 31, next year.’²⁹⁵ He observed: ‘How the Australian government responds to this decision may influence the levels of support it receives from the region’.²⁹⁶ Craney noted: ‘Current sentiment is broadly positive; however, dissent has come from respected sources, such as the Pacific Elders Voice.’²⁹⁷

Conclusion

After the success of the Torres Strait Eight human rights action, the initial outcome of the domestic climate litigation in *Pabai Pabai v Commonwealth of Australia (No. 2)* is something of a disappointment. The Torres Strait Islander representatives were distressed and heartbroken by the outcome of the Federal Court of Australia decision on their torts-based climate litigation in *Pabai Pabai v Commonwealth of Australia (No. 2)*.²⁹⁸ Uncle Pabai Pabai said:

We are cultural people, our ancestors... For the love of my son and for all the people in our community in the Torres Strait, for the bushfire and flood survivors, the farmers, kids and grandkids. I’ll keep fighting and will sit down with my lawyers and look at how we can appeal.²⁹⁹

Uncle Paul Kabai said: ‘I can feel the moral burden on my shoulders. Sometimes when I’m alone I feel the heaviness of the burden and it is not mine to carry.’³⁰⁰ Aunty McRose Elu,

²⁹⁴ Australian Associated Press, ‘Two Torres Strait Elders are Sailing to Vanuatu on a Rainbow Boat to Highlight this Issue: Uncle Paul Kabai and Uncle Pabai Pabai are Joining Other Activists on a Greenpeace Ship for a Climate-Inspired Journey’, *SBS News*, 24 June 2023, <https://www.sbs.com.au/news/article/two-torres-strait-elders-are-sailing-to-vanuatu-on-a-rainbow-boat-to-highlight-this-issue/t06wi89ij>

²⁹⁵ Scimex, ‘Expert Reaction: Landmark Australian Climate Case Ruling’, *Scimex*, 15 July 2025, <https://www.scimex.org/newsfeed/expert-reaction-australias-landmark-australian-climate-case>

²⁹⁶ Ibid.

²⁹⁷ Ibid.

²⁹⁸ The Grata Fund, ‘Federal Court says Climate Change Poses an “Existential Threat to All of Humanity,” Despite Finding Law Does Not “Currently” Support Claim’, the Australian Climate Case, *The Grata Fund*, 15 July 2025, <https://australianclimatecase.org.au/climate-decision/>

²⁹⁹ Ibid.

³⁰⁰ Ibid.

Saibai Elder, said commented: ‘We will cry together and we will rise because unlike the Prime Minister, this isn’t a fancy job that one day he will walk away from – it’s our lives, our children’s futures, it’s everything we have.’³⁰¹

It remains to be seen whether the case can be reinvigorated at an appellate level before the Full Court of the Federal Court of Australia, and the High Court of Australia. Brett Spiegel, Principal Lawyer, Phi Finney McDonald, had a positive appreciation of the ruling, and the possibilities of appeal:

Today His Honour found that Uncle Pabai, Uncle Paul and Torres Strait Islanders face an existential crisis. He accepted the testimony of Uncle Pabai, Uncle Paul and the other Torres Strait fact witnesses about the harm to their homes and to *Ailan Kastom* from climate change. He also found that the Commonwealth government set emissions targets that did not “give real or genuine consideration to the best available science.” Nevertheless, His Honour found that as a trial court judge, it wasn’t “currently” open him to find that the government owed a duty of care to Torres Strait Islanders. We will review the judgment with Uncle Pabai and Uncle Paul and consider all options for appeal.³⁰²

Isabelle Reinecke, founder and Executive Director of Grata Fund, observed: ‘Our communities will continue to fight back through the courts, and the streets, and the halls of power until we win a future where our communities are cared for.’³⁰³ It has been argued in this paper that the questions raised at first instance in *Pabai Pabai v Commonwealth of Australia (No. 2)* could be reconsidered in light of comparative and international law.

Reviewing the Federal Court of Australia decision, lawyers Chris Owen, Coby Foster, and Grace Cameron commented that ‘*Pabai Pabai* is likely to inform the approach taken by First Nations groups in attempting to use strategic litigation to push for sharper action to combat climate change.’³⁰⁴ The lawyers suggested: ‘Absent a successful appeal, it is likely that Australia may now see fewer so-called “climate framework cases”.’³⁰⁵ However, the lawyers suggested: ‘It’s clear that whilst not successful *Pabai Pabai* hasn’t closed the door to climate litigation in Australia, avenues remain open for prospective plaintiffs to: (1) appeal to higher

³⁰¹ Ibid.

³⁰² Ibid.

³⁰³ Ibid.

³⁰⁴ Chris Owen, Coby Foster, and Grace Cameron, ‘The Australian Climate Case: The *Pabai Pabai* Decision and What it Means for First Nations Climate and Cultural Rights’, Norton Rose Fulbright, August 2025, <https://www.nortonrosefulbright.com/en-au/knowledge/publications/64a4fd99/the-australian-climate-case>

³⁰⁵ Ibid.

courts hoping to expand the common law, (2) push for federal law reform, especially under human rights frameworks (3) strategic follow up complaints to United Nations bodies (4) more cases using human rights legislation (5) strategic litigation using established legal principles, such as greenwashing claims under Australian consumer-protection legislation'.³⁰⁶ It is worth noting that Indigenous parties have had better success in domestic climate litigation, relying upon the human rights law of Queensland.³⁰⁷ The Torres Strait Islander community could potentially bring an action against the Government of Queensland over climate inaction. There is certainly scope for further consideration of human rights-based climate litigation in Australia.³⁰⁸

The decision in *Pabai Pabai v Commonwealth of Australia (No. 2)* also leaves open the possibility of a native title matter in respect of climate action. Wigney J recognised that 'Torres Strait Islanders have native title rights under the *Native Title Act* 1993 (Cth) over or in respect of much of the Torres Strait Islands, including all, or almost all, of the inhabited islands.'³⁰⁹ He noted that 'the applicants' claims, including those made on behalf of the group members, do not directly concern any native title rights under the *Native Title Act*.'³¹⁰ Wigney J observed that Pabai Paba is a native title holder under *Gibuma on behalf of Boigu People v State of Queensland* [2004],³¹¹ a traditional owner of Boigu, a caretaker of land on Boigu, and a director of a prescribed body corporate which deals with land issues and native title.³¹² Wigney J noted though that 'the applicants withdrew and disclaimed any claim that they and Torres Strait Islander group members may have had for loss or damage relating to any of their native title rights.'³¹³ The *Mabo* decision in the Torres Strait Islands resulted in a judicial revolution in respect of the recognition of Indigenous property rights in native title in Australia.³¹⁴ There have been calls to further extend that judgment.³¹⁵ It would be worthwhile exploring in the

³⁰⁶ Ibid.

³⁰⁷ *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21.

³⁰⁸ Brian Preston and Nicola Silbert, 'Trends in Human Rights-Based Climate Litigation: Pathways for Litigation in Australia', 2021 Castan Centre for Human Rights Law and King & Wood Mallesons Annual Lecture, 9 December 2021, https://lec.nsw.gov.au/documents/speeches-and-papers/Preston_CJ_-_Trends_in_Human_Rights-Based_Climate_Litigation.pdf

³⁰⁹ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 [185].

³¹⁰ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 [185].

³¹¹ *Gibuma on behalf of Boigu People v State of Queensland* [2004] FCA 1575.

³¹² *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 [598].

³¹³ *Pabai Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 [1112].

³¹⁴ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 23 (*Mabo (No 2)*).

³¹⁵ Stephen Summerhayes, 'Reimagining Aboriginal Land Rights: Crown, Country and Custodians – *Mabo v Queensland (No 2)*.' in Michelle Maloney and Nicole Rogers (ed.), *Law as if Earth Really Mattered: Wild Law Judgments*, Abingdon (Oxon) and New York: Routledge, 2017, 219-236.

future the prospects of a native title action in respect of climate change impacts – given that the judge had explicitly mentioned the issue in the *Pabai Pabai* case.³¹⁶ There has been consideration in the Gomeroi People’s matter as to whether the effects of climate change are capable of falling within the operation of the *Native Title Act* 1993 (Cth).³¹⁷ Emeritus Professor Rick Sarre from the University of South Australia (UniSA) has commented: ‘Unless and until the High Court moves *Mabo*-like into this space, all matters regarding compensation, remediation and adaptation will need to move from the parliamentary sphere, not the judicial one.’³¹⁸

³¹⁶ Narelle Bedford, Tony McAvoy, and Lindsey Stevenson-Graf, ‘First Nations Peoples, Climate Change, Human Rights and Legal Rights’, (2021) 40(3) *University of Queensland Law Journal* 371-401.

³¹⁷ *Santos NSW Pty Ltd v Gomeroi People* [2022] NNTA 74; *Gomeroi People v Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd* [2024] FCAFC 26; and *Gomeroi People v Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd (No 2)* [2024] FCAFC 49. For commentary, see Lily O’Neill, ‘The Gomeroi win puts Native Title Holders in a Stronger Position to Fight Fossil Fuel Projects on their Land’, *The Conversation*, 8 March 2024, <https://theconversation.com/the-gomeroi-win-puts-native-title-holders-in-a-stronger-position-to-fight-fossil-fuel-projects-on-their-land-225284>

³¹⁸ Scimex, ‘Expert Reaction: Landmark Australian Climate Case Ruling’, *Scimex*, 15 July 2025, <https://www.scimex.org/newsfeed/expert-reaction-australias-landmark-australian-climate-case>